



REPUBLIC OF KENYA



**Momanyi v Onsongo (Civil Appeal E023 of 2023)
[2024] KEHC 9465 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9465 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CIVIL APPEAL E023 OF 2023
WA OKWANY, J
JULY 25, 2024**

BETWEEN

MELLEN NYABOKE MOMANYI ALIAS REBECCA OBWOGE APPELLANT

AND

DAVID KINAGA ONSONGO RESPONDENT

((Being an Appeal from the Judgment at the Senior Principal Magistrate's Court at Keroka, PMCC No. 150 of 2017 delivered by Hon. C. Ombija on 24th May 2024))

JUDGMENT

1. The Appellant herein was the Plaintiff before the trial court where she initially sued one Muthoka Elvis Itaa and the Respondent herein as the 1st and 2nd Defendants respectively. The Respondent's claim before the trial court was for damages and costs arising out of an accident that occurred on 11th February 2017. The Appellant's case was that she was on the material day walking off the verge of Keroka-Kisii road when an accident occurred at Amabuko area. She averred that the Respondent's driver, servant, agent and/or agent drove the Respondent's motor vehicle Registration No. KAW 536R so carelessly, recklessly and negligently thereby allowing it to lose control, veer off the road and knock her down thus occasioning her serious injuries.
2. The Respondents filed a Statement of Defence dated 12th October 2017 in which they denied the contents of the Plaint and averred that the Appellant was wholly to blame for the accident. The Respondents also objected to the court's jurisdiction. The Appellant however withdrew the suit against the said Muthoka Elvis Itaa and filed an amended Plaint in which she listed the Respondent herein as the sole defendant.
3. The Appellant (PW1) adopted her Witness Statement as her evidence in chief and reiterated that she was involved in a road traffic accident on 11th February 2017. She blamed the Respondent for the accident and stated that the Respondent's said vehicle hit her when she was off the road. She testified



that she was treated at Christamarrian Hospital before being referred to Tenwek Hospital where she was admitted for about 3 days. She produced the following exhibits: -

- 1- Her National ID
 - 2 - Affidavit verifying her names
 - 3- Discharge Summary from Christamarianne Mission Hospital
 - 4 - Discharge Summary from Tenwek Hospital
 - 7(a) -Dr. Ogando Zoga Medical Report
 - 7 (b) – Dr. Ogando Zoga Receipt
 - 8 (a) – Motor Vehicle Search Records
 - 8 (b) – Receipt for Search Records
 - 9 (a) – Sale Agreement for Motor Vehicle KAW 536R
 - 9 (B) – Transfer Forms for Motor Vehicle KAW 536R
 - 10 – Police Abstract
4. The Respondent did not tender any evidence during the trial.
 5. At the end of the case, the trial court dismissed the Appellant’s suit on the basis that the case was not proved to the required standard.
 6. Aggrieved by the trial court’s said decision, the Appellant instituted the present Appeal vide Memorandum of Appeal dated 6th June 2023 wherein she listed the following grounds of appeal: -
 1. That the Learned Trial Magistrate misdirected himself on several matters of law and fact.
 2. That the Learned Trial Magistrate erred in law and in fact in dismissing the Appellant’s evidence.
 3. That the Learned Trial Magistrate erred in law and in fact in dismissing the Appellant’s suit for not proving ownership of the motor vehicle that caused the accident when no evidence had been led by the Respondent at all.
 4. That the Learned Trial Magistrate erred in law and in fact in dismissing the Appellant’s submissions and failing to properly analyse and consider the evidence before him thus arriving at an erroneous decision.
 5. That the Learned Trial Magistrate erred in law and in fact in deciding the matter against the weight of the evidence that had been adduced.
 6. That the Learned Trial Magistrate misdirected himself in setting the standard of proof higher than on a balance of probabilities.
 7. That there being a prayer for general damages, the Learned Trial Magistrate erred in law and in fact in not assessing the damages that should have been paid to the Appellant had the matter succeeded.
 8. That the judgement of the honourable trial magistrate has occasioned a failure of justice and/ or resulted in a gross miscarriage of justice.



