



**Buhuru v Butali Sugar Company Limited (Civil Appeal 178 of 2023)
[2024] KEHC 14434 (KLR) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14434 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL 178 OF 2023
SC CHIRCHIR, J
NOVEMBER 14, 2024**

BETWEEN

JOHN BUHURU APPELLANT

AND

BUTALI SUGAR COMPANY LIMITED RESPONDENT

*(An appeal arising out of the judgment of Hon. R.S Kipngeno (RM) in
Butali Civil Case No 232 of 2022 delivered on 24th October 2023.)*

JUDGMENT

1. The Appellant filed a suit against the respondent in the lower court seeking damages for injuries sustained as a result of a road traffic accident which occurred on 30/7/2018. The accident is said to have involved a Tractor registration Number KTCB 271P and the Appellant who was a pedestrian on the same road.
2. The plaintiff states that as a result of the accident he suffered the injuries on the neck, bruises on the right side of the chest and Sprain of the shoulder. In a judgment delivered on 24th October 2023 the learned magistrate dismissed the plaintiff's suit for want of proof
3. The appellant was aggrieved by the outcome and filed this Appeal. The grounds are as follows;
 - a. That the learned trial magistrate grossly erred in evaluation of evidence before him.
 - b. That the learned magistrate grossly erred in not making a finding that it is the respondent's motor vehicle that was involved in the accident.
 - c. That the learned trial magistrate grossly erred in making a finding that the respondent's tractor was somewhere else despite overwhelming evidence to the contrary.



- d. That the learned trial magistrate grossly erred in not placing due weight on the evidence of the investigating officer and the fact that the driver of the tractor was actually charged for careless driving.
 - e. That the learned trial magistrate believed the contradictory and wish washy evidence by the respondent's witness.
 - f. That the learned magistrate grossly erred in not making any award to the appellant in any event.
4. The Appeal was canvassed by way of written submissions.

Appellant's submissions

5. The Appellant chose to address one issue, namely if Tractor registration number KTCB 271P was involved in an accident. It is submitted the Appellant reported the accident and that a police abstract was produced, whose veracity was not challenged; that the vehicle movement records and personnel of the defendant are private documents, which could not displace the evidence of the police officer and the Appellant. It is further submitted that in any event there was no evidence tendered showing that the subject vehicle was assigned a different route on the material day; that despite disowning the then driver, one John Wamalwa simiyu, the defendant did not produce a record of its drivers to prove that the said John was not one of them. On quantum of damages, the Appellant has referred the court to his submissions in the lower court.

Analysis and determination

6. Issues for determination ;
- a. Whether the appellant proved on a balance of probabilities that the subject motor vehicle was the one that caused the accident
 - b. If in the affirmative, whether the Appellant is entitled to general damages.
7. In Nairobi Civil Appeal No. 77 of 1982 Ephantus Mwangi & Anor vs Duncan Wambugu [1984]eKLR the court had this to say about the role of an appellate court:
- “A Court of Appeal will not normally interfere with a finding of fact by the trial court, unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown, demonstrably, to have acted on wrong principles in reaching the findings he did.”
8. I have perused the judgment of the trial court while bearing in mind the guidance from the supreme court. Although the trial Magistrate addressed various aspects of the witnesses testimonies, his final decision was informed by his determination that the Appellant had failed to prove that the subject vehicle was the one that caused the accident.
9. The following portion of the judgment explains the court reasoning: “The plaintiff alleged that the tractor lost control and came to his side. He confirms seeing the tractor before the RTA, having crossed from left to right, still the tractor ran over him. With respect, I find that the plaintiff's account appears exaggerated as a fully loaded tractor running over him would certainly be fatal..... I note from the medical report that the plaintiff was aged 62 years old. Obviously this may have affected his agility. I find it more probable that he may not have concentrated in looking at the registration number of the tractor when it lost control as he most probably focused on saving himself. Indeed the plaintiff ducked to avoid being injured by the overloaded tractor and thus could not notice the trailer registration number” (page 56 of the record of appeal, paragraphs 1 and 3)



