Njuguna v Kimani & another; Kinyanjui (Third party) (Civil Appeal E036 of 2023) [2025] KEHC 692 (KLR) (30 January 2025) (Judgment)

Neutral citation: [2025] KEHC 692 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL E036 OF 2023

FN MUCHEMI, J

JANUARY 30, 2025

BETWEEN

SELINA WANJIRU NJUGUNA ..... APPELLANT

AND

ISAAC MBUGUA KIMANI ..... 1ST RESPONDENT

FRANCIS THIDIU KUNG'U ..... 2ND RESPONDENT

AND

JOSEPH KINYANJUI ..... THIRD PARTY

(Being an Appeal from the Judgment and Decree of Hon. O. Wanyaga (SRM) delivered on 25th October 2023 in Thika CMCC No. 340 of 2019)

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Thika Senior Resident Magistrate in CMCC No. 340 of 2019 for a claim for damage for injuries sustained in a traffic accident whereby the trial court dismissed the appellant's claim for failure to discharge the required burden of proof and dismissed the suit.

2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 6 grounds summarized thus:-

    a. That the learned trial magistrate erred in fact and law in finding that the appellant did not discharge the burden of proof and thus dismissed the suit.

3. Directions were issued that the appeal be canvassed by way of written submissions and from the record only the appellant complied by filing her submissions on 9th December 2024. The respondents on the other hand had not filed their submissions by the time of this appeal was given a judgement date .

Appellant's Submissions

4. The appellant submits that the trial court erred in finding that she did not prove her case on a balance of probabilities by relying on the confusion that the motor vehicle involved in the accident was KBV 163M or KBU 163M. The police abstracts produced by PW1 and DW1 dated 20/12/2018 and 13/9/2018 respectively both indicated that the motor vehicle involved in the accident was registration number KBV 163M, a Toyota passo belonging to the 3rd party. Furthermore, the appellant argues that she and DW2 both testified that the motor vehicle involved in the accident was KBV 163M.

5. The appellant urges the court to take judicial notice of the fact that occurrence books in the police stations are filled by hand and some individuals can write the letter "V" in such a way that it may appear as the letter "U" which may explain the confusion when the two police officers were testifying in court whilst referring to the occurrence book. Furthermore, the police abstracts produced by the appellant and the respondents indicate that the motor vehicle in question was KBV 163M.

6. The appellant further argues that the two police officers, PW1 and DW1 testified that they were not the investigating officers neither did they record the accident in the occurrence book. They were in court for the sole purpose of producing the respective police abstracts. Thus, the appellant submits that the trial court dismissed her case just because the police officer who recorded the abstract on the OB had a handwriting that seemed to confuse PW1 and DW1 and she cannot be placed for blame on that as doing so would be unfair and unjust and goes against Section 1B(a) of the *Civil Procedure Act*.

7. The appellant argues that the police abstract indicated that the matter was pending under investigation and if the police had already come to the conclusion that motor vehicle registration number KBV 163M was to blame for the accident, they ought to have stated so in the police abstract. Furthermore, if the police had done so, the appellant argues that she would have sued the party blamed for the accident. In the absence of the foregoing, she sued the respondents. The appellant further argues that as she was involved in an accident that could have easily ended her life, it is possible her recollection of what transpired after the fact could not have been 100% accurate.

8. The appellant submits that despite the trial court finding that the accident was not caused by motor vehicle registration number KAZ 755J it declined to find the driver of motor vehicle registration number KBV 163M liable because the third party notice indicated KBV 163M and not KBU 163M as the court believed the occurrence book indicated.

9. The appellant further submits that the trial court provided in its judgment that the occurrence book extract indicated that the 3rd party motor vehicle was KBU 163M however the trial court never got the chance to look at the occurrence book since the hearing was held virtually with the said police officers testifying from different locations from the court and neither did the said extracts get filed in court. Thus, the appellant argues that it was wrong for the court to conclude that what was recorded in the OB was KBU 163M having not had the chance to look at the OB or the extracts of the same.

10. The appellant further argues that despite the difference in the motor vehicle registration, the owner and driver at the material time as per the testimony of all the witnesses was the 3rd party. Further, there is no dispute that the make of the said motor vehicle is a Toyota passo. The appellant argues that the 3rd party was served with a 3rd party notice, he failed to enter appearance and judgment was entered against him. He was given an opportunity to come to court and give his side of the story and he failed to do so.

