



REPUBLIC OF KENYA



**Ondindo v Ouma (Civil Appeal E1395 of 2023)
[2024] KEHC 11298 (KLR) (Civ) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11298 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E1395 OF 2023

JN NJAGI, J

SEPTEMBER 26, 2024

BETWEEN

MICHELLE ACHIENG ONDINDO APPELLANT

AND

MAVIN ONYANGO OUMA RESPONDENT

(Being an appeal from the judgment and decree of Hon. Gachuki Nelson Githinji, Adjudicator, in Milimani Small Claims Court SCCC No. E2575 of 2023 delivered on 11/12/2023)

JUDGMENT

1. The respondent herein brought suit against the appellant at the Small Claims Court Milimani seeking compensation in general and special damages after she was injured in a road traffic accident involving a vehicle belonging to the appellant herein. The appellant denied the claim. The trial adjudicator in his judgment found both parties to be equally to blame for the accident and apportioned liability between the two. He awarded damages to the tune of Ksh.1,230,732/=. The appellant was aggrieved by the finding on liability and the assessment of damages and lodged this appeal.
2. The grounds of appeal are that:
 - a. The Learned Magistrate erred in law by arriving at a conclusion that was not based on the law of proof of negligence when the Learned Magistrate held the Appellant 50% to blame.
 - b. The Learned Magistrate erred in law by awarding Kshs. 1,230,732/= plus costs and interest which was way in excess of his jurisdiction under the *Small Claims Court Act* and therefore acted without jurisdiction.
 - c. The Learned Magistrate erred in law by awarding Kshs. 300,000/= future medical expenses against the law governing awards of future medical expenses which must be strictly proved.



- d. The Learned Magistrate erred in law by awarding an excessive sum of general damages of Kshs. 800,000/= against the legal principle of stare decisis.
3. The parties canvassed the appeal by way of written submissions of counsels on record for the parties.

Appellant's Submissions

4. The Appellant submitted that the award of Kshs. 1,230,732/= plus costs and interests was way in excess of the trial Magistrate's pecuniary jurisdiction as provided for under the section 12 of the *Small Claims Court Act* and therefore that the court acted in excess of jurisdiction.
5. It was submitted that a court in the first place must be seized of requisite jurisdiction before delving into the merits of the case at hand. Otherwise where a court determines a matter whilst devoid of jurisdictional competence, the ensuing decision is a nullity and void in law. To this end, the appellant cited the case of *Macfoy vs United Africa Co. Ltd* [1961] 3 ALL E.R. 1169 wherein Lord Denning held as follows:

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”
6. The Appellant further made reference to the locus classicus case of *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR and the avowed words of Justice Nyarangi, JA (as he then was) that:

Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.
7. The appellant submitted that the pecuniary jurisdiction of the Small Claims Court as set out by section 12(3) of the *Small Claims Court Act* is one million Kenya shillings. To emphasize the point, the appellant cited the decision of Justice Mativo (as he then was), in *Republic v Magistrates Court, Mombasa; Absin Synergy Limited [Interested Party] (Judicial Review E033 of 2021)* [2022] KEHC 10 (KLR) (24 January 2022) (Judgment) wherein the learned Judge held as follows on the pecuniary jurisdiction of a court:

“26. First, pecuniary literally means ‘related to money.’ Pecuniary jurisdiction sets the pecuniary limits on the jurisdiction of a court. Every court is deemed to have a certain monetary limit of which it can entertain cases and decide...”
8. It was submitted that the act of awarding damages in excess of the court's pecuniary limit was a nullity in law and incurably defective.
9. On liability, the Appellant submitted that the learned Magistrate erred in law in arriving at a conclusion that was not based on the law of proof of negligence when he apportioned liability at 50% to be borne by each party.



10. The Appellant submitted that the burden of proof in an action of damages for negligence rests with the claimant. The appellant relied on the holding of Visram J (as he then was) in *Statpack Industries v James Mbithi Munyao* C.A No, 152 of 2003 [2005] eKLR where it was held that:

Coming now to the more important issue of “causation”, it is trite law that the burden of proof of any fact or allegation is on the Plaintiff. He must prove a causal link between someone’s negligence and his injury. The Plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily a result of someone’s negligence. An injury per se is not sufficient to hold someone liable for the same.

