



**Waziri v Kenya Commercial Bank Ltd & another (Civil Appeal
13 of 2021) [2023] KEHC 17554 (KLR) (22 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 17554 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL 13 OF 2021
SM GITHINJI, J
MARCH 22, 2023**

BETWEEN

OMAR MOHAMED WAZIRI APPELLANT

AND

SHREEJI ENTERPRISES (K) LTD 1ST RESPONDENT

KENYA COMMERCIAL BANK LTD 2ND RESPONDENT

*(An Appeal from the judgment and decree by Hon. N. C. Adalo (SRM)
delivered at Mariakani on 26th January, 2021 in SPMCC No. 63 of 2013)*

JUDGMENT

1. The Appellant Omar Mohammed Wazir appeals to this Court on both Liability and quantum from the Judgment of Honourable NC Adalo (SRM) delivered on January 26, 2021 in SPMCC no 63 of 2013, in which she dismissed the Appellant's case.

Background

2. The principal claim in a Plaintiff dated October 19, 2012 is for the award arising out of an accident which occurred on January 10, 2012 at Uwanja wa Ndege area along Mombasa- Nairobi Road. It is asserted that the appellant was standing off the road when the 2nd Defendant's driver, agent and or servant so negligently drove, managed and or controlled motor vehicle registration No xxxx that it lost control, veered off the road and hit him. As a result whereof the appellant sustained personal severe injuries that were revealed as cut wound on occipital region of skull, a large bi-frontal acute intra-cerebral hematoma due to brain edema and multiple fractures of the occipital, temporal and parietal bone of the skull.
3. The Defendants filed their Defence on the April 1, 2014 denying that the accident occurred in the manner alleged by the Plaintiff in Paragraph 4, 5 and 6 of the Plaintiff. The Defendant alleged in his defence that the accident and if at all it occurred, was wholly caused by the negligence and carelessness



of the Plaintiff. He also denied each and every particular of pain, suffering and injuries sustained by the Plaintiff as stated in paragraph 6 of the plaint.

4. On consideration of the matter as a whole the Learned trial magistrate dismissed the suit against the 2nd Defendant.

The Appeal

5. Aggrieved by the decision on liability of the trial Court the appellant appealed to this Court on the following grounds of appeal; -
 1. That the learned magistrate erred in law and fact in evaluating the evidence and arrived at a wrong finding that the appellant had failed to prove that the motor vehicle that had caused the accident was owned by the 2nd Respondent.
 2. That the learned magistrate erred in law and fact in evaluating the evidence and exhibits adduced and arrived at a wrong finding that the appellant had failed to prove the special damages sustained by the appellant.
 3. That the learned magistrate misdirected herself in treating the evidence on the injuries sustained by the appellant and ignored the principles and relevant decided cases on quantum of general damages and arrived at a sum in respect of general damages which was inordinately low in the circumstances.

Summary of the Evidence

6. PW1 Mohammed Omar Wazir told the court that on January 10, 2012 he was at Uwanja wa Ndege stage on the right side of the road as one heads to Mombasa waiting to board a vehicle to Mariakani. He also told the court that there was a lorry heading to Mombasa from Nairobi. The vehicle was on the left side. It is his testimony that he does not know what happened but the vehicle lost control and veered off to the right side where he was at the stage off the road and hit him. That when the vehicle hit him, it threw him further off the road and he noted that it was marked *shreeji*.
7. It is his further testimony that after the accident, the driver controlled the vehicle and went back to its lane. That he was taken to Mariakani Sub- County Hospital and later admitted at Bomu Hospital for 10 days. That at Bomu Hospital he paid a total of Kshs 46,342/- and at Jocham Hospital a total of Kshs 91, 207/- including payments in other hospitals where he sought medical attention. That he was later issued with a police abstract dated February 7, 2012.
8. Upon cross examination, he confirmed that the accident occurred at 7: 00 pm and that it was already dark. He also told the court that they were standing on the right side as one heads to Mombasa and the lorry was heading to Mombasa. That he was told the registration number of the vehicle but before he lost consciousness, he noted that it was marked Shreeji on the sides as the writings on the lorry were large. It is his testimony that the trailer/lorry hit him and threw him off to the side.
9. PW2 Hamisi Madzungu Bedzuya told the court that on January 10, 2012 he was at his business premises when the accident happened. According to him, there was a vehicle heading from Nairobi towards Mombasa. The vehicle was on the left as one faces Mombasa direction and there was a group of people standing at the stage towards Mombasa. That the lorry from Nairobi direction lost control and veered off the road to the side where people were standing at the stage. He testified that the driver was taking off after the accident but he rushed to take the registration number of the vehicle. That the registration number he took is xxxx and it belonged to Shreeji.



