



**Riaga v Mumbo (Civil Appeal E1337 of 2023)
[2024] KEHC 16750 (KLR) (Civ) (18 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 16750 (KLR)

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

CIVIL

CIVIL APPEAL E1337 OF 2023

NIO ADAGI, J

SEPTEMBER 18, 2024

BETWEEN

FREDRICK OGALO RIAGA APPELLANT

AND

BRIAN ONYANGO MUMBO RESPONDENT

*(An Appeal from the Judgment of Hon. B. AA. Akinyi (RM) in
Milimani SCCCOMM E5005 of 2023. delivered on 24/11/2023)*

JUDGMENT

1. By a Statement of Claim dated 21st September 2023, the Respondent sued the Appellant seeking for general damages, special damages of Kshs.5,550/=, costs of the suit as well as interest.
2. The Respondent's case was that on or about 12th February 2023, he was a pedestrian along Waiyaki way when Motor Vehicle Registration number KCD 926F was negligently driven, controlled and/or managed causing it to lose control, hitting the Respondent and as a result he suffered serious severe injuries.
3. The Appellant filed a defence denying negligence on his part. He attributed negligence to the Respondent wholly or substantially.
4. By agreement of the parties, the hearing proceeded pursuant to provisions of section 30 of the Act. And parties were directed to file and exchange written submissions which they did.
5. Upon consideration of the pleadings, evidence and submissions, the trial court framed two issues for determination. i. whether the Respondent/Claimant proved that the accident was caused by the Appellant/Respondents' negligence and ii. whether he was entitled to the damages sought.



6. On whether the claimant proved that the accident was caused by the respondent's negligence.
7. The learned magistrate observed that the claim being an action for negligence, like in all civil litigation, the burden is always on the claimant to prove that the accident was caused by the negligence of the Respondent.
8. She noted that the Respondent had availed documentary evidence from NTSA that proved ownership of the motor vehicle. The ownership of the vehicle was therefore established and undisputed.
9. Turning now as to whether the Respondent proved negligence on the part of the Appellant. She observed that generally, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. She cited Section 107 (1) of the *Evidence Act*, which provides:

“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”.
10. The learned magistrate states to have looked at the medical report, P3 and the police abstract tendered in evidence and thought that the Respondent had proved on a balance of probabilities that the accident was caused by the negligence on the part of the Appellant. The Appellant on the other hand did not place any evidence before the court to displace the case established by the Respondent regarding the issue of negligence on the Appellant's part.
11. The learned magistrate referred to the case of Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No.68 of 2007 where Justice Ali-Aroni, J. cited the decision in Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter Civil Appeal No. 23 of 1997 which held that:

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence”.
12. The learned magistrate stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings.
13. It was the learned magistrate's considered opinion that the Appellant's defence was unsubstantiated and remained mere statements and that in the same vein failure to adduce any evidence meant that the evidence adduced by the Respondent against the Appellant was uncontroverted and therefore unchallenged.
14. On the claim for special damages, the learned magistrate cited Court of Appeal decision in Hahn Vs. *Singh, Civil Appeal No. 42 of 1983* [1985] KLR 716 that a party claiming special damages must demonstrate that they actually made the payments or suffered the specific injury before compensation will be permitted. She awarded Kshs.5,550 for special damages being the cost of medical report and motor vehicle search based on receipts presented.
15. In assessing and awarding general damages for personal injury, the learned magistrate that she considered the nature and extent of the injuries pleaded and proved together with the residual effects upon the Respondent. She considered the injuries of the Respondent as pleaded and proved by the



produced medical documents including the medical report by Dr. Okere dated 15th September 2023 and Dr. Mwaura dated 18th October 2023 revealed the injuries suffered by the claimant.

