



REPUBLIC OF KENYA



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**Ndichu v Mwangi & another (Civil Appeal 42 of 2017)
[2024] KEHC 4443 (KLR) (30 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4443 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CIVIL APPEAL 42 OF 2017**

**J WAKIAGA, J
APRIL 30, 2024**

BETWEEN

MARY WAMBUI NDICHU APPELLANT

AND

PETER NJUGUNA MWANGI 1ST RESPONDENT

PAUL CHEGE 2ND RESPONDENT

*(Being an Appeal from the Judgement of Hon. M. W. Kurumba Resident
Magistrate delivered on 17th August 2017 in Kandara PMCC NO 204 of 2013)*

JUDGMENT

1. This Appeal arises from the Judgment by the lower Court in respect of the Respondent's claim for negligence against the Appellant arising from a road traffic accident on 29th October 2012 involving motor vehicle registration number KAG 296G registered in the name of the 1st Respondent, with the 2nd Respondent as a beneficial owner and or Policy holder as a result of which the deceased Stephen Ndichu Muriuki sustained fatal injuries.
2. It was pleaded that the accident and subsequent injuries were caused by the negligence of the Respondents and or their servants and agents which was denied by the Respondents.
3. The trial Court found that the Appellant had failed to prove her case and proceeded to dismiss the case and as required assessed general and special damages at KShs.3,500,000 and KShs.198,270 respectively which she would have been awarded had the Appellant proved her case.
4. Being dissatisfied by the said determination, the Appellant filed this Appeal and raised the following grounds of Appeal;



- a. The trial Court erred in law and fact in failing to appreciate that the Plaintiff satisfactorily proved her case on liability.
- b. The Court erred in law and fact by considering matters which were not pleaded in determining the suit.
- c. The trial Court did not take into account all the issues before her and failed to be guided by the relevant standard of proof required in a Civil matter.
- d. The Court erred in law and facts in disregarding the evidence of the Appellant's eye witnesses.
- e. The trial Court erred in failing to evaluate the evidence before her.

Submissions

5. Directions were issued that the Appeal be heard by way of written submissions. On behalf of the Appellant, it was submitted that the same called five witnesses, two of whom were eye witnesses whose evidence should have been believed by the Court and that the Court relied on the issue of the position of the tool box, yet the same had not been pleaded by the Respondent, in support thereof reference was made to the case of *Adetoun Olejedi (NIG) Ltd v Nigeria Breweries Plc S.C 91/2002* where it was stated that it is not for the Court to make a case of its own or to formulate its own from the evidence before it and proceed to give a decision based upon its own postulation separate from the case before it.
6. It was contended that the Court placed a heavier burden of proof upon the Appellant over and above what was required in civil claim and proceeded to analyse the height of the deceased, which was never proved at the trial. It was contended that the evidence before the Court was watertight and therefore the Appeal should be allowed.
7. On behalf of the Respondents, it was submitted that the Appellant totally failed to identify motor vehicle registration number KAG 296 G as the one which hit and injured the deceased and that the trial Court came to the conclusion that the issue of the identification of the same was in doubt and that the burden was with the Appellant to prove negligence on the part of the Respondent's as was stated in the cases of *Tredesetters Tyres Ltd v John Wekesa Wepukbulu* [2010] eKLR and *Mbuthia Macharia v Annah Mutua Ndwiga & Another* [2017] eKLR .
8. It was submitted that the trial Court analysed the evidence of the eye witnesses and found that they were not credible. It was the Respondent's contention that the Court did not take into consideration matters that were not pleaded and that she found that the Respondents had raised weighty issues which could not be dismissed and that the Court addressed all the issues that were raised by the parties. The Court was urged not to interfere with the decision of the trial; Court based on the principles set out in *Mbogo v Shab* [1968] EA 93.
9. It is clear that the Appellant's Appeal herein is solely based on the issue of liability and as such an issue of fact, this being a first Appeal , the Court is under a duty to re-evaluate the evidence tendered before the trial Court and to come to its own determination thereon, though taking in to account the fact that it did not have the benefit of seeing and hearing the witnesses as was stated in *Karanja Mwangi Jackson & Another v Nancy Wanjiru Nyaga* [2021] eKLR .
10. PW1 DR. George Kimiiri Karanja testified on the injuries sustained by the Appellant and therefore his evidence is not relevant for the purposes of this Appeal save that the deceased sustained severe head injuries and was admitted for two weeks. PW2 Mary Wambui Ndichu stated that she was not present at the time of the accident and therefore her evidence was hearsay.



