



**Kahungu v Nchore (Civil Appeal E1369 of 2023)  
[2024] KEHC 13042 (KLR) (4 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13042 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL APPEAL E1369 OF 2023**

**TW OUYA, J**

**OCTOBER 4, 2024**

**BETWEEN**

**PETER MACHARIA KAHUNGU ..... APPELLANT**

**AND**

**JOASH ONGONDO NCHORE ..... RESPONDENT**

*(Being an appeal against the judgement and decree of the Hon.D. S. Aswani (Adjudicator)  
delivered on 16th February 2023 in Nairobi Milimani SCCC No. 3671 OF 2023)*

**JUDGMENT**

**Background**

1. Peter Macharia Kahungu (hereinafter the Appellant), the Claimant before the lower Court, initiated suit by way of a statement of claim dated 21<sup>st</sup> November, 2022 as against Joash Ongondo Nchore, the defendant before the lower Court, (hereinafter the Respondent) claiming damages arising out of a road traffic accident.
2. The claimant pleaded that he was lawfully and carefully crossing the road along Ronald Ngala Street when the Respondent or his authorized driver/agent carelessly drove motor vehicle registration number KDA 018H causing it to lose control and violently knock down the claimant occasioning him severe injuries for which he solely blames the respondent. The Respondent failed to enter appearance or file any response despite being served with pleadings and accompanying documents. Interlocutory judgement was entered. The court also directed that formal proof proceed by way of documents with leave granted to the claimant to file submissions.
3. The trial Court after analyzing the evidence and submissions adduced by the claimant, found the claim lacking in merit and set aside the interlocutory judgement which had been entered in favor of the claimant with no orders as to costs.



4. Aggrieved with the outcome therein, the Appellant preferred the instant appeal challenging the finding by the trial Court on the following grounds in his memorandum of appeal dated 24<sup>th</sup> March, 2023, as itemized hereinunder: -
  - a. The learned Magistrate erred in facts and law by finding in favour of the respondent to the extent of dismissing the Appellant's claim.
  - b. The learned magistrate erred in facts and law by failing to consider the evidence on record and appreciate the fact that the respondent had not filed any pleadings.
  - c. The learned magistrate applied the wrong principles in dismissing the appellant's claim.
  - d. The learned magistrate erred in facts and law in failing to appreciate the totality of the weight of the evidence adduced by the Appellant.
  - e. The learned magistrate erred in facts and law in failing to find that the respondent owed the claimant a duty of care.
  - f. The learned magistrate erred in fact and law in faulting the claimant by not filing a witness statement while the rules of procedure do not require so.
  - g. The learned magistrate erred in fact and in law in attributing 100% liability on the claimant.
5. In light of afore-captioned itemized grounds of appeal, the Appellant prays that:
  - a. The Appeal be allowed and the judgement and consequential orders of the Small Claims Court made on 16<sup>th</sup> February 2023 be set aside.
  - b. Costs of the Appeal be awarded to the Appellant.
6. Directions were taken on disposal of the appeal by way of written submissions, of which this Court has duly considered. Similar, to the lower Court proceedings, only the Appellant participated in the instant appellate proceedings.

### **Submissions**

7. The Appellant's arguments were centered around two main issues: That the trial court erred in setting aside the interlocutory judgement yet the Respondent did not file any pleadings or submissions. Secondly, the Appellant argued that the trial court in its Ruling stated that the Appellant had not filed a witness statement yet this is not a mandatory requirement in the Small Claims Court. That the first schedule of the *Small Claims Court Act* provides that the form required to be filed in court is the statement of claim and that there is no mention of the witness statements being a mandatory document. He cited various provisions of the *Small Claims Court Act* 2016 which give guidelines on how to deal with its matters:

Section 17 of the small claims Act 2016 states:

1. 17. Procedure of small claims court
2. 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.

Section 23 (1) of the small claims Act 2016 states:



1. Every claim filed with the Court shall commence with the filling of a statement of claim in the prescribed form signed or authenticated by the claimant or authorized representative.