7. The Appeal was canvassed by way of written submissions which I have considered. The main issue for my determination is whether the appeal is merited.
8. The duty of a first appellate court was discussed in the case of *Gitobu Imanyara & 2 others vs. Attorney General* [2016] eKLR as follows: -

“[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that, this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”

Analysis and Determination

9. It is trite that the standard of proof that is expected in civil cases is on a balance of probabilities. In *Miller vs. Minister of Pensions* [1942] 2 ALL ER 372 it was held as follows:-

“The(standard of proof).....is well settled. It must carry a reasonable degree of probability..... If the evidence is such that the tribunal can say ‘we think it more probable than not’ the burden is discharged, but if the probabilities are equal, it is not.”

10. The trial court found that the Appellant’s real identity was not proved as while she stated that she was Mellen Nyaboke Momanyi, the medical document from Tenwek Hospital indicated that the patient’s name was Rebecca Obwoye. The trial court disregarded the Appellant’s explanation that she was admitted at the said hospital while unconscious and that the good Samaritan who escorted her to the hospital knew her name as Rebecca Obwoye which was also her name.
11. A perusal of the proceedings reveals that the Appellant produced her National Identity Card which records her name as Mellen Nyaboke Momanyi. The discharge summary from Tenwek Hospital records the patient’s name as Mrs. Rebecca Obwoye. The Appellant also produced an Affidavit sworn on 31st July 2017 (P.Exh2) to attest to the fact that she is known by both names; Mellen Nyaboke Momanyi and Rebecca Obwoye. I also note that the said Affidavit was not disputed or controverted by the Respondent. Besides the Treatment documents from Tenwek Hospital, the Appellant also produced treatment documents from other hospitals together with the P3 form which indicates that her name is Mellen Nyaboke Momanyi. It is also noteworthy that the name recorded in the Police Abstract is Mellen Nyaboke Momanyi.
12. I find that the trial magistrate misapprehended the law when he held that the Appellant should have brought the person who took her to hospital, while unconscious and recorded her name as Rebecca, to testify on this issue or a witness from the hospital to confirm that she was the said Rebecca. My finding is that the trial court’s said finding was tantamount to asking the Appellant to prove her identity beyond reasonable doubt yet this was a civil matter that required proof only on a balance of probabilities. I am satisfied that the Appellant proved her identity and the fact that she was involved in the accident in question to the required standard.
13. It was not disputed that an accident occurred on 11th February 2017 involving the Appellant and motor vehicle Registration Number KAW 536R as shown in the Police Abstract (P.Exh 10). As I have already stated in this judgment, the Appellant produced Discharge Summaries from the hospitals where she was treated as exhibits. The Appellant’s injuries were classified as maim because her right fore-leg was amputated. This evidence was not controverted by the Respondent during the trial. I am satisfied that the Appellant established that she was knocked down by the motor vehicle KAW 536R on 11th



February 2017 as indicated on the Police Abstract and that she sustained serious injuries as a result thereof. In view of the foregoing, I am satisfied that the Appellant proved negligence on the part of the Respondent and that she was involved in the accident in question.

14. On liability, I note that the Appellant produced a Certificate of Search of the Registrar of Motor Vehicles records (P.Exh 8(a)) which indicated that one Elvis Itaa Muthoka was the registered owner of the suit motor vehicle. Section 8 of the *Traffic Act* provides as follows on the issue of motor vehicle ownership as follows: -

8. Owner of vehicle

The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.

15. In *Joel Muga Opinja vs. East Africa Sea Food Ltd [2013] eKLR* the Court of Appeal rendered itself on the issue of proof of ownership of motor vehicles as follows:-

“We agree that the best way to prove ownership would be to produce to the Court a document from Registrar of Motor Vehicles showing who the registered owner is but when the abstract is not challenged and is produced in Court without any objection, the contents cannot later be denied.”

16. Section 8 of the *Traffic Act* posits that registration as a motor vehicle owner with the Registrar of Motor vehicles creates a rebuttable presumption of ownership. This means that should other evidence be presented to show that another person, other than the one appearing in the Registrar’s records is the owner of the motor vehicle, then the court can find that other person to be the owner of the suit vehicle. This is the position that was taken in *Ignatius Makau Mutisya vs. Reuben Musyoki Muli [2015] eKLR* where it was held thus: -

“All this goes to show that the presumption that the person registered as owner of a motor vehicle in the log book is the actual owner is rebuttable. Where there exists other compelling evidence to prove otherwise, then the Court can make a finding of ownership that is different from that contained in the log book. Each case must however be considered on its own peculiar facts. As observed by this Court in the case of *Francis Nzioka Ngao vs Silas Thiani Nkunga, Civil Appeal No.92 of 1998,*

“whether the property in a chattel being sold has or has not been passed to the buyer is a question of fact to be determined on the facts of each individual case.”

