



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwalimu v Modern Coast Express Limited (Civil Suit E020 of 2021)  
[2023] KEHC 24266 (KLR) (9 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24266 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CIVIL SUIT E020 OF 2021  
GMA DULU, J  
OCTOBER 9, 2023**

**BETWEEN**

**BENSON MULI MWALIMU ..... APPELLANT**

**AND**

**MODERN COAST EXPRESS LIMITED ..... RESPONDENT**

*(From the judgment/decree delivered on 25th March 2021 in Makindu  
Law Courts in SPMCC No. 54 of 2018 by Hon. A. Ndung'u (SRM))*

**JUDGMENT**

1. In a judgment delivered on March 25, 2021 the Magistrate's court at Makindu concluded as follows:-

“In the upshot I will enter judgment in favour of the plaintiff as against the defendant as follows:-

- a. Liability 85% plaintiff and 15% defendant
  - b. General damages Kshs. 1,300,000/=
  - c. Special damages Kshs. 3,550/=
- Kshs. 1,303,550/=
- Less 85% liability Kshs. 1,108,017/=
- Total Kshs. 195,533/=
- Costs and interest of the suit.



2. Dissatisfied with the judgment of the trial court, the appellant who was the plaintiff in the trial court, has come to this court on appeal through counsel S. N. Ngare & Company Advocates on the following grounds:-
  1. The learned magistrate misdirected herself in law and in fact by misapprehending the evidence adduced thereby reaching an erroneous finding.
  2. The learned Magistrate misdirected herself in relying on unproven facts hence arriving at an erroneous decision.
  3. The learned Magistrate erred in law and in fact by failing to consider the totality of the evidence and proceedings on record.
  4. The learned Magistrate erred in law and in fact by failing to consider the appellant's submissions on liability.
3. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by S. N. Ngare & Company Advocates for the appellant as well as the submissions filed by Kimondo Gachoka & Company Advocates for the respondents. I have to acknowledge here that each counsel relied upon decided court cases.
4. This being a first appeal, I have to be guided by the principle that I am expected and have a duty to evaluate all the evidence on record and come to my own conclusions – see *Selle =Versus= Associated Motor Boat Company Ltd* (1968) EA 132.
5. The appeal herein is on liability, and I am aware that under the reasoning in the case of *Selle* (supra), I am not bound to agree with the findings of facts or interpretations of the trial court.
6. In the present case, the appellant called 3 witnesses, PW1 was PC David Okiki a Traffic Police Officer from Sultan Hamud, who relied upon and produced a police abstract report, which he stated was extracted from the OB report. He was not at the scene, nor did he conduct investigations in the matter. The accident, according to him, occurred at Emali town, where the appellant was hit by a bus when crossing the road. He did not know the direction from which the appellant was crossing the road.
7. PW2 was Dr. Esther Nzomo Musyoki of Makindu Sub County Hospital. She examined the appellant who was distressed, and suffered a deformed right thumb, and loss of hearing in the right ear. She produced the medical examination report, and stated that the injuries were of permanent nature, though there was no reference to another hospital for further treatment.
8. PW3 was Benson Muli Mwalimu the appellant, who testified but was later recalled. He testified that the accident occurred at Emali town at night when he was crossing the road, when a bus headed for Mombasa direction from Nairobi direction, overtook some lorries at high speed and hit his ear while he was already on the right side where vehicles travelling to Nairobi would be driven. The place did not have a pedestrian crossing, but had a bump.
9. The respondent, though they were given a number of adjournments did not avail any witness, and the trial court thus closed the case.
10. On evaluation of the evidence on record, the trial Magistrate found the appellant to blame to the tune of 85%, and this is the subject of the present appeal.
11. In determining liability, the trial court was of the view that the appellant should have left the overtaking bus pass before crossing in order to avert or mitigate the accident.



12. In my view, from the evidence on record, that finding was a misapprehending of the evidence and a misinterpretation of the evidence on record. The first reason is that there was no contradiction between the evidence of PW1 and the appellant on the existence of a bump, as PW1 never went to the scene nor participated in the investigations. So he could not testify or confirm the existence of a road bump.
13. Secondly, the evidence on what occurred at the scene was only that of the appellant, as the respondent neither called the bus driver or any other person to testify and give another version of what happened. Thirdly, there is no dispute that the accident occurred on the side of the road where vehicles heading to Nairobi were to use, which means that the driver of the bus headed to Mombasa could avert the accident by swerving or slowing down. In the absence of the evidence of the bus driver, the evidence of the appellant stands unshaken.
14. Even though there are contradictions on whether the appellant crossed the road to buy food or a torch battery, that in my view is not a contradiction that would affect how the accident occurred. It has to be noted that nobody has contested the occurrence of the accident or even the time of the accident, so the reason for crossing the road in my view is not of material substance in the present case.
15. From the foregoing therefore, I find that the trial Magistrate erred in apportioning the liability. Considering that the accident occurred at night, and there is a likelihood of the appellant making a mistake in determining the speed of the bus, but also taking into account the evidence on record and that the scene was Emali town, wherein by the [Traffic Rules](#) in Kenya the driving speed is 50kph even where it is not displayed on a road sign, I find that the appellant was 15% to blame for the accident and the bus driver (respondent) was 85% to blame.
16. I thus allow the appeal and order as follows:-
  - a. Liability 15% appellant (plaintiff) and 85% respondent (defendant)
  - b. General damages Kshs. 1,300,000/=
  - c. Special damages Kshs. 3,550/=

Kshs. 1,303,550/=

Less 15% liability Kshs. 195,533/=

Total Kshs. 1,108,017/=

I award the appellant the costs of this appeal.

**DATED, SIGNED AND DELIVERED THIS 9<sup>TH</sup> DAY OF OCTOBER 2023 AT VOI VIRTUALLY.**

**GEORGE DULU**

**JUDGE**

In the presence of: -

Alfred – Court Assistant

Ms. Kemunto for appellant

No appearance for respondent

