



**Wahome v Gatu (Civil Appeal E049 of 2022)
[2024] KEHC 4873 (KLR) (26 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4873 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL E049 OF 2022**

MA ODERO, J

APRIL 26, 2024

BETWEEN

DAVID KARUGU WAHOME APPELLANT

AND

SAMUEL WAITHAKA GATU RESPONDENT

JUDGMENT

1. Before this court is the Memorandum of Appeal dated 1st September, 2022 by which the Appellant David Karugu Wahome seeks the following orders:-
 - “(a) That the Appeal be allowed and the decision and judgment of the learned trial magistrate in Nyeri CMCC No. 353 of 2019 be set aside.
 - (b) That this Honourable court be pleased to re-evaluate the evidence and make its own finding and judgment in regard to liability.
 - (c) That the Appellant be awarded the costs of the Appeal herein and the costs of the suit in the Trial Court.
2. The Respondent Samuel Waithaka Gatu opposed the appeal. The appeal was canvassed by way of written submissions. The Applicant filed the written submissions dated 26th June, 2023 whilst the Respondent relied upon the written submissions dated 3rd May, 2023.

Background

3. This appeal arises from the judgment delivered on 25th August, 2022 by Hon. Lubia Senior Resident Magistrate in Nyeri CMCC No. 353 of 2019.



4. The case was a Civil Suit filed by the Appellant following an accident which occurred on 23rd December, 2016 along the Nyeri – Nanyuki Road at Nyeri Junior School area.
5. The Appellant stated that on that material day he was lawfully riding his motorcycle Registration Number KMCF xxxN along the Nyeri – Nanyuki Road. That the Respondent, his driver, employee and/or agent was driving a motor vehicle Registration KCC xxxB along the same road and in the same direction.
6. The Appellant states that the driver of the motor vehicle KCC xxxB while attempting to overtake encountered an oncoming vehicle. In a bid to avoid a collision the Respondent swerved back into his lane and in so doing hit the Appellants motor cycle on the right rear side.
7. As a consequence the Appellant was thrown off his motorcycle and landed on the tarmac road sustaining grievous injuries. The Appellant blames the Respondent for causing the accident by driving negligently hence the suit seeking General and special damages.
8. The Respondent filed a defence to the suit in which he denied liability for the accident but did not call any evidence during the trial.
9. On 25th August, 2022 the learned trial magistrate delivered her judgment in which she assessed liability at 50:50. The court awarded General Damages of Kshs. 1,000,000 and special Damages of Kshs. 123,583. Taking into account the 50% liability imposed upon the Appellant the final award to the Appellant was as follows:-

- a. Liability 50:50
- b. General damages Kshs. 1,000,000 less 50% and liability making Kshs. 500,000/=
- c. Special damages Kshs. 123,583 less 50% liability making Kshs. 61,791/=
- d. Costs of the suit to the plaintiff and equally subject to the apportionment of liability”

10. Being aggrieved by the decision of the trial court the Appellant filed this Memorandum of Appeal dated 1st September, 2022 which was premised upon the following grounds:-

- (i) The Learned Magistrate erred in law by apportioning liability in the ratio of 50:50 thus holding the Appellant 50% liable for causing the accident against the weight of the evidence.
- (ii) The learned Magistrate erred in law and in fact by failing to appreciate the evidence tendered with regard to the liability of the Respondents.
- (iii) The Learned Magistrate erred in failing to adequately consider all the evidence on the issue of liability with the resultant miscarriage of justice to the Appellant.
- (iv) The learned Magistrate’s findings on liability are not supported by facts or law hence irregular”



Analysis and Determination

10. I have carefully considered the memorandum of Appeal dated 1st September, 2022, the record of appeal as well as the written submissions filed by both parties.
11. This is a first appeal therefore the duty of this court is to re-examine and re-evaluate the evidence adduced in the lower court and to draw its own conclusions on the same.
12. In *Selle & Another-v- Associated Motor Boat Company Limited & Others*[1968] E.A. 123, the court of Appeal held that;-

“An appeal to this court from 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 consider 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.

In particular this court is not bound necessarily to follow the trial judge’s findings or fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence of if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.....”
13. The Appellant herein does not appear to have any issue on quantum.

