Waweru v Obwogi (Civil Appeal E832 of 2023)
[2024] KEHC 6099 (KLR) (Civ) (30 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6099 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E832 OF 2023

HI ONG'UDI, J

MAY 30, 2024

BETWEEN

EVANSON THUO WAWERU ..... APPELLANT

AND

JACKLINE OBWOGI ..... RESPONDENT

(Being an appeal against the Judgment delivered by Hon. M. W. Murage Principal Magistrate in Milimani CMCC No. 6203 of 2019 on 28/7/2023)

JUDGMENT

1. Evanson Thuo Waweru the appellant was the defendant in the lower court case. The respondent herein had sued for recovery of Ksh 328,064/= being money spent by her insurer (UAP Insurance Company Ltd) on repairing her motor vehicle registration No. Kxxx. She claimed that her said vehicle had been damaged by the appellant's vehicle registration No KBM xxx.
2. After hearing both parties the trial court found for the respondent and entered Judgment for the claimed special damages plus costs and interest.
3. The appellant being dissatisfied with the Judgment filed the Appeal dated 23/08/2023 on the following grounds:
    i. The learned trial magistrate erred in law and in fact in holding that the respondent had proved her case against the appellant.
    ii. The learned trial magistrate erred in law and in fact in finding the appellant 100% liable for the accident yet;

a. The respondent did not adduce evidence to show that the appellant's driver was negligent.

b. The respondent did not testify on how the accident occurred and who caused the accident

c. The respondent did not controvert the evidence adduced by the appellant's driver on how the accident occurred and who was at fault.

iii. The learned trial magistrate erred in law and in fact by relying on the police abstract and the evidence of the police officer in support of her finding that the appellant was liable for the accident.

iv. The learned trial magistrate erred in law and in fact in putting more weight on the evidence of the police officer as opposed to that of the appellant's driver who was involved in the accident.

v. The learned trial magistrate erred in law and in fact in awarding the respondent the sum of Ksh 329, 064/= yet the respondent did not tender evidence to show that she had incurred the said amount.

vi. The learned trial magistrate erred in law and in fact by relying on the respondent's submissions that were full of misrepresentation of facts.

vii. The learned trial magistrate erred in law and in fact by failing to take into consideration the appellant's submissions.

viii. In all circumstances of the case, the findings of the learned trial magistrate cannot be sustained in law or on the basis of the evidence adduced.

4. A summary of the case is that on 22/8/2016 at around 9.00 am a road traffic accident occurred involving motor vehicle registration No. Kxx Subaru Forestor (respondents) and Kxxx Isuzu (appellants). Each party blamed the other for causing the accident. A report was made to the Embakasi police station.

5. No. 81695 P. C Jackline Maeko (PW2) from Embakasi police station confirmed the report of the accident. P.C Mungeko who did not testify carried out the investigation and found the respondent to blame. According to the report both vehicles were heading towards the same direction. The respondent then changed lanes and hit the appellant's car from the side. Both parties were issued with police abstracts, as they reported the accident. In cross examination PW2 said she was not the one who wrote the OB and she did not visit the scene. She did not also have the police file with her in court.

6. PW1 Erick Onderi is a Legal Officer with Old Mutual Insurance Company formerly UAP Insurance company. He said the respondent was their client the insured. He produced the documents related to the repairs and payments in respect of her motor vehicle which was involved in an accident on 22/08/2016. They sought a total of Ksh 328,064/= for the repairs undertaken.

7. The appellant is the owner of motor vehicle registration No. KBM 468V Isuzu Exhauster. His driver Geoffrey Maina Kaguda testified as DW 1. He is the one who was driving the said vehicle on 22/08/2016. In his witness statement which was adopted he stated that he was driving the lorry along Mombasa road on his way to Njiru. He drove on the extreme left lane of the road. As he passed the

junction of Mombasa Road/Imara Daima he saw something fly up in the air and also heard a small bang on the left rear side of the lorry. He immediately stopped to check what was happening.

8. He discovered that motor vehicle registration No. KBL 911X had hit the left rear side of the lorry. The front side of the said vehicle was damaged but the lorry was not damaged. He stated that he noticed that the said vehicle had driven straight onto Mombasa road without using the service lane that vehicles intending to join Mombasa road from Imara Daima are required to use. Police immediately arrived at the scene and advised him to go to Embakasi police station where he recorded his statement the same day. He blamed the respondent for the accident. In cross examination he said his vehicle was blamed for the accident.