17. In the instant case, the Appellant sued Elvis Muthoka (the 1st Defendant) as the registered owner of the suit motor vehicle. At the hearing, however, the Appellant testified that she later learnt that the 1st Defendant had sold the said vehicle to the 2nd Defendant, the Respondent herein. She produced a copy of the duly signed motor vehicle sale agreement between Elvis Muthoka and David Onsongo Kinanga (the Respondent) as (P.Exh 9(a)). I note that a copy of a duly signed motor vehicle Transfer Form(P.Exh 9(b)) was also attached to the sale agreement.

18. It is noteworthy that the Respondent did not tender any evidence to counter or controvert the Appellant’s evidence on his ownership of the suit motor vehicle. I find that the Appellant proved, on a balance of probabilities, that the Respondent was the owner of the motor vehicle that caused the accident. I further find that the trial court misdirected himself in holding that the Appellant should have called the evidence of the advocate who drafted the motor vehicle Sale Agreement when the said agreement had already been admitted in evidence without any objection from the Respondent.



19. I further find that the trial magistrate misapprehended facts of the case when he held that the transfer of ownership form and the sale agreement were only marked for identification and were not produced as exhibits when the trial court's record (proceedings), at page 15 and 16 thereof, reveals that the agreement was produced as an exhibit.
20. Having found that the Respondent did not contest the motor vehicle Sale Agreement, I find that the trial court had no basis for finding that the Appellant should have presented proof of payment for the purchase of the motor vehicle or called the evidence of the Registrar of Motor Vehicles and the law firm that drafted the sale agreement to corroborate her evidence. It is my finding that the evidence that the Appellant presented on the ownership of the suit motor vehicle was more than sufficient to prove her case and that asking her to avail more evidence, as the trial court did, was tantamount to raising the standard of proof to a level higher than the level expected in civil matters.
21. Turning to the damages payable for the Appellant's injuries, I note that the trial court did not assess the damages that would have been payable to the Appellant had she been successful in her claim. It is trite that a trial court is required to make a finding on the damages payable to a claimant even where the case is not successful. This is the position that was taken in *Frida Agwanda & Ezekiel Onduru Okech vs. Titus Kagichu Mbugua* [2015] eKLR, where the court held that:-

“Indeed even when the learned trial magistrate dismissed the claim, in such a case, he should have assessed damages, notwithstanding the dismissal. That now will be done by this court, for convenience, instead of returning the file to the lower court for assessment.”
22. Similarly in *Lei Masaku versus Kalpama Builders Ltd* [2014] eKLR, it was observed thus:

“It has been held time and again by the Court of Appeal that the court of first instance assess damages even if it finds that liability has not been established. To have casually dismissed the suit and failed to address that issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the appellate court needs to know the view by the Court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behoves this court to assess quantum.”
23. The Appellant produced a P3 Form, Treatment Notes and a Medical Report to support the injuries that she enumerated in the Plaint as already stated elsewhere in this judgment. The trial court held that the Appellant should have called the doctors who prepared the medical reports as witnesses to confirm her injuries.
24. My finding is that the trial court misdirected itself in law and in fact in finding that the Appellant was required to call Dr. Ezekiel Zoga as a witness in the case when the report prepared by the said doctor was admitted in evidence as an exhibit without any objection from the Respondent. I note that the Respondent did not challenge the contents of the Appellant's Medical Report through a second medical report. I am satisfied that the Appellant proved, on a balance of probabilities, that she sustained injuries in the said accident.



