**Wangongu v Kithinji & 2 others (Civil Appeal 293 of 2023)**
**[2024] KEHC 6272 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6272 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT THIKA**

**CIVIL APPEAL 293 OF 2023**

**FN MUCHEMI, J**

**JUNE 6, 2024**

**BETWEEN**

**SAMUEL MWANGI WANGONGU ..... APPELLANT**

**AND**

**PATRICK KITHINJI ..... 1ST RESPONDENT**

**BENSON MUDHINE ALILA ..... 2ND RESPONDENT**

**NIC BANK ..... 3RD RESPONDENT**

***(Being an Appeal from the Judgment and Decree of Hon. V. A. Ogutu (Adjudicator/SRM) delivered on 28th March 2023 in Thika Small Claims Court Civil Claim No. E054 of 2023)***

## JUDGMENT

### Brief facts

1. This appeal arises from the judgment of Thika Adjudicator/Senior Resident Magistrate in Small Claims Court Civil Claim No. E054 of 2023 a claim arising from a road traffic accident whereby the trial court found that the appellant failed to discharge the required burden of proof and dismissed the suit.

2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 8 grounds of appeal summarized as follows:-

    a. The learned trial magistrate erred in fact and law in finding that the appellant did not discharge the burden of proof and thus dismissed the suit;

    b. The learned trial magistrate erred in law and in fact by failing to recognize that the police abstract being an expert report is a public document extracted from the police records

following thorough investigations on liability and negligence which informs the decision as to whom is to blame for the accident.

3. Parties put in written submissions to dispose of the appeal.

**Appellant's Submissions**

4. The appellant submits that the trial court erred by finding that he did not give evidence as to how the respondent caused the accident and the particulars of negligence on the respondent. The appellant further submits that in his statement of claim, paragraph *4* he particularised the elements of negligence by the respondent and informed the court that the respondent at the time of the accident was speeding, driving motor vehicle registration number KCE 961Z in a zig zag manner, driving without due regard to other road users, failing to indicate while changing lanes, failing to keep a proper look out on the road and driving without keeping a proper look out on the road. The appellant submits that the respondents, in their response to the statement of claim, stated that they dent all the particulars of negligence contributed as stated in the said claim.

5. The appellant states that since he did not expressly reiterate what was in his statement of claim, the trial court should not have disregarded his claim and find that he did not demonstrate negligence.

6. The appellant relies on the cases of Civil Appeal no. 44 of 2017 Harrison Baya Yaa vs Marsh East Africa Limited and Techard Steam & Power Limited vs Mutio Muli & Mutua Ngao [2019] eKLR and submits that the fact that the police officer who testified was not the investigating officer was not a ground for dismissing the claim. The appellant argues that his evidence and documents proved on a balance of probability that the accident happened and the respondent was responsible for the accident. Additionally, the appellant states that he produced a police abstract which indicated that the respondent was to blame for the accident and the said abstract was not controverted. As such, the appellant argues that the fact that the abstract was not produced by the investigating officer and the fact that the officer did not produce the sketch map did not warrant the trial court in dismissing the suit.

7. Relying on the case of Mombasa High Court Civil Appeal No. E077 of 2022 Samuel Kioko Mbiti vs Vincent Muli Maingi, the appellant submits that the learned magistrate failed to take into consideration the weightiness of the police abstract. Furthermore, the respondent in cross examination stated that he had been issued with another police abstract in which he was not blamed for the accident however he did not produce it in court. Additionally, the respondents did not challenge the authenticity of the said abstract or the testimony of the officer to the effect that the respondent's motor vehicle was to blame for the accident.

8. The appellant states that the respondent confirmed that he was aware that the appellant had been issued with a police abstract which blamed him for the accident and the fact that the accident occurred damaging both vehicles. The appellant submits that the respondent averred that the appellant was the one that hit him on the passenger side but he did not produce any evidence on his damaged motor vehicle. Instead, the respondent produced was a photo evidencing the damage on the appellant's motor vehicle registration number KBQ 466F.

9. The appellant submits that he clearly indicated in his statement of claim that his motor vehicle was damaged. He produced further assessment reports and payment receipts which documents the respondents did not challenge.

10. The appellant argues that the trial court placed the burden of proof way too high in light of Section 32 of the Small Claims Court which excludes the strict rules of evidence in small claims matters.

**The 1st & 2nd Respondents' Submissions**

11. The respondents submit that during the hearing of the trial case the appellant's testimony entailed adopting his witness statement and producing his list of documents. Further the appellant testified that the accident occurred at around 3.00 am along Waiyaki way which contradicted his testimony as per his witness statement. On cross examination, the appellant admitted that Waiyaki way had several lanes and that he conceded that in his statement that he neither indicated the direction he was headed to prior to the accident nor the lane he was on. The respondents further submit that the appellant testified that he did not state which part of his motor vehicle was damaged.

