

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
CIVIL APPEAL NUMBER E015 OF 2023

JANET NZISA NZIOKA.....APPELLANT

-VERSUS-

BENARD KIMANI.....1ST RESPONDENT
PETER KAGARI MBUGUA.....2ND RESPONDENT
*(Being an appeal from judgment and decree in Chief Magistrate's Court at
Thika (O. Wanyaga SRM) civil case number E627 of 2020 dated 27-09-2023)*

JUDGMENT

The appellant filed suit against the respondents in the trial court in which she was pursuing compensation for pain and suffering as a result of an accident that occurred on 2-07-2018 involving motor vehicles registration numbers KBK 340V and KCN 827N. The former was owned by the 2nd respondent and driven by the 1st respondent. The respondents filed a defence in which they denied liability and shifted blame to the driver of motor vehicle registration number KCN 827N.

By judgment delivered on 27-09-2023, the trial court found that the appellant had failed to prove negligence on the part of the respondents as the vehicle to be blamed for the accident was KCN 827N and proceeded to dismiss the suit with costs.

Being aggrieved by the above judgement, the appellant has approached this court with an eight-grounds memorandum of appeal in which he complains that;

1. *The learned Magistrate erred in fact and in law in failing to find that the plaintiff having been a fare paying passenger aboard motor vehicle*

registration number KBK 340V TOYOTA matatu was owed a duty of care by the defendants and not third parties.

- 2. The learned Magistrate erred in fact and in law by failing to find that the driver of motor vehicle registration number KBK 340V TOYOTA matatu liable especially having failed to produce his driving license or to account for what evasive action he took to avoid the accident.*
- 3. The learned trial Magistrate erred in law and in fact in relying on the evidence of police officers who blamed motor vehicle registration number KCN 827N HONDA for causing the accident without carrying out any investigations or preferring charges against the driver of the said vehicle thereby made a wrong decision.*
- 4. The learned trial Magistrate erred in law and in fact in failing to find that it was the duty of the respondents to enjoin a third party if they felt that the third party was the cause or contributed to the occurrence of the accident. The learned trial Magistrate erred in shifting the said duty thereby made a wrong decision.*
- 5. The learned trial Magistrate erred in fact and law in failing to find liability against the respondents hence made a wrong decision.*
- 6. The learned trial Magistrate erred in law and in fact in finding that the appellant did not prove her case on a balance of probabilities thereby arriving on a wrong conclusion.*
- 7. The learned trial Magistrate erred in law and in fact in dismissing the appellant's case against the weight of evidence thereby making a wrong decision.*

8. *In view of the circumstances set out herein above, the learned trial Magistrate totally misdirected herself in delivering judgement in favour of the respondents by failing to consider and appreciate the evidence on record tendered on behalf of the appellant.*

This is a first appeal and I will, as required by the law re-evaluate, re-consider and re-analyse the evidence produced by the parties in the trial court and come to my own independent conclusion but keeping in mind that I should give allowance to the fact that I did not take the evidence of the witnesses and did not have an opportunity to observe their demeanour as it was held by the Court of Appeal in ***Erick Onyango Ondeng’ v Republic [2014] KECA 523 (KLR)***, thus;

‘The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial court is to carefully analyse that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers. It is the trial court, when it comes to questions of fact, which has the singular advantage of seeing and hearing the live witness testify and being subjected to cross-examination, that time-honoured devise for testing the truth or correctness of evidence. Next is the first appellate court which by law, it is its bounden duty to re-consider, re-evaluate and analyse the evidence that was before the trial court, to determine whether, on the basis of those facts, the decision of the trial court is justified.’

The appellant was the only one who testified on her side. When she took the witness stand, the appellant adopted her witness statement filed on 29-12-2020 which stated that on 2-07-2018, she was travelling as a lawful passenger in

motor vehicle registration number KBK 340V along Ruiru-Kiganjo road when near Ruera area, the 1st respondent so carelessly, negligently and/or recklessly drove, managed and/or controlled the said motor vehicle that it collided with motor vehicle registration number KCN 827N upon which she sustained injuries as pleaded in her plaint.

She added that, she was treated at Ruiru Sub-County hospital and went on to state the post-treatment complications she had at the time of the trial. The appellant produced a total of seven exhibits comprising treatment records from Ruiru and Aga Khan hospitals, P3 form, medial report by Dr. Ikonya dated 23-10-2018, police abstract dated 23-07-2018, a copy of records for KBK 340V, a demand letter dated 13-08-2018 and a statutory notice dated 13-08-2018.

When she was cross-examined, the appellant did not say much touching on negligence or liability. She stated that she was seated at the back and could not see the driver as he drove and insisted that she had belted up.

The proceedings show that the evidence of the defence witnesses in civil case number 61 of 2021 was adopted in this matter. I have not been given the benefit of seeing that evidence but the same is reproduced in the trial court's judgment and I have no reason to doubt the contents of the judgment.

