



REPUBLIC OF KENYA



KENYA LAW
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**Okoth v West Kenya Sugar Co Ltd & another (Civil Appeal E019 of 2024)
[2024] KEHC 14653 (KLR) (25 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14653 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E019 OF 2024
S MBUNGI, J
NOVEMBER 25, 2024**

BETWEEN

BENSON OKOTH APPELLANT

AND

WEST KENYA SUGAR CO LTD 1ST RESPONDENT

AVENUE LEASE AND RENTALS EAST AFRICA LTD 2ND RESPONDENT

*(Being an appeal arising from the judgment and orders of the Honorable
Gladys W. Kiamah RM/Adjudicator delivered on 5th February 2024
at Kakamega in Small Claims Court Civil Suit No. E355 of 2023)*

JUDGMENT

Brief facts of the case.

1. Having been dissatisfied with the judgment proffered in Small Claims Court Civil Suit No. E355 OF 2023 at Kakamega, the appellant filed a memorandum of appeal dated 13.02.2024 on the following grounds: -
 - a. That the Learned Magistrate erred in law and in fact in not appreciating the provisions of Section 124 of the *Evidence Act* that 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.
 - b. That the Learned Magistrate erred in law and in fact in dismissing and shifting the evidential burden of proving the Respondent's case to the Claimant by stating and confirming the case was dismissed for failure to attend the 2nd medical examination yet the Claimant availed overwhelming evidence to corroborate the injuries he had suffered as a result of the accident.



- c. That the Learned Magistrate erred in law and in fact in dismissing the Appellant's/claimant's case for failure to attend the 2nd medical examination yet the Appellant's/Claimant's counsel clarified that the Appellant availed himself for the said 2nd examination.
 - d. That the Learned Magistrate erred in law and in fact hence denying the Claimant/Appellant the Constitutional Right to a fair trial as provided for by Article 50 of *the Constitution* by requiring him to appear before her on the same day to confirm whether he was subjected to the 2nd medical examination hence dismissing the Appellant's/claimant's case for failure to meet the short timeline of appearing before her that very same day of the judgement.
 - e. That the Learned Magistrate erred in law and in fact hence denying the Claimant/Appellant the Constitutional Right to a fair trial as provided for by Article 50 of *the Constitution* by not considering the Claimant's/Appellant's written submissions filed at the trial court on the 26th day of January,2024.
 - f. That the Learned Magistrate erred in law and in fact in not acknowledging the factors that ought to guide the courts in the dispensation of justice as provided for by Article 159 of *the Constitution* of Kenya which provides that justice shall be administered without undue regard to procedural technicalities; hence denying the Appellant substantive justice by dismissing the Appellant's/claimant's case for failure to attend the 2nd medical examination yet the Claimant's/Appellant's counsel clarified that the Appellant availed himself for the said 2nd examination
2. The appellant sought that:
- i. The Appeal be allowed.
 - ii. The Judgment and Orders of the Honorable Magistrate Gladys .W. Kiamah (Resident Magistrate/Adjudicator) in Kakamega Small Claims Court Civil Suit No. E 355 of 2023-Benson Okoth versus West Kenya Sugar Company Limited and Avenue Lease and Rentals East Africa Limited delivered on the 5th day of February,2024 at the Small Claims Court, Kakamega be set aside.
 - iii. The Appellant be awarded both special damages of Kshs. 590,000/- Inclusive of future medical costs as pleaded and proved and general damages be assessed by this Honorable Court guided by the medical evidence tendered before the trial court and precedents on award of general damages.
 - iv. The costs of this Appeal and those of the Lower Court be awarded to the Appellant.
3. The appeal was canvassed by way of written submissions.

Appellant's Case.

4. Vide submissions dated 17.07.2024, the appellant condensed the 6 grounds of appeal and submitted under one ground: Whether the trial court erred in law and in fact in not appreciating the provisions of Section 124 of the *Evidence Act*.
5. The appellant submitted that he provided overwhelming medical evidence on his injuries and had no obligation to prove the respondent's case that he had not suffered any injuries and that the second medical exercise was meant to assist the respondent's case, citing the case of Ahmed Mohammed Noor v Abdi Aziz Osman (2019) eKLR.



