



REPUBLIC OF KENYA



**Moindi v Nyang'ao & another (Civil Appeal E125 of 2023)
[2024] KEHC 2510 (KLR) (12 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2510 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E125 OF 2023
HI ONG'UDI, J
MARCH 12, 2024**

BETWEEN

VINCENT NYAMBANE MOINDI APPELLANT

AND

LAWRENCE NYANGENA NYANG'AO 1ST RESPONDENT

KENNEDY CHEYUIYOT MARITIM 2ND RESPONDENT

(An appeal from the Judgment of Hon C. A. Ogweno (SRM) delivered on 26th September, 2023 in Kisii Chief Magistrate's Court Civil Case No. No. 405 of 2020)

JUDGMENT

1. Vincent Nyambane Moindi the appellant herein was the plaintiff in the lower court while Lawrence Nyangena Nyangau and Kennedy Cheruiyot Maritim the 1st and 2nd respondents were the 1st and 2nd defendants respectively. The appellant sued the respondents claiming general and special damages for injuries he sustained when he was hit by a motor vehicle registration No KBJ 222V owned by the 2nd respondent and driven by the 1st respondent, on 17th April, 2020. This was vide the amended plaint of 24th August, 2020.
2. The respondents filed a joint defence dated 26th September, 2020 denying the claim.
3. The appellant called three (3) witnesses in support of his claim. It was his case that he was a pillion passenger aboard a motor bike when the motor vehicle registration No KBJ 222V lost control, veered off the road and knocked the motorbike. He was taken to Kisii Teaching and Referral Hospital where he was treated. He had injuries namely; bruises on left arm, lacerations on both knees, injury on the chest, trauma on the back, avulsion on the left lower molar tooth.



4. A report was made at Kisii central police station and he was issued with a P3 form and police abstract. He produced the demand notice, copy of ID card, invoice of Kshs 550/= (PEXB 5b, 6a, 6b & 7) plus a receipt of Kshs 6,500/=, as Exhibits.
5. All these injuries suffered were confirmed by Dr. Morebu Peter Momanyi who testified as PW2. He produced the treatment notes (PEXB 2), P3 Form PEXB 3 the clinical card (PEXB 1). He confirmed that the appellant did not suffer any fracture but he lost the left 1st molar tooth.
6. It was PW3's (No 88300 P. C Moses Kasera) evidence that he received a report of the accident on 20th April 2020 from the appellant's older brother. He gave the details of the motor vehicle as KBJ 223 V Toyota Amazon plus an unknown motor bike. The vehicle was traced at Menyinkwa and they were given the particulars of the person who had the vehicle. The vehicle was inspected and it was confirmed that it had damages. He produced the police abstract. He confirmed that the motorbike had 2 pillion passengers.
7. The respondents called one witness the driver who is the 1st respondent. He stated he had testified in a similar matter namely Kisii Civil Case No 520/2020 (E41/2020), whose judgment he produced as DEXB1. He adopted his witness statement as his evidence in chief. The statement is dated 26th September, 2020 in which it denies the appellants claim.
8. In cross examination he stated he only heard something hit his vehicle and he was rushing due to the imposed curfew. Time was 6.30pm. He further stated that the plaintiff in DEXB1 was different from the plaintiff herein. He did not know why the suit in DEXB1 had been dismissed.
9. After hearing the witnesses, the learned trial magistrate dismissed the appellant's suit with costs.
10. Being aggrieved by the Judgment the appellant filed this Appeal citing the following grounds:
 - i. That the learned trial Magistrate erred both in law and fact in dismissing the Appellant's suit despite there being overwhelming evidence in proof of liability on the part of the Respondents.
 - ii. That the learned trial Magistrate erred both in law and fact in relying on her previous decision in Civil Suit No E41 of 2020 – Albert Nyanchoka Ayako v Lawrence Nyangena Nyangau & Kennedy Cheruiyot Maritim despite the fact that the two suits were never consolidated nor either of them selected as a test suit for purposes of determining liability.
 - iii. That the learned trial Magistrate erred both in law and fact in failing to assess the quantum of general damages the appellant would have been awarded had his suit been allowed.
 - iv. That the learned trial Magistrate exhibited open bias as against the appellant by selectively applying the law in support of the arguments by the respondents in isolation of the arguments presented by the appellant.
 - v. That the learned trial Magistrate erred both in law and fact by failing to analyse all the evidence on record and hence arrived at a wrong conclusion.
 - vi. That the learned trial Magistrate erred both in law and fact in failing to consider the appellant's submissions and authorities tendered as the Lower Court in arriving at her finding.
 - vii. That the Judgment delivered by the learned trial Magistrate is against the weight of evidence on record, erroneous and unfair.
11. The appeal was canvassed by written submissions.



