**Kamau v Kimani & another (Civil Appeal 159 of 2019) [2023] KECA 187 (KLR) (17 February 2023) (Judgment)**

Neutral citation: [2023] KECA 187 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAIROBI**

**CIVIL APPEAL 159 OF 2019**

**K M'INOTI, KI LAIBUTA & PM GACHOKA, JJA**

**FEBRUARY 17, 2023**

**BETWEEN**

**MARY WANJIKU KAMAU ...................................................................... APPELLANT**

**AND**

**SAMUEL KIMANI ............................................................................ 1ST RESPONDENT**

**JOSEPH WACHIRA ......................................................................... 2ND RESPONDENT**

***(Being an appeal from the judgment and decree of the High Court of Kenya at Kiambu (J. N. Mulwa, J.) delivered on 23rd January 2019 in High Court Civil Appeal No. 176 of 2017)***

**JUDGMENT**

1. On October 13, 2010 at about 6.30 pm, the appellant, Mary Wanjiku Kamau, was on her way home. It is not in dispute that she was hit by motor vehicle registration number KAN 932J near Rock City Gardens along Kiambu road. The main issue in contention in the appeal is who, as between the appellant and the driver of motor vehicle registration number KAN 932J, is to blame for the accident. The only other issue that was in dispute was as to the ownership of the said motor vehicle, but that appears to have been resolved.

2. By way of background, the appellant instituted civil case No. 86 of 2011 against the respondents in Kiambu chief magistrate's court. In the suit, she claimed general damages for pain and suffering, special damages of Kshs 2,200, costs of the suit and interest. The respondents filed a defence and averred as follows: that they were wrongfully sued; that the plaint did not disclose any cause of action against them as the 1st respondent was not the registered owner of the vehicle that was allegedly involved in the accident; that, in any event, motor vehicle registration number KAN 932 J was not negligently driven; that the appellant was wholly to blame for the accident; and that the injuries allegedly suffered by the appellant were denied.

3. Upon hearing the suit, the learned magistrate (Hon Mrs CC Oluoch, PM) entered judgment for the appellant on January 15, 2014. The relevant part of the decision is as follows:

> " I now turn to who was to blame for the accident. The plaintiff told the court she had crossed the road from Rock City side when the vehicle came at a high speed while overlapping and hit her. The same account was given by the eye witness, PW2. This was not controverted as there was no evidence to the contrary on how the accident occurred. The fact that the 2nd defendant was not charged does not necessarily mean that he was not at fault as argued by the defendant in submissions. There is also no evidence that the plaintiff contributed to the accident in any way. In the circumstances, I hold the 2nd defendant 100% liable for the accident and the 1st defendant vicariously liable. Even though the vehicle was registered in the name of the 3rd defendant, it has been established that the 1st defendant was the beneficial owner. I therefore have no basis to hold the 3rd defendant negligent for the acts of the 1st defendant as there is no proof of existence of master servant relationship between them.
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> On quantum, medical documents show that the plaintiff suffered the following injuries:
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> a. Sprained neck with blunt head injuries
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> b. Subluxation on the right clavicle joint
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> c. Swollen bruised forehead
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> d. Blunt injury on the left side chest wall
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> e. Cut on the dorsal surface of the left hand
>
> f. Blunt injuries on the right shoulder
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> Dr Mwaura confirmed that the injuries were not severe and would fully heal with no resultant permanent disability. The plaintiff's counsel proposed an award of Kshs 650,000(sic) based on the following authorities Margaret Aluoch Oduol v The AG (200) eKLR (sic) where Kshs 350,000 was awarded for multiple blunt injuries. Lucy Ntibuka v Bernard Mutwiri & Others (2007) eKLR where Kshs 500,000 was awarded for head injuries, lacerations on side of the right eye and cut wound on the left arm and BenMengesa v Edith Makungu Lande (2013) eKLR where the High Court confirmed an award of Kshs 900,000 for; blunt injuries to the head and both shoulders, numbness of the lower limbs, tender lumbo sucral spine, post traumatic osteoarthritis of the lumbar spine, injury to both legs and to the chest. The defendant on the other hand proposed an award of Kshs 80,000 based on PamelaOmbiyo Okinda v Kenya Bus Services HCCC Nairobi No. 1309 of 2002. First and foremost, all these decisions are from the High Court which are only persuasive and not binding on this court. If a lower court feels that an award given by the High Court is manifestly low or excessive, it is at liberty to award what is reasonable and that which will serve the ends of justice for both parties. Taking into consideration the nature of injuries suffered by the plaintiff which were confirmed by Dr Mwaura to be moderately soft tissue, I hold the view that an award of Kshs 350,000 is sufficient.
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> Special damages were pleaded at Kshs 2,000 but proved at a much higher amount. I can only award that which has been proven, Kshs 2,000.

