Kayoni & another v Mwanduka (Civil Appeal E217 of 2024)
[2025] KEHC 14928 (KLR) (24 October 2025) (Judgment)

Neutral citation: [2025] KEHC 14928 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E217 OF 2024

J NGAAH, J

OCTOBER 24, 2025

BETWEEN

EZEKIEL KIPRUTO KAYONI ..... 1ST APPELLANT

JOSEPHAT NGETICH ..... 2ND APPELLANT

AND

MARCELA SAMBA MWANDUKA ..... RESPONDENT

(An appeal against the judgment and decree in Mombasa Chief Magistrates' Court Civil Case No. E1643 of 2022 (Hon. Noelyne Ake Reuben (Senior Resident Magistrate)) delivered on 27 June 2024.)

JUDGMENT

1. This is an appeal against the judgment and decree in Mombasa Chief Magistrates' Court Civil Case No. E1643 of 2022 (Hon. Noelyne Ake Reuben (Senior Resident Magistrate)) delivered on 27 June 2024., "the vehicle" and the respondent.

   The suit before the learned magistrate arose out of a road traffic accident involving motor vehicle registration no. KDE 206Y, a lorry of Isuzu make (hereinafter

2. According to the plaint dated 17 November 2022, the 1st appellant is said to have been the registered owner of the vehicle while the 2nd appellant was its driver at the time material to the suit in the lower court.

3. The respondent pleaded that on or around 30 September 2022, she was walking along Likoni ferry road when the vehicle lost control and hit her "from the side". According to the respondent, the accident arose because of the negligence of the 2nd appellant in driving the vehicle. The 2nd appellant is said to have been careless and reckless and, among other things, he drove without keeping to his lane and

without any proper lookout. Besides particularising the 2nd appellant's negligence, the respondent also pleaded the doctrine res ipsa loquitor.

4. As a result, if the accident, the respondent suffered bodily injuries which she particularised as follows:

> " a) Fracture of the radius forearm bone (distal 1/3rd)
>
> b) Fracture of the right 5th foot bone (metatarsal)
>
> c) Blunt object injury to the right foot.
>
> d) Blunt object injury to the left forearm."

5. The respondent averred that consequent upon these injuries, she suffered loss and damage and, therefore, sought judgment against the appellants for general damages, special damages and costs of the suit together with interest thereof.

6. The appellants refuted the respondent's claim and filed a defence to that effect. In particular, they denied each and every allegation of fact, including the claim that a road traffic accident occurred as stated or at all and that the 1st appellant was the owner of the vehicle or that the 2nd appellant was its driver at the time material to the suit. They also denied the respondent having been injured in the accident or suffered any loss or damage.

7. Nonetheless, in its determination, the lower court held that indeed a road traffic accident did occur as pleaded by the respondent and that the appellants were solely responsible for the accident. As far as quantum of damages is concerned, the learned magistrate awarded Kshs. 12, 984/= as special damages and general damages of Kshs. 500,000/=.

8. The appellants have appealed against this decision and, in their memorandum of appeal dated 24 July 2024, they raised the following grounds of appeal:

> " a. That the Honourable Learned Magistrate erred in law and in fact in finding the Appellants l 00% liable.
>
> b. That the Honorable Learned Magistrate erred in law and in fact in disregarding the overwhelming evidence tendered by the Defence and further failed to apportion liability between the Appellants and the Respondent
>
> c. That the Honourable learned Magistrate erred in law and in fact in failing to find that the Respondent was the author of his own misfortune.
>
> d. That the Honourable learned Magistrate erred in law and in fact in relying on extraneous evidence in arriving at the decision on liability.
>
> e. That the Honourable learned Magistrate misdirected himself by failing to consider the evidence and the submissions by the Appellants while arriving at the judgment."

9. The appellants have, therefore, prayed that the appeal be allowed and the lower court's judgment be set aside or varied. In particular, they have asked that the lower court's finding on liability be "reviewed". They also want the appellant to bear the costs of the appeal and the costs of her suit in the lower court.