Quantum of Damages

25. In *Odinga Jacktone Ouma vs. Moureen Achieng Odera* [2016] eKLR the Court of Appeal stated that
- “comparable injuries should attract comparable awards.”
26. In *Harun Muyoma Boge vs. Daniel Otieno Agulo MGR HCCA No. 7 of 2015* [2015] eKLR, it was held as follows: -
- “The assessment of general damages is not an exact science and the court in doing the best it can, takes into account the nature and extent of injuries in relation to awards made by the court in similar cases. It ensures that the body politic is not injured by making excessively high awards and that the claimant is fairly compensated for his or her injuries.”
27. In *Terrell’s Law of Running Down Cases*, 3rd Ed. London Butterworths (1964) at p.75, and the dictum of Lord Morris Borth-y-Gest in *H. West & Son Ltd. v. Shephard* (1964) AC 326, 345, the following principles were established: -
- “But money cannot renew a physical frame that has been battered and shattered. All the courts can do is to award sums which must be regarded as giving reasonable compensation. In the process, there must be the endeavour to secure some uniformity in the method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said and done, it still must be that amounts which are awarded are to a reasonable extent conventional.”
28. The Appellant stated that she suffered the following injuries in the said accident: -
- i. Tenderness on the anterior chest wall
 - ii. Tenderness on both knees
 - iii. Traumatic amputated right leg between the knee and ankle.
29. The medical reports and treatment notes reveal that the Appellant suffered soft tissue injuries on her chest and knees and traumatic amputation of her right leg. The Medical Report by Dr. Zoga assessed permanent disability at 80%.
30. In light of the above injuries, I have considered the following similar cases: -
- a. In *Abdi Werdi Abdulahi vs. James Royo Mungatia & another* [2019] eKLR, the court assessed general damages at Kshs. 3,500,000/= where the claimant suffered multiple fractures on the right lower and upper limb, amputation of the right lower limb with permanent incapacity, multiple fractures and bruises on the upper right limb leading to affixation of two metal plates, injury to the right eye leading to impaired vision, compressed burst L4 vertebra with retro pulsed fracture fragments, deep bruising on the chest due to dragging on tarmac and head trauma injuries leading to concussion.
 - b. In *James Joseph Rughendo vs. Kenya Power and Lighting Co. Ltd.* (2011) eKLR, the plaintiff suffered bilateral electrical damage to the upper limbs radial, ulna and median nerve, third degree electrical burns on the palms of both hands at 40% burns surface, gangrene right leg below the knee and gangrene left foot dorsal aspect, big toe and 2nd toe, right knee amputated, and was awarded Kshs. 3,000,000/= for general damages.



- c. In *Kipkoskei Tangus Tesot vs. Julius Kiprono Tanui* [2018] eKLR, the High Court sitting on appeal revised an award of Kshs. 3,903,003/= to Kshs. 2,500,000/= for crash injury of left leg which resulted in amputation at the level above the knee and fractures of the right tibia and fibula, with 80% permanent disability.
31. The Appellant proposed an award of Kshs. 3,000,000/= for pain and suffering. I have considered the grave nature of the Appellant's injuries and I find that an award of Kshs. 2,700,000/= will be adequate compensation for pain and suffering.
32. The Appellant pleaded the particulars of special damages as follows: -
- i. Medical Report – Kshs. 6,500/=
 - ii. Copy of Records – Kshs. 500/=
 - iii. Medical Expenses – Kshs. 274,870/=
33. In *Richard Okuku Oloo vs. South Nyanza Sugar Co. Ltd* [2013] eKLR the Court of Appeal observed thus: -
- “We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of.”
34. I note that the Appellant produced receipts for the Medical Report by Dr. Ogando Zoga (P.Exh 7b) for Kshs. 6,500/=: the Motor Vehicle Search Records (P.Exh 8b) for Kshs. 550/= and receipts from Tenwek Hospital in the sum of Kshs. 274,870/=. I find that she specifically pleaded and proved special damages and I therefore award the same as prayed.
35. In sum, I find that the instant appeal is merited and I therefore allow it and enter judgment for the Appellant as follows: -
- Liability assessed at 100% against the Respondent
- General Damages – Kshs. 2,700,000/=
- Special Damages – Kshs. 281,920/=
- Total – Kshs. 2,981,920/=
36. I award the Appellant the costs of the appeal and the lower court case and interests on costs and damages at court rates till payment in full.
37. It is so ordered.

**JUDGMENT DATED AND SIGNED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS
THIS 25TH DAY OF JULY 2024.**

W. A. OKWANY

JUDGE