10. On cross examination, he informed the Court that the vehicle had a trailer which was No xxxx and that the vehicle did not stop. He also informed the court that as the vehicle struggled to get back to the road, he ran ahead and saw it's registration number. It is his testimony that he ran to check what happened first before he checked the registration number of the vehicle. He told the court that the vehicle did not stop but it took about half an hour before it took off.
11. PW3 Benard Muchoki Mwangi told the court that on 10.01.2012 he had gone to Uwanja wa Ndege to buy vegetables and when he got to the road, there was a trailer from Nairobi direction which was on the left side. That it lost control and the people who were on the side of the road were hit. That he saw the vehicle had writings reading Shreeji. He also told the court that the vehicle did not stop.
12. PW4 PC Ann Wambui No xxxx told the court that the matter was in relation to a fatal road accident that occurred on January 10, 2012 at about 7:30 pm at Uwanja wa Ndege area along Nairobi-Mombasa Road. That the plaintiff together with other persons were hit by a semi trailed whose registration was not taken. According to her, the vehicle which was being driven by an unknown driver lost control and veered off the road, hit and knocked down the four pedestrians who sustained serious injuries as a result.
13. She also told the court that one of the witnesses had identified the motor vehicle to have a logo written Shreeji and that they did not get any information from the witnesses to specify the registration number of the vehicle.
14. Upon cross examination, she stated that she was not the investigating officer and that the information she got was that the motor vehicle was unknown. She also confirmed that she was not aware of the vehicle's registration number. That the members of the public only identified the vehicle bearing the mark Shreeji and she also confirmed that many vehicles bear that mark. On being referred to the police abstract, she told the court that the abstract bears the date of January 7, 2012 but the accident is alleged to have occurred on January 10, 2012.

The Appeal

15. At the hearing of the appeal Learned Counsel for the appellant stated in his written submissions in an effort to persuade the reversal of the lower court judgment by this Court, that the learned magistrate erred in law and fact in evaluating the evidence and arriving at a wrong decision. Counsel argued cumulatively on the three grounds of appeal and submitted that the issue that arose for determination was the identity of the motor vehicle that caused the accident. According to him, the appellant's testimony on the identity of the motor vehicle was a lorry by make and had the name Shreeji inscribed on its side and that this evidence was corroborated by the testimony of PW2 and PW3.
16. According to him, the testimony of PW1, PW2, PW3 and PW4 corroborated each other with regard to the fact that the motor vehicle was inscribed with the name Shreeji and that the registration number given by PW2 went to prove that the vehicle belonged to the 2nd Respondent. Further, that although he had the onus to prove that the accident motor vehicle belonged to the 2nd respondent, the standard of proof was not beyond reasonable doubt but on a balance of probabilities, and there having been no evidence in rebuttal from the 2nd respondent, he had discharged his burden on liability. Counsel also submitted that the learned magistrate erred in law in evaluating the evidence relating to special and general damages as the fact that the appellant testified that he incurred an expense at both Bomu Hospital and Jocham Hospital but only produced invoices and not receipts was no basis to dismiss the evidence. Further with respect to general damages, he submitted that the amount assessed was inordinately low in the circumstances noting the injuries sustained by the appellant. He opined that an award of Kshs 3,000,000/- would have sufficed relying on the case of *B A J Vs Roadstar Limited*



Et 2 Others, HCCC NO 374 of 2009 where the plaintiff sustained comparable injuries and the general damages had been assessed at Kshs 1,500,000/- in the year 2018.

17. The Respondent on the other hand submitted that the plaintiff's witnesses collectively failed to identify the registration number of the vehicle that had caused the accident. Counsel submitted that the determination of the present appeal revolves around the question whether the appellant proved his case on the balance of probabilities as per the provisions of Sections 107, 109 and 112 of the *Evidence Act* as was extensively dealt with in *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi Et Another (2005) 1 EA 334* and *Mumbi M'mbui M' Nabea v David M Wachira (2016) eKLR*.