9. The Appeal was canvassed by written submissions.

Appellant's submissions

10. These were filed by A.E Kiprono advocates and are dated 11th March 2024. Counsel argued grounds 1-4 together. He submitted that the respondent did not adduce evidence to prove that the appellant was negligent. He cited section 107(1) and the case of Gichinga Kibutha V Caroline Nduku [2018] eKLR to show that the respondent had a duty to prove negligence on the part of the appellant.

11. Counsel argued that the blame on DW1 arose from the entry in the police abstract, however, neither the respondent nor the officer who visited the scene testified. He therefore blamed the trial court for erroneously relying on an answer given by DW1 in his cross examination, to lay blame on him.

12. Counsel urged that the respondent did not discharge her burden of proof, though she pleaded several particulars of negligence, against the appellant. In support he cited the cases of Leonard Mwashume Shinga & another V Auto Selection (K) Limited & another [2009] eKLR and Kennedy Nyangoya Vs Bash Hauliers [2014] eKLR.

13. Counsel further submitted that the evidence of PW2 was way below that of DW1 who witnessed the accident. To support this, he cited the case of ZOS & CAO (suing as the Legal Representative in the Estate of SAO (deceased) Vs Amollo Stephen [2019] eKLR where the court stated:

> " The police abstract from the material accident was also produced as an exhibit. However, a police abstract is not and cannot be proof of occurrence of an accident but proof of the fact that following an accident, the occurrence thereof was reported to the police who took cognizance of that accident. It is therefore the police, having received information of a report of occurrence of an accident, who would investigate and establish circumstances under which such an accident occurred".

14. Also cited is the case of James Tom *Mulekye V Mativo Kovi (Civil Appeal No. 27 of 2019)* [2022] KEHC, 3291 (KLR (II July 2022) where R. K. Limo J stated

> " The respondent called a police officer (PW1) who tendered the police abstract but the said officer was not the investigating officer. He was not at the scene of the accident to give evidence as an eye witness. While he tendered the police abstract... which indicated that the motor vehicle was to blame, that evidence in my view did not add any probative value to the respondent's case basically because it was hearsay...

15. On the same issue in Grace Kanini V Kenya Bus Services No. 4708 of 1989 Ringera J as he then was stated:

> " On the undisputed fact, it is entirely probable that the accident was caused by the negligence of the second defendant. It is equally probable that it was by the negligence of the defendant. And that it is also equally probable that it was caused partly by the negligence of the deceased without the advantages of divine omniscience. I cannot know which of the probabilities herein coincides with the truth. And I cannot decide the matter by adopting one or the other probability without supporting evidence. I can only decide the case on a balance of probability if there is evidence to enable me to say that it was more probable than not that the second defendant wholly or partly contributed to the accident. There is no such evidence. In the premises, I must, not without a little anguish, dismiss the plaintiff's suit on the ground that fault has not been established against the defendants".

16. In view of DW1's evidence and the cited authorities counsel urges the court to find that it is the respondent who ought to be blamed for the accident.

17. On grounds 5-7, counsel submitted that the respondent did not exhibit payment receipts to show that the Insurance paid both the assessor and garage. That the invoices produced by the underwriter cannot be relied on as they are not evidence of payment. He relied on the case of Total Kenya Ltd V Janevams Ltd [2015] eKLR where the Court of Appeal adopted the decision in Great Lakes Transport Co (U) Ltd V Kenya Revenue Authority (2009) eKLR stating as follows:

> " From the judgment, the respondent produced proforma invoices in support of the claim for the retained petrol station equipment. A proforma invoice is considered a commitment to purchase goods at a specific price. It is not a receipt and as such cannot attest to the existence of or the acquisition of goods. We consider a proforma invoice was not satisfactory proof of the plaintiff's loss,.... and the learned judge misdirected himself in finding that the proforma invoices were sufficient proof of special damages".

Respondents submissions

18. These were filed by Wangai Nyuthe & Company advocates and are dated 9/04/2024. Counsel identified two (2) issues for determination. On whether the applicant was liable for the accident, he submitted that the police abstract (PEXB 2) confirmed that the motor vehicle KBM 468V was to blame for the accident. That the investigating officer testified and confirmed the occurrence of the accident, and that the appellant testified and confirmed being to blame for the accident.

