Njoroge v Gichiri (Civil Appeal 202 of 2023) [2025] KEHC 4115 (KLR) (27 March 2025) (Ruling)

Neutral citation: [2025] KEHC 4115 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL 202 OF 2023

FN MUCHEMI, J

MARCH 27, 2025

BETWEEN

LEONARD MUIGAI NJOROGE ..... APPELLANT

AND

JEREMIAH KARUMA GICHIRI ..... RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. J. A. Agonda (PM) delivered on 3rd July 2023 in Ruiru SPMCC No. E130 of 2022)

RULING

Brief facts

1. This appeal arises from the judgment of Ruiru Principal Magistrate in SPMCC No. E130 of 2022 a claim arising from a motor vehicle accident whereas the court assessed liability at 100% in favour of the respondent as against the appellant and awarded the respondent special damages at Kshs. 468,515/-.

2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 9 grounds summarized as follows:-

    a. The learned trial magistrate erred in law and in fact in holding that the respondent was the registered owner of motor vehicle registration number KCL 433M without any evidence being tendered by the respondent to that effect.

    b. The learned trial magistrate erred in law and in fact in finding the appellant negligent based on the Occurrence Book (O.B.) which was not tendered in evidence.

    c. The learned trial magistrate erred in law and in fact in misapplying the doctrine of subrogation as there was no evidence that the insurer had paid the sum of Kshs. 468,515/- to the respondent prior to the institution of the suit.

3. Parties disposed of the appeal by way of written submissions.

The Appellant's Submissions

4. The appellant submits that in considering who was to blame for the accident, the learned magistrate relied on the evidence of the respondent (PW1), the police officer (PW2), Leonard Njoroge Muigai (DW1) and Edwin Maina Waweru (DW2). PW1 testified that he was driving motor vehicle registration number KCL 433M along Githurai-Mwihoko road when motor vehicle registration number KCU 263L approached from behind and rammed into him at around 1930 hours. He further testified that the driver of KCU 263L did not stop but sped off after the accident. He said and he got out of his motor vehicle and took a photograph of the speeding KCU 263L but on cross examination, he conceded that the number plate of the motor vehicle was not visible.

5. The appellant further submits that PW2 testified that he is a police constable at Kahawa Sukari Police Station where the respondent reported a hit and run accident at 9.00pm and produced the police abstract. On cross examination, PW2 conceded that he was not the investigating officer and he did not have photographs of the defendant's motor vehicle. DW1 testified that he was the registered owner of motor vehicle KCU 263L and on the material day of the accident DW2 was driving the said motor vehicle. He further testified that the motor vehicle was returned to his custody two days after the alleged accident and it did not have any visible dents. DW2 testified that he was driving the said motor vehicle on the material day and that the motor vehicle was not involved in an accident and if it had been involved, the impact of the accident would have immobilized the motor vehicle.

6. The appellant submits that from the evidence, there is no persuasive evidence to support the conclusion that his driver was liable for the accident as the photograph the respondent alleged to have taken does not clearly show the registration number of the vehicle. Furthermore, the respondent's evidence identifying the motor vehicle that hit him from behind is purely conjecture as he merely gave the registration number of the vehicle that he though hit him. The appellant further argues that there was nothing at the scene of the accident to support the investigations of the police since all motor vehicles involved in the accident had already left the scene. The police based their findings on the information given by the respondent and thus the police abstract was therefore of little or no evidentiary value. Further, although the respondent testified that he reported the accident at Kahawa Sukari Police Station where they referred him to Ruiru Police Station, the investigating officer from Ruiru Police Station was not called to produce evidence of his findings. Additionally, the appellant argues that if his driver was indeed to blame for the accident, he would have been charged with a traffic offence but he was not.

