



**Evanson Carriers Limited v Kasiwa (Civil Appeal 13 of 2023)  
[2024] KEHC 2636 (KLR) (11 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2636 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL 13 OF 2023  
DAS MAJANJA, J  
MARCH 11, 2024**

**BETWEEN**

**EVANSON CARRIERS LIMITED ..... APPELLANT**

**AND**

**FATUMA FOLENI KASIWA ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. E. Muchoki, SRM dated 27th January 2023 at the Magistrates Court at Mombasa, in Civil Case No.861 of 2021)*

**JUDGMENT**

1. By a plaint dated 25.05.2021 that was later on amended, the Respondent filed suit in the subordinate court claiming that on or about 21.01.2021, she was lawfully working as a street cleaner along Utange-Masuvini Road within Musuvini Kwa Katana Area at around 12.00 pm, when a motor vehicle registration number KBV J FAW TIPPER (“the motor vehicle”) which was heading to Zawadi Apartments area in Bamburi from Shanzu lost control and ran over her legs as a consequence of which she sustained severe injuries. She claimed to have sustained a fracture of both malleoli right foot with minimal displacement, a fracture of the right distal fibula bone with slight displacement and a deep cut left ankle joint/foot medial aspect. The Respondent blamed the Appellant for the accident by claiming that it was negligent and vicariously liable. As such, the Respondent sought general and specials damages, costs of the suit and interest.
2. In response, the Appellant filed defence and denied being the insured, registered and/or beneficial owner of the subject motor vehicle. It further denied the accident and the claims of negligence on its part and that if anything, it was the Respondent who was negligent.
3. At the hearing, the Respondent called PL John Ominde (PW 1), a police officer stationed at Bamburi Police Station and Dr. Denis Wambua Kiema (PW 2), a general medical practitioner.



The Respondent (PW 3) testified on her own behalf. The Appellant did not call any witnesses or produce any evidence.

4. The Subordinate Court rendered its judgment on 27.01.2023. It found that since the Appellant did not present any witnesses and the Respondent's evidence remained unchallenged, it entered liability at 100% against the Appellant. On quantum of damages, the Subordinate Court made an award of Kshs. 600,000.00 as general damages. It further made an award of Kshs. 2,000.00 as for the medical report, Kshs. 5,000.00 as PW2's court allowance, Kshs. 550.00 as motor vehicle copy of records charges and Kshs. 11,900.00 as medical expenses making a total of Kshs. 14,450.00. The Subordinate Court declined the prayer for future medical expenses and in total awarded a sum of Kshs. 619,450.00, costs of the suit and interest.
5. The Appellant is dissatisfied with this judgment and it has, through its amended memorandum of appeal dated 29.08.2023, filed the present appeal for the court's determination. It has supplemented its arguments by filing written submissions as well.
6. In determining this appeal, this court, as the first appeal has a duty to re-evaluate and re-assess the evidence before the court of first instance and at the same time, keep in mind the fact that the trial court interacted first hand with the parties (see *Selle v Associated Motor Boat Co.* [1968] EA 123).
7. The Appellant is aggrieved with the subordinate court's findings on both liability and quantum. On liability, the Appellant submits that only the Respondent and PW 1 were the witnesses who testified before the trial court on the issue of liability and that the Appellant never gave any evidence on the issue of negligence. The Appellant submits that its failure to testify on negligence does not in any way negate the burden of proof resting on the Respondent.
8. The effect of a defendant not calling evidence to challenge a Plaintiff's testimony renders not only the Defence unsubstantiated but also leaves the Plaintiff's case unchallenged. This position was restated by Lesiit J., (as she was then) in *Motex Knitwear Limited v Gopitex Knitwear Mills Limited* [2009] eKLR where the learned judge relied on the case of *Autar Singh Bahra and Another v Raju Govindji*, HCCC NO. 548 OF 1998 (UR) where Mbaluto J., stated as follows:

Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the Defence rendered by the 1<sup>st</sup> Plaintiff in support of the Plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.

9. However, I agree with the Appellant that even though it failed to support its case by evidence, the Respondent still had a duty to prove her case on a balance of probabilities as is required by law. In the case of *Kirugi and Another v Kabiya & 3 others* [1987] KLR 347 the Court of Appeal held that, "The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof". Likewise, failure by a defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard hence in *Gichinga Kibutha v Caroline Nduku* [2018] eKLR the Court held that, "It is not automatic that instances where the evidence is not controverted the Claimants shall have



his way in Court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest.”