19. On whether the respondent proved the pleaded submissions in view of the principle of subrogation, counsel referred to PEXB3 which confirmed the insurance contract and how the said insurance catered for repair costs, assessment fees, investigation fees and e-copy of motor vehicle search fees. Counsel referred to the case of Egypt Air Corporation Vs Suffish International Food Processors (U) Ltd & another [1991] IEA 69 where the court stated thus:

> " The whole basis of subrogation doctrine is founded on a binding and operative contract of indemnity and it derives its life from the original contract of indemnity and gains its operative force from payment under that contract. The essence of the matter is that subrogation springs not from payment only but from actual payment conjointly with the fact that it is made pursuant to the basic and original contract of indemnity. If there is no

contract of indemnity then there is no juristic scope for the operation of the principle of subrogation".

20. He argued that under the doctrine of subrogation, the insurance company is entitled to claim for damages against the appellant via the respondent. He referred to the case of David Gichiri & 3 others V Emmah Kerubo Sese [2021] eKLR where the court quoted the case of: Opiss V Lion of Kenya Insurance Company Civil Appeal No. 185 of 1991, which held:

> " The right to subrogate does not create a privity of contract between the insurance company and the third party. It only gives the insurance company the right to take over the rights and privileges of the insured and therefore must be brought in the name of the insured"

In Africa Merchant Assurance Company V Kenya Power & Lighting Company Ltd [2018] eKLR the court held thus:

> " The essence of the doctrine of subrogation is not in contention. It allows an insurer after compensating an insured for any loss under the insurance contract to step into the shoes of the insured. In that, the insurer is entitled to all the rights and remedies the insured might have against a third party in respect of the loss compensated".

21. On the issue of the respondent not testifying counsel submitted that it has been held severally that the respondent does not have to testify so long as the facts in issue are proved. To support this, he cited the case of Julianne Ulrike Stam V Tiwi Beach Hotel Ltd Court of Appeal No. 57 of 1996 (Mombasa) where the court observed inter alia as follows:

> The hearing of suits is governed by the procedure provided in Order 17 of the Civil Procedure Rules. Order 17 Rule 2(1) reads:
>
> QUOTE{startQuote "}
>
> 2(1) On the day fixed for hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove".

There is no reference in this rule to respondent himself giving evidence first or at all. But a respondent is bound to produce evidence in support of the issues, which he is bound to prove and which evidence can be given by any competent witness not necessarily himself. A respondent does not have to be personally present when he is represented by duly instructed counsel as was the case here. It is for a respondent's counsel to decide how to prosecute his case. If a respondent can prove his case by the evidence of someone else he does not have to be present at the hearing of the suit. If a respondent can prove his case by means of legal arguments only, he does not also have to be physically present at the hearing of the suit. In short, according to Order 17 rule 2(1), a respondent can prove his case by the evidence of a witness or witnesses other than himself, or by the arguments of his counsel and we say with no hesitation whatsoever, that the point taken by Mr. Kirundi could be described as an abuse of the process of court and that the acceptance of this point and the reasons for this in the ruling by the learned judge were not only surprising but also totally erroneous".

Also see Kisumu ELC No. 203 of 2017 – Grace Monica Aketch V Arthur William Ogwayo and Hacton Blasio Luke Okumu

22. Finally, on material damage he submitted that claims should be awarded even if they are not shown to have been incurred. He supported this by the case of Nyeri Civil Appeal No. 154 of 2005 Nkuene

Dairy Farmers Co-op Society Ltd & another V Ngacha Ndeiya delivered on 10/12/2010. Counsel referred to the satisfaction note and the post repair invoice by Top Quality Ltd confirming payment (PEXB 8 & 9) Respectively.

Analysis and Determination

23. Having carefully considered the grounds of appeal, record of appeal, parties submissions and authorities I find two issues falling for determination namely:

    i. Whether liability was proved against the appellant. Did the appellant admit liability?

    ii. Whether the rule of subrogation should be complied with whether or not liability has been proved.

24. This being a first appeal this court is called upon to re-evaluate and re-consider the evidence and arrive at its own independent conclusion. It has to be born in mind that this court did not see nor hear the witnesses. This position has been stated and re-stated in a good number of cases namely:Selle & another V Associated Motor Boat Company Ltd & Others [1968] E.A 123;Jackson Kaio Kivuva V Penina Wanjiru Muchene [2019] eKLR;Kamau V Mungai & another [2006] 1 KLR 150;Mursal & another V Manese (suing as the legal administrator of Dalphine Kanini Manesa Civil Appeal E20 of 2021 [2022] KEHC 282 (KLR) 6/04/2022.