10. This being a first appeal, it is incumbent upon this Honourable Court to consider and evaluate afresh the evidence in the lower court record and come to its own conclusions but bearing in mind that the subordinate court had the advantage of seeing and hearing, the witnesses. (see Selle v Associated Motor

Boat Co. [1968] EA 123; Kiruga v Kiruga & Another [1988] KLR 348. In the latter of these two cases, the Court of Appeal held, inter alia, that: -

> " An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution."

11. The grounds of appeal suggest that the appellants are concerned more about the subordinate's court finding on liability than the award on damages. I note that despite not raising any ground against the judgment on quantum, the appellants have purported to submit that the award was too high as to be considered a fair compensation for the injuries which the respondent sustained. This part of the appellant's submissions is contrary to order 42 rule 4 of the Civil Procedure Rules which restricts an appellant to grounds of appeal set forth in the memorandum of appeal. The rule reads as follows:

> "
>
> " 4. Grounds which may be taken in appeal [Order 42, rule 4]
>
> The appellant shall not, except with leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the High Court in deciding the appeal shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this rule:
>
> Provided that the High Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground."

12. I must mention here also that the respondent filed what she described as a "notice of cross-appeal" and nothing more. Order 42 rule 2 of the Civil Procedure Rules prescribes a memorandum of appeal as the form an appeal from the magistrates' court takes. It states further that it is in the memorandum of appeal that the grounds of appeal are set forth. The rule reads as follows:

> 1. Form of appeal [Order 42, rule 1]
>
> (1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
>
> (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

13. Against the foregoing background, in evaluating the evidence a fresh, I need not bother with the evidence on loss and damage that the respondent may have suffered and the award that was subsequently made in this regard by the learned magistrate.

14. That said, the record of proceedings of 19 July 2023 when the plaintiff testified is as follows:

> " 19th July, 2023
>
> Before Hon. R.N Akee - Senior Resident Magistrate Court assistant: Teddy
>
> Ms Onkaba for pla1ntiff

Mr. Bosire for defendant

Ms. Oukoba;

I have 3 witnesses ready to proceed.

Mr. Bosire:

I am ready to proceed with the plaintiff case.

Ms. Okaba:

lam ready

ON OATH:

Maralla Samba Mwanduka.

lam the plaintiff, I wrote my statement. I adopt it as evidence.

The documents attached with pleadings Peexh 1--6 I am not fully healed. lam still on medication

Examined

I had crossed the ferry.

The police didn't come to the scene. lam not fully recovered.

I went their last month.

Re -examined

lam not fully healed.

Mr. Bosire;

We pray for a defendant hearing date

Court: - hearing 31/08/2023"

15. It is clear from these proceedings that no other evidence was called on behalf of the respondent besides her own testimony. In the statement which she adopted as her evidence, the respondent wrote that on 30 September 2022 at about 1.30 PM, she was a pedestrian on Likoni ferry road when the vehicle lost control, veered off the road and hit her "from the side." She blamed the driver of the vehicle because, according to her, he did not keep a proper lookout for other road users.

16. The only witness called on the appellants' side was Josephat Ng'etich who like the appellant adopted his witness statement as his evidence. His statement read as follows:

> " I am the above named adult of sound mind, residing within the Republic of Kenya. I am well versed with the circumstances leading to the present claim. I wish to state that I am a qualified driver and a holder of a valid driving License.
>
> I wish to state that on the material day at around 1:30pm I was driving motor vehicle registration number KDE 206Y exiting the ferry at Likoni. I was driving at a speed of 15km/hr. The weather was dry and visibility was clear.
>
> As I was exiting the ferry, with the aid of my side mirrors I noticed a commotion on the ferry. I stopped my motor vehicle and tried to find out what had happened. A woman, who is the Plaintiff herein alleged that I had hit with the rear side of my motor vehicle.

I reported the matter at Makupa Police Station and was issued with a police abstract. I have never been charged with any traffic offence.

I blame the Plaintiff for causing the accident by failing to exercise caution as motor vehicles were exiting the ferry at Likoni exit."

17. Besides his statement, Ng'etich reiterated that he did not knock the respondent and that at the time of the accident, he was headed to Mombasa town, driving at the speed of 15 Kilometres per hour. He described his vehicle as "long 20". He also testified that there were many people but that he did not see any one at the ferry.

