



**Sammy Traders Ltd v Owino & 2 others (Civil Appeal E31 of 2020)  
[2023] KEHC 1882 (KLR) (14 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1882 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL E31 OF 2020**

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

**BETWEEN**

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

**AND**

**NANCY ACHIENG OWINO ..... 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. 7 OF 2017)*

**JUDGMENT**

**Background**

1. The Appeal before court is against the award of Kshs 150,000/= 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 and interlocutory judgment was entered against them.
2. Brief facts of the case were that on or about the October 4, 2015 the 1<sup>st</sup> Respondent was lawfully travelling as a fare paying passenger aboard Nissan Matatu registration no KBN 978G along the Kendu Bay Katito road, when at Harambee area the agents of the Appellant, 2<sup>nd</sup> Respondent and 3<sup>rd</sup> Respondent caused Mitsubishi lorry reg no KCC 106P to lose control and ram the Nissan Matatu occasioning her serious injuries.
3. The Appellant denied liability claiming they had sold the Matatu to a third party as at the time the accident occurred.



4. The suit proceeded for hearing on various occasions and vide a judgment delivered on August 6, 2019 the learned magistrate entered judgment in the following terms.
  - a. Liability 100% against the Appellant, 2<sup>nd</sup> Respondent and 3<sup>rd</sup> Respondent
  - b. General Damages Kshs 150,000/=
  - 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 on January 12, 2023.

### **Appellant's Submissions**

7. The Appellants submitted on liability and quantum.
8. With regard to liability the Appellant contended that it was the 2<sup>nd</sup> Respondent's vehicle that was wholly to blame for the accident having hit the Nissan Matatu from behind. They placed reliance on the case of *Statpack Industries Ltd vs James Mbiti Munyao* HCCA NO 152 of 2003 as quoted in the Court of Appeal case of *South Nyanza Co Ltd vs Wilson Ongumo Nyakwemba* [2008]eKLR.
9. Furthermore, it was their contention that at the time the accident occurred they had already sold the Nissan Matatu to a third party hence they couldn't be held responsible for the accident.
10. They urged this court to find that their failure to enjoin the buyer wasn't 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 150,000/= was excessive in the circumstances. They urged this court to award Kshs 100,000/= based on the case of *Ndungu Dennis vs 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 herein 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 she contended that the learned magistrate was right in holding the Appellant, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents 100% liable. They stated that they had provided sufficient proof of ownership through production of certificates of search, and therefore the onus was on the Appellant to enjoin the party they had sold the vehicle to. She relied on Order 1 Rule 15 of the *Civil Procedure Rules* 2010 and the case of *Oceanfreight (EA) Ltd vs Technomatic Ltd & Another* (2010) eKLR.
14. As regards quantum the 1<sup>st</sup> Respondent submitted that she sustained injuries to the head, chest, wrists and knees. They reiterated their submissions before the trial court 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 as espoused in *Selle & Another vs Associated Motor Boat Co Ltd & Another* (1968) EA 123, 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

### **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. With regard to the Matatu's ownership the Appellant's witness testified that they had sold it 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 in order 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 did not discharge.
20. Be that as it may PW1 testified that she was inside the matatu when they were hit from behind by the lorry. It was her further testimony that they were parked off the road when they were hit.
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 it is not easy to decipher whether the vehicle was correctly parked or not. In the absence of this evidence the court can only infer that the driver of 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 jointly liable for the accident at 100%. The appellant is thus not liable for the accident as there was no wrong doing on it's part.

### **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 judge 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 1<sup>st</sup> Respondent sustained soft tissue injuries. There was no indication that there was any degree of disability. I have seen the case of *Lilian Anyango Otieno v Philip Mugoya Ogila* [2022] eKLR where the appellant sustained soft tissue injuries on the right hand, minor lacerations on the chest and elbow joint. She was awarded general damages in the sum of Kshs 70,000/= which was enhanced to Kshs 150,000/= on appeal. The said injuries are comparable to the ones sustained by the 1<sup>st</sup> respondent herein. I find that the award of Kshs 150,000/= was adequate in the circumstances. This court therefore sees no need to interfere with the magistrate's award on quantum. I thus proceed to enter judgment for 1<sup>st</sup> respondent against 2<sup>nd</sup> and 3<sup>rd</sup> respondents jointly and severally in the sum of Kshs 150,000/=.



## **Conclusion**

23. The Appeal thus succeeds to the effect that the Appellant is absolved from blame. I proceed to enter Judgment for 1<sup>st</sup> Respondent against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents jointly and severally in the sum of ksh 150,000/=. 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**

