Wekesa v Ndukuyu & another (Civil Case 39 of 2021) [2025] KEHC 1265 (KLR) (27 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1265 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CIVIL CASE 39 OF 2021

RPV WENDOH, J

FEBRUARY 27, 2025

BETWEEN

LEONARD SIMIYU WEKESA .... PLAINTIFF

AND

GEORGE M. NDUKUYU .... 1ST DEFENDANT

DENNIS WALUCHE .... 2ND DEFENDANT

JUDGMENT

1. Leonard Simiyu Wekesa (the appellant) has filed this appeal against the Judgment of Hon. Makila SRM dated 21/7/2021 and delivered on same date in CMCC 177 OF 2020 where the appellant was the plaintiff and George M. Ndukuyu and Dennis Waluche (1st & 2nd Respondents) were the defendants. The magistrate apportioned liability at 50:50 and the appellant is dissatisfied with the said finding. He filed the Memorandum of Appeal on 13/11/2021 citing the following eight (8) grounds of appeal.

    1. The learned Magistrate erred both in law and fact in entering judgment on liability at 50:50 between the Appellant and the Respondent when there was no legal or otherwise basis of doing so.

    2. The Learned Magistrate erred both in fact and law by apportioning liability at 50:50 between the Appellant and Respondents whereas the Appellant had proved Respondent whereas the appellant had proved Respondents' liability on a balance of probabilities.

    3. The Learned Magistrate erred both in fact and law by failing to take into account all material and relevant facts as to the causation of the accident and as a result thereto he reached a wrong decision by entering judgment on liability at 50:50.

4. The Learned Magistrate erred both in fact and law by holding that the Respondent had proved negligence as against the Appellant on balance of probabilities and only to enter judgement on liability at 50:50 without legal basis.
5. The Learned Magistrate erred both in fact and law by apportioning liability at 50:50 between the Appellant and Respondent in total disregard of the Appellant's submissions.
6. The Learned Magistrate erred both in fact and law by awarding half costs to Respondents without any legal basis.
7. The learned Magistrate erred both in fact and also by failing to consider the authorities tendered by the appellant in his written submissions an thereby trashing the principle of stare decis.
8. The judgement on liability of the learned magistrate is in the circumstances unfair and unjust and irregular and should not be allowed to stand.

2. The appellant prays that the Judgement on liability be set aside and be substituted with a proper finding on liability at 100% as against the Respondents. He also asks for costs of the appeal

3. Directions were taken in court that the appeal be canvassed by way of written submissions. The appellant filed their submissions on 26/1/2024 while the Respondents filed theirs on 5/2/2024.

4. This being a first appeal, it behoves this court to reexamine all the evidence tendered in the lower court, analyze it and arrive at this court's own conclusions but bearing in mind that this court neither saw nor heard the witnesses testify. This court is guided by the decision of Peter V Sunday Post Ltd (1958) EA 42 and Selle and Another V Associated Motor Boat Co. Ltd and other (1968) EA 123. Where the court said, "this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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 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"

5. The appellant then called a total of five witnesses in support of his case. PW1 John Koima, a Clinical Officer at Kitale County Hospital examined the appellant after the accident on 12/5/2020 and found that he had sustained bruises to the right side of the neck and tenderness and swelling on the right arm which injuries he assessed as harm. The P3 form was produced as P.Exh.1.

6. PW2 Dr. Samuel Chege prepared the appellant's medical report on 14/5/2020; He found that the appellant complained of pain in the right forearm and right elbow. He had no fractures or dislocation PW2 formed opinion that the appellant sustained minor soft tissue injuries which would not leave any permanent injury.

7. PW3 PC Philip Michio produced the police abstract in respect of an accident that occurred on 12/5/2020 at 2.00 p.m. on Moi Avenue Kitale between a pedestrian and Motor vehicle KAR 973S. He confirmed that nobody had been charged as the case was still under investigations.

8. PW4 the appellant, recalled that he was walking on the left side of the road facing Mamboleo Hotel in Kitale; that motor vehicle KAR 973S came from behind and his friend who was with him shouted that he was being hit. He managed to move and the side mirror hit him on the right elbow and he was injured on elbow and fingers. He was treated by the hand being put in plaster. He blamed the driver of the vehicle for being careless, speeding and losing control. He stated that the place where he was hit had a parking area but the speed was not for parking; that he was off the road when he was hit.

9. PW5 Robert Simiyu Wekesa who is the eye witness stated that he saw the motor vehicle leave its lane; that the lane was a parking area and that the vehicle was speeding and that the driver was on phone.