7. The appellant submits that the trial magistrate's rationale on liability was erroneous as if liability was hotly contested, it was the respondent's duty to discharge his evidentiary burden sufficiently. Requiring the appellant to produce documentary evidence such as a motor vehicle inspection report was shifting the burden to the appellant which is contrary to Section 107, 109 & 112 of the *Evidence Act*. The appellant argues that there was no sufficient evidence to identify his motor vehicle as the one that hit the respondent's motor vehicle. The learned magistrate therefore erred in law and in fact in finding that motor vehicle KCU 263L was responsible for the accident.

8. The appellant submits that the trial magistrate misapplied the doctrine of subrogation but instead treated the matter as a material damage claim. The appellant relies on the case of John Njoroge Kibe & 2 Others vs Priscillah Wambui Martin Civil Appeal No. E182 of 2021 and submits that for the doctrine of subrogation to crystallize there must be in existence a contract of insurance, risk must have crystallized and there must be actual payments made in order to indemnify the insured.

9. The appellant submits that the claim for subrogation had not crystallized as the respondent did not provide sufficient evidence to prove that his driver was liable for the accident. Furthermore, the respondent did not produce any actual payments made by its insurance Madison General Insurance but only produced requisition vouchers which are not proof of payment but rather an expression of intention to pay a sum of money. There is no evidence that the insurer indemnified the respondent.

10. The appellant argues that the trial magistrate erred in law and in fact in awarding damages to the respondent without proof that he or his authorised driver was liable for the accident and without proof that the insurer had actually indemnified the respondent.

The Respondent's Submissions

11. The respondent relies on Section 107, 109 and 112 of the *Evidence Act* and the case of Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another [2005] 1 EA 334 and submits that he discharged the burden of proof on a balance of probabilities and the burden of proof then shifted to the appellant to disprove the same. The evidence of DW2 was that the motor vehicle was not involved in an accident however he did not deny that he operated the said motor vehicle on the date of the accident along Githura-Mwihoko road. The appellant further testified that his vehicle would have locked if involved in an accident due to immobilization but he did not produce any evidence of existence of immobilizers on his vehicle. The appellant did not produce a motor vehicle inspection report to prove that his motor vehicle did not have any pre-accident defects.

12. The respondent submits that the learned magistrate was correct in finding that the appellant's version as to the accident having not occurred was based on unfounded facts. On the allegation that if indeed the appellant's driver was to blame he would have been charged with a traffic offence, the respondent submits that the fact that the appellant's authorized driver was never charged with a traffic offence does not mean that he has no case to answer in civil proceedings. A civil claim is not reliant on a conviction or charge in a traffic offence and no law requires that one be charged with a traffic offence for a civil claim to hold. To support his contentions, the respondent relies on the cases of Catholic Diocese of Machakos & Another vs Janet Munaa Mutua & Another [2021] eKLR and John Kirimi Stanley vs Evergreen Agencies Limited & Another [2014] eKLR.

13. The respondent submits that he produced invoices and ETR receipts that amounted to Kshs. 469,515/- and further testified that it was the amount expended as repair costs for his motor vehicle. PW3 produced an assessment report together with the invoice and ETR receipts amounting to Kshs. 6,380/- showing that Madison Company had made the payment and PW4 produced an investigation report along with an invoice and ETR receipts of Kshs. 17,400/- to Madison Insurance. The respondent submits that the payment vouchers by Madison Insurance are evidence of payment of the invoices and fee notes that were raised and ETR receipts which show that the amount was settled. The respondent argues that the allegation that there is no evidence showing that the insurance company incurred those expenses is untrue.

14. The respondent submits that as per the doctrine of subrogation, the insurer is put in the position of the insured and is entitled to claim compensation from the 3rd party tortfeasor. The respondent submits that he testified to the effect that an accident occurred and the insurer stepped in and took care of the repair expenses. Thus the risk did in fact attach and the insurer stepped in and caused his motor vehicle to be repaired to his satisfaction

Issues for determination

15. The main issues for determination are:-

a. Whether liability apportioned by the trial court was against the weight of the evidence adduced.

b. Whether the doctrine of subrogation was applicable at the point of hearing and determination of this case.

