



**Makori v Bikundo (Civil Case E881 of 2021) [2024] KEMC 139 (KLR) (11 July 2024) (Judgment)**

Neutral citation: [2024] KEMC 139 (KLR)

**REPUBLIC OF KENYA  
IN THE NAKURU LAW COURTS  
CIVIL CASE E881 OF 2021  
PA NDEGE, SPM  
JULY 11, 2024**

**BETWEEN**

**HENRY MOMANYI MAKORI ..... PLAINTIFF**

**AND**

**NYANDORO JOSIAH BIKUNDO ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff in this case, Henry Momanyi Makori, is praying for judgment against the Defendant, Nyandoro Josiah Bikundo, for special and general damages emanating from a road traffic accident that occurred on or about 04.08.2020, as a consequence of which he sustained severe injuries. He brought this suit vide a Plaint dated 18.05.2021 and filed on 20.09.2021.
2. It is the plaintiff's case that he was a motorcyclist along Rift Valley Technology farm heading towards Mogoon Primary School when, the accident herein occurred. It is further the plaintiff's case that the accident was solely caused by the defendant himself and/or his authorized driver, agent and/or servant, when he carelessly and/or negligently drove, and/or controlled the Motor Vehicle KAD 649 E, belonging to the Defendant, causing it lose control and knock the plaintiff as a consequence whereof the plaintiff sustained the severe injuries, namely<sup>1</sup>: -
  - a. Blunt injury to the right elbow joint leading to sprain of the right elbow joint,
  - b. Fracture tibia plateau of the right tibia,
  - c. Fracture lateral condyle and neck of the right fibula,
  - d. Severe soft tissue injury of the right knee joint.
3. The plaintiff particularized his claim of negligence on the part of the defendant at Paragraph 4 of his plaint as follows: -

<sup>1</sup> Refer to paragraph 4 of the Plaint



- a. Driving without due care and attention
  - b. Driving without proper look out before proceeding on,
  - c. Driving with an excessive speed in the circumstances,
  - d. Failing to swerve, control the motor vehicle KAD 649 E and/or brake in any way to avoid the accident
  - e. Failing to stop after the accident
  - f. Being generally careless and negligent
  - g. Driving under the influence of alcohol
  - h. Driving a defective motor vehicle
  - i. Driving while sleepy
  - j. Res ipsa loquitur.
4. The Defendant has thus been sued in his capacity as registered, beneficial and/or users of the motor vehicle registration number KAD 649E. He entered appearance and filed his defense, respectively vide a Memorandum of Appearance and Statement of Defense, both dated 12.01.2022 and filed on 20.01.2022; filed by the firm of Messrs. Mose, Mose & Mose Advocates, wherein he mainly disavowed the alleged negligence attributed on him and/or his agent in control of the motor vehicle. Furthermore, the defendant attributed the accident to the negligence of the plaintiff; and particularized the same in Paragraph 3 of his Statement of Defense, as follows:
- a. Riding at an excessive speed in the circumstances thereby provoking and causing the alleged accident
  - b. Riding under the influence of alcohol and/or intoxicated drugs thereby provoking and causing the accident.
  - c. Riding on the path of Motor Vehicle Registration Number KAD 649E thereby provoking and causing the accident.
  - d. Riding a defective motorcycle thereby provoking and causing the alleged accident.
  - e. Riding the alleged motorcycle negligently, carelessly and recklessly thereby exposing himself to risk of injury which he knew or ought to have known thereby provoking and causing the alleged accident.
  - f. Exposing himself to the risk of injury of which he knew or ought to have known especially riding a motorcycle on the centre and/or edges of the wrong lane of the road thereby provoking and causing the alleged accident.
  - g. Failing to keep any or proper look out to avoid causing the alleged accident, by trying to stop the motorcycle at an undesignated section of the road thereby provoking and causing the accident.
  - h. Failing to stop, slow down and or control, ride, manage the said motorcycle in order to avoid the accident.
  - i. Refusing to heed to road traffic rules and the Highway Code especially being a motorcycle rider thereby provoking and causing the alleged accident.



- j. Riding the alleged motorcycle on the wrong lane and thereby blocking and/ or obstructing Motor Vehicle Registration Number KAD 649E and causing the alleged accident.
  - k. Losing control of the motorcycle which veered towards the lane of Motor Vehicle Registration Number KAD 649E thereby provoking and causing the alleged accident.
  - l. Failing to heed the alerts and or warnings of the hooting by the driver of Motor Vehicle Registration Number KAD 649E and instead meandering on the subject road thereby causing confusion and causing the alleged accident.
  - m. Causing the aforesaid accident by failing to exercise due care, skill and/or prudence while riding the motorcycle.
5. The plaintiff testified and called a medical practitioner, PW2, Dr. Obed Omuyoma, and a police officer, No. 68201 CPL Jane Githinji, as his witnesses, while the defendant failed to present any witness or evidence in his case.
  6. Further, only the plaintiff was able to file and serve his written submissions. At the close of the hearing and submissions, the accident and injuries have not been challenged. The remaining issues for determination are mainly as follows: -
    - a. Who is to blame for the accident?
    - b. Whether the plaintiff is entitled to the reliefs sought?