In sum, I enter judgment for the plaintiff against the 1st and 2nd defendants jointly and severally in the sum of Kshs 352,000 together with costs of the suit and interest thereon. I dismiss the suit against the 3rd defendant with no orders as to costs."

4. Aggrieved by the decision, the respondents filed an appeal in the High Court against the decision of the learned magistrate. Upon hearing the parties, the learned judge (JN Mulwa, J) overturned the judgment of the lower court and held as follows:

> " 15. It is true that a motor vehicle search certificate would have shown the registered owner as at the date of accident. Failure to produce the same in my view was not fatal as express admission of the ownership was made by the 1st Appellant.
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> 16. In the circumstances I decline to find otherwise as urged by the Appellants. In the same breath, the 1st Appellant having confirmed in the letter – PExt 7 – that the 2nd Appellant was his driver, and there having been no challenge to the letter, then that is taken as the truth as it was not challenged or at all
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> – Motex Knitwear Ltd –v- Gopitex Knitwear Mills Ltd – Milimani HCCC No. 834 of 2002.
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> 17. For the foregoing, I come to the conclusion that the accident vehicle belonged to the 1st Appellant and the 2nd Appellant was his duly authorized driver.
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> 18. Who was to blame for the accident?
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> There was very scanty evidence on this issue. The police officer who investigated the case did not testify. I wholly agree with the Appellants' submissions that the 1st Respondent did nothing to avoid the accident
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> Her evidence was that
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> > " ---After crossing the road I saw a vehicle KAM 932J (should be KAN 932J). After crossing the road, the speeding vehicle hit me. I later found myself in hospital..."
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> 19. On cross examination, PW1 testified that
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> > " ---there was no zebra crossing. There is a stage. The vehicle was over speeding --- there is a junction and stage...."
>
> That piece of evidence does not show where the point of impact was, at the stage or on the road or off the road or elsewhere.
>
> 20. In Patrick Mutie Kamau & Another –vs- Wambui Ndurumo the court held that
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> > " ---pedestrians too have a duty of care to other road users and are obligated to follow the Highway Code, that they ought to take care of their own safety and not to run across the road when it is not safe and if they do so, it is at their own peril and cannot blame an oncoming vehicle which is unable to avoid the accident due to short distance."

21. Further in Kiema Muthungu –vs- Kenya Cargo Handling Service Ltd (1991)2, it was held that;

> "There can be no liability without fault and a plaintiff must prove some negligence on the part of the defendant where the claim is based on negligence."

22. Combing through the entire evidence it is evident that the 1st Respondent failed in her duty to take care of her own safety by crossing the road on a no zebra crossing busy road. She too did not adduce sufficient evidence to demonstrate how if at all the accident vehicle was overtaking and/or over speeding and the point of impact.

23. The first Respondent failed to prove to the required standard of proof the particulars of negligence she pleaded in her plaint as stated in Statpack Industries –vs- James Mbithi Munyao Nairobi H.C. Appeal No. 1152 of 2003 that;

> "It is trite law that the burden of proof of any fact or allegations is on the plaintiff. He must prove a causal link between someone's negligence and his injury. The plaintiff must adduce evidence from which on a balance of probability a connection between the two may be drawn. Not every injury is necessarily as a result of someone's negligence.
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> An injury per se is not sufficient to hold someone liable."

24. Having stated as above I come to the conclusion that the trial magistrate erred in fact by failing to sufficiently analyze the evidence on record and came to findings not based on the evidence. The 1st Respondent did not show how the appellant's driver (2nd Appellant) failed to control or manage the vehicle so as to avoid the accident.

25. It is not always that when someone's evidence is uncontroverted it is always truthful and should be accepted as such. Proof of the allegations must be tendered as stated under Section 107-108 of the *Evidence Act*. See Patrick Mutie Kamau case and Kiema Muthungu (*supra*).

