



REPUBLIC OF KENYA



**Mwangi v Mutenyo (Civil Appeal E1010 of 2022)  
[2024] KEHC 3510 (KLR) (Civ) (19 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3510 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E1010 OF 2022**

**CW MEOLI, J**

**MARCH 19, 2024**

**BETWEEN**

**KENNETH KAMAU MWANGI ..... APPELLANT**

**AND**

**GEOFFREY WANJALA MUTENYO ..... RESPONDENT**

*(Being an appeal from the judgment of Aduke JPA (Mr.) (SRM) delivered on 6th December, 2022 in Nairobi Milimani CMCC No. E1167 of 2021)*

**JUDGMENT**

1. This appeal emanates from the judgment delivered on 06.12.2022 in Nairobi Milimani CMCC No. E1167 of 2021 (hereafter the lower court suit). The suit was instituted via a plaint dated 17.02.2021 by Kenneth Kamau Mwangi, the plaintiff in the lower court (hereafter the Appellant) against Geoffrey Wanjala Mutenyo, the defendant in the lower court (hereafter the Respondent). The claim was for general and special damages in respect of an accident that allegedly occurred on 08.03.2019.
2. It was averred that at all material times relevant to the suit, the Respondent was the registered owner and driver of motor vehicle registration number KBZ 147T (hereafter the suit motor vehicle) while the Appellant was a pedestrian and that on the material day, at 12:30 Hrs., he was walking along the New Pumwani Ring Road. That while the Appellant was standing off the road on a pavement along the New Pumwani Ring Road the Respondent drove the suit motor vehicle so negligently and carelessly that he caused it to veer off the road and knock down the Plaintiff. It was further averred that by reason of the Respondent's negligence, the Appellant sustained serious injuries and was admitted in hospital for twenty (20) days and has suffered loss and damages.



3. The Respondent filed a statement of defence dated 09.07.2021 denying the key averments in the plaint and liability. He further averred, without prejudice to the denials in the statement of defence, that the accident (which was denied) was wholly caused by the Appellant's negligence.
4. The suit proceeded to hearing during which both parties adduced evidence. In its judgment, the trial court was unable to find the Respondent liable and consequently proceeded to dismiss the suit with no orders as to costs.
5. Aggrieved with the outcome, the Appellant preferred this appeal challenging the whole judgment based on the following grounds: -
  - “ 1. The learned trial magistrate erred in fact and in law in finding that the Appellant had not established that the Respondent was the owner of motor vehicle registration No. KBZ 147T.
  2. The learned trial magistrate erred in fact and in law in failing to assess the damages she would have otherwise awarded to the Appellant.
  3. The learned trial magistrate erred in fact and in law in failing to find that the Respondent was not only sued as owner but also as the driver of motor vehicle registration No. KBZ 147T.
  4. The learned trial magistrate erred in fact by finding that the Appellant had not produced police abstract and a motor vehicle search record to confirm the Respondent as owner of motor vehicle registration No. KBZ 147T.
  5. The learned trial magistrate erred in fact and in law in failing to take into account the Appellant's evidence, submissions and authorities.
  6. The learned trial magistrate erred in fact and in law in ruling that the whole of the Plaintiff's claim failed without addressing any of the evidence adduced by the Appellant.
  7. The learned trial magistrate erred in fact and in law in failing to make a finding on each and every issue raised by the parties.” (*sic*)
6. The appeal was canvassed by way of written submissions. Only the Appellant complied by filing his submissions.
7. Counsel for the Appellant condensed the grounds of appeal in four (4) issues, riveted on liability and quantum of damages. Addressing ground 1 and 4 of the memorandum of appeal, counsel argued that the trial court's finding that the Appellant had not produced a copy of the police abstract and motor vehicle records was erroneous as the said documents were contained in the Appellant's bundle of documents having been filed alongside other documents at the time of filing the suit. Moreover, the trial court proceedings show that the Appellant's documents were produced and marked by the trial court as PExh.1-16 in the order in which they were itemized in the Appellant's bundle of documents.
8. Counsel asserted that the record of appeal contained a screenshot of the documents filed by the Appellant and receipt issued by the court upon filing of the same. That the copy of motor vehicle records was listed as item No. 2 and the Police Abstract as item No.13, both of which were produced as PExh.2 & PExh.13, respectively. That the trial court could not have admitted and marked the foregoing documents if they were not on record. It was further pointed out that the Appellant's witness



