



**Ayieko v East African Sea Foods Ltd (Civil Appeal E080 of 2023)
[2024] KEHC 7230 (KLR) (19 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7230 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL E080 OF 2023**

**KW KIARIE, J
JUNE 19, 2024**

BETWEEN

FELIX OTIENO AYIEKO APPELLANT

AND

EAST AFRICAN SEA FOODS LTD RESPONDENT

*(Being an Appeal from the judgment in Ndhiwa Principal Magistrate's
PMCC No.26 of 2021 by Hon. B.W. Murangasia–Senior Resident Magistrate)*

JUDGMENT

1. Felix Otieno Ayieko, the appellant herein, was the plaintiff in Ndhiwa Principal Magistrate's PMCC No.26 of 2021. This was a claim from a road traffic accident involving motor vehicle registration number KCO 098V, owned by the respondent, and motorcycle registration number KMFD 495K, which the appellant was riding. As a result of the collision, the appellant sustained injuries and filed a suit. On the 15th day of August 2023, the learned trial magistrate delivered his judgment and dismissed the claim.
2. The appellant was dissatisfied with the judgment and lodged this appeal. The law firm of Ben K. Gichana & Company Advocates represented him. He raised the following grounds of appeal:
 - a. That the learned trial magistrate erred in failing to find that the evidence and material exhibits tendered herein established/proved to the required standard injuries sustained by the appellant.
 - b. That this trial magistrate erred in law and fact by subjecting the appellant's case to a standard of proof of beyond reasonable doubt and dismissing the appellant's suit with costs because she had not proved liability against the respondent on a balance of probabilities.



- c. That the learned trial magistrate erred in-law and failed to appreciate the evidence that was placed before him and, in considering extraneous issues, arrived at a decision that was erroneous and against the evidence that was placed before him.
 - d. That the learned trial magistrate erred in law and fact and failed to consider principle in the doctrine of *res ipsa loquitur* as pleaded by the appellant.
 - e. That the learned trial magistrate erred in law and, in fact, by disregarding the plaintiff's testimony when defence witnesses did not rebut the same as to the accident's occurrence and the defendant's culpability.
 - f. That the learned trial magistrate misdirected himself in the appraisal of the evidence by failing to consider that the authenticity of the police abstract report and other medical exhibits produced by consent had not been disputed.
 - g. That the learned trial magistrate erred in fact and law in failing to assess the quantum damage payable to the appellant even after he dismissed the suit.
 - h. That the learned trial magistrate erred in law and fact by being biased against the appellant.
 - i. That the learned trial magistrate erred in law and fact by exercising his discretion capriciously and not judiciously.
 - j. That the trial magistrate erred in fact and law by writing a judgment that is incomplete and not based on proper evaluation and consideration of pleadings, evidence on record, submissions and applicable law and principles for award of damages.
 - k. That the trial magistrate erred in fact and law by failing to award the appellant general and special damages despite the appellant having proved her case to the required standard.
 - l. That the learned trial magistrate erred in law and fact and failed to appreciate that it was not in dispute that the appellant was injured in a road accident, that the occurrence of the accident is not disputed, hence the liability of the blamed motor vehicle could be inferred.
 - m. The learned trial magistrate erred in law in discarding the evidence of the appellant who witnessed the accident and dismissed the case.
 - n. The learned trial magistrate's decision was arrived at cursory and superficially, considering irrelevant factors while leaving out relevant ones and dismissing the appellant's case.
 - o. That the learned trial magistrate's decision, albeit a discretionary one, was wrong.
3. The respondent opposed the appeal through the firm of Mose, Mose & Mose Advocates.
 4. As the first appellate court, I understand that I must thoroughly review all the evidence on record. I need to consider that I did not have the opportunity to witness the witnesses' testimonies or observe their demeanour. I will be guided by the principles established in the *Selle vs Associated Motor Boat Co. Ltd.* [1965] E.A. 123, which held that the first appellate court must re-examine and assess the evidence presented in the trial court and reach its conclusions.
 5. The appellant (PW1) 's evidence was that the offending motor vehicle hit his motorcycle when it was in the process of overtaking him. Since there was an oncoming motor vehicle, it swerved back to its lane, which is when the collision occurred. He produced a police abstract report indicating an accident between motor vehicle registration number KCQ 098V and motorcycle registration number KMFD 495K.



6. Linus Okoth Ogola (DW1) was driving the vehicle with registration number KCQ 098V. He denied being involved in an accident. He testified that police officers arrested him in Kobodo under suspicion of causing the accident, but they did not take him to the scene of the incident.
7. The respondent, other than saying he disagreed with the police abstract report, did not say why. Section 38 of the *Evidence Act* provides:

An entry in any public or other official book, register or record, stating a fact in issue or a relevant fact, and made by a public servant in the discharge of his official duty or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself admissible.
8. The evidence in the police abstract report is, therefore, admissible. In the absence of any contrary evidence, I find that there was an accident involving the two motor vehicles where the appellant was injured.
9. In his defence, the respondent denied the existence of an accident. Since I have found an accident, we have only one version of how it occurred: that of the appellant. I, therefore, find that the respondent was 100% liable.
10. The appellant sustained the following injuries:
 - a. Cut wounds on the right leg;
 - b. Cut wounds on the face;
 - c. Chest contusion;
 - d. Lacerations on the left shoulder;
 - e. Bruises on the left hand; and
 - f. Bruises on the right knee.

At the trial court, he sought Kshs. 500 000/= as general damages. The respondent had submitted that Kshs. 100,000/= would be adequate compensation.
11. The learned trial magistrate did not assess the damages he could have awarded had he allowed the claim. I will, therefore, do the same using the authorities the parties relied on at the trial.
12. The appellant cited several decided cases. The one that was closely comparable to the injuries he sustained is Samwel Martin Njoroge Kamunyu vs Mildred Okweya Barasa [2020] eKLR where the plaintiff had sustained two deep cut wounds on the forehead horizontally, bruises and lacerations on the right cheek, blunt injury to the shoulder and chest, blunt injury to the pelvis, and deep cut wounds to the right and left legs, and the High Court awarded Kshs. 300, 000.00 for pain and suffering.
13. Conversely, the respondent relied on Edward Mutevu Maithya & another v Edwin Nyamweya [2022] eKLR. The respondent herein sustained the following injuries:
 - a) Cut wounds on the scalp;
 - b) Bruises the back;
 - c) Bruises on the right upper limb; and
 - d) Bruises on the left lower limb.



He was awarded Kshs. 100,000/=. These injuries are comparable to what the appellant herein sustained.

14. The judgment of the learned trial magistrate is set aside and substituted with the above finding on liability. I award the appellant Kshs. 100,000/= general damages and special damages of Kshs. 18, 170/=, which had been pleaded and proven.
15. The appeal succeeds with costs in this and the lower court.

DELIVERED AND SIGNED AT HOMA BAY THIS 19TH DAY OF JUNE 2024

KIARIE WAWERU KIARIE

JUDGE