10. The question then is whether the Respondent proved her case on a balance of probabilities. PW 1 produced the police abstract and confirmed that an accident occurred on 20.1.2021 involving the subject motor vehicle and the Respondent and that the driver was from Shanzu heading to Bamburi when he hit the Respondent who was beside the road. PW 1 stated that when the police abstract was issued, the matter was still pending investigations. On her part, the Respondent testified that she was on the side of the road when the subject motor vehicle veered off the road and hit her leading her to lose consciousness. She stated that she was on the right side of the road, that the motor vehicle did not hoot and that its driver was drunk. She blamed the driver for not hooting, that it was the motor vehicle which joined the feeder road from the main road and that she was not crossing the road.
11. From the evidence above, it was not challenged that an accident took place on 20.01.2021 and that it was the subject motor vehicle that veered off the road and hit the Respondent. The Respondent’s evidence that she was on the right-hand side of the road lends credence to her testimony that it is the motor vehicle that moved from the lane it was supposed to be in, which is the left side and hit the Respondent on the other side, that is on the right. The Respondent’s evidence alone was enough to find the motor vehicle solely responsible for the accident. She confirmed the accident and testified as to how it occurred. Even though the Appellant avers that the police abstract produced had errors and indicated that the accident was still pending investigations, this abstract did not negate the Respondent’s evidence and testimony of how the accident happened. It is not lost to the court that a police abstract is merely evidence that a report of an accident has been made to the police. Unless it contains information regarding the investigations and their outcome, such evidence alone does not carry much weight on the question of negligence (see *Florence Mutheu Musembi & Geoffrey Mutunga Kimiti v Francis Karengi* [2021]eKLR). As stated, the Respondent’s testimony alone was sufficient to find the motor vehicle to be at fault and since the matter was still under investigations, the information contained in the police abstract were not of much value and the errors therein did not absolve the motor vehicle from liability. Since the Respondent produced evidence of the motor vehicle’s records which indicated that it belongs to the Appellant and that this evidence was not challenged, it follows that the Appellant was rightfully found to be liable for the accident. I cannot therefore fault the Subordinate Court for concluding that the Appellant was 100% liable for the accident that occurred on 20.01.2021. This ground of appeal by the Appellant fails.
12. Turning to the issue of quantum of damages, the Appellant faults the Subordinate Court for awarding the sum of Kshs. 600,000.00 as general damages as opposed to Kshs. 250,000.00 based on the nature of injuries in the instant case. The general principles upon which an appellate court can interfere with an award of damages was stated in the case of *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5 as follows:

An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was inordinately high or low.”
13. In awarding the sum of Kshs. 600,000.00, the Subordinate Court took into account the Respondent’s injuries as corroborated by the evidence of PW 2 that she sustained a fracture



of both malleoli right foot with minimal displacement, a fracture of the right distal fibula bone with slight displacement and a deep cut left ankle joint/foot medial aspect. Permanent disability was assessed at 7%. The trial magistrate also considered the decision advanced by the Respondent, that is Edward Shoboi Gambo v Fatma Osman Ahmed & another [2020]eKLR where the appellant therein suffered a comminuted fracture of the right distal fibula, displaced fracture of the right distal malleolus; and blunt injury to the right hip and held that the same was for more serious injuries than those suffered by the Respondent.

14. The Appellant on its part relied on Savanna International Ltd v Muka [2022] KEHC 675 (KLR) where the respondent therein suffered a fracture medial malleolus of the left ankle joint and Severe soft tissue injuries of the left ankle joint where an award of Kshs. 500,000.00 was set aside and substituted with an award of Kshs. 400,000.00. In Triad Coaches Ltd & another v Mary Mutheu Kakemu [2020] eKLR the respondent therein suffered a fracture of the tibia fibula, blunt injury of the right wrist and blunt injury of the right ankle with dislocation and the court substituted the subordinate court's judgment with an award of Kshs. 250,000.00. In Naom Momanyi v G4s Security Services Kenya Limited & another [2018] eKLR the appellant sustained a fracture of the left-right condylar tibia, blunt injuries on the back and multiple bruises on the left arm and the court substituted the lower court's judgment with an award of Kshs. 300,000.00. In Maselus Eric Atieno v Unitel Services Limited [2017] eKLR the court sustained the award of Kshs. 250,000 for what it considered "a simple fracture and multiple soft tissue injuries". In Gladys Lyaka Mwombe v Francis Namatsi & 2 others [2019] eKLR the appellant therein had sustained a cut wound on the anterior part of the scalp, a head injury, spinal cord injury, neck injury, fracture of the lower tibia and fibula and a cut wound on the face. The court sustained an award of Kshs. 300,000.00.
15. Going through the aforementioned decisions and considering inflation, I cannot fault the trial magistrate for finding that Kshs. 600,000.00 was sufficient to compensate the Respondent in the circumstances. This sum falls within the range of what could have been awarded in those cases cited by the Appellant having factored in the effect of inflation and for the injuries sustained by the Respondent.
16. It is clear that the appeal lacks merit. It is dismissed with no order as to costs since the Respondent did not participate in this appeal.

**SIGNED AT NAIROBI**

**D. S. MAJANJA**

**JUDGE**

**DATED and DELIVERED at MOMBASA this 11th day of MARCH 2024.**

**OLGA SEWE**

**JUDGE**

