



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ojwaka v Gaitho (Civil Case E868 of 2021)  
[2023] KEMC 314 (KLR) (31 October 2023) (Judgment)**

Neutral citation: [2023] KEMC 314 (KLR)

**REPUBLIC OF KENYA  
IN THE NAKURU LAW COURTS  
CIVIL CASE E868 OF 2021  
PA NDEGE, SPM  
OCTOBER 31, 2023**

**BETWEEN**

**EDMUNDS JUDE OJUANG OJWAKA ..... PLAINTIFF**

**AND**

**ALEX KURIA GAITHO ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff in this case, Edmunds Jude Ojuang Ojwaka, is praying for judgment against the Defendant, Alex Kuria Gaitho, for special and general damages emanating from a road traffic accident that occurred on or about 12.02.2021, as a consequence of which he sustained severe injuries. He brought this suit vide a Complaint dated 30.08.2021 and filed on 14.09.2021.
2. It is common ground herein that the plaintiff was a lawful pedestrian along the Nakuru-Eldoret highway when at Njoro interchange area, the accident herein occurred. It is the plaintiff's case that the accident was solely caused by the defendant, when he carelessly and/or negligently drove, managed and/or controlled the Motor Vehicle KCT 041U causing it to knock him down as a consequence whereof he sustained the severe injuries, namely<sup>1</sup>: -
3. The plaintiff particularized his claim of negligence on the part of the defendant at Paragraph 4 of his complaint as follows: -
  - a. Driving the Motor Vehicle at a high speed in the circumstances

<sup>1</sup> Refer to paragraph 5 of the Complaint

- a. Comminuted fracture of the right tibia and fibula
- b. Dislocation of the right shoulder joint.
- c. Temporary disability of 6 months.
- d. Permanent disability of 20%.



- b. Failing to exercise or maintain any sufficient or adequate control of the said Motor Vehicle.
  - c. Driving on the wrong side of the road.
  - d. Knocking the Plaintiff off the road.
  - e. Failing to stop, slow down, brake, swerve or act in a way necessary to control the Motor Vehicle to avoid knocking down the Plaintiff.
  - f. Failing to have proper outlook or to have any regard for other road users specifically the Plaintiff
  - g. Failing to obey the Road Traffic Rules and the provision of the Highway Code.
  - h. Res ipsa loquitor.
4. The Defendant has thus been sued in his capacity as registered, beneficial and/or users of the motor vehicle registration number KCT 041U. He entered appearance and filed his defense, respectively vide a Memorandum of Appearance dated 29.10.2021 and filed on 08.11.2021; and a Statement of Defense dated 29.10.2021, filed by the firm of Messrs. Kinyanjui Njuguna & Co. 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 6 of his Statement of Defense, as follows:
- a. Walking and/or standing on the road when it was unsafe and dangerous to do so.
  - b. failing to keep any proper look-out or to have any sufficient regard for traffic that was/might reasonably be expected on the said road.
  - c. Crossing or attempting to cross the road without ensuring that it was safe so to do.
  - d. Failing to walk and/or stand on the designated and/or pedestrian walk off the road.
  - e. Exposing herself to the unnecessary risk of injury.
  - f. Failing to see motor vehicle registration number KCT 041U at all or in sufficient time so as to avoid the accident.
  - g. Failing to maintain a safe distance.
  - h. Failing to take care of his own safety.
  - i. Failing to take steps to avoid the accident.
  - j. Failing to give way to Motor Vehicle Registration Number KCT 041U.
5. The plaintiff testified and called a police officer as his witness, while the defendant was the only witness for the defense. Parties then filed and, I believe, exchanged their 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 captured by the learned counsel for the Defendant's written submissions, 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.**

