



REPUBLIC OF KENYA



**KENYA LAW**  
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**Maina v EpcO Builders & another (Civil Appeal 31 of 2019)  
[2024] KEHC 4189 (KLR) (30 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4189 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CIVIL APPEAL 31 OF 2019  
GL NZIOKA, J  
APRIL 30, 2024**

**BETWEEN**

**JOHN NJAU MAINA ..... APPELLANT**

**AND**

**EPCO BUILDERS ..... 1<sup>ST</sup> RESPONDENT**

**GODWIN OWINO ODHAIMBO ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal against the decision of Hon. K. Bidali Chief Magistrate (CM) delivered on 19th June 2019 vide Naivasha Chief Magistrate's Court vide Civil Case No. 127 of 2014)*

**JUDGMENT**

1. By a plaint dated 27<sup>th</sup> March 2014, the appellant sued the respondents seeking for orders that, judgment be entered against the respondent in terms of:
  - a. General damages
  - b. Special damages
  - c. Interest of the above (a) and (b) at court rates
  - d. Any other or further relief the Honourable court may deem fit to grant
2. The appellants claim arose out of a road traffic accident that occurred on 31<sup>st</sup> December 2013 at 8:00pm along Moi road at the junction near the Post Office at Naivasha.
3. The appellant averred that, on the material day he was riding a motorcycle when the respondents' motor vehicle registration No. KBV 017Q was driven by its agent and/or servant negligently that, the vehicle collided with the motorcycle causing him actual bodily harm.



4. He averred that the respondents' agent drove at an excessive speed, without proper look out for other road users, failing to slow down, swerve or in any other way taking action to avoid the accident. The appellant averred that, he sustained a fracture of the left tibia and bruises on the right chest wall. Consequently, he seeks for the orders herein.
5. However, the respondents filed a statement of defence dated 12<sup>th</sup> August 2014, and denied the particular of negligence attributed to its agent and/or servant. The respondents denied the occurrence of the accident, the injuries allegedly sustained by the appellant and being responsible for the accident.
6. The respondents averred that, on a without prejudice basis, if the accident occurred as alleged, then the appellant was to blame for it. That he rode the motorcycle without regard to other road users, at an excessive speed and failed to heed the presence of the motorcycle (I believe it was meant to be motor vehicle) on the road.
7. The respondents further averred that, the appellant's suit was bad in law, unwarranted, short of proper and necessary parties, vexatious, incurably defective, and that, the respondent would raise a preliminary objection at the earliest.
8. The appellant's suit was canvassed through filing of submissions and upon consideration of the evidence tendered, the trial court vide a judgment delivered on 19<sup>th</sup> June 2019, dismissed the appellant's suit with costs to the defendants.
9. However, the appellant is aggrieved by the decision of the trial court and appeals against it on the grounds:
  - a. That the learned trial Magistrate erred in law and in fact and misdirected himself in finding that the appellant had not proved his case notwithstanding the evidence on record to the contrary.
  - b. That the Honourable trial Magistrate erred in law and in fact in failing to properly analyse the evidence before him and in the face of glaring discrepancies on the evidence of the 2nd respondent.
  - c. That the Honourable trial Magistrate erred in law and in fact in failing to appreciate and or go through the submissions of the appellant and showed utter bias in his findings.
  - d. That the Honourable trial Magistrate erred in law by failing to assess/quantify the appellant's claim and show what he could have awarded in the circumstances.
10. As a result thereof the appellant seek for the following orders:
  - a. That the judgment/decree of the Honourable court dated 19<sup>th</sup> June 2019, dismissing the appellant's suit, be reviewed and/or set aside.
  - b. That the Honourable court do proceed to assess the damages payable and costs in the lower court and or refer the matter back to the lower court for assessment of damages.
  - c. That the respondents do pay costs of this appeal.
11. The appeal was disposed of vide filing of submission. The appellant in submissions dated 16<sup>th</sup> February, 2023 argued that, he proved on a balance of probabilities that an accident occurred and he sustained the injuries as pleaded which were classified as grievous harm. That, the evidence adduced by both parties showed the respondents vehicle had dents on the left side and not rear. Further, the accident occurred at 8:00pm and therefore it could be difficult for the police officers to measure and identify the skid marks.



