



**Wanjohi v Ngigi (Civil Appeal E189 of 2023)
[2024] KEHC 7865 (KLR) (28 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7865 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E189 OF 2023**

**S MBUNGI, J
JUNE 28, 2024**

BETWEEN

MUTUNG’U WANJOHI APPELLANT

AND

CAROLINE NYAMBURA NGIGI RESPONDENT

JUDGMENT

1. This appeal arises from a decision of Hon. K. Sambu (SpM) on a trial in which the respondent had sued the appellant for special damages on account of material damage caused to the respondent motor vehicle registration number KCK 439L following a road traffic accident of 03/01/2018 along Kiamumbi - Kamiti road junction involving the plaintiff’s motor vehicle and the defendants motor vehicle registration number KBC 756. After a full trial and consideration of the evidence and authorities cited to Hon. Sambu on 03/05/2023 awarded the plaintiff damages and found liability wholly against the defendant. That judgement triggered the present appeal as epitomised in the memorandum of appeal crafted as follows:-
 - a. That the learned trial magistrate erred in law and in fact in failing to appreciate the pleadings, evidence and submissions placed on record by the appellant on the circumstances of the material accident and thereby reached a wrong finding on the issue of liability that the appellants was 100% liable for the accident.
 - b. That the learned trial magistrate erred in law and in fact in misapprehending the evidence placed on record on the direction of travel of the motor vehicle before the occurrence of the accident and thereby reached a wrong finding that the appellant motor vehicle cut into the lane of the respondent’s motor vehicle.
 - c. That the learned trial magistrate erred in law and in fact in making a finding that there was sufficient and consistent evidence to establish the respondents case when the evidence was



contradictory and substantially rebutted by the appellants evidence through the evidence of DW1 and the analysis of the point of impact on the vehicles.

- d. That the learned trial magistrate erred in law in considering and accepting the respondent's evidence which contradicted her pleadings.
 - e. That the learned trial magistrate erred in law and fact in dismissing the appellants defence that his motor vehicle which was being driven on the main road had a right of way at the junction in that the respondent's motor vehicle should have stopped and allowed the appellants to complete by passing the junction before joining the main road.
 - f. That the learned trial magistrate erred in law and in fact in giving undue weight to the evidence or present any investigation records and he therefore could not therefore testify on the contested facts on the material accident or corroborate any other evidence by the respondent.
2. The appeal was canvassed by way of written submissions. The appellant vide its submissions dated 24th May 2024 gave brief facts of the case and identified issues for determination to be as follows:- a) whether the appellants were liable for causing the accident and, b) whether the defence of the appellant was considered.

Appellants Submissions

3. The appellant submitted that the respondent had failed to prove liability in regards to the material accident and their contradictory evidence failed to meet the threshold of the import of Burden of proof set by Section 107 of the *Evidence Act*. relying on the case of *Ephantus Mwangi & Another v Duncan Wambugu (1984) eKLR*, the appellant contended that oral evidence must correspond with the pleadings cited, and in regard the evidence submitted was inconsistent with the respondent pleading and urged the court that the appellant's evidence provided a consistent and logical account of the direction of travel of motor vehicle, the circumstance of the accident, the point of impact and damages which the trial court unjustly disregarded.
4. The appellant also submitted that the trial court gave undue weight to the evidence by PW3 yet he was not the IO, did not visit the scene of the accident or present any investigation file on the accident to support the remarks in the police abstract that the appellant was liable.

Respondent Submissions

5. The respondent failed to tender in submissions despite being given ample time to enter and file submissions.

Analysis and Determination

6. The main issues for determination are;
 - a. Whether the appellant was liable?
 - b. Whether the appellants' defence was considered?
 - c. Whether the award on special damages was justly awarded?
7. This being a first appeal, this Court has the duty to analyse and re-examine the evidence adduced in the lower Court and reach its own conclusion but bear in mind that it neither saw nor heard the witnesses



testify and make due allowance for the said fact. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the Court stated as follows-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

8. It is clear that the determination of the matter in question revolves around the question whether the respondent proved her case on the balance of probabilities. The provisions of sections 107,109 and 112 of the *Evidence Act*, on the burden of proof, were extensively dealt with in *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, in which the Court of Appeal held that:

“As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”

9. The evidential burden of proof is captured under Sections 109 and 112 of the *Evidence Act* as follows;

“109. 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 the fact shall lie on any particular person.

