Owiti v Situma t/a Eagle Health and Clinic (Civil Appeal E949 of 2023) [2025] KEHC 5824 (KLR) (Civ) (8 May 2025) (Judgment)

Neutral citation: [2025] KEHC 5824 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E949 OF 2023

TW OUYA, J

MAY 8, 2025

BETWEEN

MAURICE OTIENO OWITI ..... APPELLANT

AND

AARON SIKUKU SITUMA T/A EAGLE HEALTH AND CLINIC ..... RESPONDENT

(Appeal from the Judgment of the Small Claims Court at Nairobi (Hon. V. Mochache dated 18th August 2023 in Claim no. E1934/2023)

JUDGMENT

1. Through a memorandum of appeal dated 18th September 2023, the appellant is seeking that judgment to be entered as against the respondent for the following Orders:

   a. That the Judgment entered by the Small Claims Court be set aside.

   b. That the Court be pleased to determine that the Respondent's driver recklessly drove the vehicle causing the accident.

   c. That the appeal against the lower Court's decision be allowed.

   d. That the costs of this appeal and those of the proceedings in the Small Claims Court be awarded to the Appellant."

2. The subject appeal challenges the decision of the trial Court delivered on 18th August 2023 in Claim No. E1934/2023 which was instituted by the Appellant (then Respondent) by way of a claim dated 28th April 2023 as amended on 5th June 2023. The claimant at the trial Court (now Respondent) averred that on 2nd April 2023 he was driving his motor vehicle registration number KDJ 206F

which vehicle was operating as an ambulance vehicle along the Nairobi Expressway whereupon the Respondent's recklessly drove his motor vehicle registration number KBY 194Y and rammed the Claimant's vehicle and damaged the same. At the trial Court, the Claimant sought special damages, loss of user as well costs of the suit and interest on all the above. The Respondent at the trial Court (now Appellant), responded to the claimant's claim through a Statement of Response dated 12th May 2023 and Further Amended Statement of Defence dated 19th June 2023.

3. The suit before trial Court proceeded for hearing on 17th July 2023 whereby, the Claimant called four (4) witnesses and the respondent also testified. Thereafter, both parties filed written submissions. The trial court found in favor of the respondent finding the appellant 100% liable and awarding the respondent damages in the tune of Kshs.778,769.00. The appellant being dissatisfied with the said outcome filed an appeal premised on grounds that:

    1. The trial Court erroneously captured the Appellant's testimony which resulted in the making of an erroneous finding that the appellant purposely refused to make way for the ambulance.

    2. The trial Court erred in law in shifting the burden of proof in the suit before it, thereby imposing an obligation upon the Appellant to prove that he did not recklessly drive his motor vehicle.

    3. The trial Court erred in law in holding the Appellant wholly liable for the accident despite the demonstrable contributory negligence on the part of the Respondent.

    4. The trial Court erred in law in misapplying Rule 83 of the *Traffic Act* to mean that the respondent is by virtue of having priority of way excused from taking any care while using the road.

    5. The trial Court erred in law by failing to apportion liability to the Respondent for failing to maintain a safe distance while driving as required by the Traffic Rules.

    6. The trial Court erred in law in selectively considering the evidence on record and particularly, ignoring evidence that was prejudicial to the Respondent's case.

    7. The trial Court erred in law in failing to determine the consequence of material contradictions in the evidence of the Respondent, his witnesses and their pleadings.

    8. The trial Court erred in relying on hearsay evidence in arriving at the conclusion that the appellant changed lanes without notice.

    9. The trial Court erred in dismissing the documents adduced by the purported engineers for the Respondent but then proceeded to hold that the Respondent had nonetheless proved special damages.

    10. The trial Court erred in determining that the Respondent had proven special damages based on an expert report whose maker was never presented to Court to testify on the contents of the said report."

4. The appeal was dispensed by way of written submissions.

Appellant's Submissions

5. The Appellant through his counsel filed written submissions dated 17th July 2024 raising three (3) issues; Whether the Court's finding of 'guilt' on the Appellant's part were fully supported by the evidence on record; Whether the Court erred in ignoring evidence that was prejudicial to the

Respondent's case and Whether the Respondent proved its claim before the trial Court as to warrant grant of the prayers sought.