12. The appellant submitted that the evidence of the respondents had glaring discrepancies and it was therefore safe to make a finding in favour of the appellant, however, the trial court erred in believing the evidence of the respondent.
12. Furthermore, the trial court did not give reasons why it believed the respondents over the appellant. That, a court ought to assign reasons for its decision making failure of which it is not possible to understand how the final orders were arrived at. He relied on the case of *Telstar Corporation Ltd vs Arden* (1994) 20 AAR 285, and *Dodds vs Comcare Australia* (1993) 31 ALD 690, 691 that, the reasoning in the judgment and the principles applied should be evident on the face of the judgment and should help indecision making.
13. The appellant further submitted that the trial Magistrate did not consider the appellant's submissions but only summarized them. Furthermore, the trial Magistrate, in his judgment, made reference to a Motor Inspection Report however, from the record, no such document was produced and, in the circumstances, he erred in finding that, the respondent proved that the impact was on the rear side.
14. The appellant argued that the trial Magistrate ought to have considered section 109 of the *Evidence Act* (Cap 80) Laws of Kenya and relied on the case of; *Anne Wambui Ndiritu vs Joseph Kiprono Kopkoi and Another* (2005) 1 EA 334 where it was held that there is evidential burden of proving any particular fact which a party desires the court to believe its existence as captured under section 109 and 112 of the *Evidence Act*.
15. The appellant finally submitted that, he tendered evidence of the traffic case to show he was not found at fault for the accident. In the circumstance, he proved his case on a probability of balance and relied on the case of; *William Kabogo Gitau vs George Thuo & 2 Others* (2010) 1 KLE 526 where the court stated that ordinary civil cases are determined in favour of a party who persuades the court that the allegation in his case more likely than not occurred at a percentage of 51% as opposed to 49% of the opposing party and is said to have established his case on a balance of probabilities.
16. The appellant urged the court to award him Kshs. 1,000,000 as pleaded in his submissions in the trial court together with costs in both the trial court and on appeal.
17. However, the respondents in submissions dated 2<sup>nd</sup> February 2023, cited section 107 of the *Evidence Act* on the burden of proof and stated that, the appellant bore the onus of proving that, the 1st respondent drove the subject vehicle carelessly thereby causing the accident. However, the appellant failed to discharge the burden of proof as he did not show on a balance of probabilities that the respondents was negligent and caused the accident.
18. Further, the appellant did provide any evidence to prove there were discrepancies of any kind. That, the appellant's evidence that he was charged in court with the offence of careless driving corroborated the evidence of the defence witness that showed the appellant was to blame for the accident. That, the appellant.
19. The respondent relied on the case of *Miller vs Minister of Penisons* (1947) A ALL ER 372 where Lord Denning J in civil cases stated that, the burden of proof must carry a reasonable degree of probability but not high as a criminal case that proof on a balance of probabilities means a win however narrow. That where a tribunal cannot decide which evidence to accept or where both explanations are (un)convincing the party bearing the burden of proof will lose for failing the requisite standard of proof.