11. PW3 Peter Chege Mututho stated that he was a boda boda operator and knew the deceased who was walking from Ndakaini going towards his home on the left side. He saw a lorry coming from the same direction with its tool box open and swinging which hit the deceased throwing him into the nappier grass, the lorry did not stop, so he perused it and was able to take down its registrations number from behind. It was his evidence that the lorry went out of the road. In cross examination he stated that the lorry did not slow down at the corner and that he followed the lorry up to Gatanga and later on went to the police station after two days.
12. PW4 Simon Chege Kimani stated that he witnessed the accident. He saw the deceased and decided to cross the road so that they could walk together when lorry which was speeding hit the pavement and hit the deceased, throwing him off a few meters from the road. He saw PW1 following the lorry on his motor bike. In cross examination he stated that he did not see the colour of the lorry save that it was covered with a tent.
13. PW5 SGT Peter Nyandiga produced the police abstract and stated that the matter was referred to the Insurance and the matter marked pending under investigation.
14. DW1 Peter Njuguna Mwangi stated that on the material day his motor vehicle was carrying firewood to Thika and the driver was Peter Gichia who had since left his employment. He was not informed of any accident until 22nd May 2013. When he inquired he was told that the deceased was drunk on the material day and that he was hit by a motor bike before the lorry appeared at the scene. He stated that the tool box of his motor vehicle is on the right side and not left as stated by the Respondent's witnesses and that it is below the body of the lorry so could not hit the deceased on the head and that the police are always in the area who could have stopped the lorry and that the motor bikes around the area would have given a chase.
15. In cross examination he stated that the investigating officer called him to the station on 22nd May 2013 where the Appellants wanted him to compensate them which he declined and that he referred the matter to his Insurance whom he disagreed with. He contended that the medical report was in consistent with the witnesses account and that his motor vehicle was moving at 40 kmh.
16. In dismissing the Appellant's case, the Court stated that the Respondent's motor vehicle was not identified as the one which had knocked the deceased and proceeded thus "I have difficulties understanding how the accident occurred and who saw exactly what happened. Let me start with PW4 Simon Chege Kimani. This witness never identified the vehicle that hit the deceased he never mentioned the issue of the lorry ... he never noticed the colour of the vehicle that allegedly hit the deceased yet he was very close just crossing road which is less than meters away. He saw the lorry approaching turning to PW3 he followed the lorry Where he took the registration number and immediately turned back. A number of things strike me about this witness' testimony."
17. As submitted by the Appellant, the trial Court went on to speculation and reached conclusions which were not supported by the evidence on record save for the fact that she made a finding of fact that it eroded the credibility of the testimony of PW3 and was therefore unable to rely on it to as a basis that the deceased was hit by KAG 296G.
18. The issue before the Court was whether there was an accident involving the deceased and the Respondent's motor vehicle? The Respondent admitted that his motor vehicle was in the area and that it passed after the deceased had been hit by a motor cycle but provided no evidence in support of the same.



19. This being a Civil matter, the Appellant was only expected to prove its claim against the Respondents on a balance of probability and not beyond reasonable doubt and that inconsistency in the testimony of the witnesses and their conduct did not mean that the accident did not occur.
20. I therefore find and hold that the Applicant proved her case against the Respondent on a balanced of probability.
21. The other issue is whether the deceased contributed to the accident? The trial Court found as a fact that it was not clear how the accident occurred and therefore based on the authorities of the superior Court, I find that the liability be apportioned between the Appellant and the Respondent at 50%: 50%.
22. I therefore allow the Appeal, set aside the order on liability and substitute the same with a finding of 50%; 50% since there was no cross Appeal on quantum I will not interfere with the finding thereon.
23. In the final analysis I enter judgement as follows:
 - a. Liability 50% 50%
 - b. General damages Kshs. 3,500,000
 - c. Special damages Kshs. 198,270
Total Kshs. 3,698,270
 - d. Less 50% Kshs. 1,849,135
24. The Appellant is entitled to cost of this Appeal and it is ordered.

SIGNED DATED AND DELIVERED AT MURANGA THIS 30th DAY OF APRIL 2024

J. WAKIAGA

JUDGE

In the presence of :

Mr. Onyango for Mr. Ondieki for Respondents

Ms Mwangi for the Appellant

Jackline – Court Assistant

