



**Al-Husnain Motors Ltd v Kamau & another (Civil Appeal E056 of 2021)
[2024] KEHC 12190 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12190 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E056 OF 2021
S MBUNGI, J
OCTOBER 11, 2024**

BETWEEN

AL-HUSNAIN MOTORS LTD APPELLANT

AND

PETER NJUGUNA KAMAU 1ST RESPONDENT

**EDMOND OPEMI OKWOBA (SUING AS THE LEGAL REPRESENTATIVE
OF THE ESTATE OF PHAUSTINE NENGO OPEMI -
DECEASED) 2ND RESPONDENT**

*(Being an Appeal from the judgment of T.A Odera, Chief Magistrate
delivered on 05/10/2021 in Mumias PMCC No. 72 of 2019)*

JUDGMENT

1. What is before this court is an appeal against a decision by the trial court in Mumias PMCC No. 72 of 2019 delivered on the 5th October 2021.
2. The trial court plaint was filed on 21/06/2019 through Messrs Abok Odhiambo & Co. Advocates, where the Appellant herein, Al-Husnain Motors was sued by the 1st respondent for loss and damages incurred by the 1st Respondent as a result of a road accident along the Busia-Mayoni area involving one Phaustine Nengo Opemi and a motor vehicle registration number KCA 104D Toyota Hiace Van.
3. The 2nd Respondent did not enter appearance in the matter and as a result, default judgment was entered against him.
4. The matter proceeded to full hearing. The appellant participated in the trial despite not yet having filed the witness statement nor the bundle of documents. After close of the 1st Respondent's case but before commencement of the defence case, the appellant finally filed its witness statement, taking the



- position that it had sold the motor vehicle to one James Jomo Machengo, in the year 2014 hence the appellant was not in control, management or possession of the vehicle by the time of the accident.
5. While testifying, the appellant's witness sought to produce the said bundle documents filed out of time. The same was objected to by the 1st Respondent's counsel. The objection was upheld by the trial court and the bundle of documents duly expunged from the record. The case proceeded and judgment was entered against the appellant and in favor of the 1st Respondent.
 6. The appellant being dissatisfied with the decision filed the present appeal vide a memorandum of appeal dated 26th October 2021 on the following grounds: -
 - a. That the learned magistrate erred in law and fact by failing to make a decision on merits of the case after hearing the case on merit.
 - b. That the learned magistrate failed to consider evidence tendered before court thus arriving at a wrong decision on quantum.
 - c. That the learned magistrate erred in law and fact by awarding excessive loss of dependency and not apportioning liability.
 - d. That the learned trial magistrate erred in fact and law by overlooking the evidence on the age of the minor.
 - e. That the learned magistrate erred in that the judgment was against the weight of the evidence tendered and by submissions of the appellant on liability.
 - f. That the learned magistrate did not consider submissions by the defendant.
 - g. That the learned magistrate erred in totality in arriving at the decision and applied the wrong principles.
 - h. That the learned magistrate erred in law in not finding that the respondent had not proved this case under section 207 and 108 of the evidence act.
 7. The appellant sought to have the appeal allowed and the judgment of the trial court be set aside and be substituted with an appropriate order on quantum and costs of the appeal be awarded to the appellant.
 8. The 1st Respondent filed written submissions dated 20th June 2022 in response to the memorandum of appeal submitting that the appeal is unmerited and should be dismissed with costs to the 1st Respondent.
 9. The appellant, vide a notice of motion dated 9th June 2022, prayed that the court be pleased to allow the appellant to adduce additional evidence at the hearing of the appeal, this being the sale agreement between the appellant and the said James Jomo Machengo in respect to the suit motor vehicle KCA 104D.
 10. The 1st Respondent filed a replying affidavit and written submissions dated 12th October 2022 and 14th October 2022 respectively in response to the motion, urging the court to dismiss the application with costs. The 1st Respondent stated that the trial court subsequently gave its ruling on the attempt by the appellant to introduce new evidence and the same should be upheld.
 11. The 1st Respondent further mentioned that the appellant herein was granted 30 days right of appeal against the trial court's ruling expunging the new evidence, which appeal step was not taken by the appellant and as such should not have a second chance to do the same.



12. The replying affidavit was served upon the appellant by the 1st Respondent's counsel and an affidavit of service dated 13th October 2022 duly filed.
13. After careful consideration of the records, including the affidavits and submissions presented in this court as to whether the appellant had made a case warranting it to be granted leave to adduce additional evidence at this appellate stage, the court issued a ruling dated 22nd September 2023. The Notice of motion dated 9th June 2022 was struck out with costs to the 1st Respondent.
14. Since the appeal had already been admitted, parties proceeded towards the expeditious disposal of the appeal, being canvassed by way of written submissions.

Appellant's submissions.

15. The appellant in his submissions dated 11th May 2024 mentioned that they were not in possession of the motor vehicle at the time of the accident as it was transferred to one Mr. James Jomo Machengo, supporting this claim with a sales agreement dated the 24th August 2014.
16. The appellant further submitted that they were not the owners of the said motor vehicle as per the motor vehicle copy of the records produced by the 1st respondent herein dated 21st June 2019, where the search shows that they were the previous owners and the 2nd respondent herein, Peter Njuguna Kamau is the current registered owner of the suit motor vehicle as from 17th April 2019.
17. The appellant submitted that he had no relationship whatsoever to the 2nd respondent and could only have been liable if it was proved that the driver then was his agent or was acting under his authority at the time of the accident.
18. The appellant also submitted that the trial magistrate awarded inordinately high damages. He further submitted that the special damages should be pleaded and proved through production of receipts. The appellant submitted that no receipts were produced to prove the pleaded amount of Kshs. 216,950/-

Respondent's submissions.