20. The respondents argued that, while the appellant had proved that an accident occurred and he was injured, he failed to tender evidence to prove that the respondents were liable. They relied on the case of; *Afro Apin Limited vs George Mangaa Maganya* [2005] (unreported)
21. At the conclusion of the hearing of the appeal, and in considering the evidence on record, I note that, as stated in the case of; *Selle & Another vs Associated Motor Boat Co. Ltd. & Others* (1968) EA 123, the role of the first appellate court is to review the evidence adduced afresh to determine whether the decision impugned was arrived at properly and or correctly in law bearing in mind that, the appellate court did not have the benefit of the demeanour of the witnesses.
22. To revert back to the matter herein, the trial court in dismissing the appellant's suit observed that "from the motor vehicle inspection report produced in evidence before the court that the point of impact was near side door of the defendants' motor vehicle. It is also clear that no prior accident evidence defects were noted."
23. The trial court went on to state:

"In any event, the police abstract and police investigation placed blame on the plaintiff as a result of which he was charged with a traffic offence. It is clear in criminal cases the standard of proof is much higher than (sic) of beyond reasonable doubt. The case is different however, when it comes to civil matters where the standard is lower and may vary well be that a party who is acquitted in criminal trial is still found culpable in a civil trial where the standards are lower."
24. It sufficed to note that, the appellant avers that, the motor vehicle inspection report that, the trial court relied on was not produced in evidence. Further, by virtue of his acquittal in the traffic case, he was not to blame for the accident.
25. I shall now evaluate the evidence adduced. The plaintiff's evidence was that, the respondents motor vehicle entered the road on which he was riding the motor vehicle suddenly; and hit his motorcycle on the left. That he was later issued with a police abstract, indicating that, the respondent was the owner of the motor vehicle. In cross-examination the appellant conceded that he was charged with careless driving but was acquitted. That, he did not understand why he was charged.
26. The defendant on its part testified that, he was driving in the inner lane when he heard a loud bang on the rear left body of his motor vehicle registration KBV 017Q. He stopped his motor vehicle and saw the rider lying down on the road. That later the police officers attended to the scene, and the motor vehicle taken for inspection. He blamed the appellant for causing the accident. In cross-examination, he stated that, he heard a bang and did not see how the accident occurred. He conceded that he moved the vehicle before the police officers visited the scene. He further stated that the scratch on his motor vehicle was long from the rear upto the door on the left side.
27. Pursuant to the aforesaid it is clear that while as the appellant blamed the respondent for emerging on the road carelessly, the respondent blamed the appellant for hitting his motor vehicle from the rear. None of the parties called an additional witness to corroborate their version of evidence on how the accident occurred. As such it called for evaluation of the evidence adduced by consent to reconcile the matter.
28. In that regard, the following evidence was referred to:
  - a) The traffic charge of careless driving and the outcome thereof



- b) The police abstract and any indication therein as to who was to blame for the accident
  - c) The motor vehicle inspection report
  - d) Any evidence on the probable point of impact
29. The evidence relating to the police abstract, was admitted by consent of both parties. I have considered the same and note that, it indicates that, the appellant, was charged with the offence of careless driving and the matter was still pending before the court. It is in evidence that the appellant was acquitted after the trial. Unfortunately, the proceedings of the traffic case were not available. As such the court did not have the benefit thereof.
30. However, prima facie an acquittal exonerates the accused from blame, and therefore the benefit of doubt accrues to the appellant. Furthermore the investigating officer did not testify to inform the court the basis of the charge against the appellant. As such the trial court's argument that it would still find the appellant liable despite the acquittal was erroneous. Even if the court were to hold as such then it has a legally duty bound to explain the reason thereof and the other evidence relied on. It is therefore the finding of the court that, the acquittal should have been decided in favour of the appellant
31. The other evidence the trial court relied on was the motor vehicle inspection report. I have gone through the evidence adduced in total and I find that the motor vehicle inspector was not called to give evidence. Furthermore I have considered the documents produced by consent of the parties and they are as follows:
- a) The discharge summary produced as plaintiff exhibit 1(a)
  - b) Medical report (Dr. Kiamba) as plaintiff exhibit 4
  - c) Receipt for Kshs 4,000 as plaintiff exhibit 5
  - d) Medical report by Dr. Malik produced as defence exhibit 1
32. There is no indication in the proceedings of the court of 30th October 2018, when these documents were produced by consent of the parties that, the motor vehicle inspection report was ever produced. In that regard, the trial court erred in relying and quite heavily on evidence that was not adduced and/or admitted in evidence.
33. Furthermore the scene visiting officer was not called to testify as to where the point of impact was. There was no sketch map produced to show the same. As such it was the word of the appellant as against the respondent and in the given circumstances, the best the trial court could do is to apportion liability among the parties equally at 50:50% in favour of the plaintiff as against the defendant. I therefore set aside the order dismissing the appellant's suit in its entirety and substitute it with a finding of liability apportioned at 50:50% in favour of the appellant and as against the respondents.
34. As regards quantum, the medical reports by Dr. Kiamba and Dr. Malik were admitted by consent of the parties. The reports by Dr. Kiamba indicate that the appellant sustained a comminuted fracture of the left tibia and bruises on the right anterior chest wall. However, the report by Dr. Malik is not available in the record of appeal and the trial court's file. It does appear that the only documents filed on 2<sup>nd</sup> September 2014, by the defendant alongside the statement of defence was the police abstract dated 30<sup>th</sup> July 2014, and certificate of examination and test of vehicle. The report by Dr. Malik was not produced, therefore it cannot form the basis of trial herein.
35. To revert back to the matter herein, the plaintiff sought for a sum of Kshs 1,000,000 as general damages. The record of appeal does not include the defendant's submissions. The trial court's record indicates



