



REPUBLIC OF KENYA



**Mboga v Mwambodze (Civil Appeal E139 of 2023)
[2024] KEHC 7376 (KLR) (20 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7376 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E139 OF 2023
DKN MAGARE, J
JUNE 20, 2024**

BETWEEN

LUBANDO NYAMAWI MBOGA APPELLANT

AND

DOUGLAS MMBETSA MWAMBODZE RESPONDENT

*(Being an appeal from the Judgment of Hon. N. Gatambia - RM in Mombasa
Small Claims Court Case No. E071 of 2023, delivered on 3rd May, 2023)*

JUDGMENT

1. This is an Appeal from Mombasa SCCC E071 of 2023. Submissions were filed in this claim. It related to injuries arising from a personal accident on 28/12/2022.
2. The court refrained from making Judgment on the question of general damages. This gives rise to the difficulties I pointed out in *Ogwari v Hersi* (Civil Appeal 223 of 2022) [2023] KEHC 20111 (KLR) (3 July 2023) (Judgment) Neutral citation: [2023] KEHC 20111 (KLR): -

“In the case of *Dharmagma Patel & another v T A (a minor suing through the mother and next friend HH)* [2014] eKLR, the court had this to say: -

“I also take note of the fact that in our legal system, there is no liability without fault. In this regard see *Kiema Mutuku v. Kenya Cargo Hauling Services Ltd* (1991) 2 KAR 258 where the Court of Appeal held:-

“There is, as yet, no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence.”

The fault has to be pleaded and proved by evidence at the hearing.”



3. Of what use are pleadings not based on negligence or breach of contract or any duty of care? Further there were no findings related to general damages. The court will have to delve into facts, which it has no jurisdiction to do. There were no pleadings on negligence. the case was just am mongrel. On this issue, in the case, in Ogwari v Hersi [supra], I stated as doth: -

“However, that duty to plead negligence cannot be surmounted. Section 32 of the Small Claims Court Act removed only the aspect of strict application of evidence. It does not remove the duty to make and proof specifically the common law duty of care.

15. The Small Claims Court Act, did not by any extension introduce strict liability in accident cases.”

4. It must be recalled that we have not introduced a no fault system. In that regard I had held hitherto that However, in respect of unquantified claims, like negligence leading to personal injury the small claims court is singularly unsuited to handle the same. There this being a matter arising from a road traffic accident the Small Claims Court had no jurisdiction to handle the matter. The appeal arising therefrom as a result must be allowed.

5. The court sets aside the award. I set aside the judgment and decree and in lieu thereof strike out the suit in SCCC E071 of 2023. The Appellant should file a proper suit in the Magistrates Court.

6. Each party shall bear its own costs.

Determination

7. The upshot of the foregoing is that I make the following orders:-

- a. The Appeal is allowed. The court sets aside the Judgment in Mombasa SCCC E071 of 2023 and in lieu thereof the said claim is struck out.
- b. Each party to bear its costs both in the appeal and in the court below.
- c. Both these files are closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 20TH DAY OF JUNE, 2024.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

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JUDGE

In the presence of:

Mr. Baya for the Appellant

No appearance for the Respondent

Court Assistant - Jedidah