6. The Appellant subscribed to the position that the trial Court misapprehended the evidence presented before it by arriving at the conclusion that the Appellant changed lanes and suddenly joined the lane occupied by the ambulance belonging to the Respondent without notice. It was the Appellant's contention that he steered his vehicle to avoid hitting the boulders placed at the entrance of some sections of the Nairobi Expressway which was misunderstood by the trial Court as switching of lanes by the Appellant.

7. Further, the Appellant argued that the photographic evidence adduced before the trial Court clearly indicated that it was the Respondent's vehicle rammed into Appellant's vehicle in the latter's middle section which is inconsistent with the trial Court's finding that the Appellant's vehicle is the one which rammed into the Respondent's ambulance.

8. It was further submitted that as the maker of the first assessor's report relied upon by the trial Court in awarding special damages to the Respondent did not testify before Court nor file a Witness Statement, the trial Court misdirected itself by relying upon the aforesaid report.

9. The Appellant argued that the police officer who testified in support of the Claimant's case at the trial Court admitted during cross-examination that he did could not identify the officer who prepared the abstracts presented before the trial Court. Relying on the holding of the Court in the case of Steve Mwasya & Another V Rosemary Mwasya [2015] eKLR, the Appellant submitted that a police abstract report unaccompanied by an investigative report which expounds the same, does not amount to conclusive evidence of the facts in issue in a dispute.

The Respondent's Submissions

10. The Respondent through their counsel filed written submissions dated 21st June 2024.

11. The Respondent pointed out that the appellant's grounds of appeal run afoul of the provisions of Section 38(1) of the *Small Claims Court Act* which requires appeals to this Court against decisions of the Small Claims Court to be on "matters of law." Further reliance was sought in the decision of the Court in the cases of Amunga V Muisu (Civil Appeal no. E725 of 2022) [KEHC 2504 (KLR) (Civ); Kenya Breweries Ltd V Godfrey Odoyo [2010] eKLR; and, Bashir Haji Abdullahi V Adan Mohammed Nooru & 3 Others [2014] eKLR, to anchor the preceding submission.

12. In response to the appellant's argument that the trial Court wrongly relied on the report submitted by Explore Auto Assessors, the Respondent argued that Section 32(2) of the *Small Claims Court Act* provides for the exclusion of strict rules of evidence in the operations of the Small Claims Court. Further guidance was placed on the provisions of Rule 5 (1) of the *Small Claims Court Act* in support of the proposition that the trial Court rightfully relied upon the report submitted by Explore Auto Assessors.

Analysis

13. This Court has carefully perused the pleadings, the totality of the evidence adduced before the trial Court as well as the rival submissions of the parties filed before the trial Court. The court notes that the substratum of this appeal is premised on three issues for determination: Whether the holding of liability at 100% against the Appellants was justified, Whether the trial court misapplied Rule 83 of the *Traffic Act*, whether this appeal is merited and who should bear the costs of this appeal.

14. The Respondent urged the Court to dismiss the subject appeal as it raises issues of fact as opposed to matters of law. Section 38(1) and (2) of the *Small Claims Court Act* (No. 2 of 2016) provides follows:

> "(1) A person aggrieved by the decision or an order Appeals. of the Court may appeal against that decision or order to the High Court on matters of law.
>
> (2) An appeal from any decision or order referred to in subsection (1) shall be final."

15. In the case of *Fidelity Insurance Company Ltd v Korir (Civil Appeal 13 of 2023)* [2024] KEHC 3365 (KLR) (22 March 2024) (Ruling), the Court appreciated the meaning and import of the provisions of Section 38 of the *Small Claims Court Act* as follows:

> "What the above means is basically that under Section 38 of the *Small Claims Court Act*, 2016, the High Court, while handling an appeal from the Small Claims Court is not permitted to substitute that Court's decision with its own conclusions based on its own analysis and appreciation of the facts unless the findings are so perverse that no reasonable tribunal would have arrived at them."

