



REPUBLIC OF KENYA



**KENYA LAW**  
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**Okuot alias Adkinyi Domtila v Adembesa & another (Civil Appeal  
E100 of 2021) [2023] KEHC 25147 (KLR) (31 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 25147 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL E100 OF 2021  
MS SHARIFF, J  
OCTOBER 31, 2023**

**BETWEEN**

**DIMITILA AKWITI OKUOT ALIAS ADKINYI DOMTILA ..... APPELLANT**

**AND**

**HUMA OSCAR ADEMBESA ..... 1<sup>ST</sup> RESPONDENT**

**ANTHONY WESONGA OWPORA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgement and decree of Hon M. Agutu  
SRM delivered in Kisumu CMCC 640 of 2017 on 5/2/2021)*

**JUDGMENT**

1. This appeal emanates from a dismissal of the appellant's case by the trial court. Before the trial court, the appellant had sued the respondents claiming damages as a result of injuries she sustained after being involved in a road traffic accident involving the respondent's motor vehicle.
2. After hearing the matter, the trial court found the appellant had not proved her case and dismissed the suit. The appellant being aggrieved moved this court by way of appeal raising the following grounds;
  - a. That the learned trial magistrate erred by failing to apprehend the principle of deciding a case on a balance of probabilities.
  - b. The learned trial magistrate misdirected himself in finding that there was no evidence to establish who was to blame in the accident whereas the same was proved.
  - c. The learned trial magistrate erred in failing to award the appellant damages yet she was a fare paying passenger in the respondent's vehicle.
  - d. The learned trial magistrate erred in law by dismissing the appellant's case against the respondents yet she was not liable in negligence or contributed to the accident in any way.



- e. The learned trial magistrate erred by dismissing the appellant's suit yet she had discharged her burden of proof against the respondents.
3. The appellant's case before the trial court was comprised in the testimony of 4 witnesses whose testimony briefly was as follows;
4. PW-1 Dimtila Akitwi Okuot stated that she was aboard a motor vehicle heading to ukwala when on the way, the vehicle she was travelling in was hit by the respondent's motor vehicle whose registration number she could not recall. That as result of the impact, she lost consciousness and found herself in Aga Khan Hospital. That she was admitted therein from 24<sup>th</sup> march, 2017 to 31<sup>st</sup> March, 2017.
5. PW-2 Dr. Jack Okumu from Aga Khan hospital stated that the patient was admitted into their facility after being involved in a road traffic accident.
6. PW-3 professor were okombo, a physiscian presented a medical report showing the appellant sustained as left thigh injuries, chest injuries and left hand injuries. In his opinion, the appellant sustained soft tissue injuries.
7. Pw-4 was PC Hillary masiga who confirmed the occurrence of the accident. He confirmed that the driver, the 2<sup>nd</sup> respondent was charged in court and fined Kshs 40,000/-
8. The respondents on their part did not call any evidence. Their case was closed.
9. By directions of this court, the appeal was disposed of by way of written submissions. Only the appellant complied. The same is on record and due consideration has been given to them.

#### **Analysis and determination.**

10. This being a fist appeal, the duty of this court is as was stated in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, where it was stated;
 

“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”
11. The facts in this case are as summarized in the preceding paragraphs and the only issue at this stage is whether the trial court erred in dismissing the appellant's case. From the record, the trial magistrate in declining the suit found that it would have been prudent to produce the sketch maps and plans in determination of who was to blame for the accident. That further, despite the allegation that the driver had been fined for careless driving, the same had not been proved. The trial magistrate nonetheless appreciated that failure to call an investigating officer is not fatal in such claims.
12. In light of the finding by the trial court, I have carefully perused the evidence by the appellant, the said police officer as well as the documentary and other evidence tendered in that court.
13. The appellant stated that she was fare paying passenger aboard motor vehicle registration number KBN 724M when the same was hit by trailer whose registration number she couldn't recall due to the unconsciousness she underwent. The police officer (PW-4) on his part stated that the trailer was registration number KBT 842C. He confirmed that the accident indeed occurred and the truck's driver was charged. This is confirmed by the abstract produced by the said police officer as pexh 7.



14. From this set of evidence, it is not not in dispute that the accident occurred and the driver was charged and found guilty.
15. On the issue that the plaintiff did not produce into evidence the sketch maps and plans is far fetched since from the available evidence, the accident occurred and the driver charged. This obviously points to an act of wrong doing and or negligence on the 2<sup>nd</sup> appellant's part.
16. Similarly, the respondents called no evidence showing that the accident may have occurred due to the negligence of the kdriver carrying the appellant. I am aware that even if the defence called no evidence, the trial court is duty bound to satisfy itself that the evidence adduced on behalf od the plaintiff (in this case the appellant) was sufficient in terms of Section 107 and 109 of the Evidence Act.
17. Having said as such, it is my finding that the appellants case was proved to the required standards and this calls for the setting aside of the trial magistrate's finding on liability and substituted with an order that the respondents are hereby to be jointly and severally held wholly liable for the accident.
18. Upon the above finding, the next issue is assessment of damages awardable to the appellant. The trial magistrate held that had he been to award damages under the head of pain and suffering, he would have awarded kshs 110,000/- and kshs 7,897/- in special damages.
19. I find no fault to set aside the proposed awards and hereby proceed to award the same in the sum of kshs 110,000/- in general damages for pain and suffering and Kshs 7,897/- in special damages.
20. Interest is awarded on the special damages from the date of filing suit and from the date of judgement herein for general damages. The appellant is also awarded costs of this appeal.
21. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KISUMU THIS 31<sup>ST</sup> DAY OF OCTOBER, 2023.**

**MWANAISHA S. SHARIFF**

**JUDGE**

