



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
CIVIL APPEAL NO. E063 OF 2023

PETERSON NDAMBIRI KARANGU.....
APPELLANT

VERSUS

MATHEW MUNENE NJOGU.....RESPONDENT

*[Being an appeal from the Judgment and Decree of Hon. Cheruto C. Kipkorir PM in
Kerugoya Chief Magistrate's Court Civil Case No. E029 of 2021 delivered on
29/6/2023]*

JUDGMENT

[1] The Appellant herein being aggrieved by the judgement of the trial court moved this court by a Memorandum of Appeal dated 28.7.2023 raising six grounds therein:

1. The Honourable Learned Magistrate erred in law and fact by holding that, the Appellant had failed prove his case against the Respondent which finding was against the weight of evidence produced by the Appellant during the trial.
2. The Learned Magistrate erred in law and fact by holding that the Appellant had failed to prove negligence which finding was against the weight of evidence produced by the Appellant during trial.
3. The Learned Magistrate erred in law and fact by dismissing the suit instead of apportioning liability accordingly.
4. The Learned Magistrate erred in law and fact by holding that the Respondent was not to blame yet there was enough evidence in proof of the same.

5. The Learned Magistrate erred in law and fact in not finding that the doctrine of res ipsa loquitor was applicable in this matter.
6. The Learned Magistrate erred in law in delivering a judgment that was wrong.

Brief facts

- [2] The plaintiff filed this suit on 15/3/2021. The cause of action arises out of a motor vehicle accident that occurred on 5/10/2019. It was pleaded that the defendant is the registered owner of motor vehicle registration number KCU 701C Isuzu FR. The plaintiff is the registered owner of motor vehicle KCF 964 J Toyota Matatu.
- [3] The accident as per the plaint occurred along Kutus-Kagio highway when at Gatuto area, the defendant's authorized driver or agents drove the defendant's vehicle recklessly and negligently it lost control and ramed into the plaintiff's vehicle causing material damage. The particulars of negligence were pleaded against the defendant herein in paragraph 5(i-vi). They include: driving at high speed, recklessly and with observing highway code.
- [4] The plaintiff sought the following prayers:
- a) Payment of Kshs. 174,782.76 being loss on material damages over plaintiff's motor vehicle registration no KCF 964 J, Toyota Matatu with interest at court rates from 5.10.2019 until payment in full.
 - b) Costs of Suit and interest thereon at court rates.
- [5] The defendant entered appearance and filed a defence on 26/4/2021 denying the plaintiff's case. The occurrence of the accident was denied so were the particulars of negligence attributed to him. The defendant pleaded particulars of negligence against the plaintiff's driver in paragraph 5(a-k). they included: driving with excessive speed, encroaching the lane and endangering the lives of other road users.
- [6] The reply to defence was filed on 2/5/2021. The plaintiff was the sole witness for his case. The defendant called one witness. Both parties filled written submissions.
- [7] On 29th June, 2023 the court delivered judgement dismissing the suit with costs to the defendant.

Witness testimony

- [8] **PW1- Peterson Ndambiri Karangu**, the plaintiff filed a statement dated 11th March, 2021 and relied in it as his evidence. He stated that the accident occurred on

5/10/2019, his vehicle KCF 964 Toyota Matatu, was driven by his employee Zachary Mugo Njaja. It was driven along Kutus-Kagio road when it was hit by motor vehicle KCU 701. The defendant's vehicle was recklessly and negligently driven and that it caused the accident. After the report was made at Kerugoya police station, the vehicle was later repaired at Machere's Garage. The total cost was Kshs. 174,782.76. He adduced in evidence the documents filed as his list of documents as well as the further list of documents dated 21/12/2022. This includes the police abstract, that shows the defendant's driver is to blame for the accident.

[9] **DW1- James Kimani Mwangi** the driver of KCU 701 C, on 5/10/2019 along KCU 701 C stated that the vehicle KCF 964J, was driven into the lane he was in, which was his rightful lane. He was headed towards Kutus general direction and driving at a speed of 40 km/h as his vehicle was loaded. He denied that he caused the accident but the same was caused by KCF 964J when it veered into his lane. The plaintiff's vehicle hit his angle line and fibre mold on the right side of his car.

[10] On cross-examination, police did not come to the scene. He was not given an abstract but it shows case was pending investigations.

Appellant submissions

[11] The appellant submits that the learned magistrate erred in law and fact in dismissing the suit. The Appellant produced documentations proving his case and particularly the content of the Police Abstract dated 7.10.2019. The content of the police abstract shows that motor vehicle registration number KCF 964 J was involved in an accident with motor vehicle KCU 701C. The abstract was issued to the Appellant herein and KCU 701C was blamed for the accident.

[12] Further, the Respondent did not produce any police abstract for comparison hence the trial magistrate ought not to have had doubts with the content. The Respondent failed to oppose the production of the police abstract without calling the maker.

[13] The learned magistrate further erred in noting that since investigations were still pending then the Respondent could not be liable. The Appellant had no control on the issues of investigations as that is beyond his powers. The fact that preliminary investigations blamed the Respondent was enough for him to file a compensation claim.

[14] The Respondent in his statement acknowledged the accident but was not trustworthy on who caused the same. If at all he was not liable he ought to have been issued with a police abstract but the same was issued to the Appellant and blamed the Respondent. The appellant submit that the trial court erred in dismissing the Appellant's suit.