10. DW1 Dennis Walucho, the driver of the subject vehicle stated that on 12/5/2020 about 2.00p.m. while driving on Moi Avenue, at a very low speed, about 10 KPH, he was approaching a parking space that was empty when a pedestrian hit his left side mirror on his right hand and he stopped, checked the mirror, it was not damaged and was surprised to learn of this suit filed by the appellant yet it is the Appellant who caused the accident. He blamed the appellant for being negligent and hitting his left-hand side mirror whilst he was parking the vehicle.

Appellant's submissions.

11. The appellants Counsel, Gachathi Advocates, identified the three issues for consideration as,

    1. Whether the court erred in apportioning liability at the ratio of 50:50;

    2. Whether the quantum was adequate;

    3. Whether the appellant is entitled to all the costs.

12. The appellants Counsel opened his submissions by trying to define the term negligence as defined in Law Salmond and Heuston on Law of Torts 9th Edition which states that negligence is a conduct, but not a state of mind which involves an unreasonable great risk of causing damage; that it is the omission to do something that a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or not do something which a prudent and reasonable man would not do. He also relied on the definition in the case of Loctgell, Iron Coal Co Ltd -V- Mcmillian Caw (1934) AC.

13. Counsel also relied on the decision of Washington Matele -v- Isabella Wanjiru Karanja *CA 50/1981* (1982-88) 1KAR 186, where Chesoni Ag. Judge of Appeal held that a driver is obligated to keep a greater look out for other road users because "he has under his control a lethal machine"

14. Counsel urged the court to find the respondents 100% liable because they failed to discharge their duty of care towards other road users and particularly the appellant because he hit the appellant from the rear. Counsel relied on the decision of Embu Public Road Services Ltd -v- Riimi (1968) EA 22 where it was held that the plaintiff bears the burden to prove the negligence of the defendant and if proved, the burden shifts on the defendant to give an explanation or demonstrate that they are not blameworthy. See also Nandwa -V- Kenya Nazi Ltd (1988) eKLR Raila Amollo Odinga & another -V- IEBC and 2 others (2017) eKLR where it was held in part that the evidential burden keeps shifting and the question to be answered is who would lose if no further evidence were to be introduced.

15. It was Counsel's submission that the respondents have not offered a reasonable explanation in the circumstances and should be held 100% liable because the driver never told the court what care he took. Counsel further observed that the court's finding that there was no pedestrian walk where the accident occurred was an error because pedestrians do not only walk on pedestrian walk; that the court should take judicial notice that the accident was near the Kitale Law Courts where there is no pedestrian lane and that in any case there are no zebra crossing or pedestrian lanes in Kitale Town.

16. On Quantum, Counsel submitted that the award of Kshs.100,000/= was too long and an award of Kshs.350,000/= should be made. He put reliance on Poa Link Services Co. Ltd and Another -V- Sindani Boaz Bonzemo (2021) eKLR; Mohammed Noor Oloo -V- Peter Kinyua Muriungi (2018) eKLR and Equity Bank Kenya & 2 Others -V- David Githuu Kuria (2020) eKLR where similar award was made for similar injuries.

17. As to costs, Counsel urged that the appellant is entitled to both costs of the lower court and Appeal.

18. The appeal was opposed. The Respondent's Counsel was Paul Ouru Advocate. He submitted that quantum was not challenged in the grounds of appeal as one of the issues; that the only issue pleaded is one of liability and was surprised to see the appellant include quantum as one of the issues. The Counsel framed the issues as

    1. Whether the trial magistrate was justified in apportioning liability at the ratio of 50:50;

    2. Whether the trial court erred by awarding half the costs to the Respondent;

    3. Who bears the costs of the appeal?

19. On the issue of liability, Counsel urged that the court has to consider causation and blameworthiness because the fact that an accident occurs does not mean one is automatically to blame but the court has to apply some tests to establish who is liable; that each case depends on its own unique circumstances: that the determination of liability in a road traffic accident is not a scientific affair. Michael Hubert Kloss and another -V- David Seroney & others (2009) eKLR; that the question of liability is determined by applying common sense to the facts of each particular case. Counsel also urged that the person who brings another to court has the duty to prove their case on a balance of probabilities. Reliance was made in Morris Njagi & Another -V- Beatrice Wanjiku Kurira (2019) eKLR and Treadsetters Tyres Ltd -V- John Wekesa Wepukhulu (2010) eKLR.

