



REPUBLIC OF KENYA



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**Nyabando v Onsongo (Civil Appeal E022 of 2023)  
[2024] KEHC 8277 (KLR) (4 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8277 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
CIVIL APPEAL E022 OF 2023**

**WA OKWANY, J**

**JULY 4, 2024**

**BETWEEN**

**AGNES KWAMBOKA NYABANDO ..... APPELLANT**

**AND**

**DAVID KINANGA ONSONGO ..... RESPONDENT**

*(Being an Appeal from the Judgment in the Principal Magistrate's Court at Keroka in PMCC No. 149 of 2017, delivered by Hon. C. Ombija, Senior Resident Magistrate on 24th May 2024)*

**JUDGMENT**

1. The Appellant herein was the Plaintiff before the trial court where she sued the Respondent/Defendant seeking damages and costs arising from a road traffic accident which occurred on 11<sup>th</sup> February 2017. The Appellant's case was that she was on the material day walking off the verge of the road long Keroka-Kisii road when at Amabuko area the 2<sup>nd</sup> Respondent drove, managed and or controlled the 1<sup>st</sup> Respondent's motor vehicle Registration No. KAW xxxR, so carelessly, recklessly and/or negligently thereby permitting it to lose control, veer of the road and knock her down thereby occasioning her serious injuries.
2. The Respondent filed a Statement of Defence dated 12<sup>th</sup> October 2017 in which he denied liability of the alleged accident.
3. At the hearing of the case, the Appellant (PW1) adopted her Witness Statement dated 28<sup>th</sup> July 2017 as her evidence in chief. She produced the following documents as exhibits.
  - i. National ID Card – P.Exh 1
  - ii. Treatment Notes from Keroka Sub-County Hospital - P.Exh 2
  - iii. Treatment Notes from Christamarriane Hospital - P.Exh 3



- iv. Treatment Notes from Tenwek Hospital - P.Exh 4
  - v. Medical Report by Dr. Ezekiel Zoga - P.Exh 5(a)
  - vi. Payment Receipt for the Medical Report - P.Exh 5(b)
  - vii. Motor Vehicle Search - P.Exh 6(a)
  - viii. Motor Vehicle Search Receipt – P.Exh 6(b)
  - ix. Sale Agreement for the sale of subject Vehicle - P.Exh 7
  - x. Police Abstract - P.Exh 8
  - xi. P3 Form - P.Exh 9
  - xii. Demand letter – P.Exh 10
4. In a judgment delivered on 24<sup>th</sup> May 2023, the trial court dismissed the Appellant’s suit upon finding that she did not prove her claim against the Respondent to the required standard.
  5. Dissatisfied with the trial court’s verdict, the Appellant filed the present Appeal and listed the following grounds of appeal in the Memorandum 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 fact in disregarding the Appellant’s evidence. Evidence not controverted
    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. Appellant proved ownership to the required stds
    4. That the learned magistrate erred in law and fact in disregarding the Appellant’s submissions to properly analyse and consider the evidence before him thus arriving at an erroneous decision.
    5. That the learned trial magistrate erred in law 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. Why call doc. When the MR was admitted as an exhibit
    7. That there being a prayer for general damages, the learned trial magistrate erred in law and fact in not assessing the damages that should have been paid to the Appellant had the matter succeeded. Yes the trial court was required to assess the damages that it could have awarded the Appellant had his case was successful
    8. That the judgment of the honourable trial magistrate has occasioned a failure of justice and/or resulted in a gross miscarriage of justice.
  6. The Appeal was canvassed by way of written submissions which I have considered.
  7. The duty of a first appellate court is to subject the entire evidence presented before the trial court to a fresh analysis in order to arrive at its own independent conclusions while bearing in mind the fact that it neither heard nor saw the witnesses testify. (See *Kenya Ports Authority versus Kusthon [Kenya] Limited* [2000] 2EA 212 and *Abdul Hammad Saif v. Ali Mohamed Sholan* [1955] 22 EACA, 270.)



## Analysis and Determination

8. The main issue for my determination is whether the trial court was right in dismissing the Appellant's case.

### Whether the Appellant proved her claim against the Respondent.

9. The trial court rendered itself, in part, as follows when dismissing the Appellant's case: -

“A party is bound by his/her pleadings and since the defendant had denied ownership of the said motor vehicle which forms the gist of the subject matter, the plaintiff ought to have called and/or adduced evidence on the same i.e. call the registrar of motor vehicles as a witness to highlight the transfer document which I have noted that was only signed by one Elvis Muthoka but excluded the signature of the purported buyer herein the defendant.

.....Dr Ezekiel Ogindo Zoga whose medical report and any other treatment notes the plaintiff sought to rely on as proof of injury was never called to produce the said document(s) and therefore the extent of the injury is not sufficiently proved as per section 107 of the Evidence Act.”