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

10. The question then is what amounts to proof on a balance of probabilities. *Kimaru, J in William Kabogo Gitau vs. George Thuo & 2 Others* [2010] 1 KLR 526 stated that:

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

11. The admitted facts are that the respondent motor vehicle was hit and damages impacted. Who was to blame for the accident? PW1 stated that she was in the material motor vehicle which was being driven by PW2 that when they were about to enter Kiamumbi- Kamiti road junction the defendant driving from Kahawa direction at a high speed had swerved and had hit her motor vehicle on the driver's right side. On cross examination she stated that they had stopped as they entered Kiamumbi-kamiti road junction so as to give way to other motorists when the defendant rushing to a bus stage hit her and damaged her rear bumper. PW2 reiterated the same as PW1 that he was the one driving the motor vehicle they were in. PW3 a traffic officer at the time of trial produced a police abstract issued following a road traffic accident which occurred on 3/1/2019. He stated that the investigating officer from his perusal of the occurrence book had observed that the driver of motor vehicle KCK 439L was joining Kamiti road from a murrum road along Kiamumbi area while the defendant was from Githurai direction heading towards Kiamumbi area. The investigating officer had visited the scene, drawn sketch maps and blamed the driver of motor vehicle registration number KBC 756C for causing the accident.



12. DW1 stated that he was driving from Nairobi's direction kahawa west when at Kiamumbi junction on kamiti road a motor vehicle registration number KCK 439L joining the Kiamumbi Kamiti road had hit the matatu motor vehicle and thereby damaging its front headlamp. Traffic police officers arrived at the scene and drew sketch maps. On cross examination they stated that the driver of the motor vehicle reg number KCK 439L was driving from Kahawa west towards Kiamumbi. He denied the assertions that he was overlapping at the material time causing the accident. It was his evidence that he had already bypassed Kiamumbi junction when he was hit on the left rear tyre of the matatu. He conceded that he had no evidence in corroboration of his assertions that the matatu motor vehicle was hit on the rear left side. It was his evidence that a woman was driving the motor vehicle.
13. The trial court in determining liability found that the motor vehicle KCK 439L joining kiamumbi-kamiti main road had stopped to give way to the motorists when the matatu motor vehicle KBC 756C being driven from kahawa west in a bid to pick passengers from undesignated bus stage had cut onto the lane of motor vehicle registration number KCK 439L and had consequently hit it from its left side. The trial court relied on evidence of PW3 cpl Geofferey who produced the abstract on behalf of the IO reported to have proceeded on transfer as at the time of trial. The plaintiff was found to have proved her case on a balance of probabilities.
14. In Peter Kanithi Kimunya vs. Aden Guyo Haro [2014] eKLR the court stated:

“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.”
15. I find that the evidence of PW3 is not cogent enough to determine who caused the accident. The trial court relied on the evidence of PW3 who produced the police abstract which had a remark that the appellant was to blame. PW3 was not the investigating officer nor did he attend to the scene. Further the sketch plan measurements allegedly taken at the scene of the accident were not produced as exhibits to assist the court to determine the point of impact. Without such evidence the court cannot exactly tell who was to blame.
16. In the case of Benter Atieno Obonyo v Anne Nganga & Another (2021)eKLR where the court opined that;-

“First and foremost, there is no doubt that an accident occurred in which the appellant was injured. Hence, the only question is who caused the said accident? The appellant, PW1, on cross examination testified that she didn't know who was to blame for the accident as she was only called and informed that her husband had been involved in the accident. She did not witness the accident. PW2 a police officer attached to Nakuru police station testified that she was not the investigating officer and produced a police abstract which indicated that the accident was pending under investigations. The investigating officer was not called to testify and give the court a clear picture of how the accident occurred and who was to blame for the accident. No police file and /or sketch map was produced to explain to the court how the accident occurred. Clearly, the appellant failed to prove her case on liability on a balance of probability as was held by the trial court. I place reliance on the case of Sally Kibii & another v Francis Ogaro [2012] eKLR where the court in upholding the lower court's decision dismissing the appellant's case stated that:

“In the Kenital case (above) I held that in all adversarial legal systems like ours, a party undermines his case drastically by not calling or failing to call witnesses. The Plaintiff simply did not adduce any evidence before the trial court on liability. They could have called eye witnesses and/or the investigating Police Officer.



Proof of negligence was material in this case and the burden of proof was upon the Plaintiff. She did not discharge the burden and the appellant's Counsel Submission before me that 'someone, has to explain how the accident took place, is telling. That 'someone' is the Plaintiff who alleges negligence on the part of the Defendant."

17. In this case there is no credible evidence on which negligence can be inferred on the part of the 1st Respondent or the 2nd respondent herein. Being guided by the case above the investigating officer never testified nor produced any sketch maps. The respondent did not prove her case on the balance of probabilities. The appeal succeeds and I set aside the judgement of the lower court.
18. Respondent to bear the costs of this appeal as well as costs in the trial court.
19. Right of appeal 30 days.

JUDGEMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 28TH DAY OF JUNE 2024.

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BY

S. MBUNGI J

Appearances;

1. Court Assistant
2. Advocate for the Respondent
3. Advocate for the Appellant

