



**Osuma v Attorney General (Civil Appeal E030 of 2024)  
[2025] KEHC 5740 (KLR) (9 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 5740 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CIVIL APPEAL E030 OF 2024**

**DK KEMEL, J  
MAY 9, 2025**

**BETWEEN**

**MAVINE OCHIENG OSUMA ..... APPELLANT**

**AND**

**HON ATTORNEY GENERAL ..... RESPONDENT**

*(Being an appeal from the judgment of the Hon. J.P. Mkala Resident Magistrate in Siaya Chief Magistrate's Court Civil Suit No. E028 of 2023 delivered on 12.06.2024)*

**JUDGMENT**

1. The Appellant approached the trial court vide a plaint dated 12<sup>th</sup> April 2023, seeking for compensation for injuries suffered after allegedly being attacked by police officers who had carried out a raid at Ngiya Market in Siaya on 30/8/2017. The Appellant averred that he was severely injured without justifiable cause or provocation. He prayed for general damages plus costs of the suit.
2. The Respondent through a defense dated 26<sup>th</sup> October 2023 denied any liability.
3. The matter went to full trial where the trial magistrate concluded that the Appellant failed to prove his case on a balance of probability and dismissed it with costs to the Respondent.
4. Aggrieved, the Appellant filed his Memorandum of Appeal dated 11<sup>th</sup> July 2024 where he raised the following grounds of appeal:
  - i. The trial magistrate misdirected himself by relying on the wrong principles of law when determining liability thereby dismissing the Appellant's case herein.
  - ii. The trial magistrate erred in law and facts by failing to adequately evaluate the evidence and exhibits and thereby arrived at a decision unsustainable in law.



- iii. The trial magistrate erred in law and fact by ignoring the Appellant's submissions, hence arriving at a wrong decision in awarding damages.
- iv. The learned trial magistrate erred both in law and fact in failing to appreciate the fact that the Appellant had a good case against the Respondent.
- v. The learned trial magistrate grossly misdirected himself in treating the evidence before he superficially and consequently coming to a wrong conclusion on the aspect of liability.
- vi. The learned trial magistrate misapprehended the evidence on record to material degree resulting in him arriving at a wrong conclusion.

Reasons wherefore, the Appellant prayed that the appeal be allowed with costs and that the trial court's judgement be set aside.

5. Being a first appeal, I have a duty to appreciate the entire evidence and subject it to a fresh exhaustive scrutiny and arrive at my own independent conclusion. I have to bear in mind that I did not have the opportunity to hear or see the witnesses and hence I must give an allowance for that. (See *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968] 1EA 123; *Peters v Sunday Post Ltd* [1958]EA 424; *Mary Wanjiku Gachigi v Ruth Muthoni Kamau* ( Civil Appeal No. 172 of 2000. ( Tunoi, Bosire & Owuor JJA); *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* Civil Appeal No. 345 of 2000.(Okubasi, Githinji & Waki JJA).

6. The Appellant called one witness while the Respondent did not call any witness.

7. PW1 Mavin Ochieng Osuma adopted his witness statement dated 6/2/2018 as his evidence in chief. He stated that he was assaulted by police officers who were in police uniform, carrying guns and buttons. That he was not among the protestors but that he was a motorcycle rider. That he was taken to Siaya Referral Hospital but there were no doctors and so he was taken to Gemifa Medical Services where he was treated as an outpatient. He produced a copy of his ID and receipt from Gemifa Medical Services as well as a demand notice to the Attorney General. That after the hospital, he went to the police station to report but they refused to record his statement. That he did not go to Independent Police Oversight Authority (IPOA). He blamed the police officers because they used their weapons carelessly and that he would like the government to compensate him.

On cross examination, he stated that he lost the treatment notes and that the incident took place on 30/10/2017 and that the receipt from Gemifa is dated 12/12/2018. That he went back to the hospital one year later when he experienced pain in the bullet wound area. That he did not file any treatment notes or medical report. That he was unable to show the specific injury inflicted by a bullet. That he has witnesses who would prove that he was hit on the right palm with a bullet.

8. The Appellant then closed his case. The Respondents did not call any witnesses and closed its case.

9. The appeal was canvassed by way of written submissions. However, at the time of writing this judgment, the Appellant had not filed his submissions as directed by the court on 12/3/2025. The Respondent's submissions are dated 11<sup>th</sup> February 2024.