Section 24 of the small claims Act 2016 provides:

Every statement of claim shall contain the following particulars

- a. The name and address of each claimant and, in the case of a representative claim, the name and address of each person represented;
- b. The name and address of each respondent;
- c. The nature of the claim;
- d. The sum of money claimed by each claimant or person represented;
- e. The relief or orders sought; and
- f. Other particulars of the claim as are reasonably sufficient to inform the respondent of the ground for the claim and the manner in which the amount claimed by each claimant or person represented has been calculated.

Section 32 of the *small claims court Act* 2016 states:

32. Exclusion of strict Rules of evidence
  - (1) The court shall not be bound wholly by the Rules of evidence.
  - (2) Without prejudice to the generally subsection (1), the court may admit as evidence in any proceedings before it, any overall or written testimony, record or other material that the court considers credible or trustworthy even though the testimony, record or other material is not admissible as evidence in any other court under the law of evidence.
  - (3) Evidence tendered to the court by or on behalf of a party to any proceedings may not be given oath but that court may, at any stage of proceedings, require that such evidence or any part thereof be given on oath whether orally or in writing.
  - (4) The court may, on its own initiative, seek and receive such other evidence and make such other investigation and inquiries as it may require.
  - (5) All evidence and information received and ascertained by the court under subsection (3) shall be disclosed to every party.
  - (6) For the purposes of subsections (2), an Adjudicator is empowered to administer an oath.
  - (7) An Adjudicator may require any written evidence given in the proceedings before the court to be verified by statutory declaration.



8. The Appellant also submitted that where a party fails to rebut evidence of the other as in this case, the court has no alternative but to believe the version of the first party. He cited Hon. Justice A. Mabeya in *Safarilink Aviation V Trident Aviation Kenya Limited & Another* [2015] Eklr where it was held that:

“Failure to rebut evidence tendered by one party leaves the court with no option but to draw an inference that the facts as presented are true...”

9. He argued that he filed all the necessary documents in the trial court and that the trial court was not bound by strict rules of evidence and ought to have relied on the statement of claim which contained all the particulars together documents attached in support of the claim.

### **Analysis And Determination**

10. The Court has considered the memorandum of appeal, the record of appeal and original lower court record. It would be apt to observe at this juncture that this is a first appeal and specifically one from the Small Claims Court. Section 38 of the *Small Claims Court Act* prescribes the nature of appeals that lie from the said Court to the High Court by providing that; -

“(1) A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.

(2) An appeal from any decision or order referred to in subsection (1) shall be final.”

11. In ordinary appeals, the first appellate court will only interfere with a finding of fact made by a trial court when such finding was based on no evidence, or if it is demonstrated that the Court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & Another vs Duncan Mwangi Wambugu* (1982 – 1988) 1 KAR 278. Nevertheless, by dint of Section 38 of the *Small Claims Court Act* this is no ordinary first appeal and it would be remiss if this Court were not at the outset, satisfy itself that the appeal before it falls within the purview of Section 38 of the *Small Claims Court Act*.

12. In considering its mandate on a second appeal, that is on points of law only, the Court of Appeal in *Kenya Breweries Ltd v Godfrey Odoyo* [2010] eKLR, distinguished between matters of law vis-à-vis matters of fact by stating that: -

“I have anxiously considered the pleadings, the evidence on record, the judgment of the learned Senior Resident Magistrate and the judgment of the superior court, the grounds of appeal, the submissions of the learned counsel as well as the authorities to which we were referred. First, this is a second appeal. In a first appeal the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyse it, evaluate it and come to its own independent conclusion. In other words, a first appeal is by way of a retrial and facts must be revisited and analysed a fresh, - see *Selle and Another vs. Associated Motor Boat Company Ltd and Others* (1968) EA 123. In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters, they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.”



13. Black's Law Dictionary, 9<sup>th</sup> Ed. Pg. 1067 defines; -

“Matter of fact as: A matter involving a judicial inquiry into the truth of alleged facts and  
Matter of law as: A matter involving a judicial inquiry into the applicable law.”