12. Furthermore, the appellant testified that at no point in his statement did he say that the respondent encroached on his lane. Thus the respondents submit that the issues raised on cross examination were not challenged in cross-examination or re-examined by the appellant.

13. The respondents further submit that CW2, the police officer testified that he was neither the investigating officer not did he visit the scene of the accident. On cross examination, the witness testified that he had not produced a copy of the occurrence book detailing the circumstances of the accident. Additionally no sketch map or police file was produced. Thus, the witness confirmed that the police did not witness the accident.

14. The respondents submit that on their part they called the 1st respondent to testify and he testified that he was on the outer lane driving at a speed of about 80km/hr when his motor vehicle registration number KCE 961Z was hit by motor vehicle registration number KBQ 466F.

15. The respondents rely on the cases of Nzoia Sugar Company Limited vs David Nalyanya (2008) eKLR and Walter Onyango vs Foam Mattress Limited (2009) eKLR cited in Franklin Maingi Nkunja vs Rose Mutuma & Another [2021] eKLR; Catherine Mbithe Ngina vs Silker Agencies Limited [2021] eKLR and Florence Mutheu Musembi & Geoffrey Mutunga Kimiti vs Francis Karenge [2021] eKLR and submit that negligence must be proved and that there should be no liability without fault. Further that 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. The respondents submit that the occurrence of the accident is not in dispute in this matter however what is in dispute is whether the accident was caused by the negligence of the respondents. Further the respondents contend that the present appeal is majorly based on the fact that the police abstract produced by the appellant in the trial court blamed them for the accident to which the respondents submit that a police abstract alone is not conclusive proof of negligence.

16. The respondents submit that the claimant on cross examination at the trial court admitted that the 1st respondent did not encroach on his lane. Equally no evidence was given at all as to how the respondent was ultimately blamed for the accident. Further, CW2, the police officer did not adduce any evidence as to the occurrence of the accident or the investigations that were carried out. A copy of the occurrence book was not produced to show to the court how the accident occurred and why the police ended up blaming the respondent.

17. The respondents rely on then cases of Stephen Kinini Wang'ondu vs The Ark Limited [2016] eKLR and Palace Investment Ltd vs Geoffrey Kariuki Mwenda & Another (2015) eKLR and submit that the appellant did not prove negligence against them and further that expert opinion can only persuade the court and does not bind the court.

**Issue for determination**

18. The main issue for determination is whether the appellant proved his case on a balance of probabilities as required by the law.

**The Law**

19. Being a first Appeal, the court relies on a number of principles as set out in Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123:

> " .....this court must reconsider the evidence, evaluate it itself 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 of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence."

20. In Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR the Court of Appeal stated that:-

An appeal to this court from a 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 reconsider the evidence, evaluate it itself 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.

21. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-

a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and

c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

**Whether the appellant proved his case on a balance of probabilities.**

22. The principles guiding the appellate court's power to interfere with the trial court's finding on liability are well settled. In Khambi & Another vs Mahithi & Another [1968] EA 70 it was held that:-

It is well settled that where a trial Judge has apportioned liability according to the fault of the parties, his apportionment should not be interfered with on appeal, save in exceptional circumstances, as where there is some error in principle or the apportionment is manifestly erroneous and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.

23. The appellant adopted his witness statement dated 21st January 2023 as his evidence and produced documents in his list of documents. It is the appellant's case that on 17/12/2022 at about 1300 hours, he was lawfully driving motor vehicle registration number KBQ 466F along Waiyaki way when the respondents' motor vehicle registration number KCE 961Z rammed into his vehicle causing material damage to his vehicle. The appellant further stated that he reported the matter at Kabete police station

and he was issued with a police abstract which blamed motor vehicle registration number KCE 961Z for the accident.

24. On cross examination, the appellant stated that he did not indicate the direction he was headed to neither did he state what part of his motor vehicle was damaged. The witness further stated that he did not say that the respondents' motor vehicle encroached his lane.

25. The appellant called the police officer who testified that the accident occurred on 17/12/2022 between motor vehicle registration number KBR 466F and KCE 961Z. The witness further stated that no injuries were sustained and that motor vehicle registration number KCE 961Z was to blame.

26. On cross examination, the witness testified that he did not witness the accident and neither did he visit the scene as he was not the investigating officer. CW2 further stated that he had no sketch map, the police file or the OB with him in court.

