REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT THIKA

CIVIL DIVISION

CIVIL APPEAL NO. E361 OF 2024

JOSEPH MUGO KARANJA……. …….APPELLANT

VERSUS

PETER MWANGI alias KARANJA……..1ST RESPONDENT

VICS CONTRACTORS &

GENERAL TRANSPORTERS CO. LTD……2ND RESPONDENT

(*Being an appeal form the judgment delivered on 25th November 2024 by Honourable Joane Wambilyanga, SPM in Thika CMCC 687 of 2019*)

JUDGEMENT

1. The background to this matter is that the Appellant moved the trial court vide an amended plaint dated 24th June 2021, seeking general and special damages following a road traffic accident that resulted in serious damages to motor vehicle registration no. KYQ 592 Isuzu Truck.

2. It was claimed that on 2nd November 2018, the Appellant was driving along Thika-Garissa Road within Kiambu County when the 2nd Respondent's motor vehicle registration number KCP 740N was negligently driven by the 1st Respondent that it rammed into the Appellant's motor vehicle registration number KYQ Isuzu truck causing it serious damages.

3. Following the accident, the Appellant incurred loss including:
   i. Towing and recovery to police station Kshs. 5,000
   ii. Towing and recovery to garage Kshs. 10,000
   iii. Wind screen Kshs. 4,500
   iv. Spares and Accessories Kshs. 3,300
   v. O/S Mirror and Arm Kshs. 5,000
   vi. Radiators re-core Kshs. 12,000
   vii. Main Leaf, Fitting & Fasteners Kshs. 3,000
   viii. Body works, chassis, panel beating & labour Kshs. 85,000
   ix. Loss of earnings for 14 days @ income of Kshs. 10,500 per day Kshs. 147,000
   Total kshs. 274,800

4. Despite the repairs undertaken, the truck is unable to operate at its optimum as it did prior to the accident, thus rendering it to be written off.

5. The Respondents denied the claim vide a Statement of Defence dated 2nd June 2020 and in the alternative pleaded contributory negligence on the part of the Appellant for failing to adhere to and observe the laid down traffic rules and regulations while sing the road. Thus, the Respondents prayed that the suit be dismissed with costs.

6. The matter proceeded to trial whereby the appellant testified by adopting his witness statement and relying on documents as exhibits. He testified that his driver notified him that the accident had occurred on 2nd November 2018, his motor vehicle was registration number KYQ 592 Isuzu. Following the accident, he had to hire another motor vehicle as his motor vehicle was seriously damaged. He clarified that he neither witnessed the accident nor was he

at the place of the accident. The respondents did not testify in court.

7. Subsequently, the trial court entered judgment in favour of the Respondent against the Appellant on the basis that there was insufficient evidence to impute liability for the accident on the Respondents. In any case, no police officer was called to produce the police abstract. Consequently, the Appellant's case was dismissed with costs.

8. Aggrieved and dissatisfied with the decision of the trial court, the appellant lodged the instant appeal on grounds that:
   i. The learned magistrate erred and misdirected herself in law and in fact by dismissing the appellant's case.
   ii. The learned magistrate erred and misdirected herself in law and in fact in failing to consider the Respondent's contributory negligence at the time of the accident.
   iii. The learned magistrate erred and misdirected herself in law and in fact by failing to consider that at the time of the hearing parties had complied with pre trial and the Respondent never indicated the maker of the police abstract come and tender their evidence in court.
   iv. The learned magistrate erred and misdirected herself in law and in fact as the appellant's evidence was not controverted as the Respondents never tendered any evidence.
   v. The learned magistrate erred and misdirected herself in law and in fact as mistakes of appellant's counsel were meted out on an innocent litigant.

9. Reasons wherefore the appellant prayed that the judgment delivered on 25th November by the honourable

Joanne Wambilyanga, SPM in Thika MCCC 687/ 2019 and the consequential decree be set aside.

10. The court directed that the appeal be canvassed through written submissions.

11. The Appellant submitted that the Respondent never called any witness nor led any evidence to controvert the evidence tendered by the appellant. Therefore, the judgment entered by the trial court was solely based on the appellant's evidence. While the trial court observed that the accident occurred, it proceeded to dismiss the appellant's claim without legal justification for failure to call the maker of the police abstract. This was contrary to the fact that the Respondents did not in any way object to the production of the abstract or require that the maker be called. It is only when the appellant was already on his feet that the Respondent objected to the production of the abstract.