The Law

16. 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."

17. 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.

18. 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 liability assessed by the trial court was against the weight of the evidence adduced

19. The appellant seeks to have the court substitute the trial court's findings of 100% liability with 100% liability upon the respondent. The appellant asserts that the accident was substantially caused by the respondent as the respondent failed to prove on a balance of probability that he caused the accident.

20. 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.

21. According to PW1, the respondent, relied on his witness statement and testified that an accident occurred on 15/6/2019 along Githurai-Mwihoko road involving his motor vehicle registration number KCL 433M and that of the appellant motor vehicle registration number KCU 263L which

was being driven carelessly, negligently and recklessly at a high speed that it rammed into the respondent's motor vehicle at the rear side pushing it forward. The respondent swerved to avoid hitting a third party's vehicle registration number KCM 675X that was in front of him. The respondent testified that he informed his insurer Madison Insurance and reported the accident at Kahawa Police Station whereby he was referred to Ruiru Police Station where he was issued with a police abstract.

22. PW2, PC Maurice Okoth attached at Kahawa Sukari police station testified that as per police abstract, motor vehicle registration number KCK 433M Nissan X Trail belonged to the respondent and the vehicle was involved in a hit and run accident. The respondent reported the accident via OB No. 40 at 9pm and the accident occurred at 6pm – 7.30pm along Mwihoko road when motor vehicle registration number KCU 263L driver did not stop. The witness testified that the respondent's motor vehicle was hit from behind by the appellant's motor vehicle as a result the respondent hit motor vehicle registration number KCM 675X that was in front of him.

23. The appellant testified as DW1 and called one witness, DW2, the driver of motor vehicle registration number KCU 263L. The appellant relied on his witness statement. He testified that he was the registered owner of motor vehicle registration number KCU 263L and on the material day he was not driving the said motor vehicle. He further testified that he received the vehicle two days after the accident but there were no pre accident defects prior to the accident.

24. DW2, Edwin Maina Waweru relied on his witness statement and testified that he was driving motor vehicle registration number KCU 263L on 15th June 2019 but it was not involved in an accident as alleged. He further testified that if the motor vehicle was involved in an accident, it would have locked automatically as it had immobilizers. He further did not produce any records of immobilizers.

25. 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.

26. 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.

27. The respondent testified that he was the registered owner of motor vehicle KCL 433M and on 15th June 2019 he was driving along Githurai Mwihoko road when the appellant's motor vehicle registration number KCU 263L hit him from behind. The witness further testified that the said motor vehicle was being driven at an excessively high speed and that the driver of the said vehicle did not stop but sped away. The occurrence of the accident was corroborated by PW2 who was the investigating officer. He testified that an accident occurred on the material day between motor vehicle registration numbers KCL 433M and KCU 263L and that the respondent was hit from behind as a result of which he hit the motor vehicle reg. No. KCM 675X in front of him. He produced the police abstract as an exhibit. The appellant did not object to the tendering in evidence of the document and neither were its contents challenged in evidence. It is therefore not correct for the appellant to say that the police abstract was not produced in evidence.

The contents of the abstract blamed motor vehicle registration number KCU 263L for the occurrence of the accident. Although DW2 testified that an accident did not occur on the material date and if it did, his vehicle would have been immobilized due to the fact that it had an immobilizer, this was not corroborated by other evidence. The evidential burden of proof shifted to the appellant when he denied that an accident occurred. The respondent testified that an accident did occur involving his vehicle and that of the appellant. It was upon the appellant to rebut the evidence that an accident did not occur for instance by producing evidence. Although the appellant claimed that his motor vehicle had no dents two days after the accident when he received it from his driver, he did not produce any evidence to that effect. Thus, when the evidential burden of proof was shifted to the appellant, he failed to discharge it as required by the law. It is notable from the evidence of the parties, it is the testimony of the respondent that seems more credible as to the occurrence of the accident in question. The extent of the damages on the respondent's motor vehicle blended are in line with his testimony that the appellant's motor vehicle hit him from the rear and that it was being driven at an excessively high speed. The respondent's evidence is further corroborated by that of PW2 who produced the police abstract which laid the blame on the appellant for the occurrence of the accident.