16. The Respondent proposed that Kshs.1,000,000 would be adequate amount to compensate him in general damages and relied on the cases of Peter Robert Kinuthia & another V Jackline Atieno Otieno (2022) eKLR, and Alphonse Mwatsuma Mwagamchi V Joseph Mwanza Mwanzu & another (20005) eKLR
17. On his part, the Appellant proposed that Kshs.400,000/= would be a fair estimate of general damages and relied on the cases of Gladys Lwaka Mwombe V Francis Namatsi & 2 others (2019) eKLR and Julius Ndwiga V Damaris Mwende Kasembi (2018)eKLR.
18. In the end, the learned magistrate considered the authorities that were relied upon by the parties and taking into consideration the nature of the injuries, awards from comparable cases and the element of inflation made an award of Kshs.800,000/=, in general damages.
19. The learned magistrate also found that the need for future medical expenses was supported by medical evidence and proved accordingly. She proceeded to award Kshs.30,000/=. She also awarded special damages of Kshs.3,550/= to attract interest at court rates from date of filing suit until payment in full while interest on the award of general damages would be applied at court rates from the date of delivery of the judgment. The Respondent was awarded costs of the suit.
20. Being aggrieved by the said judgment the Appellant lodged the appeal herein
21. The Appellant in the Memorandum of appeal dated 11/12/2023 has raised 8 grounds of appeal which basically challenge the entire judgment of the trial court. The grounds are as follows:
 1. That the learned Magistrate and Adjudicator proceeded on wrong principles in entering judgment for the Claimant for the sum of Kshs.800,000/= in general damages.
 2. That the learned Magistrate and Adjudicator erred in failing to scrutinize/ evaluate the evidence tendered in support of the injuries suffered by the Claimant and to correctly relate them to case law cited therein and thus failed to arrive at a fair and reasonable compensation to the Claimant for the said injuries.
 3. That the Learned Trial Magistrate and Adjudicator erred in failing to give reasons for finding that the sum of Kshs.800,000/= in General Damages to the Claimant was reasonable and / or adequate compensation;
 4. That the Learned Magistrate and Adjudicator erred in law in failing to consider the Respondent's evidence on record and only considered the Claimant's documents yet parties agreed to proceed under section 30 of the *Small Claims court Act*.
 5. That the Learned Trial Magistrate and Adjudicator erred in law in failing to scrutinize and evaluate the evidence tendered and to correctly relate them to case law cited and thereby misapprehended the facts by finding the Appellant 100% liable for causing the accident;
 6. That the Learned Magistrate and Adjudicator erred in law by validating the Claimant's evidence in determining liability; which evidence had not been supported factually and was marred with inconsistencies in its entirety;
 7. That the Learned Magistrate and Adjudicator erred in law in failing to note that Claimant had failed to strictly prove the particulars of negligence pleaded in the Plaint contrary to the trite rule of evidence that negligence must be strictly proven;



8. That the Learned Magistrate and Adjudicator erred in law in failing to apportion liability taking into account the totality of evidence laid by the Appellant and Respondent.
22. This being the final appeal to this court, I am reminded of the provisions Under section 38(1) of the [Small Claims Court Act](#), 2016 an appeal to this court is limited to matters of law only. Accordingly, the court is not permitted to substitute the subordinate court's decision with its own conclusions based on its own analysis and appreciation of the facts unless the findings are so perverse that no reasonable tribunal would have arrived at them (John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others [2018] eKLR).
23. I have perused through the grounds of appeal and to me the Appellant seems to be challenging the entire judgment and the main issues that stand out for consideration by this court are:
- i. Whether the Learned Magistrate and Adjudicator's finding on liability can be disturbed.
 - ii. Whether the Learned Magistrate and Adjudicator's finding on quantum can be disturbed.
24. Before I consider the issues identified above, I note that the Appellant has in the submissions raised an issue of great concern which though not in the grounds of appeal, I am constrained to address it first. The Appellant submits that the trial magistrate's judgment delivered in the lower court is too shallow for the learned magistrate to have fully addressed the legal issues leading to the grant of the award. The Appellant has thus invited this court to read the short judgment and consider whether the same was in compliance with Order 21 Rule 4 & 5 of the Civil Procedure Rules.
25. Order 21 refer to Judgment and Decree:
4. Contents of judgment [Order 21, rule 4]
Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.
 5. Court to state its decision on each issue [Order 21, rule 5]
In suits in which issues have been framed, the court shall state its finding or decision, with the reasons therefor, upon each separate issue.
26. The Judgment subject of this appeal being part of the record, I have carefully and thoroughly read through it and I do not agree with the Appellant because according to me the judgment is valid pursuant to the provisions of x. In any event, the Civil Procedure Rules do not apply to the Small Claims Court.
27. The procedure for the Small Claims Court is also exclusive. In section 17 of the Small Claims [Act No. 2 of 2016](#), the law requires that the court exercises its own procedure, having regard to principles of natural justice. The said section states that: -
- “Procedure of Small Claims Court Subject to this Act and Rules, the court shall have control of its own procedure in the determination of claims before it and, in the exercise of that control, the court shall have regard to the principles of natural justice”.
28. See the decision in Biosystems Consultants v Nyali Links Arcade (Civil Appeal E185 of 2023) [2023] KEHC 21068 (KLR) (31 July 2023) (Ruling) where Justice Kizito Magare, J held that: -
- “In section 17 of the Small Claims Act, the law require that the court exercises its own procedure, having regard to principles of natural justice. The [Civil Procedure Act](#) and Rules



did not apply to the Small Claims Court. Indeed, even the application of the [Evidence Act](#) was severely restricted by section 32 of the Act.

