



**Musungu v Tipper Hauliers Limited (Civil Appeal E091 of 2023)  
[2024] KEHC 15889 (KLR) (22 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 15889 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL E091 OF 2023  
REA OUGO, J  
OCTOBER 22, 2024**

**BETWEEN**

**MOSES BARASA MUSUNGU ..... APPELLANT**

**AND**

**TIPPER HAULIERS LIMITED ..... RESPONDENT**

*(Being an appeal from the judgment and decree of the Principal Magistrate at Webuye read and delivered by P.Y Kulecho on the 25th August 2023 in Webuye CC No 189 of 2013)*

**JUDGMENT**

1. The appellant filed a suit at the subordinate court claiming that the respondent was the legal/or beneficial owner of trailer registration KAZ 376L/ZC 466 Nissan Diesel. On 18<sup>th</sup> December 2018, the appellant was lawfully riding motorcycle reg no KMEF 596A along Webuye- Bungoma road when the respondent's driver lost control and infringed on the other lane occasioning the accident. The appellant averred that the defendant's driver's recklessness caused the accident. The appellant sought general damages for pain, future earning capacity, special damages and costs of the suit.
2. The respondent filed its statement of defence and averred that if at all an accident occurred then the same was occasioned by the negligence of the appellant.
3. The appellant testified as Pw1 while the respondent closed its case without calling any witnesses. The trial court found that the appellant pleaded that he was knocked down by KAL 367L//ZC4661 but in his evidence and submissions, he refers to KAL 367L/ZC4661 and not KAL 376L/ZC4661. The trial court found that the appellant had not proved his case on a balance of probabilities. It noted that if the appellant proved its case it would have held that the respondent was 100% liable and awarded general and special damages of Kshs 1,000,000/- and Kshs 6,000/- respectively.
4. The appellant dissatisfied with the judgment of the lower court gas filed a memorandum of appeal highlighting six grounds for appeal:



1. That the learned trial magistrate misdirected herself in finding that the appellant referred to motor vehicle registration number KAL 367/ZC4661 and not KAL 376L/ZC4661 in the plaint.
  2. The learned trial magistrate misdirected herself in finding that the appellant led evidence purporting to have been knocked down by a motor vehicle other than which was pleaded when the exhibits produced in evidence and the adopted witness statement indicated the motor vehicle involved and blamed in the accident was registration number KAL 376L/ZC 4661.
  3. The learned trial magistrate erred in law and in facts in finding that the appellant failed to prove his case on a balance of probability.
  4. That the learned trial magistrate failed to apply judicially and to adequately evaluate the pleadings; evidence and exhibits tendered before it and particularly those of the appellant and thereby arrived at a decision unsustainable in law.
  5. The trial magistrate misdirected itself on the principles applicable in determination of liability and relied on technicalities to arrive at its decision.
  6. The learned trial magistrate erred in law and facts by failing to consider and take into account the materials presented before it holistically.
5. The appeal was canvassed by way of written submissions and both parties filed their respective submissions. The appellant argues that its pleadings did not refer to motor vehicle registration numbers KAL 376L/ZC4661, KAL 367L/ZC4661, and KAL 376L/4661. Similarly, no evidence was led concerning those vehicles. The appellant's evidence was unchallenged and therefore the respondent as the owner of motor vehicle registration number KAZ 376L/ZC 4661 was liable for the accident. The appellant sought to set aside the trial court's finding and urged the court to find the respondent 100% liable. On quantum, they submit that an award of Kshs 1,500,000/- is an adequate compensation and cited the case of Francis Ndungu Wambui & 2 others v VK (a minor suing through next friend and mother MCWK (2019) eKLR and George William Awuor v Beryl Awuor Ochieng (2020) eKLR.
  6. Although the trial court found that the same was not pleaded or proved, the appellant submits that he pleaded that he would require a knee replacement at an estimated cost of Kshs 600,000/- and the same was supported by the report of Dr Sokobe as well as the medical report from St. Luke's Hospital. The appellant implored the court to set aside the finding on quantum.
  7. The respondent opposed the appeal. They submit that the appellant in their plaint pleaded that the vehicle involved in the accident was motor vehicle registration no. KAZ 376L/ZC 4661 while the appellant's witness statement identifies the vehicle as KAZ 367L/ZC 4661. They submit that the appellant's testimony was at variance with his pleadings and cited the case of David Sironga Ole Tukey v Francis Arap Muge & 2 Others (2014) eKLR and Raila Amolo Odinga & Another v IEBC & 2 Others (2017) eKLR. They urged the court to find that the trial court did not error in its judgment by finding that the appellant's case had been proved on a balance of probability.
  8. On quantum, it was submitted that the trial court was properly guided by the decision made in Mutai v China Road Bridge Corporation (2008) eKLR where the plaintiff suffered similar injuries and an award of Kshs 1,000,000/- was made.



## **Analysis And Determination**

9. Being a first appeal, the court relies on principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“.....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular,, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

10. The trial magistrate found that the appellant failed to prove its case to the required standard because his pleadings and evidence were at variance. In paragraphs 3, 4, and 5 of the plaint, the appellant refers to the respondent’s car as trailer registration number KAZ 376L/ZC 4661. Similarly, in paragraph 9 of the appellant’s witness statement, he testified that he blamed the driver of trailer KAZ 376L/ZC 4661 for causing the accident. The Motor Vehicle Copy of Records reveals that the respondent owns motor vehicle registration number KAZ 376L. The police abstract also shows that the vehicle involved in the accident was KAZ 376L/ZC 4661. The evidence by the appellant was clear in his pleadings that the motor vehicle registration number KAZ 376L/ZC 4661 caused the accident and he presented sufficient evidence to support his allegations. The respondent did not present any evidence to counter the appellant’s testimony and I find that the appellant proved his case on a balance of probabilities. The respondent was 100% to blame for the accident, thus I set aside the trial court’s judgment on liability.
11. On quantum, I note that the issue has been raised by the appellant in his submissions but not in grounds 1-6 of the Memorandum of Appeal. The trial magistrate in his judgment held that he would have awarded Kshs 1,000,000/- as general damages and Kshs 6,000/- as special damages. The appeal challenging liability having been successful, the appellant is awarded general and special damages of Kshs 1,000,000/- and Kshs 6,000/- respectively. Orders accordingly.
12. The appellant shall have the cost of the appeal.

**DATED, SIGNED, AND DELIVERED AT BUNGOMA THIS 22<sup>ND</sup> DAY OF OCTOBER 2024.**

**R.E. OUGO**

**JUDGE**

In the presence of:

Miss Murithi - For the Appellant

Respondent - Absent

Wilkister -C/A

