



**Ndogohi v Sewe (Civil Appeal E082 of 2023)
[2024] KEHC 16828 (KLR) (Civ) (16 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 16828 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E082 OF 2023

BM MUSYOKI, J

SEPTEMBER 16, 2024

BETWEEN

TIMOTHY KIBERA NDOGOHI APPELLANT

AND

DENIS ODENY SEWE RESPONDENT

*(Being an appeal from judgement and decree of Honourable C.A. Okumu RM/Adjudicator
in Milimani Small Claim Courts claim number E2711 of 2022 dated 19-01-2022)*

JUDGMENT

1. This is an appeal from judgment of Adjudicator in Nairobi Small Claims Court commercial case number E2711 of 2022. In the said claim, the respondent and sued the appellant claiming Kshs 419,655 being costs of repairs, assessor's fees and tracing fees which arose from an accident alleged to have occurred on 22-09-2019 involving motor vehicles registration numbers KCT 750E and KCJ 932H. The respondent was said to have been the owner of the former while the appellant was the owner of the latter motor vehicle.
2. On 10-11-2022, the parties recorded a consent to prosecute the matter under section 30 of the *Small Claims Court Act*. The purport of this section is that the court may with the consent of the parties direct that the matter before it be disposed of by way of reliance on evidence and documents filed by the parties without calling witnesses. The parties filed their submissions and on 19-01-2022, the court rendered judgment in which it held each party 50% liable and awarded damages of Kshs 419,655.00 as prayed.
3. The appellant has brought this appeal as he felt aggrieved by the court's judgment. In the memorandum of appeal, the appellant has raised the following grounds of appeal;



1. The learned adjudicator totally misdirected herself in law and in fact in failing to address the issues arising from the parties' pleadings and formulating hers based on speculation and conjecture.
 2. The learned adjudicator grossly misdirected herself by failing to properly analyse the claimant's documentary evidence against the pleadings and thus failed to make proper finding as follows: The claimant's evidence was at variance with the pleadings. The claimant failed to address the issues emanating from the respondent's response. There was manifest violation of proper pleading on the part of the claimant in failing to give accurate essential particulars of the subject matter of the suit consistent with his statement; thus misleading and causing uncertainty to the respondent in preparing response. That the vehicle type is a fundamental detail which being described wrongly in the essential documents in support of the claim was fatal to the claimant's case.
 3. The learned adjudicator erred in law and in fact on both assessing and applying the standard of proof.
 4. The learned adjudicator misguided herself on applying the fair and just standard required for relying on documentary evidence under Section 30 of SCCA as follows: The police abstract filed by the claimant was not duly scrutinized as it has PUI which is the well-known police abbreviation for pending under investigation which is totally incompatible with blame; making the police abstract misguided/questionable for reaching any conclusion. The claimant unequivocally stated in his witness statement he hit a grey Toyota fielder, so a claim against a matatu van was not at all envisaged in the case. The vehicle type was a prominent issue arising from the pleadings, shifting the burden of proof that the adjudicator failed to address. The claimant sought no amendment when it was incumbent for him to do so had he intended to change his duly filed witness statement, claim form and police abstract whose contents guided the response to the case.
 5. The learned trial adjudicator failed to apply the credible/trustworthy test to the claimant's evidence on vehicle registration number despite the manifested doubts in the claimant's documents, particularly claim form where he stated that: he was driving at 80 km per hr around 23.00 hours; the other vehicle had no lights, he (claimant) failed to brake and fell unconscious upon impact. In the statement part of the, form he stated the vehicle was a grey Toyota fielder or wish.
 6. The learned trial adjudicator failed to adequately evaluate the evidence and exhibits and thereby arrived at a decision which is unsubstantiable in law.
 7. The learned trial magistrate erred in law and fact by totally ignoring the submissions and authorities of the respondent.
 8. The judgement violates the sacrosanct principle which governs all courts that: "Evidence which is at variance with the averments of the pleadings goes to no issue".
 9. The trial magistrate erred in law and in fact by failing to exercise the special powers of SCC under S 9(1)(2) of the Act to make an inquiry that was merited in the circumstances.
 10. The costs of appeal be provide.
4. I have reproduced the grounds of appeal above in verbatim owing to obvious grammatical and pleadings skills errors some of which renders the grounds hardly incomprehensible. It was also



important for me to reproduce them in order to have clear distinction of which ones are on matters of facts and of law.