11. The Appellant submitted that proof of negligence is based on three tests being: a duty of care, breach of that duty and consequential damage. Additionally, that evidence must be adduced on causation. Therefore, that the Respondent ought to have adduced evidence, on a balance of probabilities, the connection between the injury he suffered and the Appellant’s negligence. On this, the decision by Justice Visram J. (as he then was) in *Statpack Industries v James Mbithi Munyao* C.A No, 152 of 2003 [2005] eKLR, Lord Reid’s *Stapley v Gypsum Mines Ltd* (2) (1953) A.C. 663 P. 681 as cited with approval in *Michael Hubert Koss & Another v David Seroney & 5 others* (2009) eKLR were cited.
12. The Appellant submitted that the evidence adduced before the adjudicator showed that it is the Respondent who dashed into the road without due care and attention and came into the path of the appellant’s motor vehicle after police officers launched teargas canisters onto some protestors thereby giving the appellant little room to manoeuvre to avoid the accident. That evidence was adduced that there was a nearby footbridge which the respondent did not take. The appellant blamed the respondent for running into the road thereby exposing himself to the risk of injury. It was submitted that there was no evidence adduced to prove causation.
13. It was submitted that negligence is a question of fact and in the absence of any evidence attributing negligence on the appellant, the respondent ought to have been held 100% to blame for causing the accident.
14. The Appellant submitted that as a pedestrian, the Respondent ought to have known that he owed a duty to other road users. The appellant relied in the case of *Patrick Mutie Kimau & Another v Judy Wambui Ndurumo* [1977] eKLR where the Court of Appeal upheld a decision where a pedestrian was found liable at 100% for jumping into the road without due care and attention.
15. The appellant further submitted that there is no liability without fault in our laws, and in this respect relied on the cases of *Kiema Muthuku v Kenya Cargo Hawling Services Ltd* 1991 and *Eastern Produce (K) Ltd v Christopher Astiado Osiro*, Civil Appeal No. 43 of 2001. However, that in the event the court finds it fit to apportion liability between the parties, the appellant should not be held liable for more than 10%.
16. On quantum, the Appellant submitted that the same as awarded was excessive and against the principle that comparable injuries ought to attract comparable awards. On future medical expenses, it was submitted that the same was speculative as there was yet a final medical examination to be conducted before deciding whether an internal fixation of the tibia was to be done.
17. It is for the above reasons that the Appellant urged this court to allow the appeal with costs.



Respondent's Submissions

18. The Respondent submitted that the apportionment of liability at 50% was legally sound and correct. That both sides gave a similar account of the circumstances under which the accident occurred. That it is worth noting that both the appellant and the respondent were reacting to safeguard themselves from the violence that had resulted from chaos caused by demonstrations. It was submitted that the trial court correctly appreciated the chaos that led to the occurrence of the accident and apportioned liability equally between the parties.
19. The respondent submitted that the appellant had a duty of care to other road users especially in the chaotic environment whereby the appellant should have driven and managed the motor vehicle at slow speed so as to ensure not to hit any person. That the fact that the appellant could not break to avoid the accident is a clear testament that he was driving at high speed. The appellant cited the case of decision of *PW v Peter Muriithi Ngari (2017) eKLR* where it was observed as follows:

“The driver and pedestrian owe a duty of care to others as road users. The Appellant should be vigilant enough to observe the wider view of the road including any intervention from both sides of the road, and the respondent to observe the old age traffic practice “Look right, look left, right again” before crossing the road.”
20. On whether the learned Magistrate erred in awarding Kshs. 1,230,732/= plus costs and interest which was in excess of his jurisdiction under the *Small Claims Court Act* and therefore acted without jurisdiction, the Appellant submitted that the judgment delivered on 11th December 2023 was quite categorical that the net award was Kshs. 615,366/= and therefore within the pecuniary jurisdiction of the small claims court as decreed under section 12(3) of the *Small Claims Court Act*.
21. On whether the damages awarded were excessive, reliance was placed on the decision of Justice Majanja (as he then was) in *Harun Muyoma Boge v Daniel Otieon Agulo MGR HCCA No. 7 of 2015 [2015] eKLR* wherein the court held that:

“The assessment of general damages is not an exact science and the court in doing the best it can, takes into account the nature and extent of injuries in relation to awards made by the court in similar cases. It ensures that the body politics is not injured by making excessively high awards and that the claimant is fairly compensated for his or her injuries.”
22. Therefore, the Respondent submitted that the award was justified by making reference to other decided cases and after an accurate assessment of the medical reports and the evidence on record. The Respondent cited several decisions in support of his position that the award is justifiable.
23. On future medical expenses, the Respondent submitted that the same was not speculative and was anchored on Doctor Wokabi's medical report dated 18th May 2023 which confirmed that if the Respondent's fractures will not have united within 6 to 8 months, the Respondent would require a surgery to fix a metal implant at the cost of Kshs. 300,000/=. Therefore, that future medical expense was justified.
24. In respect to costs, the Respondent submitted that costs follow the event and as such, he prayed for the same on the basis of section 27(1) of the *Civil Procedure Act*.



Analysis and Determination

24. Being a first appeal the court relies on the principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & others* [1968] 1EA 123 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. 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.”

25. I have considered the record of the trial court, the judgment and the submissions made by counsels appearing for the parties. The issues for determination in the appeal are:

1. Whether the Adjudicator erred in his finding on liability.
2. Whether the Adjudicator awarded damages beyond his pecuniary jurisdictional limit and if the answer is to the affirmative, the attendant consequences; and
3. In the event the appeal is sustainable after analyzing the attendant consequences, whether the learned Adjudicator exercised his discretion judiciously in awarding the damages.

Whether Adjudicator erred in his finding on liability

26. The respondent in his statement of claim alleged that he was on the 3rd April 2023 a lawful pedestrian along University Way near Central Police station when the appellant herein negligently, carelessly and recklessly drove her vehicle registration number KCD 538R thereby causing it to lose control and rammmed into the claimant thus causing him grievous injuries. The same was repeated in his witness statement dated 7th June 2023 and in his evidence in chief in court.

27. The claimant, however stated in his evidence in cross-examination that he is a video journalist. That on the material day he was in a media team that was covering a protest march by one Eric Omondi and his entourage along University way. That the protest was headed towards Central police station when the police hurled a teargas cannister to disperse the protestors. Everyone scampered for safety. He himself ran away and he was hit by a vehicle. It was his evidence that he did not see the vehicle which hit him as the tear gas had affected his eye sight. He denied that he dashed into the path of the motor vehicle when it hit him.

28. The respondent in her response to the claim denied the claim and stated that the accident was caused and or substantially contributed to by the negligence of the claimant by running across the road. She in her evidence adopted her witness statement in which she stated that she was on the material day driving along University Way heading towards Konja round about when she suddenly heard a loud bang and saw white cloudy smoke ahead, later realizing that it was teargas. She saw a group of men running away as police officers chased after them. She changed lane to the furthest lane away from the commotion. That as she proceeded to pass the commotion, one of the men suddenly and abruptly ran across the road onto the open highway and hit the left side of her car and by the time she saw him it was too late to swerve. That concerned about the unsafe environment and commotion, she drove up to Ken Gen Stima Plaza and waited until the situation calmed down. She proceeded to Central police station to report the accident.



29. The Adjudicator in his judgment stated that the accident occurred in an abnormal situation where everybody was scampering for dear life after police hurled a teargas cannister at protestors. The court considered the aspects of negligence in such a situation and held as follows:

Demonstrations and the hazy environment caused by hurling teargas canisters would definitely cause panic and impair the decision making process of all road users. Any person, such as the claimant, would scamper for the safety of his life. On the other hand, any driver such as the respondent would try to speed off from the scene, for her own safety as well. The question then, who should blame in circumstances such as this, when the driver finds herself in a collision cause, with a pedestrian who was running for his life?