19. The 1st respondent that the trial court made a judgment as per the standard required in civil cases, being on a balance of probabilities. The 1st respondent placed reliance on the case of *Stanley Maira Kaguongo v Isaac Kibiru Kabuthia*(2022)eKLR, *Francis Mutito Mwangi v MM* (2016) eKLR , the *Town Council of Ol'Kalou v Ng'ang'a General Store* Civil Appeal No. 269 of 1997 among others.
20. On whether the quantum of damages awarded by the trial court was commensurate in compensation in terms of loss of pain and suffering, loss of expectation of life and loss of dependency, the 1st respondent cited *Catherine Mwendwa Mwirigi v Lucy Nyokai Karwamba(suing as the legal administrator of the estate of Derrick Mugambi Mwimbi - Deceased)*(2019) eKLR, *Seremo Korir & Another v SS(suing as the legal representative of the estate of MS, deceased)*(2019) eKLR.

Analysis.

21. I have considered the pleadings and submissions by both parties and the main issues for determination are: -
 - a. Whether the trial magistrate court properly rendered itself on the merits of the case in apportioning liability.
 - b. Whether the trial magistrate erred in finding that the appellant is the registered owner of the motor vehicle KCA 104D and should be liable for the damages in this suit.



- c. Whether the trial magistrate erred in finding the appellant herein vicariously liable.
 - d. Whether the damages granted against the appellant by the magistrate court are excessive.
 - e. Whether the quantum of damages awarded by the trial magistrate court was commensurate in compensation in terms of loss of pain and suffering, loss of expectation of life and loss of dependency.
22. This being a first appeal, this Court has the duty to analyse and re-examine the evidence adduced in the lower Court and reach its own conclusion but bear in mind that it neither saw nor heard the witnesses testify and make due allowance for the said fact. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the Court stated as follows-
- “This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”
23. It is clear that the determination of the matter in question revolves around the question whether the respondent proved her case on the balance of probabilities. The provisions of sections 107,109 and 112 of the *Evidence Act*, on the burden of proof, were extensively dealt with in *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, in which the Court of Appeal held that:
- “As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”
24. The evidential burden of proof is captured under Sections 109 and 112 of the *Evidence Act* as follows;
- “109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.
112. in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him”.
25. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in *William Kabogo Gitau v George Thuo & 2 Others* [2010] 1 KLR 526 stated that:
- “In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”



Determination.

26. After looking at the grounds of appeal, submissions of the parties, it is my opinion that issue (a), issue (b), issue(c) are intertwined. For they both revolve around the issue of liability so I will address them wholesomely.

27. It is clear to this court that the appellant's submissions on the above three issues are hinged on evidence that was expunged from the record by the trial court. The appellant's attempt to have additional evidence as to the ownership of the motor vehicle adduced at the appellate stage was thwarted by this court's ruling delivered on the 22nd September 2023 by Justice Wananda where he rendered himself as follows: -

“...Having chosen not to appeal against the ruling, I find that what the appellant is now attempting to do is to ‘sneak in’ an appeal within an appeal. This is against procedure and is an abuse of the court process. Allowing the application will set dangerous precedent and will fly against the face of the principal that ‘litigation must come to an end’...”

Furthermore, the court ruled as follows: -

“...I find the application to be vague in so far as it seeks that the court be pleased to allow the applicant to adduce additional evidence at the hearing of the appeal ‘which shall include’ the sale agreement. Apart from the agreement therefore, the application seeks leave to adduce other evidence which however has not been specified leaving the court to speculate...”

28. Therefore, the court is left to re-evaluate the evidence as recorded by the trial court.

29. On the issue of ownership of motor vehicle, the appellant (2nd defendant in the lower court) called one witness, Alfred Kalya(DW1) who denied ownership of the motor vehicle saying that it was sold to one James Jomo Machengo in the year 2014. The trial court rendered itself as follows: -

“...I have seen the copy of records indicating that the 2nd defendant is the previous owner while the 1st defendant is the current registered owner. An issue thus arises on who was the registered owner at the material time. If defendant sold to Jomo, then assuming Jomo sold to 1st defendant. When did the sale occur? This issue can only be answered by 1st defendant, Jomo and 2nd defendant. The sale agreement and transfer documents were not produced. The issue of sale could have been determined between the 2nd defendant and Jomo on one part and Jomo and 1st defendant on the other part. In any event, the issue of Jomo was not pleaded and it is trite law that parties are bound by their pleadings. The date of registration of 1st defendant is not indicated in Pexh 14. The issue of ownership at the material time was between 1st and 2nd defendant and the said Jomo. Jomo was not enjoined herein to say when he took over the vehicle and when he passed it to 1st defendant. In the absence of the same, I find that the 1st defendant was the registered owner of the vehicle as at 17.04.2019 while the 2nd defendant while the 2nd defendant was the owner of the vehicle at the material time...”

30. After considering the facts, I find that the appeal has no merit and is hereby dismissed. Costs to the respondent.

31. Right of appeal 30 days.



DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 11TH DAY OF OCTOBER, 2024.

S.N MBUNGI

JUDGE

In the presence of:

Mr. Mulama for the 1st respondent present online.

Mr. Otieno Yogo Advocates for the appellant absent.

Court Assistant – Elizabeth Angong'a

