



**Musabi v Dodha & another (Civil Appeal E407 of 2024)
[2025] KEHC 2473 (KLR) (Civ) (13 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2473 (KLR)

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

CIVIL

CIVIL APPEAL E407 OF 2024

AB MWAMUYE, J

FEBRUARY 13, 2025

BETWEEN

KEVIN MUSABI APPELLANT

AND

SHREYA DODHA 1ST RESPONDENT

VISHAL KAUSHIK GUDKA 2ND RESPONDENT

*(Being an appeal from Judgement and Decree of Hon. V.K. Momanyi
Resident Magistrate issued against the Appellant on the 23rd of
February 2024 in the Small Claims Court Nairobi no. E6100 OF 2023)*

JUDGMENT

1. This Appeal arises out of the decision of Hon. V.K. Momanyi (RM) dated 23rd February 2024, where the Trial Court dismissed the Appellant's claim in part for failure to prove his injuries on a balance of probabilities and for lack of strict proof of special damages.
2. Aggrieved by the judgment, the Appellant filed this appeal raising two main grounds:
 - i. That the Learned Hon. Magistrate erred in law and fact in finding that the plaintiff had on a balance of probability failed to prove his injuries resulting from the accident that occurred in 27th February 2023.
 - ii. That the Learned Hon. Magistrate erred in law and fact in arriving at a finding that the Appellant had not proved his claim under Special damages despite the Appellant producing receipts on the same.



3. The Appeal was to be canvassed by way of written submissions. The Appellant filed written submissions dated 24th September, 2024. The Respondents did not file any submissions. I have considered the pleadings, evidence adduced in the lower court, the submissions of the parties, and the relevant legal principles.

Issues, Analysis and Determination

4. This being the first appeal, the court will re-evaluate evidence adduced in the lower court so as to arrive at an independent determination of the matter, noting that that the lower court had an opportunity to observe the demeanour of witnesses as they testified.
 - i. Whether the Trial Court erred in finding that the Appellant failed to prove injuries arising from the accident.
5. The Trial Court held that the Appellant failed to prove the injuries he sustained from the accident of 27th February, 2023. The medical reports adduced at the lower court emanated from Avenue Healthcare and bear a date that is inconsistent with the undisputed records of the accident. The date on the report is 25th February, 2023 whereas the accident is agreed by the Parties to have occurred on 27th February, 2023.
6. On record I see that there is a P3 Form dated 7th August, 2023, reproducing the impugned injuries noted in the Medical Report by Avenue Healthcare. The P3 Form notes that the accident was reported on the 27th February, 2023. It further records that the lower limbs of the Appellant sustained a fracture on the left ankle medial malleolus transverse. On the degree of the injuries, it was noted they were of the nature of grievous harm.
7. The receipt prepared by Avenue Healthcare where the Appellant was first attended to notes that the total expenses was Kshs. 12, 513/- and further indicates that the Bill Date was 25th February, 2023, two days before the accident.
8. The Trial Court took note of the inconsistencies and surmised that the Appellant chose to rely on evidence that contradicted his pleadings and he did not amend his pleadings to reflect the correct position.
9. The Respondent did not take issue with the inconsistency and did not mount any challenge thereof, at least from a review of the proceedings as well as the pleadings exchanged at the lower court.
10. In his written submissions filed in support of the Appeal, the Appellant relies on the case of Henry Binya Oyala vs. Sabera O. Itira (2011) where the court cited with approval the case of Ben Ocharo & Others vs. Kenya Farmers' & Cooperative Society, Kisii HCCA No. 91 of 2006 where the court held that:

“The primary source of information about injuries sustained in an accident if at all is by the victim himself.....Accordingly, a victim’s own statement with regard to the injuries should not be easily dismissed merely on the grounds that it was not matched by initial treatment from the hospital.”
11. I am of the view that what a Trial Court should do when presented with a piece of evidence that seems misaligned with the rest of the averments is to place it in the context and allow some benefit of doubt, especially in light of the fact that there may exist an honest mistake that does not go to the root of the dispute.



12. In the present case, there was a P3 form, a police abstract, and a medical report by a Dr. Okere that together corroborated the Appellant's averments that the accident happened on the 27th February, 2023, and the Appellant sustained the injuries as noted in the reports thereof.
13. Moreover, the issue on chronology of the events was not raised and tried, and as such, the Appellant did not get an opportunity to clarify. That notwithstanding, there were other pieces of evidence that on a balance of probability proved that the Appellant actually sustained the injuries as pleaded.
14. Accordingly, on this issue I hold that the Appellant proved his injuries satisfactorily.

ii. Whether the Learned Magistrate erred in law and fact in arriving at a finding that the Appellant had not proved his claim under Special Damages

15. When dealing with Special Damages the Trial Court reasoned that they need to be specifically pleaded and strictly proved. The court noted that the receipts from Avenue Healthcare predated the date of the accident; and the amount spent for the medical report was overly inflated; and that the receipt was not stamped as required under Section 19(1) of the Stamp Duty Act. The Learned Magistrate questioned the authenticity of the amount thereon and refused to award the same.
16. While the concerns are valid, the Learned Trial Magistrate did not indicate the parameters employed to dismiss the amounts as inflated. It is noteworthy that the Respondents did not challenge the amounts on the receipts – if they did, the Appellant could have had the opportunity to seek leave to adduce further evidence that probably would have answered (or not) the suspicious figures.
17. In *Henry Binya Oyala vs. Subera O. Itira* (2011) Eklr, Justice Asike Makhandia while confronted with a similar issue noted in his obiter that:

“...in any case the Respondent had not asked in his submissions that the Appellant's suit be dismissed on that account. Courts should be wary of striking out suits on issues not canvassed before it. That draconian act has the effect of denying a party justice on a ground that he could perfectly have an answer to if it had been pleaded and canvassed beforehand.”
18. In the absence of a stamp as required by the provisions of the Stamp Duty Act, I agree with Justice Wananda in *Idris & Another vs. Lime & Another* (Suing as the legal representatives in the estate of Samson Ndunde Lime (Deceased) Civil Appeal No. E20 of 2022 where the Learned Judge found that the duty to affix a revenue stamp on a receipt is upon the issuer and not the payee. He reasoned that to decline admission of such receipts would be punishing an innocent party.
19. Ergo, I set aside that part of the Trial Court's judgment that found the Appellant had not proven his injuries on a balance of probability and substitute with a finding that the Appellant had, on a balance of probability proven his injuries. Accordingly, I award the Appellant damages of Kshs. 500, 000/- as assessed by the Trial Court in view of comparable injuries.
20. Further, I set aside that part of the Trial Court's judgment that found the Appellant had not strictly proved the medical expenses incurred as a result of the accident and substitute thereof with a finding that the Appellant strictly proved the medical expenses incurred. Accordingly, I award special damages of Kshs. 29, 063/- as pleaded.
21. The Appellant shall have the costs of this Appeal as well as the costs of the lower court.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 13TH DAY OF FEBRUARY, 2025.

BAHATI MWAMUYE



JUDGE