**Basically, it is a determination on liability and quantum.**

7. On liability, the plaintiff testified, and adopted his statement dated 17/08/2020, that he was a lawful rider of the motorcycle herein along the aforesaid marram/ rough road and on the far-left side of the road while heading towards Magoon Primary School, where at around Mwale's shop, the vehicle herein came from the opposite direction while loaded with sand and while over speeding. That out of the driver's overspeeding, carelessness and negligence, the vehicle, a lorry, lost control and in the process hit his motorcycle. As a consequence of the accident he sustained the severe injuries. It is his testimony that the defendant is wholly to blame because he was driving carelessly and negligently thus causing the accident.
8. In cross-examination, he stated that the spot of the accident was at a corner. That he attempted to get out of the way of the motor vehicle, in a bid to avoid the accident. That he saw the vehicle 20m away. That he wore a helmet and a reflexive jacket as required. He confirmed that he had recovered.
9. PW2, Dr. Obed Omuyoma, confirmed that he examined the plaintiff herein on 13/11/2020. He produced his report as PEXH. NO. 8. That he charged the plaintiff Kshs. 7,000/= for the report and he produced the receipt as PEXH. NO. 9.
10. The police officer, PW3, NO. 68201 CPL Jane Githinji, from Kapetembwa police station, traffic section, referred to their records on the accident herein. She confirmed that the motor vehicle herein was being driven by one Alfred Keter along Magoo road. That the driver failed to keep to its lane and in the process hit the plaintiff's motorcycle thereby causing the plaintiff right hand and foot injuries. She produced the Police Abstract as PEXH. NO. 5.
11. In a bid to determine and or apportion liability herein, I have gone through the submissions by the learned counsel for the plaintiff herein. In an action for negligence, the burden of proof falls on the plaintiff alleging to establish each element of the tort, hence it is for the plaintiff herein to adduce evidence of facts on which he bases his claim. There has to be a duty of care which was breached



resulting to loss and damage to the plaintiff. The plaintiff herein therefore has a duty to prove his case on a balance of probabilities that the defendant was so negligent so as to occasion the accident that led to the plaintiff's injuries. However, once the legal burden of proof is discharged by the plaintiff, the evidential burden might shift to the defendant to prove his claim of plaintiff's sole or contributory negligence as pleaded.

12. The provisions of sections 107 and 108 of the *Evidence Act* are relevant and provide as follows:

107(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

13. In the case of *Muruingu Kanoru Jeremiah Vrs Stephen Ungu M'mwarabua* [2015] eKLR the superior court held as follows with regard to the burden of proof:

....As I have already stated, in law, the burden of proving the claim was the appellant's including the allegation that the respondent did not pay the sum claimed as agreed; i.e. into the account provided.....The trial magistrate was absolutely correct in so holding and did not shift any legal burden to the appellant.....The appellant was obliged in law to prove that allegation; after the legal adage that he who asserts or alleges must prove.... In the circumstances of this case, the respondent bore no burden of proof whatsoever in relation to the debt claimed. By way of speaking, the shifting of burden of proof would have arisen had the trial court magistrate held that the respondent bore burden to prove that he deposited the sum of Kshs. 98,200/= the debt being claimed herein.

14. I also refer to *The Halsbury's Laws Of England*, 4<sup>th</sup> Edition, Volume 17, at paras 13 and 14: which describes it thus:

The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to act; thus, a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.

15. The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the plaintiff, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence.

16. In this case, both the plaintiff and the defendant were using the road herein, and more specifically at the time of the accident herein. Both therefore owed a duty of care to each other. Whereas the plaintiff has adduced evidence that attributes blame on the part of the defendant's driver, there was no evidence



from the defendant to prove the averments of negligence on the part of the plaintiff as pleaded by himself.

17. The police officer produced a police abstract which clarifies what appears to be a final conclusion as to blameworthiness herein. The defendant's motor vehicle is to be blamed. The evidence of the plaintiff has thus been corroborated by the evidence of the police officer and the police abstract that the defendant's driver is to be blamed 100% for the accident herein. He left his lane and encroached into the plaintiff's. The copy of records produced herein confirms that the vehicle belonged to the defendant herein. I thus find the evidence herein uncontroverted and sufficient to prove and I do hereby find the defendant 100% liable. He ought to have discharged his evidential burden as to his averments concerning plaintiff's negligence.
18. On quantum, I also do find that the medical evidence adduced herein to be uncontroverted that the plaintiff sustained the injuries pleaded. There was however no relevant authority submitted to aid me reach a guided opinion as to quantum. I however find an amount of Kshs. 1,650,000/- as sufficient compensation for pain and suffering mainly because of the fractures sustained by the plaintiff herein.
19. His claim for special damages has also been proved to the extent of Kshs. 10,500/= only - Kshs. 7,000/= proved vide PEXH. NO. 9, Kshs. 550 being the costs of official search and Kshs. 2,600/- being the costs of treatment. His other claims for Filling of P3 form (Kshs. 3,000) and the cost of Police Abstract (Kshs. 200/-) as unsubstantiated. Thus, the total damages awardable herein is hereby assessed at 1,660,500/-.
20. In conclusion, judgment is hereby entered in favor of the plaintiff, against the defendant at Kshs 1,660,500/=, costs and interests at court's rates.

**DATED, SIGNED AND DELIVERED AT NAKURU IN OPEN COURT THIS 11<sup>TH</sup>, DAY OF JULY 2024**

**ALOYCE-PETER-NDEGE**

**SENIOR PRINCIPAL MAGISTRATE**

In the presence of;

Plaintiff's counsel: n/a

Defense Counsel: n/a