Respondent submissions

[15] The respondent submits that a reading of the Appellant's witness statement, he does not even state in which direction his vehicle was headed to. This begs the question; which lane did the Respondent's motor vehicle encroach? This is a question the Appellant did not answer in his pleadings and or oral testimony.

[16] The Respondent's driver on the other hand gave cogent and credible evidence as to how the accident occurred. He explained that his vehicle was being driven towards Kutus general direction when the Appellant's vehicle that was headed towards Kagio encroached on his lane and hit his vehicle. The Appellant's photographs of his motor vehicle corroborate the Respondent's driver evidence as to the occurrence of the accident.

[17] The Appellant produced in exhibit a police abstract. It is worth noting that in paragraph 2 and 3 of the police abstract it is indicated that the investigations are still pending and it indicated that they don't intend to prefer any charges as against anyone. Paragraph 7 indicated that the matter is still pending under investigations.

[18] Surprisingly the police abstract while stating the registration number of the Respondent's motor vehicle indicated in brackets to blame. If the legal content of the abstract indicated that the matter is still pending under investigation, they submit that the Honourable court should disregard the side note that the Respondent's vehicle was to blame.

[19] The investigating officer was not called as a witness by the Appellant. The Court in the case of *Erastus K. Mbijiwe v Joseph Kaura Buria (Suing as Administrator of the estate of the Late Martin Muriungi Kaura* [2014] eKLR.

Issues

- a) Whether the Appellant proved negligence against the Respondent to the required standard.
- b) Whether the appeal should be allowed.

Analysis

- [20] The Appellant's claim before the trial court was that the Respondent's driver drove motor vehicle KCU 701C negligently causing it to ram into the Appellant's vehicle thereby causing material damage valued at Ksh.174,782.76.
- [21] The Appellant testified as PW1 and relied on his witness statement and documentary evidence including a police abstract which indicated that the Respondent's vehicle was to blame.
- [22] On the other hand, the Respondent called DW1, the driver of motor vehicle KCU 701C, who testified that he was driving at about 40 km/h towards Kutus when the Appellant's vehicle veered into his lane causing the accident.
- [23] The Respondent further pointed out that no police officer testified to confirm the findings contained in the police abstract.

Evidential value of the Police Abstract

- [24] The Appellant's case rests on the police abstract which indicated that the Respondent's vehicle was to blame. However, the abstract itself indicated that investigations were still pending and that no charges had been preferred against any party.
- [25] Courts have consistently held that a police abstract alone is not conclusive proof of liability unless supported by evidence from the investigating officer. In ***Kennedy Nyaga Mwigie v Austin Kiguta & 2 Others*** [2015] eKLR, the Court of Appeal held that the mere production of a document does not amount to proof of its contents and the maker ought to be called where the contents are contested.
- [26] Similarly, in ***Erastus K. Mbijiwe v Joseph K. Buria (Suing as the Administrator of the Estate of Martin Muriungi Kaura)*** [2014] eKLR, the court held that a police abstract without testimony from the investigating officer carries limited probative value and mainly serves as ***prima facie*** proof that an accident occurred.
- [27] In the present case, the investigating officer was not called as a witness to clarify how the police reached the conclusion that the Respondent's vehicle was to blame. Consequently, the trial court was entitled to treat the abstract as evidence only of the occurrence of the accident but not conclusive proof of liability.
- [28] The burden of proof in civil cases lies with the party who alleges a fact. Sections 107 and 109 of the Evidence Act (Cap 80 Laws of Kenya) provide that the

burden of proving a fact rests upon the party who asserts it. In the present appeal, the Appellant did not call the driver of motor vehicle KCF 964J, who was the person best placed to explain how the accident occurred. This left the court with conflicting versions of how the accident occurred and insufficient evidence to determine who was to blame.

Doctrine of res ipsa loquitur

[29] The Appellant also argued that the trial court ought to have applied the doctrine of *res ipsa loquitur*. The doctrine applies where the occurrence of an accident is such that it would not ordinarily happen without negligence.

[30] In ***Embu Public Road Services Ltd v Riimi*** [1968] EA 22, the court held that the doctrine of *res ipsa loquitur* only applies where the circumstances of the accident give rise to a reasonable inference of negligence and where the defendant has superior knowledge of the cause of the accident.

[31] In the present case, both parties offered competing explanations of how the accident occurred and therefore the doctrine could not be invoked automatically to impose liability on the Respondent.

[32] Upon re-evaluating the evidence on record, this Court finds that the trial magistrate correctly concluded that the Appellant had not proved negligence against the Respondent on a balance of probabilities. The Appellant failed to call crucial witnesses including the driver of his vehicle and the investigating officer, both of whom were central to proving how the accident occurred. This court is satisfied that the accident Abstract Report without the proper officer to verify the information renders the evidence of very low probative value of the occurrence of an accident.

ORDERS

[33] Accordingly, for the reasons set out above, the court finds that the appeal lacks merit and it is dismissed.

[34] The Appellant shall pay the costs of the appeal to the Respondent
Order accordingly.

DATED AND DELIVERED THIS 12TH DAY OF MARCH 2026.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Mr. G. Kahiga for the Appellant.

Mr. Mwangi Maina for the Respondent.