The appellant's submissions

12. His submissions were filed by Ochoki and Company advocates and are dated 29th November, 2023. Counsel has raised two issues for determination. On whether the appellant proved his case, he answered in the affirmative citing the case of *Mary Mwangi t/a Mosmay Services v Nairobi County & 2 others* [2017] eKLR. Its his contention that the appellant was owed a duty of care by the respondents who breached it as a result of which he suffered the injury. To support this argument, he cited the case of *Segwick Kenya Insurance Brokers v Price Water House Coopers Kenya* [2007] eKLR and *Caparo Industries PLC v Dickman* [1990] I ALL ER 568.
13. Referring to the evidence of the appellant and PW2 he submitted that the evidence was not challenged at all. Further that he explained the 1st respondent's negligence as he drove the vehicle. That the same was reiterated by the evidence of PW3 who produced the police abstract. Counsel argued that the two civil cases were never consolidated and the appellant narrated what he had seen. That there was no deviation by the witnesses from what they recorded in their witness statements.
14. Counsel pointed out that the respondents merely denied there having been an accident and nothing more, yet the trial court had treated the collision so lightly. He referred to the case of *Mercy Wanjiru Nyaga v Josphat Kiura & another* [2020] eKLR on the issue of negligence. Finally, he submitted that the trial court had not taken the matter seriously especially where there was evidence of collision.
15. Referring to a number of decided cases counsel submitted that the appellant was entitled to damages, which exercise was not undertaken by the trial court. Reference was made to the case of *Mohamed Mobmoud Jabane v High Shine Butty Tongo* CA No 2 of [1986] KLR Vol where the Court of Appeal stated as follows:

“The correct approach in award of damages are:

- i. Each case depends on its own facts
- ii. Awards should not be excessive for the sake of those who have to pay premiums, medical fees or taxes (the body politic)
- iii. Compensable injuries should attract comparable awards
- iv. Inflation should be taken into account
- v. Loss of future earnings has to be pleaded
- vi. Loss of earnings power is part of the general damages

16. In *Southern Engineering Co. Ltd v Musinga Muia* [1985] KLR 730 at Pg 6 paragraph 2 the court held:

“It is trite law that the measurement of the quantum of damages, is a matter for the discretion of the individual judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the county (In *Butt v Khan* [1982 – 1988] I KAR) It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries, since no two cases are precisely the same either in the nature of the injury or in age, circumstances of or other conditions”

17. While relying on several similar decided cases counsel submitted that in the said cases awards of between Kshs 300,000/= - Kshs 500,000/= had been made by the courts. He therefore argued that the appellant was entitled to compensation.



The respondent's submissions.

18. These were filed by O. M. Otieno & Co. advocates and are dated 11th December, 2023. Counsel has submitted that the case by the appellant did not avail any evidence showing the particulars of the motor cycle that the appellant was riding. The particulars are not even pleaded and neither did the police have the information in the OB. The scene was never visited by the police. He referred to Kisii CMCC No 520 of 2020 (E41 of 2020) arising from the same facts which had been dealt with. To him the fact of the appellant riding a motor bike with another pillion passenger is a traffic offence. Reference was made to Rule 7 (b) of the [National Transport & Safety Authority \(Operation of Motorcycles\) Regulations, 2015](#). He urges that in the present case the appellant came to court with unclean hands.
19. Counsel further referred to the case of [Rosemary Kaari Murithi v Benson Njeru Muthitu & 3 others](#) [2020] eKLR where the court stated that:
- “I am also inclined to find that a person who voluntarily gets on a boda boda when he/she finds that they are more than one should equally be held accountable and hence culpable”
20. Further in [Paul Lawi Lokale v Auto Industries Limited & another](#) [2020] eKLR where the Court of Appeal held thus:
- “I am inclined to agree with the learned counsel for the respondents that the appellant by voluntarily boarding motorcycle registration No KMDE 362M with another passenger violated the law and the same could have precluded the motorcycle from swerving to avert the accident. I am also unable to fault the learned Magistrate’s findings that both motorcycle registration No KMDE 362M and motorcycle registration KMJA 461H were equally to blame for the accident”.
21. Counsel wondered loudly how the appellant and PW3 learnt of the registration number of the motor vehicle and not the motorbike. He referred to the case of [SYT v TA](#) [2019] eKLR where the Court of Appeal held that a party must call evidence in support of his case. He thus submitted that the appellant had failed to prove his case to the required standards.