26. To that extent I allow the appeal on the matter of liability, and more specifically that the 2nd Appellant was not to blame for the accident and therefore as the duly authorized driver of the 1st Appellant, the 1st defendant too cannot be held to have been vicariously liable for the actions and alleged negligence of his driver."

5. As required by law, the learned judge proceeded to assess the damages that would have been payable had she found that the respondents were to blame for the accident. She reduced the trial court's award from Kshs 350,000/= to Kshs 180,000/=.

6. Aggrieved by the decision of the High Court, the appellant has filed this appeal listing 9 grounds, which we take the liberty to summarize as follows: whether the first appellate court properly discharged its duty to analyze and re-evaluate the evidence; whether on the evidence on record the appellant

had proved her case on a balance of probabilities; whether on that evidence the learned judge erred by holding that the accident was wholly caused by the negligence of the appellant and whether the appellant was entitled to the prayers sought.

7. The appellant has filed submissions dated October 30, 2019. In her submissions, she consolidates the 9 grounds into 3. In a condensed form, those grounds of appeal are: that the finding that the appellant was solely to blame for the accident was against the evidence on record; that the learned judge erred in applying a higher test than the balance of probability in assessing the appellant's evidence on record, and that the learned judge used wrong principles to re – assess the quantum of damages.

8. On the first ground, the appellant submits as follows: that the evidence on record shows that the point of impact was off the road; that she called one eyewitness; that the High Court disregarded the evidence of that eye witness while assessing liability, and that the respondent did not call any witness to testify to controvert her evidence. She submits that the evidence as given by the appellant proved that the 2nd respondent was negligent in the way he drove the car while overlapping, and was therefore to blame for the accident. She relies on the case of *Embu Public Road Services Limited v Riimi* (1968) EA 22.

9. On the second ground, she submits that the evidence on record proved the particulars of negligence, to wit, that the 2nd respondent was overlapping off the road, was using the wrong side of the road while driving at a very high speed; and that the court failed to consider that her evidence was not rebutted by the respondents. She relies on the case of *Edward Mariga through Stanley Mobisa Mariga v Nathaniel David Schulter & another* [1997] eKLR.

10. On the last ground, she submits that the learned judge did not make a finding that the trial court used wrong principles in awarding damages and, hence, she urges the Court to find that the damages awarded by the trial court were reasonable.

11. The respondents have also filed submissions dated January 31, 2020. On liability, they submit that the appellant in the lower court confirmed seeing the motor vehicle approaching, but did not move aside to avoid the accident and that as a pedestrian, she had a duty to be careful when crossing the road. They rely on the case of *Cyprian Awiti & another v Independent Electoral and Boundaries Commission & 3 others* (2018] eKLR.

12. On whether the learned judge used the wrong principles in assessing the quantum of damages, they submit that the judge correctly analyzed the same by taking into account relevant factors, and that she was in order in re-assessing the damages for pain and suffering, as the court relied on previously decided cases on the quantum of damages.

13. On whether the learned judge erred in allowing the appeal, they submit that the appellant did not discharge her evidentiary burden from her pleadings and testimony as required by sections 107 and 109 of the *Evidence Act*, and that the learned judge was right in allowing the respondent's appeal.

14. This is a second appeal and this Court has pronounced itself on principles that are applicable in a case of this nature. In *Kenya Breweries Ltd v Godfrey Odoyo*, Civil Appeal No. 127 of 2007, this Court (Onyango- Otieno, JA) held as follows:

> " In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse."

15. In *Charles Kipkoech Leting v Express (K) Ltd & another* [2018] eKLR, this Court held, *inter-alia*:

> "This is a second appeal. Our mandate is as has been enunciated in a long line of cases decided by the Court. See Maina versus Mugiria [1983] KLR 78, Kenya Breweries Ltd versus Godfrey Odongo, Civil Appeal No. 127 of 2007, and Stanley N. Muriithi & Another versusBernard Munene Ithiga [2016] eKLR, for the holdings inter- alia that, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the Courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. See also the English case of Martin versus Glywed Distributors Ltd (t/a MBS Fastenings) 1983 ICR 511 where in, it was held inter- alia that, where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

16. This appeal succeeds or fails on only one issue, namely: from the evidence on record, who, between the appellant and the respondents, was to blame for the accident? In other words, was it the appellant as held by the learned judge, or was it the respondents as held by the trial magistrate? The issue regarding negligence is both a question of fact and law. The trial court in instances where parties are blaming each other is always confronted with a different set of facts which it has to analyze to determine whether the particulars of negligence have been proven and, if so, who is to blame, and in what proportion would they be liable in contributory negligence.