However he challenges the apportionment by the trial court of 50% liability as against himself.
14. It is not in dispute that an accident occurred on 23rd December, 2016 along the Nyeri-Nanyuki Road, which accident involved the Appellant riding a motorcycle Registration KMCF xxxB and a motor vehicle Registration KCC xxxB. A search revealed that the said motor vehicle was registered in the name of the Respondent.
15. Although the investigating officer did not attend the trial to give evidence PW1 No. 82xxx PC Kennedy Maingiconfirmed that the incident had been reported at NaruMoru Police Station and that the police blamed the Appellant for the accident.
16. PW1 produced into evidence a police abstract dated 30th May, 2019 which indicated that investigations into the accident were ‘still pending’. It is therefore difficult to see how the police blamed the Respondent for causing the accident when investigations were ‘still pending’
17. Be that as it may the Appellant did give evidence in which he explained how the accident occurred. The Respondent did not testify therefore the evidence of the Appellant remained uncontroverted. The Appellants testimony was not shaken in cross-examination.
18. From the evidence on record it is evident that the Appellant proved his case on a balance of probability.
19. In determining the question of ‘liability’ the court must consider the facts of the case and determine which party bore greater responsibility for the accident.
20. The Appellant stated the he was riding his motorcycle in the same direction as the motor vehicle. That the vehicle attempted to overtake another vehicle but in doing so encountered oncoming vehicle in the overtaking lane. In a bid to avoid a head on collision the driver of the motor vehicle swerved back into its lane and hit the motorcycle on the rear right side.



21. It is the duty of every motorist and/or road user to exercise reasonable care to ensure his own safety as well as the safety of other road users.

In the case of *Mary Njeri Murigi-v- Peter Macharia & Another* [2016] eKLR the court held that

“..... A person who is driving a vehicle is under a duty of care to other road users. The vehicle is a lethal weapon and due care is expected of the driver who is in control thereof”

22. More pertinently a motorist or rider ought not proceed to overtake unless it is safe to do so.

23. In apportioning liability at 50:50 the learned trial magistrate stated as follows:-

“An analysis of the said evidence leads me to the conclusion that the Plaintiff was riding his motorcycle behind the Defendant. The Defendant then started to overtake and the Plaintiff then occupied the space initially occupied by the Defendant. The Defendant then saw an oncoming vehicle and swerved back to his lane to avoid a head on collision but unfortunately hit the Plaintiff’s motor cycle. This can only mean that the Defendant started to overtake before ascertaining it was safe to do so. The Plaintiff on the other hand failed to maintain a safe distance. Equally despite seeing what was happening did nothing to avert the accident. It is for this reason that I find both the Plaintiff 50:50 liable for the accident.”

I do agree with the trial magistrates finding that the facts reveal that the driver of the motor vehicle began to overtake when it was clearly not safe to do so. He had not checked to ensure that the road was clear before embarking on overtaking.

24. However I am very hard pressed to see how the trial court came to the conclusion that the Appellant contributed to the accident by failing to maintain a safe distance. No evidence was adduced by any party at all to indicate that the Appellant had failed to keep a safe distance. The fact that upon swerving back into its lane the motor vehicle hit the Appellant’s motorcycle is not evidence much less proof that the Appellant had failed to keep a safe distance. This finding by the trial judge is totally unsubstantiated.

25. From the evidence on record I find that the accident was caused by the Respondent’s negligent manner of driving in failing to ensure it was safe for him to overtake therefore having to veer back into his lane when faced with an oncoming vehicle. The Appellant was all along in his rightful lane and was not shown to have done anything to contribute to the accident.

26. The trial courts finding of 50:50 liability is not based on law or fact.

Accordingly I do set aside that finding, in its place I find that liability ought to be apportioned at 80:20 in favour of the Appellant.

27. I further note that in her judgment the trial magistrate found that special damages had been proved in the amount of Kshs. 123,583/=. For some unfathomable reason the trial magistrate then proceeded to award this figure less 50% liability. Special damages are the category of damages which are specifically pleaded and proved. Having found that special damages in the amount of Kshs. 123,583 had been specifically proved it was erroneous to subject these proven special damages to a 50% deduction on account of liability.

Conclusion

28. Finally this appeal succeeds. The judgment of the lower court is set aside and instead judgment will be entered in favour of the Appellant as follows:-



- (i) Liability 80:20 in favour of the Appellant.
- (ii) General damages of Kshs. 1,000,000 less 20% liability making Kshs. 800,000.00
- (iii) Special damages at Kshs. 123,583.00
- (iv) Interest on the above at court rates.
- (v) Costs of the suit and of this Appeal are awarded to the Appellant.

It is so ordered.

DATED IN NYERI THIS 26TH DAY OF APRIL, 2024

.....

MAUREEN A. ODERO

JUDGE