18. What comes out of this evidence is that although the appellants denied in the statement of defence that an accident involving motor vehicle registration no. KDE 206Y occurred on 30 September 2022, it is apparent from appellants' own evidence that indeed such an accident did occur and that, as a matter of fact, the 2nd appellant was driving the vehicle at the material time. The 2nd appellant even took a further step and reported the accident to the police.

19. A medical examination report or a P3 form issued by Central Police Station in Mombasa and an abstract of the police records from the same station show that indeed an accident involving the 1st plaintiff's vehicle, which at the time of the accident was being driven by the 2nd appellant, and in which accident the respondent was injured, did occur.

20. As far as the question of liability for the accident is concerned, the crux of the respondent's testimony is that the vehicle veered off the road and knocked her. On the other hand, as far as I gather from the testimony of the driver of the vehicle, he could not tell how the accident happened. In his own words, he only realised that there was an accident when he "noticed a commotion on the ferry." It is then that he stopped the vehicle "and tried to find out what had happened". This kind of evidence would lend credence to the respondent's position that when the accident occurred, the driver of the vehicle was not on the lookout or cautious of other road users, including the respondent.

21. Be that as it may, in the absence of any evidence to the contrary, the lower court was entitled to accept the respondent's explanation of how the accident happened particularly when the driver of the vehicle all but acknowledged that he did not know how the accident happened.

22. It is also worth noting that the appellant pleaded the doctrine of res ipsa loquitor in pursuit of her claim. The essence of this doctrine is that the respondent was not bound to call any evidence of how the accident occurred once it was established, and as the appellants admitted in their testimony, that indeed an accident did occur. It is trite that once a claimant invokes this doctrine, the burden is on the respondent to explain that he was not negligent for the accident in issue and regardless of whatever he may have done to avoid it, it did happen anyway.

23. In the English case of Barkway v South Wales Transport Co. Ltd (1950) 1ALL ER; a tyre of an omnibus burst, causing it to veer off the road and fall over an embankment as a result of which a passenger died. Several hypotheses were put forth but none of them was attributable to the tyre burst with any measure of certainty. It could not be explained in categorical terms how the defendant company, the omnibus owner, may have been negligent. The claimant pleaded res ipsa loquitur because, she urged, 'omnibuses which are properly serviced do not burst their tyres without cause nor do they leave the road along which they are being driven.'

24. The case escalated to the House of Lords. In the leading judgment, Lord Porter cited Erle CJ in Scott v London Dock Co (3H&C 601) where he said of this doctrine as follows:

> " ... where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care"

25. The learned judge went further to explain that "the doctrine is dependent on the absence of explanation and although it is the duty of the defendants if they decide to protect themselves to give an adequate explanation of the cause of the accident yet if the facts are sufficiently known the question ceases to be one where the facts speak for themselves and the solution is to be found by determining whether on the facts as established negligence is to be inferred or not."

26. On his part, Lord Normand spoke of the doctrine as follows:

> " The fact that an omnibus leaves the roadway and so causes injury to a passenger or to someone on the pavement is evidence relevant to infer that the injury was caused by the negligence of the owner, so that, if nothing more were proved, it would be a sufficient foundation for a finding of liability against him. It can rarely happen when a road accident occurs that there is no other evidence, and, if the cause of the accident is proved, the maximum res ipsa loquitur is of little moment. The question then comes to be whether the owner has performed the duty of care incumbent on him, or whether he is by reason of his negligence responsible for the injury. The maxim is no more than a rule of evidence affecting onus. It is based on common sense, and its purpose is to enable justice to be done when the facts bearing on causation and on the care exercised by the defendant are at the outset unknown to the plaintiff and are or ought to be within the knowledge of the defendant." (Emphasis added).

27. Based on these decisions, I hold that the learned magistrate was right in finding the appellants negligent and solely responsible for the accident. In the ultimate, I find no merit in the appellant's appeal and it is hereby dismissed with costs to the respondent.

SIGNED, DATED AND DELIVERED ON 24 OCTOBER 2025

NGAAH JAIRUS.

JUDGE