Determination

18. It is trite that this is a first appeal and as provided in the well settled principles, the Court is entitled to re-evaluate the evidence, but must remember that the Learned trial magistrate had the advantage of hearing and seeing witnesses testify before her, which advantage is not availed to this Court as was held in *Peters Vs Sunday Post Limited (1958) EA 424*. It is not in dispute that the first hurdle which ought to be passed by the appellant in this appeal is proof of liability on a balance of probabilities.
19. I have carefully weighed the evidence adduced before the trial court in its entirety; the grounds of appeal; the judgment of the learned trial magistrate and the written submissions filed by the appellant and the respondent together with all the authorities cited. Having done so, I find that the only issue for determination is whether the learned trial magistrate erred in her finding on liability.
20. Whereas it is true that the accident involved a motor vehicle and the appellant was standing by the road side, the burden of proof that the accident was caused by the negligence on the part of the 2nd Respondent lies squarely with the Appellant. That is the issue which stood out throughout the trial before the Learned Magistrate. I have analyzed the evidence by the parties and I note that PW1 told the court that after the accident, he had been thrown off the road but did not note the registration number of the motor vehicle that hit him as he lost consciousness, but he remembered seeing that the motor vehicle was marked 'Shreeji'.
21. From the Judgment, the Learned trial magistrate had to decide on a balance of probabilities the circumstances on how the accident occurred and if at all the 2nd respondent was to blame. The starting point was for the Appellant under section 107 (i) of the *Evidence Act* to present admissible material evidence to persuade the trial court to give judgment in his favour on proven facts disclosing negligence on the part of the 2nd respondent. The Court in *Ciabaitani M'Mairanyi Et Others V Blue Shield Insurance Co Ltd CA No 101 of 2000(2005) 1EA 280* held that; -
- ' Whereas under section 107 of the *Evidence Act*, which deals with the evidentiary burden of proof, the burden of proof lies upon the party who invokes, the aid of the law and substantially asserts the affirmative of the issue. Section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.'
22. PW 2 on the other hand told the court that when the accident occurred, he left his business premises, rushed to the scene of the accident and as the driver maneuvered to get out of the trench, he had run ahead of the lorry and noted the registration number of the lorry. PW3 told the court that he did not get the registration number of the motor vehicle, but PW4 told the court that the accident had been caused by an unknown vehicle. Even if the evidence of PW2 is anything to go by, PW4 informed the court that no one had come out to give information regarding the registration number of the motor vehicle that caused the accident.



23. I wish to make reference to Section 107 (1) of the *Evidence Act* which is to the effect that:
1. Whoever desires any Court to give Judgment as to any legal right dependent on the existence facts which he asserts must prove that those facts exist.
 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
24. In this case, it was the appellant who bore the evidential burden to lead evidence against the 2nd respondent to show negligence and breach of duty of care owed to him on the material day. According to PW4, the police officer who visited the scene of the accident, she was only informed that the accident was caused by a motor vehicle belonging to Shreeji but at the time, no one gave out information regarding the registration number of the motor vehicle.
25. The Appellant implores this court to be persuaded by the evidence of PW2 but the said witness contradicted himself in his testimony since he stated that the motor vehicle stopped and that he was able to capture the registration number yet on cross examination he told the court that the motor vehicle did not stop. PW2 did not also tell the court that he gave the investigating officer the registration number of the said motor vehicle on the day of the accident or on any other subsequent date following the accident. His evidence as to the registration number of the motor vehicle involved is highly doubtful.
26. In my view, the decision of the trial magistrate purely depended on whether the appellant met the burden and standard of proof that was imposed on him. Ideally, the burden was to satisfy the court of the existence and non- existence of a particular fact and in this case, whether the 2nd Respondent caused the accident. In view of the foregoing, the burden was not met and this Court finds no reason to disturb the findings of the trial Court on liability.
27. On quantum, an appellate court can only disturb an award of damages made by a trial court if satisfied that it was either inordinately high or low as to justify an inference that it represented an erroneous estimate of the damage suffered; or that the trial court took into account irrelevant factors or omitted to take into account relevant ones or acted on wrong legal principles in arriving at the award.
28. I have considered the authorities availed by both parties to the trial Court in support of their respective proposals on quantum. The Plaintiff's medical report is to the effect that the Plaintiff suffered 4% permanent partial disability while the medical report by the defence opined that the plaintiff had fully healed. I also note that the authorities relied on by the Plaintiff were of persons who had suffered far more serious injuries and as such, I find that the assessment by the trial magistrate is proper.
29. Further, I note that appellant has challenged the trial court's decision on special damages, from the record it is evident that the appellant sought treatment in two different hospitals and spent far much more than the pleaded Kshs 2,700/-. The sums were not proved by way of receipts. He was not as well entitled to more than he had pleaded. Special damages must be specifically pleaded and proved.
30. For the foregoing reasons, I find no merit in the appellant's appeal. The same is hereby dismissed with costs to the respondent.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 22ND DAY OF MARCH, 2023.

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S.M. GITHINJI

JUDGE



In the Presence/absence of; -

1. Mr Shujaa for the Appellant
2. Mr Wayieka for the Respondent