10. The Respondent submitted that the trial magistrate correctly determined the case using the evidence, or lack of it as adduced by the Appellant during trial. The Appellant alleged that as he rode his motorcycle at Ngiya market, he was accosted by police officers who attacked and shot him. The Respondent submitted that the Appellant did not adduce any evidence to show that he reported to any authority such as area chief or the Independent Police Oversight Authority. On the issue of injuries sustained, the respondent submitted that no treatment notes were produced as evidence.



11. The Respondent relied on section 107 of the *Evidence Act* Cap 80 Laws of Kenya which provides that whoever alleges must prove. The Respondent submitted that the Appellant failed to prove his case before the trial court and therefore the judgment of the trial court should be upheld and the appeal dismissed.
12. I have considered the record of appeal together with the Respondent's submissions. I find the issue for determination is whether the Appellant proved his case on a balance of probabilities.
13. The Appellant having lodged his claim against the Respondent was duty bound to prove the same before the trial court in accordance with the dictates of the *Evidence Act*. Section 107, of the *Evidence Act* provides that:
  1. 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.
  2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that personIn the case of *Susan Mumbi v Kefala Grebedhin* (Nairobi HCC No. 332 of 1993) as quoted by the Respondent, the court held thus:

“The question of the court presuming adverse evidence does not arise in civil cases. The position in civil cases is that whoever alleges has to prove. It is the Plaintiff to prove her case on a balance of probability, and the fact that the defendant does not adduce any evidence is immaterial.”
14. In another case of *Strat pack Industries v James Mbithi Munyao*; Nairobi HCCA No. 152 of 2013, the court held that:

“It is trite that the burden of proof of any fact or allegation is on the Plaintiff and he must prove a casual link between someone's negligence and his injuries; he must adduce evidence from which, on a balance of probabilities a connection between the two can be drawn as 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”
15. The Appellant in my humble view failed to draw a nexus between his injuries and the actions of the police as alleged. He did not make any report to the authorities such as the chief or even Independent Police Oversight Authority (IPOA). Further, there is no treatment notes or medical report that show a history of treatment of a bullet wound and/or any other injuries alleged to have been incurred. The Appellant merely produced a receipt of payment of medical services rendered by a private clinic. He did not convince the court as to why he was not able to seek treatment at a public hospital such as Siaya County Referral Hospital or any public dispensary. The Appellant was at great pains to explain why he did not have any treatment notes or medical report regarding his injuries. Further, the Appellant did not even call a doctor to testify regarding the injuries allegedly sustained from a bullet wound. The trial court observed that the Appellant showed his right palm but which showed no visible scars as a result of the injuries and that there were no physical mark or scar for bullet wound which could not be identified. It is therefore clear that the Appellant had an uphill task before the trial court and that he miserably failed to present his case beyond the threshold of proof. The fact that the Respondent did not tender evidence in defence, the same did not relieve the Appellant from his obligation to prove his claims on a balance of probabilities against the Respondent. I find that the Appellant failed to prove that the Respondent is liable in damages to him. He was under obligation to prove that the Respondent



owed him a duty of care and that it had breached that duty and as a result he sustained injuries for which he seeks compensation. As the Appellant failed to prove liability against the Respondent, I find that the trial court's finding thereon was quite sound and must be upheld.

16. Even though the Appellant failed to prove the issue of liability against the Respondent, the trial court ought to have assessed the quantum of damages. It is noted that the Appellant did not call a doctor who would be best placed to give an expert opinion regarding the extent of injuries sustained by the Appellant. From the Appellant's evidence, it is clear that the alleged injuries were soft tissue in nature. It is instructive that the Appellant showed the trial court his right palm which did not show any visible scars and hence if there had been injuries, then the same must have healed by then. I find that had the Appellant proved his claim, then an award of Kshs 100,000/ would have been adequate as general damages for pain, suffering and loss of amenities.
17. The upshot of the foregoing analysis is that I find the Appellant's appeal is bereft of merit. The same is hereby dismissed. Each party to bear their own costs.

It is so ordered.

**DATED, AND DELIVERED AT SIAYA THIS 9<sup>TH</sup> DAY OF MAY, 2025.**

**D. KEMEI**

**JUDGE**

In the presence of:

M/s Wafula.....for Appellant

N/A Esendi.....for Respondent

Okumu.....Court Assistant