27. RW1, the 1st respondent and driver of motor vehicle registration number KCE 961Z, adopted his witness statement dated 24th February 2023 as his evidence in chief. According to the 1st respondent he was driving along Waiyaki way at a speed of 80km/hr on the outer lane while the appellant was on the inside lane. The 1st respondent further states that when he reached Kangemi, the appellant hit his motor vehicle on the passenger side. The witness blamed the appellant for the accident as he was driving at a high speed, failed to keep proper look out thereby hitting the 1st respondent's motor vehicle occasioning damages to the vehicle.

28. It is trite law that he who alleges must prove. Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya, provides that:-

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

29. In Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, 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 case 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.

30. From the evidence on record, it is not disputed that an accident occurred on 17/12/2017 between motor vehicle registration numbers KBR 466F and KCE 961Z. The appellant, blamed the 1st respondent for the accident saying that he rammed into his motor vehicle. In support of the appellant's case, he called a police officer who was neither the investigating officer nor visited the scene of the accident. As far as it goes, the said police officer could not tell who was to blame for the accident but produced a police abstract which faulted the 1st respondent for causing the accident but did not produce the sketch map, the police file or the OB to show the alleged accident occurred. Notably, the appellant did not adduce any evidence on how the accident occurred. And neither did he explain on what lane he was driving along Waiyaki way, a highway consisting of several lanes. Niether did the appellant testify on the alleged negligence leading to the accident. The appellant failed to show the damaged part of his vehicle. The evidence of the 1st respondent on the other hand gave a more detailed account of how the accident occurred. The 1st respondent who was the driver of motor vehicle registration number KCE 961Z testified that he was on the outer lane and the appellant was in the inner before the accident occurred. On reaching Kangemi the respondent testified that the appellant

hit his motor vehicle on the passenger side. The 1st respondent faulted the appellant for driving at a high speed and failing to keep a proper look out for other motor vehicles. In my considered view, the appellant failed to prove negligence on the part of the 1st respondent and therefore there is no material before me to apportion liability to the respondents.

31. The appellant further argued that the police abstract showed that the 1st respondent was to blame for the occurrence of the accident and since the respondents did not controvert that evidence the court ought to have apportioned liability to the respondents. It is trite law that the purpose of a police abstract is to support the fact that an accident was reported the making of a report is not necessarily proof of occurrence of an accident. This principle was enunciated in Techard Steam & Power Limited vs Mutio Muli & Mutua Ngao [2019] eKLR where the court held as follows:-

> Negligence can be proved notwithstanding the fact that the accident in question was never reported to the police since there is no nexus between a report of an accident to the police with proof of negligence. While such report and the steps taken thereafter may be proof of the occurrence of the accident in question, where there is independent evidence proving that an accident took place and that it was caused by the negligence of the defendant, the failure to call the investigations officer is not necessarily fatal in accident claims. In Peter Kanithi Kimunyu vs Aden Guyo Haro [2014] eKLR it was held that:-
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> > 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.

32. It therefore follows that the appellant ought to prove negligence as against the 1st respondent independently of what the police abstract may have indicated for the reason that proof of negligence and the police abstract are not dependent on each other. In the absence of the appellant proving negligence as against the 1st respondent, the police abstract could not be said to determine that the 1st respondent was to blame for the causation of the accident just because it indicated so. As such, it is my considered view that the appellant failed to discharge the required burden of proof.

33. Regarding assessment of damages, the trial court did not assess any damages, for the reason that it had dismissed the suit. That was erroneous as was espoused in the case of Frida Agwanda & Ezekiel Onduru Okech vs Titus Kagichu Mbugua [2015] eKLR where the court held that:-

> Indeed even when the learned magistrate dismissed the claim, in such a case, he should have assessed damages, notwithstanding the dismissal. That now will be done by this court, for convenience, instead of returning the file to the lower court for assessment.

34. Similarly in Lei Masaku vs Kaplana Builders Ltd [2014] eKLR it was observed thus:-

> It has been held time and again by the Court of Appeal that the court of first instance shall assess damages even if it finds that liability has not been established. To have casually dismissed the suit and failed to address that issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the appellate court need to know the view by the court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behooves this court to assess quantum.

35. In assessing damages, it is noted that the appellant sought for special damages in the sum of Kshs. 195,570/-. It is trite law that special damages must be both pleaded and proved, before being awarded. The appellant produced receipts to show the funds he spent in repair costs of Kshs. 35,000/-, purchase of repair items at Kshs. 128,020/-, costs for the preparation of the assessment report at Kshs. 6,000/- and for the motor vehicle search at Kshs. 550/-. Had the appellant succeeded in his claim, this court would have awarded Kshs. 169,570/- as special damages pleaded and proved.

**Conclusion**

36. Consequently, I find that the appeal lacks merit and is hereby dismissed with costs to the respondents.

37. It is hereby so ordered.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 6TH DAY OF JUNE 2024.**

**F. MUCHEMI**

**JUDGE**