14. I had noted here-above that the substratum of this appeal is premised on two major arguments:

- a. That the trial court misdirected itself by finding that failure to file a witness statement was fatal to the plaintiff's case.
- b. That the Trial court failed to enter judgement in spite of unrebutted evidence based on the fact that the defendant did not file any pleadings or submissions.

The two issues raised above are on points of law which need to be evaluated.

15. In considering whether the trial court erred by finding that the appellant's claim could not succeed due to failure to file a witness statement, this court has looked at the impugned judgement which reads in part:

“Liability

“.....This being a tort of negligence, the claimant is obligated to prove negligence on the part of the Respondent. For the Respondent to be found to be liable to pay damages prayed for, the Claimant must prove that he was negligent.

The Claimant did not file a witness statement but pleads to have been lawfully and carefully crossing the road when the Respondent's vehicle hit.

The police abstract he produced to support the claim blames the pedestrian, himself for the accident.

The Claimant through the police abstract has only managed to prove that indeed the accident occurred and the motor vehicle as pleaded was involved.

There is nothing before court that proves that the Respondent was to blame for the accident, especially with the abstract blaming the pedestrian. The Claimant has failed to prove even to the required standard that the Respondent is liable for the accident, to any extent.....”

16. Upon analysis, it obvious that the Trial Court judgement was based on the failure of the Appellant to discharge the burden of proof rather than failure to attach a witness statement. That as the claimant, he failed to prove the elements of negligence as against the Respondent. This court will therefore not belabor the principles and procedure prescribed under the [Small Claims Court Act](#) 2016 which are cited in the Appellant's submissions.

17. The second arm of the appeal is that the trial court failed to enter judgement in spite of unrebutted evidence based on the fact that the defendant did not file any pleadings or submissions. The Appellant cited the authority *Safarilink Aviation V Trident Aviation Kenya Limited & Another* [2015] Eklr where he argues that the court had no option but to draw an inference that the facts as presented by the plaintiff are true since the defendant failed to rebut evidence.

18. Whereas it is true that unrebutted evidence can lead to an interlocutory judgement in favor of a claimant, it does not in any way discharge the alleging party from the duty of burden of proof. That said, the applicable law as to the burden of proof is found in Sections 107, 108 & 109 of the [Evidence Act](#). Whereas, it is well trodden that the same is on a balance of probabilities, the Court will still have



to assess the oral, documentary and real evidence advanced by a party and decide which case is more probable. As was held in the Court of Appeal decision in *Mumbi M'Nabea v David M. Wachira* [2016] eKLR, the duty of proving the averments contained in the claim lay squarely on the Appellant. In *Karugi & Another v Kabiya & 3 Others* (1987) KLR 347 the Court of Appeal stated that: -

“ [T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...-. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.” (Emphasis added)

19. Indeed, the trial court after considering the Appellant's pleadings and material relied on in support of his claim, stated in its decision that; -

“ The claimant has failed to prove even to the required standard that the respondent is liable for the accident to any extent. The claim against the Respondent fails for lack of evidence...”

20. On Quantum of damages the court noted that they would have been awarded only if liability would have been proven. The quantum of damages though assessed in the trial proceedings are of no consequence in this appeal being that liability of the Respondent was held not to have been proven.

21. Consequently, the Appellant failed to establish on a balance of probabilities his case as against the Respondent and this Court cannot fault the trial Court for arriving at the decision it made. Under Section 107 of the *Evidence Act*, the burden of proof lay with the Appellant and if his evidence did not support the facts pleaded, he failed as the party with the burden of proof. See the case of *Wareham t/ a A.F. Wareham* (supra). Therefore, the appeal herein lacks merit and ought to be dismissed with no orders as to costs.

### **Determination**

- i. Appeal is dismissed.
- ii. The Judgement and or Decree in *Milimani SCC No.3671 OF 2022* delivered on 16<sup>th</sup> February, 2023 is hereby sustained and or upheld.
- iii. No orders as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 4<sup>TH</sup> DAY OF OCTOBER, 2024**

**HON. T. W. OUYA**

**JUDGE**

For Appellant

For Respondent

court assistant martin korir