According to what is in the judgement, the 1st respondent confirmed that he was the driver of the motor vehicle the appellant was travelling in. He was driving from Ruiru to Kigumo when his vehicle was hit by motor vehicle registration number KCN 827N on the right back tyre as it was attempting to overtake at a corner upon which the respondent's vehicle overturned. He added that he could not have given way because it was at the corner and there was another oncoming vehicle.

The second defence witness was Linnet Makuti a police officer attached at Juja police station. She confirmed that the accident occurred when motor vehicle registration number KCN 827N attempted to overtake motor vehicle registration number KBK 340V when the two were moving in the same direction. She added that the driver of KCN 827N misjudged the distance between his vehicle and an oncoming vehicle and thus swerved and hit the rear of KBK 340V and that KCN 827N was blamed.

I have read the submissions of the appellant dated 3rd April 2025 and those of the respondents dated 10-09-2025. I have also gone through the evidence of the parties and the entire record of appeal. From my reading, I form opinion that the issues for determination are; which between the two vehicles was to blame for the accident and whether failure by the respondents to join the owner of motor vehicle registration number KCN 827N should have led to conclusion of negligence against them.

It is trite principle of the law that he who alleges must prove. No doubt the person with the duty to prove their case before the trial court was the appellant. Looking at her evidence, the appellant did not narrate to the court how the 1st respondent was negligent. All that she stated was that the 1st respondent was negligent, careless and reckless. It is not enough for a party to plead negligence or recklessness. They must go a step further and tell the court the sequence of events or actions or inactions of the driver which amounted to negligence.

On the other hand, the 1st respondent told the court that the driver of motor vehicle registration number KCN 827N was overtaking at a corner and hit his motor vehicle at the rear tyre. This was corroborated by the police officer who stated that the driver of motor vehicle KCN 827N misjudged the distance

between him and an oncoming motor vehicle and he swerved back to his lane and in the process hit motor vehicle KBK 340V at the rear side pushing it to overturn. She was also emphatic that the driver of KCN 827N was blamed.

The appellant has claimed that the court should not have relied on the evidence of the police officer as she did not investigate the accident. In my view, the evidence of the police officer was corroborative of that of the 1st respondent and in fact even without it, the court had no basis to find negligence on the part of the 1st respondent. The 1st respondent's evidence was enough to establish liability against the third-party motor vehicle.

The appellant has also claimed that the court should have found the respondents liable because they did not bring third party proceedings against the driver and owner of KCN 827N. Third party proceedings are not meant to supplement or support the plaintiff's case but to cushion a defendant who holds the view that the third party contributed or was liable for the accident. The proceedings are not meant to shift the burden of proof from the plaintiff to the defendant. In defining burden of proof on liability, Honourable Justice J.M. Mativo in ***Mursal & another v Manese (suing as the legal administrator of Dalphine Kanini Manesa) [2022] KEHC 282 (KLR)*** cited Paragraph 662, page 476 of the 4th Edition of Halsbury's Laws of England in defining burden of proof on liability thus;

'For starters, on liability, I find it useful to cite Halsbury's Laws of England¹² which states: -¹²4th Ed at Para 662 (page 476). "The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the

plaintiff, some breach of that duty, and an injury to the plaintiff between which the breach of duty a causal connection must be established.'

Further, in ***Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another [2004] KECA 65 (KLR)*** the same court held that;

'As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue.'

The appellant has interestingly made a proposal in her submissions that, she had no contractual relationship with the owner of motor vehicle registration number KCN 827N and as such they did not owe her a duty of care. I say interesting because as far as I understand, the case was not based on contract but tort of negligence. Drivers of vehicles and indeed road users do not owe duty of care to the other road users or the public on account of a contractual relationship. The duty of care is owed to all those who are expected to be near or on the road and it does not matter whether one was a passenger or not. The Court of Appeal held in ***Equator Distributors v Joel Muriu & 3 others [2018] KECA 53 (KLR)*** that;

'The liability of a gratuitous agent is not founded on contract but in tort. One who gratuitously undertakes to conduct a transaction as agent for another and begins to act under the authority conferred is liable in tort for failure to complete the transaction. In addition, there is a general duty on every person not to so conduct oneself in a manner that injures another.'

I agree with the trial court's observation that the appellant was aware of the position of liability because the police abstract she filed in court and produced as her exhibit showed that motor vehicle registration number KCN 827N was to blame. I would add that the demand letter and the statutory notice she produced

as her exhibits were directed at one Veronica Wangari Karanja and Fidelity Shield Insurance Company who were addressed as the the owner and insurer of the motor vehicle registration number KCN 827N respectively. This is clear that the appellant was well aware of who was to blame for the accident and one must wonder when that position of her mind changed.

From her shallow testimony, it is apparent that the appellant did not know how the accident occurred. She could therefore only rely on evidence of other witnesses including the police records. It was her duty to identify and sue the right person and not to drag the respondents to court simply because she was a passenger in their motor vehicle.

The upshot of the above is that I find no merits in this appeal and the same is hereby dismissed with costs to the respondents.

Dated signed and delivered at Nairobi this 27th day of February 2026.

B.M. MUSYOKI
JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Nyongesa for the appellant and Miss Waithera for the respondents.