11. The appellant relies on Section 107 of the *Evidence Act* and submits that she proved that the accident occurred and that she suffered injuries as a result. She states that she was travelling in motor vehicle registration number KAZ 755Jwhich was owned by the respondents. The appellant submits that she testified in court that the said motor vehicle was being driven at a very high speed which led it to hitting motor vehicle registration number KBV 163M. PW1, a police officer, testified that had KAZ 755J been driven at a lower speed, it would not have hit motor vehicle registration number KBV 163M which had already joined the highway from the roundabout. Further the witness testified that the driver of motor vehicle registration number KBV 163M was also liable because he was joining the highway from the roundabout and should have given way and waited for the highway to be clear before joining. His conclusion was that both drivers should have been blamed for the accident.

12. The appellant relies on the case of Mbuthia Macharia vs Annah Mutua & Another [2017] eKLR and argues that the burden of proof shifted to the respondents who introduced the 3rd party to the suit by claiming that as the driver and the owner of motor vehicle registration number KBV 163M, he was to blame for the accident. DW1 and DW2 testified to that effect. Thus, the appellant submits that the burden then shifted to the 3rd party who did not appear in court nor file any document even after being joined and served with a 3rd party notice by the respondents.

13. The appellant submits that she sustained lacerations of the left anterior leg according to the medical report by Dr. George Karanja dated 1/2/2019 and a sum of Kshs. 200,000/- as general damages would be reasonable compensation. To support her contentions, the appellant relies on the cases of Kenya Wildlife Services vs David Mutoti (2017) eKLR where the plaintiff sustained cut wounds on the head and buttocks and was awarded Kshs. 200,000/- as general damages in the year 2017. Further in Michael Okello vs Priscilla Atieno [2021] eKLR where the plaintiff sustained multiple soft tissue injuries being bruises, cut wound and blunt injury and was awarded Kshs. 250,000/- as general damages in the year 2021.

Issue for determination

14. The main issue for determination is whether the appellant proved her case on a balance of probabilities.

The Law

15. Being a first Appeal, the court relies on a number of principles as set out in Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123:

> "…..this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular,, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence."

16. In Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR the Court of Appeal stated that:-

> An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

17. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-

    a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

    b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and

    c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Whether the appellant proved her case on a balance of probabilities.

18. The principles guiding the appellate court's power to interfere with the trial court's finding on liability are well settled. In Khambi & Another vs Mahithi & Another [1968] EA 70 it was held that:-

> It is well settled that where a trial Judge has apportioned liability according to the fault of the parties, his apportionment should not be interfered with on appeal, save in exceptional circumstances, as where there is some error in principle or the apportionment is manifestly erroneous and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.

19. The appellant called two witnesses with PW1, a police officer testifying that an accident occurred on 13/9/2018 between motor vehicle registration KAZ 755Z and KBU 163M and that motor vehicle KAZ 755J was blamed for the accident. On cross examination, the witness testified that as per the occurrence book, OB reference OB 20/13/9/18, three motor vehicles namely KBW 483W, KAZ 755J and KBU 163M were involved in the accident. He further testified that motor vehicle registration number KBU 163M being driven by the third party, from the Kisii direction failed to stop to give way as it joined the highway. As a result, he was hit by motor vehicle registration number KAZ 755J which lost control and hit a stationary bus registration number KBW 483W. The witness further testified that the rules of joining the highway are that one must stop and give way and thus in his view, both drivers of motor vehicles registration numbers KAZ 755J and KBV 163M ought to have been taken to court. PW1 stated that he was not aware that there was an abstract blaming KBV 163M for the accident as the OB indicates that the matter was pending under investigations.

20. PW2, the appellant testified that she was a passenger in motor vehicle registration number KAZ 755J travelling along the Thika Garissa highway when the driver of the said motor vehicle tried to overtake a bus in front of them by swerving to the lane that had vehicles travelling the opposite direction towards Thika. The witness further testified that when the driver swerved to the said lane, he realized there was another vehicle travelling the opposite direction and he suddenly swerved trying to get back to his lane and in the process hit motor vehicle registration KBW 483W that was in front of them. PW2 further testified that motor vehicle registration number KAZ 755J was being driven at a high speed at the time of the accident. Due to the impact, PW2 said she sustained injuries to her leg.

21. The respondents called two witnesses. DW1, a police officer based at Thika Police Station presented the occurrence book and a police abstract issued on 13/9/2018. DW1 testified that an accident occurred among motor vehicle registration numbers KAZ 755J, KBW 483W and KBV 163M and that upon investigation, KBV 163M was blamed for the accident. The witness further testified that motor vehicle registration number KBV 163M was being driven from Kisii direction and joined the highway without

stopping and was hit by motor vehicle registration number KAZ 755J which lost control and hit a stationary bus. DW1 stated that according to the police abstract, the cause of the accident was the failure by KBV 163M to stop before joining the road.