- statement equally referred to the same documents and this court could access the Case Tracking System (CTS) to confirm whether the documents had indeed been filed as of the date of the hearing of the suit.
9. Submitting on ground 3 of the memorandum of appeal, counsel asserted the Respondent's admission found in his witness statement and oral evidence to the effect he was the driver of the subject motor vehicle on the material day and was charged, convicted and sentenced by a Traffic Court following the accident and the Appellant's evidence, was sufficient for the trial court to find the Respondent being the driver of the suit motor vehicle, wholly liable for the accident even in the absence of a police abstract. The decision in *Catherine Mbithe Ngina v Silker Agencies Limited* [2021] eKLR was relied on in the foregoing regard.
  10. Addressing ground 2 of the memorandum of appeal, counsel cited the decision in *Lei Masaku v Kalpama Builders Ltd* [2014] eKLR to argue that the trial court duty bound to assess the damages it would have awarded had the Appellant's claim succeeded. Regarding general damages, counsel reiterating the injuries sustained by the Appellant as captured by the medical reports of Dr. Wokabi and Dr. Ashwin, the Appellant's degree of permanent disability assessed at 60%, contended that an award of Kshs. 5,000,000/- as general damages for pain and suffering was reasonable in the circumstance. The decisions in *Peace Kemuma Nyang'era v Michael Thuo & Another* [2014] eKLR, *Florence Hare Mkaba v Pwani Tawakal Mini Coach & Another* [2012] eKLR and *Millicent Atieno Ochuonyo v Katola Richard* [2015] eKLR were relied on in support of the submission. As to special damages it was summarily submitted that the Appellant was entitled to Kshs. 156,165/-.
  11. Concerning future medical expenses counsel argued that the Appellant had not fully recovered from the injuries sustained and required physiotherapy sessions for one year, and twice a week at an estimated total cost of Kshs 57,600/-. On loss of earning capacity counsel anchored his submissions on the decision in *Millicent Atieno Ochuonyo v Katola Richard* [2015] eKLR. Reiterating evidence that the Appellant was engaged in a welding business prior to the accident, which onerous business he could not resume due to the nature of the injuries sustained, his income and that of his family had diminished. Asserting his age at the time of accident to be 57 years, and possible retirement at 60 years of age, counsel urged the court to award Kshs. 488,592/- made up; thus, Kshs 13,572x12x3. Submitting finally on grounds 5, 6 & 7 of the memorandum of appeal, counsel reiterated that the Appellant produced a total of 16 exhibits and complained that the trial court did not address the submissions and authorities tendered by the Appellant and thus arriving at an unjust and erroneous decision. The court was urged to allow the appeal as lodged.
  12. The court has considered the record of appeal, the pleadings and original record of the proceedings as well as the Appellant's submissions. This is a first appeal. The duty of this court as a first appellate court was set out by the Court of Appeal in *Selle v Associated Motor Boat Co.* [1968] EA 123. Further, it has since been settled that an appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & Another v Duncan Mwangi Wambugu* [1982 – 1988] 1 KAR 278.
  13. This appeal relates to the twin issues of liability and quantum of damages, the overarching question for determination being whether the trial court's findings on the contested issues were well founded. Here, it may be apposite to replicate the relevant parts of the judgment of the lower court. Upon restating the evidence tendered before it, the trial court proceeded to address itself in summary as follows; -

“With respect to liability, I have not seen a copy of the abstract from the police records confirming further details in respect of the accident victim and the said motor vehicle registration number KBZ 147T as at the date of writing this judgment. I have not seen a copy



of the motor vehicle search records confirming that the defendant is the registered owner of the said motor vehicle in question. As at the date of writing this judgment these documents are neither on the physical file nor available on the judiciary CTS portal. In the absence of these documents and relying only on the testimony of PW1, I am unable to find the defendant liable. This confirmation and chronology settle the issue of liability in my view.