25. From the evidence adduced it is clear there is no dispute that the two vehicles were involved in an accident on 22/08/2016. There is further no dispute that the respondent's vehicle KBL 911X was comprehensively insured by UAP Insurance company now Old Mutual Insurance. There is equally no dispute that the said Insurance Company in meeting its contractual obligations undertook repairs on the said vehicle. It is in light of this that the respondent filed the suit in the lower court on behalf of the Insurance Company for refund/reimbursement of the funds spent.

26. The above position is anchored on a number of authorities like Africa Merchant Assurance Company (supra) and David Gichiri & 3 others (supra). These two cases make it clear that in the doctrine of subrogation the Insurance Company steps into the shoes of the Insured against the third party. My interpretation is that in stepping into the Insureds shoes there must be proof of the 3rd party's liability against the insured for the 3rd party to be held liable. Payment of the moneys by the Insurance Company for its client (the insured) is not an automatic right to the Insurance for payment of the moneys spent, by the 3rd party because if that was the position then there would be no need of filing the case. The case is filed for the court to assess the evidence and first deal with the issue of liability.

27. I would first of all wish to deal with the issue of blame of the accident placed on the appellant by the respondent and the trial court. In his witness statements DW1 denied having caused the accident. He explained what to him took place. In cross examination this is what he stated

    " The accident occurred. My vehicle was hit to the left and the other vehicle was hit to the right. I recorded a witness statement at Embakasi police station. My vehicle was blamed for the accident".

    In cross examination he repeated thus:

    " KBL hit my vehicle to the left side at the rear"

28. When the witness (DW1) said his vehicle was blamed for the accident this did not mean he blamed his vehicle for the accident. It is clear it is someone else who did blame him. This is the person whose evidence the trial court should have weighed on to make a determination. The person should have been

the respondent who witnessed the accident or the Investigating officer who is expected to have visited the scene and done his work. PW2 did not know anything about the accident besides reading the O.B. She did not even have the police file with her in court.

29. This witness (PW 2) said both parties were issued with police abstracts, but she only produced one of them in respect of motor vehicle KBL 911X. What were the contents of the one in respect of KBM 468V? She never told the court. The police abstract produced reads

> " Motor vehicle KBM 468 V Blamed"
>
> Is that evidence in itself? This abstract only confirms that a report of an accident was made. It is therefore prima facie evidence of the occurrence of the accident and the particulars of those involved and is rebuttable. In the case of Peter Kanithi Kimunya V Aden Guyo Haro [2014] e KLR it was held thus:
>
> " A police abstract is not proof of occurrence of an accident but of the fact that following an accident, the occurrence thereof was "reported at a particular police station".

It is clear therefore that a police abstract is not evidence and it is rebuttable.

Also see Kennedy Nyangoya (supra), James Tom Mulekye (supra)

30. The fact that the abstract in this case indicated "Motor vehicle KBM 468 blamed" was not evidence to prove that the appellant was responsible for causing the accident. Just as the driver of motor vehicle KBM 468V was availed to state his version of what happened the respondent ought to have availed herself to state her version. This was an accident involving two vehicles and there was no way the court would rely on the evidence of only PW1 and PW2 who did not witness the accident to fault the appellant.

31. Section 109 & 112 of the *Evidence Act* Cap 80 Laws of Kenya provide as follows:

Section 109 Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Section 112 Proof of special knowledge in civil proceedings

In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disapproving that fact is upon him.

These provisions were discussed in the cases of Anne Wambui Ndiritu V Jospeh Kiprono Kopkoi & Another [2005] 1 E.A 334. Each party in this case had its evidential burden to prove the causation of this accident. The appellant herein did his part while the respondent did not.

32. I therefore find that the serious element of liability against the appellant was not proved by the respondent.

33. On the 2nd issue and in view of the above findings it is my humble view that in carrying out the repairs and others related to the accident the Insurance Company was simply fulfilling its part of the contract with the respondent. When it comes to subrogation it had to be shown to the required standard that indeed the appellant was solely to blame or was partially to blame for the accident to have the Insurance Company squarely, fit in the respondent's shoes. This was not the case from the material presented to court.

34. I therefore find merit in the Appeal, which is hereby allowed with costs. The lower court Judgment is set aside and the plaint dismissed with costs.

35. Orders accordingly

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 30TH DAY OF MAY, 2024 IN OPEN COURTAT NAKURU.

H. I. ONG'UDI

JUDGE