that, the parties were directed to file and exchange written submission in 30 days. The subsequent proceedings do show the plaintiff filed submission and judgment date was given. In that case, the only available submission are those filed by the appellant.

36. Be that as it were, the sum of Kshs. 1,000,000 sought for by the appellant is not tenable. In considering general damages regard must be held on comparable awards. It is the duty of the claimant to refer to comparable awards. A plaintiff claimant and/or appellant who cites authorities that are comparable leaves the decision in the hands of the court. The comparable authorities; Reamic Investment Limited v Joaz Amenity Samuel [2021] eKLR , Njenga & another v Kinyanjui (Civil Appeal E117 of 2021) [2024] KEHC 3810 (KLR) (12 April 2024) (Judgment) and China Henan International Cooperation Group Company Limited v Chesire (Civil Appeal E177 of 2022) [2024] KEHC 3482 (KLR) (11 April 2024) (Judgment) indicate a fracture injury will attract a sum of Kshs 300,000 to Kshs 400,000.
37. In this matter, the appellant was admitted in hospital on 3<sup>rd</sup> December and discharged on 4<sup>th</sup> December 2013, as per the discharge summary produced in court. The discharge summary indicates, the treatment given was diclofenac injection. He was discharged to continue with orthopaedic and two weeks off duty. The details in the discharge summary do not support the finding of Dr. Kiamba that, the appellant suffered 10% permanent disability. In fact, the P3 form dated 14<sup>th</sup> January, 2014 produced by the plaintiff indicates the degree of injury as “Maim” and not grievous harm yet the report by Dr. Kiamba dated 6<sup>th</sup> March 2014, classifies the degree of injury as grievous harm, wherein he states that, he relied on the discharge summary and the P3 form.
38. All in all I award the appellant damages as follows:
- a) General damages-----Kshs. 400,000
  - b) Special damages-----Kshs. 8,040
  - c) Total-----Kshs. 408,040
  - Less 50%-----Kshs 204,020.00
39. As neither party is held to blame, I direct that, each party do bear its own costs. The sum herein shall attract interest at courts rates from the date of this judgment, until payment in full. The date of interest rate is based on the fact that, the appeal arose from the erroneous finding of the trial court of which the respondent cannot be held liable for.
40. It is so ordered.

**DATED, DELIVERED AND SIGNED THIS 30<sup>TH</sup> DAY OF APRIL, 2024**

**GRACE L. NZIOKA**

**JUDGE**

**In the presence of: -**

Ms. Muia H/B for Mr. Kingori for the appellant

Ms. Kimathi for the respondent

Ms. Ogutu: Court Assistant