29. He also held that:-

- “f. The small claims court does not need to type its ruling before delivery.
- g. Parties who wish to file submissions may file them together with their pleadings but it is enough that the court acknowledges them.
- h. Whichever the case, submissions in the small claims court should never exceed 3 pages of font 12 size 1.5.”

30. See also *Uniglobe Northline Travel Limited v Maverick Picture Works Limited* (Civil Appeal E045 of 2022) [2022] KEHC 13531 (KLR) (Commercial and Tax) (7 October 2022) (Judgment) where Justice Majanja held that: -

“The appellant’s appeal is grounded on the provisions of the Civil Procedure Rules yet they do not apply to the small claims court. The small claims court is a subordinate court established under the [Small Claims Court Act, 2016](#) (“the SCCA”). Under section 50 of the of the SCCA, the Chief Justice is empowered to make rules of practice and procedure for the better functioning of the court hence the Small Claims Court Rules, 2019 (“the rules”) were enacted.

31. Now I will determine the issues as follows:-

i. Whether the Learned Magistrate and Adjudicator’s finding on liability can be disturbed.

32. I have considered the record and at part 3 of the Response to Statement of Claim, the Appellant pleaded and averred that the claim was denied for the reasons that the Respondent suddenly attempted to cross the road carelessly when the motor vehicle was on the road without taking any reasonable steps or measure to ensure his safety. The Appellant also filed his witness statement stating how the accident occurred and the element of contributory negligence clearly comes out.

33. In *Wayne Ann Holdings Limited (T/a Superplus Food Stores) v Sandra Morgan*, the Court held as follows:

“In this case contributory negligence was raised as a defence. When such a defence [sic] is raised, it is only necessary for a defendant to show a want of care on the part of the claimant for his own safety in contributing to his injury. In *Nance v British Columbia Electric Rly* [1951] AC 601, at page 611, Lord Simon said:

“.....When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove ... that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff’s claim the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full.”



34. On whether the Respondent is liable for contributory negligence. The law on contributory negligence is to apportion proximate cause and blameworthiness where appropriate. In *De Frias v Rodney* 1998 BDA LR 15 it was held as follows:

“Contributory negligence required the foreseeability harm to oneself. A person is guilty of contributory negligence, if she ought reasonably to have foreseen that if she did not act as a reasonable prudence person she might be hush and in reckoning must take into account the possibility of others being careless. All that is required here is that the plaintiff should have failed to take reasonable care for her own safety. I do not find that the plaintiffs conduct was in any way contributory negligence. In the agony of the circumstances, she made an unsuccessful attempt to avoid the collusion.”

35. What the above principle attempts to explain is that the negligence calculus is a framework for a trial court faced with such situational analysis to decide what precautions the reasonable person would have taken to avoid the harm. The classic definition of negligence given by Alderson B in *Blyth vs Birmingham Waterworks Co.* [1843 – 60] ALL ER 478

“Negligence is the omission to do something which a reasonable man, guided upon those considerations with ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.”

36. In my view negligence and contributory negligence comes in infinite forms and would therefore depend on a case-to-case basis. Furthermore, once the Plaintiff has established a prima facie case showing the Defendant is guilty of negligence the onus to discharge that burden in rebuttal rests with the defendant.

37. In the instant case the Defendant/Appellant pleaded and averred that the claim was denied for the reasons that the Respondent suddenly attempted to cross the road carelessly when the motor vehicle was on the road without taking any reasonable steps or measure to ensure his safety. The police abstract that was produced in evidence by the Respondent showed that the matter was pending investigation and it did not indicate who between the Respondent and the Appellant was to blame for the accident.

38. Pursuant to the foregoing, this court is constrained to disturb the finding of the trial court that the Appellant was 100% liable for the accident and apportion liability as at 20% against the Respondent and 80% against the Appellant.

ii. Whether the Learned Magistrate and Adjudicator’s finding on quantum can be disturbed.

39. On the issue of quantum of damages, the trial Court assessed general damages awardable to the Respondent in the sum of Kshs.800,000/= for pain and suffering, Kshs.30,000/= for future medical expenses and Kshs.3,550/= in special damages. The fact of the matter assessment of damages is purely at the discretion of the trial of facts. The idea that an appellate Court would fundamentally differ with the trial Court is neither here nor there. That is the attention of the principle in *Loice Kagunda v Julius Gachau Mwangi* CA 142 OF 2003 the Court of Appeal held that:-

“We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence a appellate Court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons make a wholly erroneous estimate of the damages suffered. The



question is not what the appellate Court would award but whether the lower Court acted on the wrong principles.” (See *Mariga v Musila* {1984} KLR 257).