6. On liability, the plaintiff testified and adopted his statement that was filed in court on 30.08.2021 that he was a lawful pedestrian along the aforesaid highway and on the right side of the road while heading towards Ngata, where at around Uhuru Primary School, the vehicle herein came from the opposite direction, veered off the road and knocked him down, as a consequence whereof he sustained the severe injuries. It is his testimony that the defendant is wholly to blame because he veered off his lawful lane and violently knocked him down.
7. In cross-examination, he denied that he was crossing the road at the time of the accident. He insisted that he was off road and the point of impact was completely off the road. He further testified that he was not aware that the police blamed him for the accident.
8. The police officer, PW2, No. 88258 Ibrahim Mohamed, from Kaptembwa police station, confirmed that he was the investigating officer herein. He stated that on the material evening, at around 10.00pm, he responded to the report of the accident herein and immediately proceeded to the scene at Njoro interchange, where he found the defendant herein while the plaintiff had already been taken to the hospital for treatment. He then continued with his investigations and concluded that the plaintiff was to be blamed for the accident. That the plaintiff was at the edge of the road at the time of the accident. He did not however explain or expound on his findings.
9. The defendant, in his testimony, stated that the plaintiff herein suddenly appeared on the road, while from the left side, and that he tried to swerve to the right, but that it was too late. That he also hooted and applied emergency brakes in an attempt to avoid hitting the plaintiff. That he could not avoid hitting him with the left side mirror of his vehicle. That the plaintiff was, as a consequence of the impact, thrown besides the road. He blames the plaintiff for not being careful. That the plaintiff ought not have approached the road at that time given that the road was very busy at the time. He insisted that the plaintiff was attempting to cross the busy road at the time of the accident. In conclusion, he blames the plaintiff for failing to give way to his vehicle, hence causing the accident.
10. In a bid to determine and or apportion liability herein, I have gone through the impressive submissions by the two learned counsel for the respective parties herein. I do agree that 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. As correctly submitted by the learned counsel for the defendant, 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.
11. Learned counsel for the defendant has referred me to the provisions of sections 107 and 108 of the [Evidence Act](#) which are as follows:  
  
SUBPARA 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.  
  
SUBPARA (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.



PARA 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.

12. In the case of *Muruingu Kanoru Jeremiah v 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."

13. 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.

(16) 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 appellant, 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?

14. 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. The learned counsel for the defendant appears to over-rely on the evidence of PW2, the police officer who blamed the plaintiff for the accident herein. There was an impressive rebuttal from the plaintiff's counsel, in the form of Justice Ngetich's decision in *Stanley Oguti Attai v Peter Chege Mbugua*[2019] e KLR. I however find the circumstances that led to the judge's decision in the case to be distinguishable, at least from my point of view, given that the police officer who testified herein is the investigating officer in this case, and he has supplemented the evidence in the Police abstract by clarifying what appears to be his final conclusion after the investigation in which he blames the plaintiff for the accident herein. The investigating officer did not however offer any convincing reason or explanation for his finding. And it is therefore highly debatable whether this court is bound to go and apply his finding blindly without any sufficient explanation offered to the court to reasonably back the finding. The relevant part of his evidence is as follows: -



...I did investigations and the accident happened at (a) highway. It had a pedestrian crossing. No streetlight. The pedestrian was therefore to be blamed. No reflector jacket was required. It's a dual carriageway. The pedestrian was on the edge of the road. The vehicle was inspected. It had no pre-accident defect.

15. And in cross – examination he only stated thus: ‘...the pedestrian is to be blamed. The pedestrian was dropped there by a colleague – opposite side of the road...’ Thus, there is no clear explanation or reasoning behind his finding. There is also no consistent or clear evidence to back his finding as no sketch map or plan was produced to back his finding that the accident occurred at the edge of the road, while the plaintiff was attempting to dangerously cross, and not off the road where the vehicle was found. I thus have to go by the decision in *Stanley Oguti Attai v Peter Chege Mbugua*,supra, and consider the other evidence adduced in court as I find the investigating officer’s opinion untested and not sufficiently corroborated.
16. I have already found both parties herein to have held a duty of care against each other. If it is true that the accident happened on the edge of the road, then I will find both of the parties herein to be blamed. The defendant however stated that he suddenly saw the plaintiff herein. He stated that he hooted, braked and swerved in a bid to avoid hitting him. However, the evidence from the investigating officer and the defendant, that he hit the plaintiff on the edge of the road and by the side-mirror of the vehicle tends to prove that he did not see the plaintiff properly, and that the plaintiff did not also see him properly. Thus, if I am to believe this evidence, then the accident herein was caused by both parties herein. Both had no proper lookout or any regard for each other; and the plaintiff, for his own safety. I might however still find the plaintiff more to blame because as a victim, he was supposed to take more care of his own safety and take steps to avoid the accident. His evidence is however that the vehicle herein veered off the road and knocked him well besides the road.
17. Again, the investigation officer did not help us much. He stated that he found when the vehicle had already been moved from the spot of the accident and was then parked besides the road. He thus did not produce the sketch map or plan. The sketch map or plan would have helped in ascertaining whether there were any emergency brake marks so as to back the defendant’s claim that he applied emergency brakes.
18. Production of sketch plans as to the point of impact and resting place of the vehicles after the accident and/or skid marks would no doubt have assisted the court to have a clearer view of the scene. See *Caroline Ann Njoki Mwangi v Paul Ndungu Muroki*[2004] e KLR.
19. From the evidence it is clear that each party was to some extent to blame. As aforesaid, the burden of proof is always on the plaintiff, but such proof may shift to the defendant when circumstances demand, like in this case where both parties blame each other. Each has a duty to prove its case against the other on a balance of probability.
20. In the Court of Appeal decision in Civil Appeal No. 739 Of 2003 *Caroline Anne Njoki Mwangi v Paul Ndungu Mwangi*,supra, impressively cited by the learned counsel for the defendant, faced with similar circumstances, the Honorable Judges rendered that:  
  
