



**Imbiri v Excel Chemicals Ltd & another (Civil Appeal E821 of 2022)
[2024] KEHC 11654 (KLR) (2 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 11654 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL E821 OF 2022
AM MUTETI, J
OCTOBER 2, 2024**

BETWEEN

TOBIAS OKUMU IMBIRI APPELLANT

AND

EXCEL CHEMICALS LTD 1ST RESPONDENT

BETT K. RICHARD 2ND RESPONDENT

*(Being an appeal against the judgement of Hon. BJ OFISI SPM in
Milimani SCC NO. E590 OF 2022 delivered on 29th September 2022.)*

JUDGMENT

Introduction

1. The Appellant in this Appeal has the claimant before the small claims Court. The suit was dismissed thus prompting the instant appeal
2. The Appellants amended memorandum of Appeal has 12 grounds namely:
 - i. The Learned Magistrate erred in law and in fact in dismissing the Claimant's suit yet it is manifestly clear that indeed the claimant was injured in the accident as pleaded and proved by the evidence on record.
 - ii. The Learned Magistrate erred in fact and in law in applying a standard of proof higher in civil cases; that is on a balance of probability.
 - iii. The Learned Magistrate erred in law and in fact in failing to hold that the Claimant's case was unchallenged and uncontroverted and thus failed to wholly hold the Respondents liable for causing the accident.



- iv. The Learned Magistrate erred in fact and in law in failing to award special damages despite production of receipts which were exhibited and produced in evidence during Hearing.
 - v. The Learned Magistrate erred in law and in fact in failing to award costs and interests of the suit to the Plaintiff.
 - vi. The Learned Magistrate erred in law and in fact in failing to balance the weight of evidence by the Claimant and that of his Witnesses against that of the Respondents' case and thus arriving at an erroneous decision.
 - vii. The Learned Magistrates erred in law and in fact in failing to consider the Claimant's submissions and authorities filed court.
 - viii. The Learned Magistrate erred in law and in fact in to totally misapprehending and misconceiving the Claimant's suit and eventually dismissing the same contrary to the weight of the documents and evidence on record.
 - ix. The Learned magistrate erred in Law and in fact in finding that in the vent that the Appellant had proved his case, he was entitled to general damages of Kshs. 300,000/= an amount that is manifestly too low in view of the injuries suffered by Appellant.
 - x. The Learned Magistrate's award of general damages was so manifestly low as to be a wholly an erroneous estimate of general damages and was a miscarriage of justice.
 - xi. The Learned Magistrate erred in fact and in Law in failing to consider the Appellant's Submissions on quantum and the authorities therein.
 - xii. The Learned Magistrate erred in fact and in Law in failing to consider conventional awards for, general damages in cases of similar injuries.
3. It is discernible from the grounds of Appeal that the Appellant has singled out the following issues for determination by this Court:-
- i. Whether the appellant proved his case on a balance of probabilities.
 - ii. Whether the respondent was wholly liable for the accident; and
 - iii. Whether the appellant was entitled to compensation for the damage suffered.

Appelants Case

4. The appellant in his submissions urges the Court to set aside the decision of the Lower Court and make appropriate orders in his favor.
5. The appellant's case was that on the 9th November 2021 he was a lawful rider of motor cycle number KMCU 988 K along ICA Road in Nairobi when the Respondents motor vehicle Registration number KBV 847T was so negligently driven that it hit his motor cycle from the rear.
6. The Respondent on his part denied the claim and maintained that the accident was solely caused by the appellant.
7. In support of his claim the appellant testified that when the accident occurred he was riding on the extreme left of the road leaving adequate room for any vehicle that rushed to overtake him.
8. He further narrated that when he was hit he lost consciousness and was picked up and rushed to the hospital where he was treated and discharged the same day.



9. He particularized his injuries in his further witness statement.
10. The appellant called CW2 Ben Kithome who testified in support of his case but who apparently did not witness the accident.
11. Further, CW3 PC JOSEPH WACHIRA of industrial police station also testified in support of the appellant. The witness stated:-

“Motor vehicle Registrations Number KBV 847 T Hyundai which was being driven by Bett K. Richard . He was driving the Motor Vehicle from Mombasa direction heading to Southern Bypass and on reaching at the scene of the accident one motor cycle registration number KMCU 988K Yamaha which was ridden by unknown rider who tried to overtake on the left side and in the process he lost control and hit the motor vehicle on the left rear side”

12. The witness produced the Police abstract dated 22nd Nov 2021 as an exhibit.
13. The witness was called by the appellant in support of this case. However, his testimony turned out to be adverse to the appellants case.
14. Upon cross examination CW3 did not say who was to blame for the accident.
15. The doctor CW4 produced the medical report as proof of the injuries and testified that he was paid Ksh. 15,000 for his services.
16. That is the summary of the plaintiff’s case.

Respondents Case

17. The Respondent on his part called one Richard K. BETT who worked as a driver at Excel Chemicals Ltd. He adopted his statement in which he stated; -

“I was driving on estimated speed of 40km/hr. Ahead of me was few vehicles and behind left side was a motor cycle. I suddenly heard a loud bang from behind and looking from the left side mirror I saw a motorcycle sliding on the left side of the road. Due to tarmac road clippings the motor cycle fell on the left road edge and the rider fell on the road edge as well. I alighted to assess the situation.”

18. The above-named witness was the only witness for the respondent. His evidence taken together with that of the appellant’s witness PC Joseph Wachira demonstrated that the appellant was the author of his own misfortune.

Analysis

19. As a first Appellate court my duty is to analyze and re-evaluate the evidence adduced by both parties and draw my own conclusions on the matter bearing in mind that I did not have an opportunity to hear the 123witnesses – *Selle & Another Vs. Associated Motor Boat co ltd & others*(1968) EA followed .
20. The learned Honourable Magistrate after analyzing the evidence arrived on finding that the Respondent was not to blame for the accident and dismissed the suit with costs.
21. After careful perusal of the submissions filed by both parties and upon analyzing the evidence, I have come to the same conclusion that the appellant was solely to blame for the accident. The learned honourable Magistrate reached the correct decision in law.



22. The excerpts of the evidence I have reproduced above point to a clear fact that the motor cyclist was to blame for the accident. He hit the motor vehicle of the respondent from the rear.
23. The respondent's witness gave a vivid account of what happened at the scene as well as the condition of the road at the point of impact if indeed there were loose chippings on the road, the appellant was negligent by failing to keep a safe distance from the motor vehicle ahead of him.
24. The risk of skidding was rather obvious. It is the duty of every driver to exercise caution whilst driving.
25. It cannot be that respondent was negligent yet his vehicle was hit from behind. The appellant was clearly at fault.
26. His witness CW2 was not at the scene when the accident occurred and therefore his evidence was worthless.

Conclusion

27. Taking into account the totality of the evidence, I find no reason to interfere with the decision of the learned Honourable Magistrate.
28. The appeal is accordingly dismissed with costs to the Respondent.
29. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 2ND DAY OF OCTOBER, 2024.

A. M. MUTETI

JUDGE

In the presence of:

Court Assistant: Kiptoo

Ms Sirma holding brief Mwihihia for the Appellant

Kiplagat for Respondent Absent