By appreciating the chaotic environment that led to the occurrence of the accident, it would be unfair to find either party to be fully liable for occasioning the accident. In the circumstances, its only safe and reasonable to enter a ratio of 50:50 in respect to liability

30. In a road traffic accident claim, a court can apportion liability between the drivers involved in an accident where from the evidence adduced the court is unable to determine as which of the drivers is to blame for causing the accident. This was the position taken by the Court of Appeal in the case of Farah vs. Lento Agencies [2006] 1 KLR 123 the court expressed itself as follows:

“In our view, it was not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who was to blame for the accident. In this state of affairs, the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.....The trial court had two conflicting versions of how the accident occurred. Both parties insisted that the fault lay with the other side. As no side could establish the fault of the opposite party we would think that liability for the accident could be equally on both the drivers. We therefore hold each driver equally to blame.”

31. This can equally apply in a determination of liability between a driver and a pedestrian. The question in this appeal is whether there was evidence from which the court could determine as to which party was to blame for occasioning the accident.
32. It was the evidence of the respondent that he was hit by the motor vehicle when he was running away after the police hurled a tear gas cannister on protestors. He at first told the court that he was not on the road when he was hit. He later stated on further cross-examination that he was hit while on the left lane as one faces the police station. He however said that he did not see the vehicle that hit him as the tear gas had affected his eye sight.
33. It was the evidence of the driver of the motor vehicle RW4 that she hit the respondent while he was running to cross the road.
34. I have keenly gone through the evidence of both the respondent and the driver of the motor vehicle, the appellant. The respondent in his statement of claim as well as in his statement in support of his case and in his evidence-in-chief claimed that the driver of the vehicle lost control of the vehicle and rammed onto him. He however did not stick to this version when he came under cross-examination. He instead stated that he was actually on the run when he was hit by the vehicle. In the final end, the respondent ended up giving two versions as to how the accident occurred - first that it is the driver of the vehicle who lost control and rammed onto him and secondly that he was running when he was hit by the vehicle. Which of these two is the correct version as to how the accident occurred?



35. The appellant on the other hand maintained throughout that she hit the respondent when he was running across the road. In view of the conflicting evidence of the respondent as to how the accident occurred, the credible evidence could only be that of the appellant that the respondent was running across the road when he was hit by the vehicle. The appellant himself confirmed that he was running when he was hit by the vehicle. Though he stated in cross-examination that he was on the left lane when he was hit by the vehicle, I do not believe it as none of that was stated in his witness statement nor in his evidence-in-chief. It was, in my view, stated as an afterthought during cross-examination. It is therefore my finding that the respondent was hit by the appellant's vehicle when he was running across the road.
36. The appellant in her response to the statement of claim stated that the accident was "caused and/or substantially contributed to by the negligent conduct of the claimant in the manner he conducted himself by running across the busy road". The question then is whether the respondent was wholly liable for the accident or the appellant contributed to the occurrence of the accident.
37. The appellant in his evidence stated that he at first saw a group of men running away from the police and realized that the police had thrown a tear gas cannister on them. That when he was passing the commotion the respondent dashed across the road and hit into his vehicle.
38. The appellant as a person who was driving a vehicle had a duty of care to other road users. In *Masembe v Sugar Corporation and Another* [2002] 2 EA 434 (as cited in *Shadrack Kilonzo Kavoi v Gacheru Peter & 3 others* [2020] eKLR), it was held that:
- "When a man drives a motor car along the road, he is bound to anticipate that there may be things and people or animals in the way at any moment, and he is bound not to go faster than will permit his course at any time to avoid anything he sees after he has seen it...A reasonable person driving a motor vehicle on a highway with due care and attention, does not hit every stationary object on his way, merely because the object is wrongfully there. He takes reasonable steps to avoid hitting or colliding with the object...Whereas a driver is not to foresee every extremity of folly which occurs on the road, equally he is not certainly entitled to drive on the footing that other users of the road, either drivers or pedestrians, will exercise reasonable care. He is bound to anticipate any act which is reasonably foreseeable, that is to say anything which the experience of the road users teaches them that people do albeit negligently...There may be occasions when criminal or traffic offences are committed without giving rise to civil liability."
39. Having seen a commotion of men running away from the police, it was the duty of the appellant to drive with care and proper look out as there was a possibility of them running across the road. That is what a prudent driver would have done in the circumstances. From the photographs produced by the accident investigator who testified for the appellant, RW3, the road at the point of the accident was very wide. The appellant stated that she had changed lane to the right when she saw the commotion. That being the case the appellant should have seen the running man from a distance. She did not state what obstructed her from seeing him. I find that the appellant was liable in contributory negligence and thus contributed to the occurrence of the accident.
40. The respondent is however the one who bears the larger part of the blame for running across the road without due care and attention. He did not even see the accident vehicle which hit him. Evidence was adduced that there was a pedestrian bridge nearby which bridge is visible from the photographs of the appellant's accident investigator. The respondent did not explain why he did not run towards the bridge instead of running across the road. He did not explain why he did not take the pedestrian path