10. The plaintiff adopted his recorded statement as his evidence in chief. This is what the Appellant stated in his statement: “ I met a tractor along Burudu road behind the market which was overloaded with sugarcane lost control and swerved in my direction . I tried to evade the tractor by running towards my right side but unfortunately it followed in my direction and it was too late. On impact it hit me on the head and the rear tyre of the trailer pinned down hand shoulder and my pelvis. A crowd of people emerged to rescue me and they advised the driver to reverse so that I could be rescued from the rear end of the trailer”
11. On cross- examination he stated “ I saw the tractor before the accident... the tractor crashed my right hand , I landed the tractor ran over me causing soft tissue injuries.”
12. The trial court expressed misgivings about the Appellant being ran over by the tractor as that would have caused fatal injuries.
13. In this regard I think the court failed to appreciate the totality of the evidence and concentrated on that aspect of being ran over. If the court had considered the evidence in chief to the effect that: “On impact it hit me on the head and the rear tyre of the trailer pinned down hand shoulder and my pelvis ,then the court would have appreciated that the Appellant could not have been referring to his whole body being under the tractor.
14. Nevertheless, what made the trial court to conclude that the Appellant might not have identified the tractor was the fact that the Appellant was concentrating on saving himself and may not have had the chance to check the registration number of the tractor. In this regard, I have perused the police abstract and the testimony of the police officer (PW1). There was no suggestion that the accident was a hit and run one . Therefore for the trial magistrate to base his conclusion purely on the desperate moves of the Appellant to save himself, while ignoring the uncontested facts in the police abstract was erroneous .
15. The fact that an accident occurred was not in dispute . The fact that the Appellant was injured was also not in dispute. The Appellant’s testimony as to how the accident occurred was not rebutted. What is in issue is whether the Respondent vehicle caused the accident.
16. A police abstract was produced by PW1. There was no objection raised to its production . The particulars of the abstract, were not challenged at all in cross- examination. The abstract contained the particulars of the vehicle , the insurance particulars and the victim of the accident. There was no suggestion that the accident was a hit and run as aforesaid so as to make it difficult to identify the subject vehicle.
17. I have considered the respondent’s witness testimony(DW1) who described herself as the HR Assistant in the defendant company. She stated that their records did not capture any entry of an accident said to have occurred on that day; that drivers are required to report all accidents ; that on the material day the particular tractor was not assigned the particular route but instead it had been assigned to cover chekali weighbridge cane control, and therefore the vehicle in question could not have been covering the location in which the accident occurred. On cross- examination, she admitted that since they were served with case documents, they had not made any request for investigation to the police, to investigate the alleged accident.
18. I agree with the Appellant that the records produced by the Respondent’s witness were internal to the company. There was no independent evidence to ascertain what the witness was telling the court. Further whereas she insisted that the alleged driver was not their employee she did not submit the list of her employees as proof. The respondent did not seek an investigation for this “strange” accident once they were served with the claim;



19. In short the Respondent did not have sufficient evidence to displace that of the Appellant.
20. Am satisfied that on a balance of probabilities, the Appellant did prove that the subject vehicle caused the accident.

Damages

21. In this regard the Appellant referred the court to his submissions in the lower court . He has proposed a figure of ksh. 200, 0000 in general damages and relied on the decision of Daniel Katana & Ano vs Harrison Ongore(2020) e KLR where an award of ksh. 140,000 in the year 2020.
22. According to Dr. Andai report (page 25 of the record of Appeal) , the Appellant sustained blunt injury to the neck and chest. He also suffered friction burns affecting on the right side of the chest and abdomen and the right upper limb. He had a cut wound on the elbow.
23. The injuries are major soft tissue and I consider the Appellant’s proposal a reasonable compensation for the injuries. I award the same. The special damages in the sum of ksh. 10, 550 was specifically pleaded and strictly proved
24. In conclusion , I hereby make orders as follows:
 - a). The Judgement of the lower court is hereby set aside.
 - b). Judgment is hereby entered for the plaintiff as against the defendant on 100% basis.
 - c). General damages of ksh 200,000 and special damages of ksh. 10, 550 is hereby awarded
 - d). The Appellant is awarded costs in this Appeal and in the lower court.
 - e). Damages will attract interest at court rates from the time of the judgment at the lower court.

DATED , SIGNED AND DELIVERED AT KAKAMEGA THIS 14TH DAY OF NOVEMBER 2024.

S. CHIRCHIR.

judge.

In the presence of :

Godwin Luyundi- Court Assistant

Ms Achieng for the Respondent.