17. We have carefully analyzed the record of the proceedings, and it is clear that the appellant adduced evidence that she had already crossed the road when she was hit by a speeding vehicle. She called one witness, Stephen Muhia Njuguna, who stated that he was with the appellant at the time of the accident. The witness stated that the motor vehicle registration number KAN 932J was overlapping on the wrong side of the road, and was being driven at high speed when it hit the appellant. On their part, the respondents did not adduce any evidence and informed the trial magistrate that they would rely on the evidence adduced during cross-examination.

18. Faced with this evidence, the learned judge analyzed the evidence that was adduced in the magistrate court and stated as follows:

> " . ..... combing through the entire evidence it is evident that the 1st Respondent failed in her duty to take care of her own safety by crossing the road on a no zebra crossing in a busy road. She too did not adduce sufficient evidence to demonstrate how if at all the accident vehicle was overtaking and/or over speeding and the point of impact."

19. The learned judge blamed the appellant for failing to take care of her own safety and held that the appellant did not adduce sufficient evidence to demonstrate how the accident vehicle was overtaking or over speeding at the point of impact. On this basis, the learned judge held that the appellant was 100% liable for the accident and overturned the decision of the trial magistrate's court.

20. This Court has pronounced itself severally on the question of negligence as follows. In *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another* [2004] eKLR the Court held as follows:

> " 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... There is however the evidential burden that is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in sections 109 and 112 of the Act."

21. In the case of *Rahab Micere Murage (Estate of Esther Wakiini Murage) v Attorney General & 2 others* [2012] eKLR the Court stated that:

> " Well driven motor vehicles do not just get involved in accidents...." As stated earlier vehicles driven on public roads in a proper manner do not without cause become involved in accidents."

22. In *Edward Mariga through Stanley Mobisa Mariga v Nathaniel David Schulter & another* [1997] eKLR, the Court held as follows:

> " The respondents filed a defence in which they denied the appellant's claim and averred that the accident was caused by the appellant's own negligence in that he suddenly ran across the road and in the process was hit by the motor vehicle. The respondents did not give evidence and so the only explanation as to how the accident happened was the version put forward by the appellant and his brother......the evidence before the learned Judge established, on a balance of probabilities, that the appellant was on the pavement when the vehicle hit him and there can be no clearer evidence of negligence than this, especially in the absence of an explanation from the first respondent, as to how the accident happened. The allegation in the defence that the appellant had dashed across the road is not evidence and remains forever an allegation."

23. In the case of *Embu Public Road Service Ltd. v Riimi* (1968) EA 22, the Court pronounced itself as follows:

> " The doctrine of res ipsa loquitor is one which a plaintiff, by providing that an accident occurred in circumstances in which an accident should not have occurred, thereby discharges, in the absence of any explanation by the defendant, the original burden of showing negligence on the part of the person who caused the accident. The plaintiff, in those circumstances does not have to show any specific negligence but merely shows that an accident of that nature should not have occurred in those circumstances, which leads to the inference, the only inference, that the only reason for the accident must therefore be the negligence of the defendant. The defendant can avoid liability if he can show either that there was no negligence on his part which contributed to the accident; or that there was a probable cause of the accident which does not connote negligence of his part; or that the accident was due to the circumstances not within his control .... Where the circumstances of the accident give rise to the inference of negligence, the defendant in order to escape liability has to show that "there was a probable cause of the accident which does not connote negligence" or "that the explanation for the accident was consistent only with an absence of negligence."