on the side of the road when running away from the police. The respondent was in the circumstances more to blame for occasion the accident.

41. From the foregoing, it is my finding that the trial Adjudicator erred in apportioning liability equally between the parties. I assess the appellant's liability at 30% and that of the respondent at 70%. The assessment of the trial court is set aside and substituted accordingly.

Whether the trial Magistrate awarded damages beyond his pecuniary jurisdiction limit

42. The Appellant argued that the learned Magistrate acted in excess of his pecuniary limit set by section 12(3) of the *Small Claims Court Act* which provides as follows:

“The pecuniary jurisdiction of the Court shall be limited to one million shillings.”

43. This was also affirmed in *Biosystems Consultants v Nyali Links Arcade (Civil Appeal E185 of 2023)* [2023] KEHC 21068 (KLR) (31 July 2023).

44. The rules of statutory interpretation states that unless there is any ambiguity to be cleared, the wording of a statute should be accorded a plain literal interpretation. Nothing ambiguous comes from section 12(3) of the *Small Claims Court Act* and therefore, the plain literal interpretation should be accorded to the provision.

45. Second, in interpreting the provision, it should be remembered that the Small Claims Court was created to adjudicate matters of low economic value being Kenya shillings one million and below as the subject matter. Therefore, the amount to be awarded as damages in any of the jurisdictional limbs of the Small Claims Court should not exceed the set limit of 1 Million Kenya Shillings.

46. The learned trial Magistrate apportioned liability at 50% on each of the parties meaning that whatever quantum that was awarded to the Respondent herein was reflective of 50% of the total. The question is, what was the amount of quantum awarded by the learned Magistrate at 100% so that the same would be reduced by 50% awarded to the Respondent?

47. The damages awarded by the trial court was Kshs. 1,230,732/= which were reduced by the court to Kshs. 615,366/= in proportion to the Respondent's fault, meaning that had the liability apportioned be borne solely by the Appellant, the Respondent was to be compensated to that tune of Ksh.1,230,732/=, which in my respective view goes beyond the set pecuniary jurisdictional limit of the Small Claims Court.

48. In the premises, I do agree with the Appellant that the Adjudicator at the Small Claims Court acted in excess of his set jurisdictional limit. The question of jurisdiction has been ably submitted before this court by parties, hence no need to rehash the same, save to stress that jurisdiction is such an important question as it goes to the core of the court's competence. Without jurisdiction, a court ought to down its tools. The trial court ought to have set the damages within its jurisdictional competence and reduce the same on the basis of the apportioned liability. The effect of the above is that the award is of no effect and is null and void.

49. Consequently, I need not engage on the third issue as to whether the award was excessive.

50. The upshot is that the appeal succeeds. The amount awarded as damages by the Adjudicator is vacated and set aside as it was awarded without the requisite jurisdiction. I revert the file back to the Small Claims Court for re-assessment of damages on the basis of apportionment of liability in the ratio of 30% being borne by the appellant and 70% by the respondent.



51. It is trite that costs follow the event as decreed by the Supreme Court in Jasbir Singh *Rai & 3 others v Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012*; [2014] eKLR. I award the appellant the costs of the appeal.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 26TH DAY OF SEPTEMBER 2024

J. N. NJAGI

JUDGE

In the presence of:

Mrs Ngala for Appellant

Ms Okinyi holding brief Mr Kibathi for Respondent

Court Assistant – Amina

30 days Right of Appeal

