



REPUBLIC OF KENYA



**Sammy Traders Ltd v Odhiambo & 2 others (Civil Appeal  
E30 of 2020) [2023] KEHC 1881 (KLR) (14 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1881 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL E30 OF 2020**

**TA ODERA, J  
MARCH 14, 2023**

**BETWEEN**

**SAMMY TRADERS LTD ..... APPELLANT**

**AND**

**FREDRICK OMONDI ODHIAMBO ..... 1<sup>ST</sup> RESPONDENT**

**DIGITECH ENTERPRISES ..... 2<sup>ND</sup> RESPONDENT**

**CHARDWICK OBALA ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. Reuben. S. Kipngeno, Senior Resident Magistrate, Nyando, delivered on 24th November 2020 in Nyando SRMCC NO. 6 OF 2017.)*

**JUDGMENT**

**Background**

1. The Appeal before court is against the award of Kshs 270,000/= to the 1<sup>st</sup> Respondent, and liability of 100% jointly and severally to the Appellant, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents never entered appearance before the lower court and interlocutory judgment was entered against them.
2. Brief facts of the case were that on or about October 4, 2015 he was standing at an accident scene along the Kendu-Bay- Katito highway when Nissan matatu number KBN 978G slowed down to take victims to hospital. That at that point lorry registration number KCC 106P hit the matatu from behind causing the matatu to hit him, as a consequence of which he suffered severe injuries.
3. The Appellant denied liability claiming to have sold the Nissan matatu to a third party by the time the accident occurred.



4. The suit proceeded for hearing on various occasions and vide a judgment delivered on November 24, 2020 the learned magistrate entered judgment in the following terms.
  - a. Liability 100% against the Appellant, the 2<sup>nd</sup> Respondent and the 3<sup>rd</sup> Respondent.
  - b. General Damages Kshs 270,000/=.
  - c. Costs and interests to the Plaintiff
5. Aggrieved by this the Appellant has now proffered this appeal on the grounds apparent on the memorandum of appeal. They called for the trial court's judgment against them to be set aside with costs.
6. On the July 12, 2022 directions were taken to the effect that the appeal be dispensed of by way of written submissions. The Appellant filed their submissions on the November 11, 2022 while the 1<sup>st</sup> Respondent filed her submissions 12/1/2023.

### **Appellant's Submissions**

7. The Appellants submitted on liability and quantum.
8. As regards liability the Appellant contended that the 1<sup>st</sup> Respondent had failed to prove a casual link between them and the accident. They relied on the Court of Appeal case of *Timsales Ltd v Stanley Njibia Macharia* [2016] eKLR. It was their contention that the 1<sup>st</sup> Respondent had not proved negligence on their part, since it was the lorry that hit the matatu from behind.
9. Moreover, it was their contention that at the time the accident occurred they had already sold the Nissan to a third party hence they were not responsible for the accident.
10. They urged this court to find that their failure to enjoin the buyer was not fatal as the 1<sup>st</sup> Respondent had failed to prove her case against them anyway.
11. As regards quantum it was their contention that Kshs 270,000/= was excessive in the circumstances. They urged this court to award Kshs 100,000/= based on the case of *Ndungu Dennis v Ann Wangari Ndirangu & Another*. They prayed for their appeal to be allowed with costs and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents be held wholly liable.

### **1<sup>st</sup> Respondent's Submissions**

12. The 1<sup>st</sup> Respondent equally submitted on liability and quantum.
13. With regard to liability he contended that the learned magistrate was right in holding the Appellant, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents 100% liable. He stated that he had provided sufficient proof of ownership through production of certificates of search, he placed reliance on section 8 of the *Traffic Act* with regard to the fact that a certificate of search is prima facie proof of ownership. The 1<sup>st</sup> Respondent averred that it was the Appellant's duty to enjoin the party they had sold the vehicle to. He relied on Order 1 Rule 15 of the *Civil Procedure Rules 2010*, the case of *Oceanfreight (EA) Ltd v Technomatic Ltd & Another* (2010) eKLR and *Thuranira Karauri v Agnes Mocheche* (1997)eKLR.
14. As regards quantum the 1<sup>st</sup> Respondent submitted that he sustained injuries to the head, chest, back, wrists and knees. They submitted that the amount of Kshs 270,000/= awarded by the trial court was adequate and urged this court to uphold the learned magistrate's finding.



