



REPUBLIC OF KENYA



**Mwandiko v Ndegwa (Civil Appeal E022 of 2023)
[2024] KEHC 7583 (KLR) (25 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7583 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CIVIL APPEAL E022 OF 2023**

**J WAKIAGA, J
JUNE 25, 2024**

BETWEEN

PIUS MUSYOKA MWANDIKO APPELLANT

AND

DOMINIC MAINA NDEGWA RESPONDENT

(Being an appeal from the Judgement of Hon. E.M. Nyagah Senior Principal Magistrate, Muranga delivered on 13th April 2023 in Muranga CMCC No 207 of 2010)

JUDGMENT

1. This appeal arises from the judgement of the lower Court delivered on the 13th day of April 2023 in which the Appellant was found liable at 100% with General damages assessed at the sum of Kshs.650,297 as special damages arising out of an accident on 29th April 2008 involving the Appellant's motor vehicle registration number KAK 406 W and the Respondent's motor vehicle registration number KAB 405 C which was insured by Ms Lion of Kenya insurance Co Limited under the doctrine of subrogation.
2. Being dissatisfied by the said judgement, the Appellant filed this appeal and raised the following grounds of appeal:
 - a. The Magistrate erred in law and fact in allowing the Plaintiff/ Respondent claim in the absence of the Plaintiff /Respondent's testimony.
 - b. The magistrate erred in law and fact in failing to consider that the Plaintiff/Respondent did not testify so no judgement could be entered in his favour.
 - c. The Magistrate failed to appreciate and lawfully apply his mind to the law of evidence and the burden of proof in civil matters.



Submissions

3. Directions were issued on the determination of the appeal by way of written submissions and on behalf of the Appellant it was submitted that the Respondent did not testify at the lower Court to prove his allegations of negligence and that the assessors report relied on by the Court was produced by PW1 Albert Murathi and not the Respondent, thereby denying the Appellant an opportunity to cross examine him on the particulars of negligence and in support of the contention reference was made to the case of *Martin Ebele Tobbo v Yvonne Nyagamukenge* Nairobi Civil Appeal No 723 of 2017 to wit the Plaintiff must adduce evidence which in the absence of rebuttal evidence by the defendant convinces the Court that on a balance of probabilities it is proved.
4. It was stated that the evidence of the Respondents witnesses PW2 clearly exonerated the Appellants motor vehicle from causing the accident, which aspect was not considered by the Court including his submissions thereon.
5. On behalf of the Respondent, it was contended that evidential burden was upon a party who desires the Court to believe in the existence of a particular fact as per Sections 109 and 112 of the *evidence Act* and in support thereof reference was made to the cases of *William Kabogo Gitau v George Thuo & 2 others* [2010] eKLR and *Evans Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR. It was submitted that the Respondent discharged this burden through the witnesses presented in Court including the evidence of PW2 on how the accident occurred.
6. It was contended further that the issue of liability was uncontroverted and unchallenged as the Appellant neither testified nor called any witness to testify on his behalf and that the averments in the statement of defence remained mere statements that were not substantiated. In support of these submissions reference was made to the case of *Linus Kiongo & 3 others v Town Council of Kikuyu* [2012] eKLR.
7. It was submitted further that the suit herein was brought under the principles of subrogation where the Respondent's insurers claimed the costs it incurred in repairing the Respondent's motor vehicle and as such the suit was brought in the name of the insured as was stated in *Opiss v Lion of Kenya Insurance Co Ltd* where the Court quoting from *Dolik Limited v Invesco Assurance Company Ltd & 5 others* [2018] eKLR stated that the rule applies in situations where by virtue of being an insurer the company is entitled to be placed in the position of the insured and to succeed to all rights and remedies against third parties in respect to the subject matter of insurance.

Proceedings

8. This being a first appeal, the Court is under a duty to re-evaluate the evidence on record and to come to its own conclusion thereon while giving allowance that unlike the trial; Court it did not have the advantage of seeing and hearing witness see *Ochieng v Ayieko* [1985] KLR 494.
9. PW1 Albert Murathi testified that he was a motor assessor and that on 22nd April 2008 he was instructed by ICEA Lion Insurance Co to assess motor vehicle registration KBA 405C and that the cost of repair would have been Kshs. 628,420. PW2PC Sarah Orlando produced the police abstract and that there was an unknown pickup which was overtaking being driven from Nairobi towards Sagana and that the Appellant's motor vehicle KAK 405 W was also being driven toward Nairobi direction and the driver veered to the extreme left of the tarmac road and on returning back lost control and veered to the right side hitting motor registration number KBA 595K on the right rear.



10. It was her evidenced that KAK 406W's driver was charged with careless driving in Traffic Case Number 456/2018. In cross examination, she stated that there were three motor vehicles involved, the Respondent did not blame anyone and had his motor vehicle released to him. She stated that the driver of the pickup triggered the accident.

Determination

11. From the proceedings herein, I have identified the following issues for determination:
- Whether the Respondent proved his case against the Appellant.
 - Whether failure by the Respondent to testify was fatal to his case.
 - Whether the claim under the doctrine of subrogation was made out.
 - What orders should the Court make.
12. In finding for the Respondent, the trial Court had this to say “the defendant did not call any witnesses and as held in *Obed Mutua Kinyili v Well Fargo & another* [2014] eKLR, the Court held;
- “perhaps more importantly in this case is that the defendants did not adduce any evidence before court and that being so the pleadings in its defence remained allegations because they were not proved..... my understanding is that once a Defendant just as much as a Plaintiff fails to give evidence their pleading cannot be relied upon because they remain unproved”
- PW2 produced police abstract and confirmed that after investigation were carried out the driver of motor vehicle registration number (sic) was charged with the offence of careless driving. It is therefore my finding that the driver of motor vehicle registration number KAK 406W was wholly to blame for casing the accident.
13. It is therefore clear that the trial Courts finding on liability was supported by the evidence on record as the Appellant was charged with careless driving in the traffic case having been blamed for causing the accident herein, which is proof of negligence. Failure by the Respondent to testify was not fatal to the Respondent's case as liability could be proved even by the use of circumstantial evidence and I therefore find no merit on the Appellants submissions herein which I dismiss.
14. The doctrine of subrogation was stated by the Court of Appeal in the case of *African Marchant assurance Company v Kenya Power & Lighting Co Ltd* [2018] eKLR that it allows an insurer after compensating an insured for any loss under the insurance contract to step into the shoes of the insured and that the insurer though bringing the case in the name of the insured is entitled to all the rights and remedies the insured might have against a third party in respect of the loss compensated.
15. This principle was amplified in the case of *Egypt Air Corporation v Suffice food Processors (u) Ltd and another* [1999] EA 69 where the Court stated that the basis of subrogation doctrine is founded on the binding and operative contract of indemnity and it drives 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.
16. From the evidence on record and considering the fact that the rights of subrogation gave the insurance company the right to take over the rights and privilege of the insured, I find no fault with the trial Court holding thereon and consequently find no merit on the appeal herein which I dismiss with cost to the Respondent.



17. The judgement by the lower Court is affirmed both on liability and quantum.

DATED, SIGNED AND DELIVERED AT MURANGA THIS 25th DAY OF JUNE 2024.

J. WAKIAGA

JUDGE

In the presence of:-

Mr. Muli for the Applicant

Miss Muriu for the Respondent

Jackline – Court Assistant