10. It is trite that whoever lays a claim before the court against another has the burden to prove it. Sections 107 and 108 of the Evidence Act provide as follows:

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- “(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.

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

11. In the case of Muriungi Kanoru Jeremiah v Stephen Ungu M'mwarabua [2015] eKLR the court held as follows with regard to the burden of proof:

“....As I have already stated, in law, the burden of proving the claim was the appellant's including the allegation that the respondent did not pay the sum claimed as agreed; i.e. into the account provided.....The trial magistrate was absolutely correct in so holding and did not shift any legal burden to the appellant.....The appellant was obliged in law to prove that allegation; after the legal adage that he who asserts or alleges must prove.... In the circumstances of this case, the respondent bore no burden of proof whatsoever in relation to the debt claimed. By way of speaking, the shifting of burden of proof would have arisen had the trial court magistrate held that the respondent bore burden to prove that he deposited the sum of Kshs. 98,200/= the debt being claimed herein.”

12. The Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 17, at paras 13 and 14: describes burden of proof thus:

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the



conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

(16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?”

13. Against the backdrop of the above cited cases and texts, the trial Court was expected to test the evidence presented by the appellant in order to determine if it meets the threshold of proof, on a balance of probabilities. The evidence legitimately expected was on the two sets of facts being liability and the quantum of damages payable for the injuries that the Appellant sustained in the accident.
14. This appeal will interrogate the issue of negligence in the context of the Kenyan Highway code and traffic laws. I have perused the impugned judgment by the Learned Magistrate Hon. Ombija and I, with all due respect, have a few reservations about his explanations and reasoning in respect to non-proof on liability and quantum.
15. In a cause of action in negligence, the Appellant was required to show; firstly, that the Respondent owed her a duty of care on the material day of the accident; that the Respondent breached the duty of care; that she suffered personal injuries attracting recoverable damages at law and that the injury she suffered was as a result of breach and negligence which was reasonably foreseeable. In *Caparo Industries PLC v Dickman* {1990} 1 ALL ER 568 and *Chun Pui v Lee Chuen Tal* {1988} RTR 298 highlighted the determinants of negligence as follows:

“The requirements of the tort of negligence are, as Mr. Batts submitted, fourfold, that is, the existence of a duty of care, a breach of the duty, a causal connection between the breach and the damage and foreseeability of the particular type of damage caused.”

16. The court added that: -

“What emerges is that, in addition to the foreseeability of the damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterized by the Law as one of proximity or neighborhood, and that the situation should be one in which the Court considers it fair, just and reasonable that the Law should influence a duty of a given scope upon the one party for the benefit of the other. As regards the question of proof of a breach of the duty of care, there is equally no question that the onus of proof on a balance of probabilities, that the defendant has been careless falls upon the claimant throughout the case.”

17. In the same vein, the *Traffic Act* Cap 403 the Laws of Kenya imposes a duty of care on drivers, to take necessary precautions to avoid accidents. Needless to say, breach of the *Traffic Act* and Highway Code attract penal sanctions such as cases of careless or reckless driving or causing death by



dangerous driving. The burden therefore rested on the Appellant to prove negligence on the part of the Respondent.

18. The Appellant adopted her witness statement as her evidence in chief during the trial. I note that she stated as follows on the aspect of negligence: -

“I blame the defendant, his driver and/or agent for the accident because he: -

- a. Drove the said motor vehicle carelessly and negligently.
- b. Drove the same without caring for the well being of other road users.
- c. Drove the said vehicle at a very high speed.
- d. Drove a defective vehicle.”

19. The Appellant produced a Police Abstract report dated 26<sup>th</sup> April 2017 (P.Exhibit 8) in support of this claim. I have perused the said report and I note that it confirms that indeed an accident occurred on 11<sup>th</sup> February 2017 involving Motor Vehicle Registration No. KAW xxxR and 2 pedestrians. The said report also reveals that the Appellant was one of the victims of the said accident. I note that the Respondent did not tender any evidence to controvert the Appellant’s testimony on negligence and how the accident occurred. I find that it was not disputed that the said accident occurred. I am satisfied that the Appellant proved negligence on the part of the Respondent and that she was involved in the accident in question.

20. The Appellant produced a Certificate of search of the Registrar of Motor Vehicles records (P.Exh 6(a)) which revealed that one Elvis Itaa Muthoka was the registered owner of the said 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.

21. In Joel Muga Opinja v. 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.”

22. 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 another person, other than the one listed in the log book, is the owner of the suit vehicle. This is the position that was taken in Ignatius Makau Mutisya v. 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 v 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.”