I would in the absence of an official police sketch map and on knowing who exactly is to blame on this matter and on a balance of probability hold that the parties are indeed equally to blame at the ratio 50% each.
15. In my considered view, it is not reasonably possible for a court to decide upon opposing and rival evidence tendered by witnesses on both sides as to who was to blame for the accident. The investigating officer, being an independent party would have been of great help to the court only if he could have



given a reasonable explanation for his finding of blame on the plaintiff, and backed the same with the relevant evidence such as the sketch map etc.

16. In the premises, it would be prudent and in line with judicial precedent, to come to the findings and conclusion that where there is no concrete evidence to determine who in a motor vehicle accident is to blame between two parties both should be held equally to blame. See Civil Appeal No. 521 Of 2007 In Commercial Transporters Ltd v Registered Trustees Of The Catholic Archdiocese Of Mombasa[2015] eKLR.
17. Accordingly, I conclude that both parties shall be held equally to blame at 50% basis. Having so decided, it therefore follows that the consequential damages arising from the accident, and the plaintiff's damages from the injuries, but subject to the proof herein, shall likewise be apportioned in the manner stated above, on a 50:50 basis.
18. On quantum, both parties herein agree that the plaintiff was injured in the manner as pleaded. The medical evidence adduced by both sides herein prove so. I find the authority of Alphonse Muli Nzuki v Brian Charkes Achuodho [2014] eKLR, cited by the learned counsel for the Plaintiff, to be the more relevant herein. The injuries sustained by the victim therein are almost similar to the ones sustained by the plaintiff herein. I therefore rely on the same to find Kshs. 1,000,000/= proposed by the counsel for the plaintiff to be sufficient compensation for the pain and suffering that the plaintiff underwent. His claim for special damages has also been proved vide PEXH Nos.6A, 6B, 8A, 8B, 10A, 10B, 11B, 12B, 15A, 15B, 16A, and 16 B, minus the Kshs. 100/= claim for the cost of Police Abstract which I find to be unsubstantiated. Also, the cost for future medical expenses have been well estimated in both medical reports herein, PEXH No11A and DEXH No1, at Kshs 100,000/=, which bring the total awardable special damages herein at Kshs 129,840/=. Thus, the total damages awardable herein is hereby assessed at 1,129,840/- less 50% contribution, giving a net total of Kshs. 564,920/=.
19. In conclusion, judgment is hereby entered in favor of the plaintiff, against the defendant at Kshs 564,920/=, costs and interests at court's rates.

**DATED, SIGNED AND DELIVERED AT NAKURU IN OPEN COURT THIS 31st, DAY OF October, 2023**

**ALOYCE-PETER-NDEGE**

**SENIOR PRINCIPAL MAGISTRATE**

In the presence of;

Plaintiff's counsel: Mungai

Defense Counsel: Odhiambo

**ALOYCE-PETER-NDEGE**

**SENIOR PRINCIPAL MAGISTRATE**

Odhiambo: Praying for 30 days stay. Also, a copy of the judgment

Mungai: No objection.

**ALOYCE-PETER-NDEGE**

**SENIOR PRINCIPAL MAGISTRATE**

CT: 30 days stay granted. Counsel to pay for the copy of the judgment which has already been printed at 18 pages.



**ALOYCE-PETER-NDEGE**  
**SENIOR PRINCIPAL MAGISTRATE**