5. Although this is a first appeal where the appellate court is called upon to re-evaluate, re-analyze and re-examine the evidence produced in the trial court and come to its own conclusion, this court is limited in that aspect owing to statutory limitation under Section 38(1) of the *Small Claims Court Act* which limits this court to matters of law only. In that case, I am unable to re-analyse the evidence produced in the lower court or conduct the matter in a manner of a re-trial. Doing so, would send me to matters of facts and in the circumstances violate the said provision of the law. I will deal with the grounds of appeal in the sequence as they are enumerated. However, it should be noted that those which turn on issues of facts will not be considered in details.
6. The first ground of appeal faults the adjudicator of failing to address the issues arising from the parties' pleadings. The ground is couched as if it covers both matters of law and facts. It would appear that the appellant was not alive to the provisions of Section 38(1) going by the way the ground has been pleaded. That notwithstanding, I find the ground too general that it fails to identify which areas of the appellant's pleadings or issues were not addressed. This led me to turn to the appellant's submissions in an attempt to decipher any issues of law which the learned adjudicator failed to consider. In the submissions, the appellant has identified three issues as follows;
 - i. Whether the claimant's documentary evidence raises any justifiable cause of action against the respondent.
 - ii. Whether the accident involved the respondent's vehicle.
 - iii. Burden of proof.
7. In my view, issue 'ii' is a matter of fact and I will not go into it. From the general look at it, issue 'i' appears to be an issue of law. However, when it comes to submissions, the appellant leads this court to interrogate facts contained in the documents which deviates to issues of fact. As for whether there was a justifiable cause of action, it is obvious to me that there was.
8. The matter was said to have arisen from an occurrence of an accident which was confirmed by the police. The respondent had filed a claim for costs of repairs which was alleged to have been a direct consequence of the accident. The respondent filed documents in support of the claim. I find that there was a justifiable cause of action which would call for production of evidence whether oral or documentary. Whether the claim was proved to the required standards depends on the facts and evidence presented by the respondent. I will not go into those facts.
9. There is the 3rd issue which the appellant identified as burden of proof. The appellant has not told the court what in this appeal revolves around that issue. The court in its judgment made reference to the evidence produced before it and held that the appellant had not proved liability to extent of 100%. Instead, the adjudicator found each of the parties to have been 50% liable for the accident. This, in my opinion, shows that the lower court was alive to the legal position that the appellant had a duty to discharge the burden of proof. It is clear to me that the court analyzed evidence properly and came to a conclusion which I do not see the point of disturbing. Whether the facts were sufficiently proved is a matter of fact which the law does not allow me to delve into.
10. The above is where the submissions of the appellant ends. He has not made submissions on the other grounds of appeal. He seems to have lumped them up with the first ground. That notwithstanding, I have given due consideration to the grounds of appeal as against the record filed in court which has led me to the conclusion that majority of the said grounds do not raise matters of law though they are couched as if there is a complaint on issues of law.



11. The 2nd ground of appeal claims that the magistrate did not properly analyse the evidence before her. It goes on to put forth four bullet points where the appellant feels that the adjudicator failed to analyse evidence before her. The appellant says in that ground that the evidence was in variance with the pleadings. The appellant has raised issue of discrepancy in description of the make of the vehicle in the respondent's witness statement and his documents. He argues that the witness statement referred to a Toyota fielder while the appellant's vehicle was a matatu. I have looked at the statement of claim filed in the lower court. The same does not mention the make of the motor vehicle. It is therefore not true that there was a variance between the witness statement and the pleadings. The witness statement may have misdescribed the make of the vehicle but since the statement of claim does not give the description, there can't be a variance as claimed by the appellant.
12. Even if there was such a variance, in my opinion, the same is immaterial. Section 32 of the *Small Claims Court Act* excludes application of strict rules of evidence in matters proceeding before the Small Claims Courts. The trial court in my view, considered this issue and came to a conclusion that the appellant had not tendered enough evidence to disprove the respondent's case on the issue of identification of his motor vehicle. I find no merit in this ground of appeal.
13. In the third ground, the appellant states that adjudicator erred in assessing and applying the standard of proof. I have stated earlier that some parts of the grounds of appeal are incomprehensible. This is one of them. I do not understand what the appellant makes of this ground. His submissions do not help as I have not seen any part where the appellant has submitted on the standard of proof and how the adjudicator erred in the same.
14. The fourth, fifth and sixth grounds of appeal raise issues of facts and I decline to be drawn into discussing them. The eighth ground raises the same arguments as in the 2nd ground and I do not need to repeat what I have said about the said ground.
15. The ninth ground of appeal complains that the Honourable adjudicator failed to exercise his special powers under Section 9(1)(2) of the *Small Claims Court Act*. The cited Section provides for functions of the Registrar of the Small Claims Courts. It is not comprehensible what the appellant intended to achieve with citation of this section of the law. It must be either ignorance or an honest mistake of citing the wrong provision of the law. The appellant has not made any submissions on the ground. I have also gone through the lower court's judgement and I am unable to see any violation of the said section of the law. I find this ground unmerited and dismiss it.
16. The 10th ground does not appear to me as a ground of appeal. The same should be a prayer. It is misplaced and again appears to me to be either a mistake or a product of poor drafting.
17. In conclusion, I find no merit in the entire appeal. The same is hereby dismissed with costs to the respondent.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF SEPTEMBER 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