23. 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 1<sup>st</sup> 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 7). I note that a copy of a duly signed motor vehicle Transfer Form was also attached to the sale agreement.
24. It is noteworthy that the Respondent herein did not tender any evidence to counter or controvert the Appellant’s evidence on his ownership of the suit motor vehicle. Indeed, as I have already noted in this judgment, the Respondent herein was also the driver of the said motor vehicle at the time of the accident. 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 (P. Exhibit 7) when the said agreement had already been admitted in evidence without any objection from the Respondent.
25. I further find that the trial magistrate misapprehended facts of the case when he held that the transfer of ownership form and sale agreement were only marked for identification and were not produced as exhibits when the trial court’s record (proceedings), at page 14 thereof, reveals that the agreement was produced as an exhibit. The said record reads as follows: -

“Exam in Chief by Mr. Bosire

PW1 Agnes Kwamboka Nyabando sworn and states in Kiswahili

“...I later came to know that the defendant had bought the said motor vehicle from one Elvis Muthoka which I have a Sale Agreement (P.Exh7)....”

26. 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.
27. 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 v. 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.”



28. 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 behooves this court to assess quantum.”

29. 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.

30. 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 not admitted in evidence as an exhibit without any objection from the Respondent. It is also instructive to 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.

#### **i. Whether the Appellant was entitled to the reliefs sought.**

31. In *Odinga Jacktone Ouma v. Moureen Achieng Odera* [2016] eKLR the Court of Appeal stated that “comparable injuries should attract comparable awards.”

32. In *Harun Muyoma Boge v. Daniel Otieno Agulo* MGR HCCA No. 7 of 2015 [2015] eKLR, Majanja J. 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.”

33. The Appellant stated that she suffered the following injuries in the said accident: -

- a. Fracture of the pelvis region
- b. Fracture of the right acetabulum
- c. Fracture of the right fibula upper third

34. I have considered the decisions in the following similar cases:

- a. In *Wakim Sodas Limited v. Sammy Aritos* [2017] eKLR, the respondent sustained a fracture of the rib and a compound fracture of the left tibia/fibula. The trial court awarded him Kshs. 400,000/= which award was upheld on appeal.
- b. In *Samuel Githambo Makumi v. South Siox Farms Ltd.* Nakuru HCC No. 9 of 2008, the plaintiff was awarded Kshs. 1,500,000/= for multiple fractures of the right and left femur,



fracture of inferior pubic ramus radius and right pelvis, fracture of the right scapular, and closed fracture medial malleolus of the leg.

- c. In *John Mutuga Kamau v. Kanini Haraka Enterprises Limited* [2019] eKLR, the Plaintiff suffered Fracture of the right femur, right acetabula fracture, deep cut wound on the forehead, Loss of one upper incisor tooth, fracture distal end of the right radius, severe soft tissue injury of the right wrist joint, blunt injury to the right shoulder joint leading to soft tissue injuries and deep cut wound on the right hip joint leading to severe soft tissue injury. The court, on appeal, enhanced an award of Kshs. 1,500,000/= to Kshs. 2,400,000/=.
  - d. In *David Mutembei v. Maurice Ochieng Odoyo* [2019] eKLR, the respondent suffered injuries of a fracture of the right femur and a proximal fracture of the left tibia. The court, on appeal, reduced the award of Kshs. 1,600,000/= general damages to Kshs. 800,000/=.
35. The above cases provide a clear range of the awards payable according to the seriousness of the injuries sustained by claimants. In this case, I note that the Appellant suffered fractures on her right hip and leg with no permanent disability. I am of the view that an award of Kshs. 500,000/= general damages will be sufficient compensation for pain and suffering.
36. I have also considered the special damages that the Appellant pleaded in this case. It is trite that special damages must not only be specifically pleaded but must be strictly proved by the claimant. In this case, the Appellant pleaded for special damages in the sum of Kshs. 64,550/= made up as follows: Medical Report – Kshs. 6,500/= Copy of Record – Kshs. 500 Medical Expenses – Kshs. 57,550/=
37. A perusal of the trial court’s record shows that the Appellant produced receipts as follows: -
1. Kshs. 30,000/= Receipt from Tenwek Hospital
  2. Kshs. 20,000/= Receipt from Tenwek Hospital
  3. Kshs. 3,000/= Receipt for Metallic Crutches
  4. Kshs. 4,550/= Other medical receipts
  5. Kshs. 550/= Motor vehicle search receipt
  6. Kshs. 6,500/= Dr. Ongado Medical Report
- Total – Kshs. 64,600
38. I therefore find that the claim of Kshs. 64,600/- for special damages was proved to the required standard.
39. Having regard to the findings and observations that I have made in this judgment, I find that the instant appeal is merited and I therefore allow it by setting aside the trial court’s decision to dismiss the Appellant’s case and substitute it with an order allowing the case in the following terms: -
- a. General Damages – Kshs. 500,000/=
  - b. Special Damages – Kshs. 64,600/=
- Total – Kshs. 564,600/=
- c. I also award the Appellant the Costs of the Appeal and the Lower Court case and Interest on costs and damages at court rates till payment in full.
40. It is so ordered.



**JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 4<sup>TH</sup> DAY OF JULY 2024.**

**W. A. OKWANY**

**JUDGE**