Analysis and Determination

22. This is a first appeal and this court has a duty to re-evaluate and re-consider the evidence on record to arrive at its own conclusion. It has to bear in mind that it did not see nor hear the witnesses and hence give an allowance for it. See [Selle v Associated Motor Boat Company Ltd](#) [1968] EA 123 and [Kenya Posts Authority v Kuston \(Kenya\) Ltd](#) [2009] 2 EA 212:
23. I have carefully considered the evidence on record, the grounds of appeal, both parties submissions plus the law. I find two issues falling for determination namely:
- i. Whether there was indeed an accident and if so, who is to blame
 - ii. Whether the appellant is entitled to compensation
24. Issue no (i) is all about evidence.
- Sections 107, 108 and 109 of the [Evidence Act](#) Provide as follows:
- Section 107: Burden of proof:



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 person.

Section 108: Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all was given on either side

Section 109: Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

25. It was the appellant's duty to place before the court sufficient evidence to support his case. He adopted his written statement. In it he stated that the accident occurred along Menyinkwa – Masogo road at Menyikwa area. He claims to have been a pillion passenger on a motor bike. He did not explain where the vehicle was from or where it was headed to. Similarly, he did not state where the motor bike was from and where it was headed to. He equally does not mention which side of the road each one of them was driving or riding. This accident is said to have occurred on 17th April, 2020.
26. A report was made at the police station on 20th April 2020 by a brother to the appellant. According to PW3 the motor vehicle traced was KBJ 223V Toyota Amazon but from the plaint the offending vehicle was KBJ 222V Toyota Amazon. The motorbike was not traced as no particulars of the same was revealed. The appellant in his evidence stated that the motorbike was carrying two pillion passengers which is a traffic offence.
27. It is not clear at what point and from whom the appellant got the particulars of the motor vehicle. In cross examination he said he reported the accident on 17th April, 2020 which is not true. The evidence of PW3 and the P3 Form (PEXB3) and the police abstract (PEXB4) all confirm the report was made on 20th April 2020.
28. In the absence of particulars of the motorbike, is the court expected to assume that indeed the appellant was being ferried on a motor bike? If indeed the said motor bike was hit by the vehicle as is claimed the owner and/or the rider would have reported the accident the same night or the next day at the police station. There is no evidence of any such report by the rider or the motor bike owner placed before the court:
29. It is not denied that the appellant was injured but who is to blame for his injuries? Negligence must be proved as was held in the two cases cited by the trial court i.e *Sally Kibii & another v Francis Ogaro* [2012] eLR and (ii) *Fred Ben Okoth v Equator Bottlers Ltd* [2015].
30. The appellant never told the court much about the occurrence of the accident. If indeed the driver lost control, veered off the road before knocking the motorbike and the pillion passengers as the appellant stated in his evidence, then the question is whether this was a vehicle and motor bike that would have taken off soon after the accident unnoticed. My answer is in the negative.
31. After weighing the evidence before me I find that the learned trial Magistrate analyzed the evidence well and arrived at the right conclusion which I will not interfere with.
32. The upshot is that the Appeal lacks merit and I dismiss it with costs.



Orders accordingly

**DELIVERED VIRTUALLY, THIS 12TH DAY OF MARCH, 2024 IN OPEN COURT AT
NAKURU.**

H. I. ONG'UDI

JUDGE