The Plaintiff prays for general damages, special damages, future medical costs, costs of the suit and any other relief. Having found as above on the issue of liability, I proceed to dismiss the plaint with no orders on costs” (*sic*)

14. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the [Evidence Act](#). See also Court of Appeal in [Mumbi M’Nabea v David M. Wachira](#) [2016] eKLR. Meanwhile, the duty of proving the averments contained in the plaint lay squarely on the Appellant vice versa with respect to the averments contained in the Respondent’s statement of defence. See [Karugi & Another v Kabiya & 3 Others](#) (1987) KLR 347.
15. To the foregoing end, the Appellant testified as PW1. He adopted his witness statement on record as his evidence in chief and relied on his list of documents which, according to the record of the trial, were identified and marked by the trial court as PExh.1-16. The Respondent on his part testified as DW1 and equally adopted his witness statement as his evidence in chief. The trial court did not go into great length in addressing itself on the issue of liability in its judgment but arrived at its conclusion on liability on the basis that the Copy of Record and Police Abstract could not be found either on the physical court file or the Judiciary CTS portal as of the time of writing the judgment.
16. The Appellant, through his memorandum of appeal and submissions in support of the appeal, has made heavy weather of the court’s finding that the Appellant had not produced a copy of the police abstract and motor vehicle record. Asserting that on the contrary, the said documents were among the Appellant’s bundle of documents filed at the time of filing the suit. That further the trial court proceedings show that the Appellant’s documents were produced and marked by the trial court as PExh.1-16 in the order in which they were itemized in the Appellant bundle of documents. The Appellant’s Counsel took the liberty of including, which to my mind is irregular, a screenshot of what appears to be the Judiciary CTS user interface and the e-filing receipt for the plaint, in the Record of Appeal while imploring this court to confirm from the CTS whether the documents were indeed filed before hearing of the suit.
17. In the record of appeal before the court, the Appellant’s bundle/list of documents appears at Pg. 14-40. This court, having perused the original record, found the plaint but did not trace the purported bundle of the Plaintiff’s documents therein. As noted earlier, the trial court during the hearing of the matter had indicated on its record that the Appellant’s bundle of documents was produced, and documents marked as PExh.1-16. The court is at a loss regarding the circumstances leading to this situation. If indeed the trial magistrate at the time of judgment having searched the CTS could not find these documents, could it be that the trial court had during the trial marked documents not before it or identified during the hearing of the suit? This court does not have the benefit of accessing the lower court CTS to verify the Appellant’s assertions. This means that the court cannot determine the key issue in controversy in the appeal.
18. Section 78 of the [Civil Procedure Act](#) provides for various powers conferred upon an appellate court as follows; -
  - (1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—



- (a) to determine a case finally;
  - (b) to remand a case;
  - (c) to frame issues and refer them for trial;
  - (d) to take additional evidence or to require the evidence to be taken;
  - (e) to order a new trial.
- (2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.
19. In the court's considered view, and in the interest of justice, the order that commends itself is that a fresh trial be conducted before a different magistrate. However, for the avoidance of doubt, and so that no party is prejudiced or unduly advantaged by this order, the retrial will be based on the parties' pleadings and evidential material which is demonstrated to have been filed prior to the initial hearing that gave rise to this appeal. To obviate further delay, the court directs the Deputy Registrar of the Court to ensure the expeditious return of the lower court file alongside a certified copy of this judgment to the CM's Court at Milimani. Arising from the outcome of the appeal, the court makes no order concerning costs.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 19<sup>TH</sup> DAY OF MARCH 2024.**

**C.MEOLI**

**JUDGE**

In the presence of:

For the Appellant: Mr.Njeru

For the Respondent: Mr. Ongeru

C/A: Carol