28. The appellant argued that his driver could not have been negligent because the police did not charge him with a criminal offence. It is trite that these two actions re not tied to one another. If the police do no charge a driver with a traffic offence, this does not mean that negligence in a civil case cannot be proved.

29. It is my considered view that the respondent proved on a balance of probabilities that the appellant's driver was negligent and was to blame for the accident.

Whether the doctrine of subrogation was applicable

30. The respondent testified that as a result of the accident, his motor vehicle was extensively damaged and he informed his insurer Madison Insurance Company Limited who repaired his motor vehicle. From the record, the respondent called an assessor who testified as PW3 and testified that he works at Elite Automobile Valuers and Assessors Limited and he assessed the respondent's motor vehicle KCL 433M on 19th June 2019. He testified that he prepared an assessment report which he produced in evidence.

31. The respondent gave evidence to the effect his insurer repaired his motor vehicle following the accident. He produced duly filled claim forms, photographs of his damaged vehicle and a bundle of payment requisition vouchers and invoices for various dates and a satisfaction note.

32. The court in Kenya Power & Lighting Company Limited vs Julius Wambale & Another [2019] eKLR set the conditions whereupon the doctrine of subrogation can be invoked as follows:

> The parameters within which the principle of subrogation applies are now well settled. The doctrine applies where there is a contract of insurance and following crystallization of the risk insured, the insurer had compensated its insured for financial loss occasioned thereby usually by a third party. Under this doctrine, the insurer is in law entitled to step into the shoes of the insured and enjoy all the rights, privileges and remedies accruing to the insured including the right to seek indemnity from a third party.

33. In the instant case, the court found that the claim for subrogation had crystallized as it has found that the appellant's driver was liable for the accident and that respondent reported the accident to his insurer Madison Insurance company The claim forms were duly filled which are evidence of processing of an accident claim. The respondent called PW3, a valuer at Elites Valuer and an assessor appointed by Madison Insurance to assess damage caused in respect of the respondent's motor vehicle. PW4, the

tracing officer testified that he was instructed by Madison Insurance Company Limited to investigate and trace motor vehicle registration numbers KCM 675X and KCL 263L. It is evident that there was a contract of insurance between the respondent and Madison Insurance Company Limited in respect of respondent's vehicle registration number KCL 433 M. The insurance company set in motion the processing of the claim.

34. The respondent further produced payment requisition vouchers and invoices for the payments namely an invoice number 2890 and ETR receipt and cheque payment voucher for the sum of Kshs. 412,860/- as repairs, invoice number 234 and claim payment requisition form for a sum of Kshs. 19,275/- as tracing charges, claim payment requisition Kshs. 6380/- as assessor's fees and a letter of authorization dated 28th June 2019 for car hire limit per day at Kshs. 3,000/- which the respondent computed at Kshs. 30,000/-. It is evident that the respondent specifically pleaded for the material damage and proved it accordingly. Evidence of payment of the claim was produced in court. The respondent further produced a satisfaction note in evidence to support the fact that Madison Insurance Company Limited paid for the repairs to his motor vehicle to his satisfaction. Thus, the respondent satisfied the conditions set to invoke the doctrine of subrogation to the satisfaction of the court. As such, the doctrine of subrogation was applicable and well-grounded in its application.

Conclusion

35. Consequently, I find that the appeal lacks merit and it is hereby dismissed with costs to the respondent.

36. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 27TH DAY OF MARCH 2025.

F. MUCHEMI

JUDGE