20. Counsel further submitted that since the issue is liability alone, the relevant evidence is that of PW4, 5 and DW1 who were at the scene; that PW3 , the Police officer produced an abstract which indicated that no one was to blame for the accident and the case was pending investigations; that PW4 stated that the 2nd respondent carelessly drove the vehicle so that it veered off the road and knocked him from the rear and that the vehicle was driven at a high speed that should not have been employed when one is parking a vehicle; that PW5's testimony contradicted PW4's testimony because he conceded that there was indeed a parking lot where the suit motor vehicle was about to park and there was no pedestrian lane there; that DW1 on the other hand stated that he was entering a parking lot when a pedestrian hit his side mirror with the right hand. Counsel submitted that the trial court may have considered that the appellant also erred; the Respondent owes other road users a duty of care and that he may have walked in the parking lot area without due care and attention as was held in Patrick Mutie Kamau -V- Judy Wabui Ndurira CA 254/96 (1997) eKLR and that likewise the Respondent being the driver of a lethal machine owed road users greater duty of care. (Washington Matele Gisore (Supra)). On the other hand, Counsel argued that from the injuries suffered by the appellant, he may not have been knocked from the rear as alleged, that the appellant out of agitation upon being informed by PW5 of the oncoming vehicle, hit the side mirror with his right hand and hence the injury was self-inflicted. Lastly, Counsel submitted that the trial magistrate was faced with three (3) contradictory versions and therefore the court had no option but apportion liability. Counsel cited several authorities in supporting apportionment of liability i.e

    1. Kibimba Rice Company Ltd -V- Umar Salim *CA 7/1988* (Supreme)

    2. Hussen Umar Farah -V- Lento Agencies *CA 34/2005*

    3. Susan Kelekye Mbuvi -V- Andrew Nzomo Malachi CA (2017 eKLR)

    4. Isaac Onyango Okumu -V- James Ayere & Another (2019) eKLR

21. Where courts have held that in absence of clear evidence on how the accident occurred, liability must be apportioned.

22. As to whether half the costs were to go to the Respondents, Counsel urged that it was a wrong interpretation of the trial courts order where it ordered "Half costs to the plaintiff" Counsel relied on Halsbury Laws of England 4th Edition 2010 Vol.10 paragraph 16 on the discretion of the court to award costs and Judicial hints on Civil procedure 2nd Edition by J. Kuloba (retired) and lastly the case of Jasbir Singh Rai and others -V- Tarlochan Rai & others (2014) eKLR on when courts can depart from the known procedure that costs follow the event. Counsel submitted that the court properly exercised its discretion after considering all the special circumstances of the case. As regards costs of the appeal it was his view that the appeal being frivolous should be dismissed with costs to the Respondent.

23. I have duly considered the grounds of appeal, the evidence on record and the rival submissions. This being the first appeal, this court will be guided by the finding in Peters -V- Sunday Post Ltd 1958 EA 424 and Selle and Another -VS- Associated Motor Boat & Company Limited and others (1968) EA 123. In the Selle Case, the court stated thus, "...... this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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 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"

24. This is a first appeal and as a general rule, this court as a first appellate court has a duty to review all the evidence tendered at the trial court and analyse it and make its own conclusions regarding the matter in dispute.

25. As pointed out by the Respondent, the Grounds of Appeal are clear. All of them are in respect of the issue of liability. They do not challenge the issue of quantum. Every party is bound by its pleadings. In this case the appellant is bound by the issues raised in the grounds of appeal and cannot purport to address the issue of quantum in its submissions as Counsel purported to do. Quantum is therefore not one of the issues for consideration.

26. The issues that remain to be addressed are: -

    1. Whether the Learned Magistrate was justified in apportioning liability at 50:50;

    2. Whether the Magistrate erred in awarding half costs to the Respondent;

    3. Who bears the costs of the appeal?

Liability

27. Section 107,108 and 109 of the *Evidence Act* places the burden of proof of a fact on the person who wishes the court to believe the existence of such fact. It was therefore the responsibility of the Respondent to prove their case on a balance of probabilities.

28. It is also trite that an appellate court will not interfere with finding of facts of a trial court unless the said finding is based on no evidence or is based on a misunderstanding of the evidence.

29. In Mwangi -V- Wambugu (1984) KLR 453, the Court of Appeal stated as follows;

> "A Court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles in reaching the finding and an appellate court is not bound to accept the trial judge's finding of fact if it appears either that he has clearly failed on some material point to take into account of particular circumstances

or probabilities material to an estimate of the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally"

30. Guided by the above principles, this court will now consider the evidence tendered in the trial court. PW1 and 2's evidence did not touch on liability. PW3 the Police Officer merely produced the abstract form issued by police confirming occurrence of an accident.