24. In an accident case, as the one before us, the question of negligence is a factual one and the respective party's position will stand or fall on the determination by the trial court on which version of evidence is

more credible and probable. The court should weigh the evidence that has been adduced to determine who is more credible. In *Stellenbosch Farmers' Winery Group Ltd & another v Martell & others*, the South African Supreme Court of Appeal explained how a Court should resolve factual disputes and ascertain as far as possible, where the truth lies between conflicting factual assertions. It stated as follows:

> " To come to a conclusion on the disputed issues, a court must make findings on:
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> i. the credibility of various factual witnesses;
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> ii. their reliability; and
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> iii. the probabilities
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> As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In light of the assessment of (a), (b) and (c), the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be a rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the lessor convincing will be the latter. But when all factors equipoised, probabilities prevail."

25. In a civil case, the burden of proof ordinarily has to be discharged by the party who alleges negligence. Such a party is expected to adduce evidence to show that the accident was caused by the other party. In the record that was produced before us, we note that the appellant adduced evidence of how the accident occurred.

26. In her testimony, she gave evidence that she had finished crossing the road and that the vehicle that hit her was overlapping and overtaking at high speed. The appellant called an eyewitness who testified that the respondent's vehicle was speeding and was being driven on the wrong side of the road. On their part, the respondents did not adduce any evidence and, therefore, the appellant's evidence remains uncontroverted.

27. The record before us shows that the appellant adduced evidence that the accident was caused by the negligence of the 2nd respondent. Therefore, to avoid liability, the respondents were under a duty to show that, either there was no negligence on their part, or that there was a probable cause of the accident which did not connote negligence on their part.

28. With respect, we do not agree with the holding of the learned judge that the appellant had failed to discharge the burden of proof. There was overwhelming evidence that the 2nd respondent was driving on the wrong side of the road and was overtaking at high speed. The evidence of the appellant was supported by an eyewitness. This evidence was not controverted by the respondents, and it remains unchallenged. There is nothing on record to show that the credibility of that evidence was challenged during cross-examination.

29. It is our finding that the learned judge misdirected herself and her holding is not supported by the evidence. The learned judge made a decision that was, on the evidence, plainly wrong in the circumstances. The case before her was a civil case that ought to have been proved on a balance of probabilities, and the evidence on record shows that the learned magistrate was correct when she held that the appellant had met that threshold.

30. In the end, we hold that the learned judge was wrong on the issue of liability.

The trial magistrate correctly analyzed the evidence that was adduced on negligence and reached the right conclusion that the respondents were to blame for the accident.

31. Having determined that the judge was wrong in overturning the trial court's finding on negligence, the only question that remains is, what is the proper quantum of damages? We note that the learned judge awarded a lower figure of Kshs 180,000/= down from Kshs 350,000/= that was awarded by the trial magistrate.

32. The Court of Appeal should only disturb an award of damages when the trial court has considered a factor it ought not to have considered, or failed to take into account something it ought to have taken into account on the award, or the award is too high or too low, that it amounts to an erroneous estimate (See *Chanan Singh v Vhanan Singh & Handa* [1955], 22 EACA 125, 129 (CA- K); *Butt v Khan* CA Civil Appeal 40 of 1977.

33. Turning to this appeal, we note that the trial magistrate considered the extent of the injuries before awarding a sum of Kshs 350,000/= as general damages for pain and suffering. We do think that the trial magistrate took into account factors she ought not to have considered or failed to take into account relevant facts. Accordingly, we are in agreement with the sum of Kshs 350,000/= as general damages that had been awarded by the trial magistrate. The sum proposed by the learned judge of Kshs 180,000 is inordinately low when one takes into account the nature of the injuries that the appellant suffered.

34. The upshot of the foregoing is that we find that this appeal has merit and it succeeds. Accordingly, we hereby order and direct that:

    a. The appellant's appeal be and is hereby allowed.

    b. The judgment and decree of the High Court at Nairobi (JN Mulwa, J) is hereby set aside and substituted for the judgment of the trial court (Hon Mrs CC Oluoch, PM). Accordingly, the appellant is hereby awarded a sum of Kshs 350,000/= as general damages for pain and suffering and Kshs 2,000/= as special damages, together with interest.

    c. The costs of this appeal, costs in the High Court, and in the magistrate's court, shall be borne by the respondents jointly and severally.

**DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF FEBRUARY, 2023.**

**K. M'INOTI**

**............................................**

**JUDGE OF APPEAL**

**Dr K. I. LAIBUTA**

**............................................**

**JUDGE OF APPEAL**

**M. GACHOKA, CIArb, FCIArb**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

*Signed*

**DEPUTY REGISTRAR**