16. Further, in the case of Directline Assurance Co. Ltd v Nyawa (Civil Appeal 157 of 2022) [2023] KEHC 20201 (KLR) (22 June 2023) (Judgment), the Court reasoned as follows:

> "However, appeals from the small claims court are different. This is the first and last Appeal. It is an appeal on points of law. This then takes the same turn as an appeal to the court of appeal, where the court gives deference to finding of fact. Only when the findings of fact are based on no evidence will that be seen as a point of law."

17. Upon careful evaluation of the Appellant's Grounds of Appeal numbered 1, 6, 7, 8, 9 and 10, the Court is satisfied that the foregoing raise issues of fact; thereby, running afoul of the provisions of Section 38 of the *Small Claims Court Act* as reproduced hereinabove. The same are hereby dismissed for want of compliance with Section 38 of the *Small Claims Court Act*. In the premises, the Court holds and finds that only the Grounds numbered 2, 3, 4 and 5 in the current appeal raise matters of law as required by Section 38 of the *Small Claims Court Act*. Accordingly, the Court will consider whether the same are merited.

18. Section 32 of the *Small Claims Court Act* stipulates as follows:

> "(1) The Court shall not be bound wholly by the Rules of evidence.
>
> (2) Without prejudice to the generality of subsection (1), the Court may admit as evidence in any proceedings before it, any oral or written testimony, record or other material that the Court considers credible or trustworthy even though the testimony, record or other material is not admissible as evidence in any other Court under the law of evidence.
>
> (3) Evidence tendered to the Court by or on behalf of a party to any proceedings may not be given on oath but that Court may, at any stage of the proceedings, require that such evidence or any part thereof be given on oath whether orally or in writing.

(4) The Court may, on its own initiative, seek and receive such other evidence and make such other investigations and inquiries as it may require.

(5) All evidence and information received and ascertained by the Court under subsection (3) shall be disclosed to every party.

(6) For the purposes of subsection (2), an Adjudicator is empowered to administer an oath.

(7) An Adjudicator may require any written evidence given in the proceedings before the Court to be verified by statutory declaration."

19. In the case of Og*wari v Hersi (Civil Appeal 223 of 2022*) [2023] KEHC 20111 (KLR) (3 July 2023) (Judgment), the Court understood the implications of Section 32 of the *Small Claims Court Act* as hereunder:

> " Appraisal of the evidence or non-compliance of the *Evidence Act* is not a point of law since under section 32 of the *Small Claims court act*, the court is not bound by strict rules of evidence. This is not to say that the court then becomes a kangaroo court acting on rumors hyperbole and surmises. It is still a court of law bound by common sense and sense of justice according to the law."

20. In the subject appeal, the Appellant subscribed to the position that the trial Court determined that the Respondent's vehicle being an ambulance was exempt from observing traffic rules and was not bound to keep a safe distance from other motorists. In its decision dated 18th August 2023, the trial Court determined that the Appellant switched lanes and entered the respondent's lane without notice, so as to avoid colliding with an object situated on the appellant's lane, resulting in damage to the Respondent's vehicle. Furthermore, citing the provisions of Rule 83 of the Traffic Rules, the trial Court held that the Appellant ought to have given way to the Respondent's vehicle being an ambulance whose siren, hazard lights and full lights were all on or blazing at the time of the aforesaid accident.

21 Upon careful perusal of the impugned decision of the trial court, this court is not persuaded by the appellant's averments and submissions to the effect that the trial court exempted the respondent herein from adducing evidence in support of his cause, as stipulated under Section 109 of the *Evidence Act*.

Further, the court is satisfied that the trial court appreciated the weight of the evidence placed before it and its decision was anchored on a sound reading of the applicable law.

22. Based on the foregoing, this Court finds and holds that the present appeal is devoid of merit. The same is hereby dismissed with costs to the Respondent. Pursuant to the provisions of Section 27 of the *Civil Procedure Act*, the Respondent herein, being the successful party in the appeal is also awarded the costs at the trial Court.

Determination

23. This appeal is dismissed with costs to the respondent. Judgement/decree delivered on 18th August 2023 in Small Claims Court at Nairobi in Claim no. E1934 of 2023 is upheld.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 8TH DAY OF MAY, 2025.

HON. T. W. OUYA

JUDGE

For Appellant…Ometto

For Respondent……Munene Njuguna

Court Assistant…Ms Jackline