22. Upon cross examination, the witness testified that the police abstract he produced did not indicate who the applicant was. The witness further testified that PC Kanyugo, the investigating officer visited the scene later but did not witness the accident.

23. DW2, the conductor in motor vehicle registration number KAZ 755J testified that motor vehicle registration number KBV 163M was to blame for the accident. He further testified that the driver of the motor vehicle registration number KAZ 755J was not blamed for the accident.

24. It is trite law that he who alleges must prove. Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya, provides that:-

> 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.

25. In Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, the Court of Appeal held that:-

> As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, 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 case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.

26. From the evidence on record, it is not disputed that an accident occurred on 13/9/2018 as testified by PW1, PW2, DW1 & DW2. The police abstracts were produced as exhibits dated 20/12/2018 and 13/9/2018 respectively.

27. According to PW1, DW1 and DW2, motor vehicle registration number KBV 163M was to blame for the accident as the driver of the said motor vehicle failed to stop at the junction as he joined the highway. As a result, he hit motor vehicle registration number KAZ 755J which lost control and hit a stationary bus registration number KBW 483W. Furthermore, DW1 produced as evidence the extract and of the O.B. police abstract which placed the blame on motor vehicle registration number KBU 163M and KBV 163M respectively for the accident. From the record, the respondents took out a third party notice against the 3rd party for motor vehicle registration number KBV 163M. However the O.B. report blames the motor vehicle registration number was KBU 163M thus contradicting the evidence of the driver, DW1 as to which motor vehicle was involved in the accident. The burden of proof was on the appellant to produce evidence to ascertain which motor vehicle was involved in the accident. In any event, the respondents are the ones who took third party proceedings against the third party and indicated motor vehicle KBV 163M as having caused the accident. Thus, it would be unjust and unfair to apportion liability against the third party as there is a discrepancy on the motor vehicle registration number. The issue of third party proceedings is determined between the defendant and the third party as was enunciated in Kenya Commercial Bank vs Suntra Investment Bank Ltd (2015) eKLR where the court held that:-

> In law, a third party is enjoined in a suit at the instance of the defendant and through the set procedure under Order 1 Rule 15-22 of the Civil Procedure Rules. And, liability between the defendant and the third party is determined between the defendant and the third party, but of course after the court is satisfied that there is a proper question to be tried as to liability

> of the third party and the defendant, and has given directions under Order 1 Rule 22 of the Civil Procedure Rules. The way I understand the law on third parties, such issues of third parties are issues and triable only between the third party and the defendant and cannot be a bona fide issue triable between the defendant and the plaintiff. On the basis of those legal reasons, even if the third party had been joined, which he has not, it is not a triable issue at all for purposes of liability between the plaintiff and the defendant.

28. It is noted that the 3rd party failed to enter appearance or to file defence upon being served with the joinder application. Although he defendant requested for default judgment, no such action was taken by the court registry to grant the request. The appellant sued the respondents herein and blamed them for the accident. The court did not find the respondents liable. Furthermore, there was no basis of apportioning liability as the appellant has argued.

29. It is my considered view that the appellant has not discharged the burden of proof.

30. Regarding assessment of damages, the trial court did not assess any damages, for the reason that it had dismissed the suit. That was manifestly erroneous as was espoused in the case of Frida Agwanda & Ezekiel Onduru Okech vs Titus Kagichu Mbugua [2015] eKLR where the court held that:-

> Indeed even when the learned magistrate dismissed the claim, in such a case, he should have assessed damages, notwithstanding the dismissal. That now will be done by this court, for convenience, instead of returning the file to the lower court for assessment.

31. Similarly in Lei Masaku vs Kaplana Builders Ltd [2014] eKLR it was observed thus:-

> It has been held time and again by the Court of Appeal that the court of first instance assess damages even if it finds that liability has not been established. To have casually dismissed the suit and failed to address that issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the appellate court need to know the view by the court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behooves this court to assess quantum.

32. I will therefore perform the duty of the court on first appellate court to assess damages.

33. According to the plaint dated 13th May 2019, the appellant sustained the following injuries:-

a. Lacerations on the left anterior leg.

34. These injuries are confirmed by Dr. George Karanja in his medical report dated 1st February 2019. The doctor classified the injuries as soft tissue injuries.

35. Looking at the decisions relied by the appellant, it is evident that the injuries sustained therein are more severe than the injuries sustained by the appellant. It is therefore my considered view that a sum of Kshs. 60,000/- would have been adequate compensation for pain, suffering and loss of amenities.

36. In view of the foregoing, I find that the appeal lacks merit and is hereby dismissed with costs to the respondents.

37. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SGINED AT THIKA THIS 30TH DAY OF JANUARY 2025.

F. MUCHEMI

JUDGE