## Issues for determination

15. In view of the issues raised by the parties herein the following issues arise for determination.
  - a. Whether the Appellant was liable for the accident?
  - b. If the answer above is in the affirmative then what damages are due to the 1<sup>st</sup> Respondent?
16. Before delving into these twin issues, the court would like to reiterate the duty of the first appellate court which is to consider the evidence, re-evaluate it afresh and come to its own independent conclusion on whether to uphold the finding by the trial magistrate. Taking into consideration that it did not have an opportunity to see the witnesses and assess their demeanour. See the case of *Selle & Another v Associated Motor Boat Co Ltd & Another* (1968) Ea 123

## Whether the appellant was liable for the accident?

17. The Appellant's major contention in this suit was that the Matatu was hit from behind. They equally contended that they had sold the Matatu at the time the accident occurred.
18. As regards the Matatu's ownership the Appellant's witness testified that they had sold the vehicle to a third party. He produced a sale agreement and a statement of account. The agreement entered on the November 17, 2010, has clauses that give conditions on when the buyer should take possession. As it stands it not clear whether the buyer complied with the conditions and took possession of the vehicle. All this would have been clear if the buyer was enjoined so as to provide the court with the full picture.
19. It is trite law that the onus is on the defendant to institute third party proceedings as per the provisions of order 1 rule 15 of the Civil Procedure Rules which duty they have not discharged.
20. The above notwithstanding it was PW1's testimony that it was the lorry that hit the matatu causing it to hit him.
21. As per the Highway Code it is imperative that vehicles maintain a safe distance from the vehicle in front, so as to avoid any mishaps i.e 70 metres. From the evidence on record the 1<sup>st</sup> Respondent was walking beside the road when the Nissan Matatu hit him as a result of being rammed by the lorry. By hitting the matatu from behind the driver of the lorry registration number KCC 106P was wholly to blame for the accident. He owed other road users a duty of care by ensuring that he maintains a safe distance from traffic in front of him. I find the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are jointly liable of the accident at 100%. The appellant is thus not to blame for the accident.

## Whether the damages were excessive in the circumstances?

22. It is trite law that an appellate Court will not disturb an award of damages unless it is so inordinately high or low so as to represent an entirely erroneous estimate. It must be shown that the trial magistrate proceeded on wrong principles, or that they misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low. (See the case of *Butt v Khan*, Civil Appeal 40 of 1977). The treatment documents show that the injuries sustained were soft tissue. There is no indication that there was any degree of disability. The appellant has urged the court to award Kshs 100,000/= while the 1<sup>st</sup> Respondent urged the court to maintain 270,000/= issued by the trial court.
23. The 1<sup>st</sup> Respondent suffered soft tissue injuries which he testified had fully healed. There is equally no evidence that he was hospitalised. Damages are meant to compensate the victim for the injuries



suffered and not to punish the tortfeasor for the injury they have caused. Based on the authorities cited before the trial court this court finds that the award by the trial court was t excessive. An award of Kshs 180,000/= would suffice in the circumstances. This court is guided by the case of, Joseph Mwangi Kiarie & Another v Isaac Otieno Otieno, HCCA No 30 of 2018, where Kshs 180,000/= was awarded for comparable soft tissue injuries.

### **Conclusion**

24. The Appeal thus partially succeeds to the effect that the Appellant is absolved from blame. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are wholly liable for the accident. Costs to the appellant.

**T.A.ODERA - JUDGE**

**14. 3. 2023**

**Delivered in Open Court via Teams Platform in the presence of;**

Ojuro for Appellant,

No appearance for Respondents,

Court assistant; Apondi.

**T.A.ODERA - JUDGE**

**14.3.2023**