12. In any case, failure to call the police officer was a mistake of counsel and the same ought not to be visited upon the client. Reliance was placed on the case of **Tana & Athi river development authority v Jeremiah Kimigho Mwakio & 3 others [2015] eKLR.**

13. The Appellant argued further that failure by the Respondent to call any witness means that the Appellant's evidence as not controverted.

14. The Respondent submitted that failure by the appellant's driver to testify at the trial meant that any evidence advanced by the appellant before the trial court was inadmissible hearsay and could not be admissible as truth of the way the accident occurred. Accordingly, the

appellant did not prove his case to the required standard as established by **Section 107 of the Evidence Act**.

15. It was further submitted that it is an established principle of law that documents should be produced by their maker except as provide under **section 35 of the Evidence Act**. The Police Abstract was neither produced neither was its maker cross examined on it. Therefore, it was not open for consideration by the trial court. Reliance was placed on the decision of the Court of Appeal in **Kenneth Nyaga Mwige vs Austin Kiguta & 2 others [2015]eKLR** where the court stated that the marking of a document is only for purposes of identification and it is not proof of the contents of the document and that a document is not proved merely because it has been marked for identification.

16. This being a first appeal, this court must re-evaluate and assess the evidence and make its own conclusion. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand. In the case of **Peters v Sunday Post Limited [1958] EA 424**, the court therein rendered itself as follows:

> ***" It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses…But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion…"***

17. The issues for determination are whether the appellant proved his case on a balance of probabilities and whether the finding on quantum was proper in law.

18. The Appellant urged this court to find that the trial court erred in dismissing the claim for want of proof yet his evidence was uncontroverted. He proposes that the judgment of the trial court be set aside. On the other hand, the Respondent's case is that the trial court's judgment was correct on both quantum and liability and should not be disturbed as the appellant's case was hinged on inadmissible hearsay.

19. It is worth noting that the standard of proof in civil cases is on a balance of probability. In criminal cases the standard of proof is beyond reasonable doubt. Therefore, it is worth of note that **Section 107 of the Evidence Act** provides that:

> ***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.***

20. In the case of **Hellen Wangari Wangechi vs Carumera Muthoni Gathua (2015)eKLR, Mativo J** (as he then was) stated that:

> ***"In my view the reason for this standard is that in some cases, the question of the probability or improbability of an action occurring is an important consideration to be taken into account in deciding whether that particular event had actually taken place or not. It is a fundamental principle of law that a litigant***

bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. The standard of proof, in essence can loosely be defined as the quantum of evidence that must be presented before a court before a fact can be said to exist or not exist."

21. It is trite that the burden of proof does not change even if the evidence is uncontroverted or the defendant fails to give evidence. This was the position in the case of **Charterhouse Bank Limited (Under Statutory Management vs Frank N. Kamau (2016) eKLR** where the court stated that:

"We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendant's failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff or his witnesses to cross-examination and the evidence adduced by the plaintiff is thereby thoroughly discredited, judgment cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgment merely because the defendant has not testified."

22. In the instant appeal, evidence was adduced by the appellant and on cross examination, he stated that he did not witness the accident neither was he present at the scene. Everything that he knew about the accident had been told to him by his driver, whom he did not call as a witness. In the absence of an eyewitness account, the appellant's case was weakened further when the police abstract was not produced by the maker or any other competent witness before court as required by law notwithstanding that there was no objection to its production. The same was therefore inadmissible hearsay. With such evidence, it is clear that the Appellant failed to discharge his evidential burden before the trial court.

23. Although the appellant alleges that the failure to call the police officer was mistake of counsel, that ought not to have been visited against the litigant as no evidence has been put forth to demonstrate that the same was a mistake.
24. It is further noted that the appellant simply alleged that it was a mistake of counsel, without specifying the counsel who made the mistake nor the reason or circumstances under which the mistake was made. I find that the representations by the appellant are mere excuses and have no basis in law.

25. ***Flowing from the above, I find no reason to disturb the exercise of discretion by the trial court. The upshot of the matter is that the appeal is dismissed with costs to the Respondent***

DATED, SIGNED AND **DELIVERED VIRTUALLY** THIS **26TH** DAY OF **FEBRUARY,** 2026.

HON. T. W. Ouya
JUDGE

For Applicant……Kariu
For Respondent……. Omondi

COURT ASSISTANT……Brian