6. It was the appellant's submission that the decision of the trial court should be overturned because it was improper for the trial magistrate to shift the burden of proving the respondent's case to the claimant/appellant.
7. On quantum, the appellant submitted that they suffered injuries to the tender right thigh, right tibia fracture, fracture right proximal tibia and bruises on the distal leg and lacerations. He further submitted that he testified that he had not fully recovered from the injuries sustained during the accident and the P3 Form and treatment notes produced corroborate the present complications.
8. He further submitted that an award of 600,000 – 800,000/- would be sufficient and referred the court to the following authorities:

The case of Godfrey Wamalwa Wamba & another vs. Kyalo Wambua [2018] eKLR, the case of Francis Ndungu Wambui & 2 others v VK (a minor suing through next friend and mother MCWK) [2019] Eklr, the case of David Kimathi Kaburu v Dionisius Mburugu Itirai (2017) Eklr, the case of Barnabas v Ombati (Civil Appeal E43 of 2021) [2022] KEHC 12136 (KLR) and the Case of Pestony Limited & another v Samuel Itonye Kagoko (2022) Eklr
9. Lastly, the appellant submitted that he produced receipts amounting to Kshs. 40,550/- as pleaded and the doctor recommended future medical expenses amounting to Kshs. 550,000/-. He submitted that a demand letter was issued in vain, and urged the court to award costs and interests of the suit.

Respondent's Case.

10. In its submissions dated 25.07.2024, the respondent submitted that the trial court in discharging its duties in the matter, not only gave the plaintiff chances to attend re-examination as prayed for by the defendant's counsel but also warned and ordered that if the plaintiff does not attend the re-examination, the suit will be dismissed.
11. It was the respondent's submission that the plaintiff had all the given time and opportunity to comply with the trial court's order, noting that the court being a small claims court is limited to timeline within which to hear and finalize its matters and continuous adjournment would not only delay the court in administering justice, but also would lead to backlogs that have been severally held to be slowing down the wheels of justice referring the court to the case of Japheth Pasi Kilonga & 8 Others v Mombasa Autocare Limited 2015] EKLR.
12. Further, the respondent submitted that the court in its judgment also outlined all the various instances and chances given to the claimant to attend re-examination. The respondent further submitted that court orders are aren't made in vain, and the consequences of non-compliance was always known to the claimant and his counsel, and as a consequence the claim was dismissed with costs to the respondent.
13. Lastly, the respondent submitted that the second medical examination is prior to the determination of liability as per the provisions of Section 10 (3A) of the Insurance (Motor Vehicles Third Party Risks) (Amendment) Act and that the respondent had intended to rely on the documents for their defence and also to verify injuries and quantification of damages.

Analysis and Determination.

14. 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.”

15. I have evaluated the proceedings and judgment by the trial court, the memorandum of appeal and submissions.
16. It is clear that in the judgment, the trial magistrate did not render a judgment on merit. She dismissed the claimant’s case for the claimant failed to comply with the court’s order to present himself before a doctor appointed by the respondent for purposes of a 2nd medical examination.
17. The trial court had taken evidence of the claimant and his witnesses and the claimant’s case was closed. What was remaining was the respondent’s case. The 2nd medical examination of the claimant was to be used in support of the respondent’s case.
18. From the record of date 5th February, 2024, Ms. Onyango for the claimant told the court the claimant attended re-examination and the examination was done. Mr. Oyugi for the respondent told the court that he went to the doctor’s office and found that the claimant had not been examined. Ms. Onyango further told the court that she had called the claimant but he did not have a smartphone and in turn called Mr. Chanzu who confirmed to Mr. Oyugi that the claimant was examined and there was no letter from Mr. Oyugi to him on the 2nd medical examination. She further told the court that Mr. Chanzu is the counsel on record for the claimant. Mr. Oyugi told the court that their doctor could not appear virtually at that time and that when he called the office the secretary confirmed that there was no record. Then the court proceeded to make its decision and dismissed the claimant’s case.
19. From the above, it is clear that the only person who could confirm whether he was examined or not was the claimant, and the second person was the doctor.
20. On the date the suit was dismissed, neither of them could be reached. Therefore, to me, the court rushed to make a decision to dismiss the suit without fully confirming whether the 2nd medical examination was done or not.
21. Dismissing the suit where evidence had been taken to a point where the claimant had closed his case, was unfair. The trial magistrate had other options to punish the claimant if really there was actual evidence to show that he deliberately failed to go for the 2nd medical examination. The claimant had a right to have his evidence considered on its own merit.
22. The need for fair trial as provided under Article 50 of *the Constitution* of Kenya and also having found that there was no proof that the claimant was not examined for the 2nd medical examination, for the interest of justice, I order that this matter be retried afresh before a different Magistrate other than Honorable Gladys W. Kiamah. The matter to be mentioned before the Small Claims Court for further directions on 6th January, 2025.
23. Therefore, the judgment dated and delivered by the trial court on 2nd February, 2024 is hereby set aside.
24. No orders as to costs in this appeal, no party can be blamed for what happened in the lower court.
25. Right of appeal 30 days.



DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 25TH DAY OF NOVEMBER, 2024.

S.N MBUNGI

JUDGE

In the presence of :

Appellant – absent

Respondents – absent

Mr. Oyugi holding brief for Omayya for the appellant present.

Court Assistant – Fred Owegi