40. From the record, the medical report of Dr. Cyprianus Okoth Okere dated 15/09/2023 the Respondent suffered: -
1. Missing three upper teeth
 2. Lacerations on the scalp and face
 3. Left tympano mandibular joint dislocation
 4. Anterior longitudinal defect C5C6 intervertebral disc
 5. C5C6 Focal cord contusions
 6. Bruises on the left elbow
41. The doctor classified the injuries as severe harm and recommended replacement of the lost teeth with prosthesis at a cost of Kshs.30,000/=.
42. On the other hand, the medical report by Dr. Waithaka Mwaura dated 18/10/2023 the Respondent suffered: -
1. Loss of three teeth
 2. Neck pains with tingling sensation on upper limbs
 3. Permanent scars.
43. As earlier observed, this matter proceeded under Section 30 of the Small Claims Court thus documents were produced without calling the makers to testify and be cross examined on them. In the instant case there are two contradicting medical reports on the injuries sustained by the Respondent. I will refer to the case of *Shadrack Mathias & another v Agnes Muluki Wambua* [2021] eKLR where the court observed as follows:-

“Where parties intend to rely on medical reports only they ought to confirm that the same are substantially the same in terms of injuries sustained. Parties and their legal advisers ought to take the advice of the Court of Appeal in *James Njoro Kibutiri vs. Eliud Njau Kibutiri* 1 KAR 60 [1983] KLR 62; [1976-1985] EA 220 that the ingenious lawyers are advised that short cuts are fine, as long as you are absolutely sure they won’t land you in a ditch. In *Lehmann’s (East Africa) Ltd vs. R Lehmann & Co. Ltd* [1973] EA 167 it was however, held that:

“The supposed short-cuts in procedure almost always confuse and obscure the true issues and almost always result in prolonged litigation and unsatisfactory decision. However, if the parties to a civil suit agree to adopt a certain procedure and the judge, however wrongly permits such a course, then there is little that a Court of Appeal can do other than seek to make the best of an unsatisfactory position.”



However, once the parties produce the same by consent the court has no option but to make the best out of them. In *Ali Ahmed Naji vs. Lutheran World Federation* Civil Appeal No. 18 of 2003, the Court of Appeal held that:

“The two medical reports before the learned Judge were made by Dr C O Agunda and Dr. Betty Nderitu...The appellant also produced a P3 form...which set out various fractures which the appellant had suffered as a result of the accident. We repeat that these documents were produced in evidence by the consent of the parties and the question of their authenticity was not open to the learned Judge to deal with. We make these remarks here because in her judgement, the Judge made remarks such as “No qualifications disclosed; the doctor is not a consultant”. If the learned Judge had some doubts about the competence of the two doctors, it was clearly her duty to summon them so that they could explain to her the basis upon which they claimed to be doctors. For our part, it is sufficient to point out that all the medical reports produced by the consent of the parties supported the appellant’s claim as to the nature of the injuries he had sustained as a result of the accident.”

The words of Byamugisha, J in *Sentongo and Another vs. Uganda Railways Corp.* Kampala HCCS No. 263 of 1987 however need to be taken note of. In that case the learned judge held, citing Sarkar on Evidence 12th ED pp 506.R. that:

“Medical evidence based on the evidence of other witnesses or prescriptions without observing the facts is not of much value compared with the evidence of a Doctor who personally attended the patient as this is hearsay. Medical reports have to be proved by the person giving them. The Evidence of an expert is to be received with caution because they often come with such a bias in their minds to support the party who calls them that their judgement becomes warped and they become incapable of expressing correct opinion.”

44. In this case, both medical reports were not consistent and the court seems to have based its opinion on both without necessarily wholly adopting one. This court will not therefore disturb the award of Kshs.800,000/= in general damages
45. In light of the state of the pleadings, the factual findings of the cost of future medical expenses cannot be disturbed since the Learned Trial Magistrate was at liberty to rely on any of the medical reports presented before her. The mere fact that she chose one and not the other does not justify interference. This is not a case where the court arrived at a finding without evidence but where the court relied on the evidence on record as it was perfectly entitled to do.
46. Special damages were specifically pleaded and strictly proved to be Kshs. 3,350/=
47. In the end, this appeal partly succeeds and the court enters judgment for the Respondent against the Appellant as follows;
 1. Liability 80% : 20%
 2. General Damages Kshs.800,000
Less liability 20% Kshs.160,000
Kshs.640,000



3. Future Medical Expenses Kshs. 30,000
 4. Special Damages Kshs. 3,550
- Total Kshs.673,550 plus costs and interest.

48. Each party to bear own costs of the appeal.

49. It is so ordered.

**DATED, SIGNED & DELIVERED VIRTUALLY AT MACHAKOS THIS 18th DAY OF
SEPTEMBER 2024**

NOEL I. ADAGI

JUDGE

