



**Ouma v East African Sea Foods Ltd (Civil Appeal E081 of 2023)
[2024] KEHC 7231 (KLR) (19 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7231 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL E081 OF 2023**

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

BETWEEN

EVALINE ACHIENG OUMA APPELLANT

AND

EAST AFRICAN SEA FOODS LTD RESPONDENT

*(Being an Appeal from the judgment in Ndhiwa Principal Magistrate’s PMCC
No.E025 of 2021 by Hon. B.W. Murungasia–Senior Resident Magistrate)*

JUDGMENT

1. Evaline Achieng Ouma, the appellant herein, was the plaintiff in Ndhiwa Principal Magistrate’s PMCC No. E025 of 2021. This was a claim from a road traffic accident involving motor vehicle registration number KCO XXXX, owned by the respondent, and motorcycle registration number KMFD XXXX, on which the appellant was a pillion passenger. 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 v 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's (PW1) evidence was that the offending motor vehicle hit the motorcycle on which she was a pillion passenger after "squeezing" them while they were on their side. She produced a police abstract report indicating an accident between motor vehicle registration number KCQ XXXX and motorcycle registration number KMFD XXXX.



6. Linus Okoth Ogola (DW1) was driving the vehicle with registration number KCQXXXX. 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 occurred, we have only one version of how this happened: that of the appellant. I, therefore, find that the respondent was 100% liable.
10. The appellant sustained the following injuries:
 - a. Head injury;
 - b. Fractured left lateral incisors;
 - c. Avulsion of the 31st and 32nd teeth;
 - d. Deep cut wounds on the frontal region of the head;
 - e. Lacerations on the right hand;
 - f. Lacerations on the right knee;
 - g. Lacerations on the left knee; and
 - h. Blunt trauma to the back.

At the trial court, she sought Kshs: 1,200, 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. In *Boniface Mugendi Njiru v Ochieng T/A Tobel Agencies & another* [2011] eKLR, the Plaintiff was awarded Kshs. 1,000,000/= for the following injuries:
 - a. Blunt head injury with loss of consciousness for over 24 hours;
 - b. Loss of four upper incisor teeth;
 - c. Fracture of the shaft of the right femur; and
 - d. Compound fracture of the right tibia with loss of soft tissues, including tendons.
13. In *Tirus Mburu Chege & another v JKN (minor suing through the next friend and mother D W N & another* [2018] eKLR the respondent was awarded Kshs.500,000/= for the following injuries:



- a. Fractures of the tibia and fibula on both legs;
 - b. Blunt injury on the forehead;
 - c. Broken upper right second front tooth;
 - d. Nose bleeding; and
 - e. Consistent loss of consciousness.
14. 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.
15. The appellant sustained more severe injuries than Edward Mutevu Maithya (supra) but also less severe than Tirus Mburu Chege (supra). In my view, an award of Kshs. 350,000/= will be adequate compensation.
16. The judgment of the learned trial magistrate is set aside and substituted with the above finding on liability. I award the appellant Kshs. 350,000/= general damages and special damages of Kshs. 29, 300/=, which had been pleaded and proven.
17. 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