31. By the time of production of the abstract, the case was still pending investigation and nobody had been charged. It means that so far, blame has not been attributed to either the appellant or Respondent.

32. It is only the testimonies of PW4,5 and DW1 that are relevant to the issue of liability. PW4 stated that as he walked off the road, the Respondent drove the vehicle in high speed and carelessly that it veered off the road and hit him. In my view, having been hit from the rear, the appellant cannot tell the court with certainty how the said vehicle was driven. It is clear from his testimony that it is PW5 who first noticed the oncoming vehicle and shouted to alert PW4 of the oncoming vehicle. Although PW4 said that they were walking along the road, PW5 admitted that there was a parking area thus corroborating DW1's testimony that he was entering a parking area.

33. DW1 on the other hand stated that he was driving at about 10KPH entering a parking area when PW1 hit the side mirror. In my considered view, had the Respondent been driving so slowly at 10KPH the appellant would not have sustained such injuries and I find that the speed was higher. Besides, had he been driving at 10KPH, the appellant would have noticed a pedestrian in the parking area where he was about to park. Since it is established that the scene was a parking, PW4 had a duty to look out for vehicles that may be parking in the area just like the Respondent had a duty of care to other users in the parking area. If PW4'S attention was drawn to the oncoming vehicle by PW5, it means he may not have been alert and aware of his surroundings.

34. Although the trial magistrate partly found that there was no pedestrian lane where PW4 and 5 were walking, when the accident occurred, it is not true that people will only walk on pedestrian lanes. There are many places in towns where there are no pedestrian walks and people walk anyway. The failure to walk on pedestrian walk should not have been the basis for apportioning liability.

35. Despite the above observation, the evidence on record confirms the occurrence of an accident but it is not clear who was to blame wholly or the extent of contribution of either.

36. There is a wealth of authorities on how the court should assess the liability in situations where it is not clear who caused the accident. In Kibimba Company Ltd -V- Umar Salim, Supreme Court civil appeal No.7 of 1988 (1988) the court said "<u>where there is little to choose between the evidence of two parties, the blame is equally divided between them i.e. 50% liability on each side</u> from the observations made by the Honourable judge in this case, and the evidence and testimony provided in the hearing of the suit, we hold a humble view that the learned magistrate, lawfully and rightly exercised his judicial powers, in applying the proper legal principles, and coming up with the equal apportionment of liability.

37. In Hussein Omar Farah -V- Lento Agencies – CA at Nairobi Civil appeal no. 34 of 2005, the justices of the Court of Appeal stated as follows; -

> The trial court as we have said, had two conflicting versions on how the accident occurred. Both parties insisted that the fault lay with the other side. As no side could establish the fault of the opposite party, we would think that liability for the accident would be equally on both the drivers. We therefore hold each driver equally to blame.

38. In Isaac Onyango Okumu -V- James Ayere & another (2019) eKLR (Musyoka, Judge) stated as follows;-

> "It is an established principle of law that where there is no concrete evidence to determine who is to blame between two drivers, both should be held equally liable.

39. In this case, the court is still faced with the dilemma that the trial court faced by not finding who is to blame for the accident or to what extent. This court finds that each party was to blame to some extent and will agree with the trial magistrate apportionment of liability at 50:50.

40. Whether the court erred in awarding half the costs to the respondents. Section 27 of the *Civil Procedure Act* gives the court unfettered discretion to award costs. This principle was restated in Halbury's Laws of England 4th Edition 2010 Vol.10 paragraph 16 as follows;- The Court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice

> Justice Kuloba reiterated the above in his Judicial Hints on Civil Procedure 2nd Edition Law Africa Page 94 as follows "costs are (awarded at) the unfettered discretion of the court, subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, but they must follow the event unless the court has good reason to order otherwise...."

41. Generally, costs follow the event but there may be reason for the court to depart from the above general rule. For that reason, the trial court rightly exercised its discretion by granting the appellants half the costs because liability had been apportioned at 50:50.

42. In the end, I find that the appeal is unmerited. It is hereby dismissed with costs to the Respondents.

DELIVERED, DATED AND SIGNED AT KAPENGURIA THIS 27TH DAY OF FEBRUARY, 2025

R. WENDOH.

JUDGE.

Judgement delivered virtually in the presence of

Respondent – no appearance

Appellants – Ms. Masinde

Juma/Hellen – Court Assistants