



**Omwenga v Kioko & another (Civil Appeal E323 of 2024)
[2024] KEHC 13926 (KLR) (Civ) (8 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13926 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E323 OF 2024

BM MUSYOKI, J

NOVEMBER 8, 2024

BETWEEN

MOSESE OMWENGA APPELLANT

AND

JOHNSTONE KIOKO 1ST RESPONDENT

HENERY MWAU MULINGE 2ND RESPONDENT

*(Being an appeal from judgment and decree of Honourable Nasimiyu J.W (RM)
at Milimani Small Claims Courts case number E1143 of 2023 dated 19- 02-2023)*

JUDGMENT

1. The appellant filed a claim in the milimani small claims court against the respondents seeking compensation for injuries sustained in an accident involving him and motor vehicle registration number KBT 005X which was said to belong to the 2nd respondent and driven by the 1st respondent. The matter was heard by the honourable adjudicator where he took evidence of three witnesses from the appellant and two witness for the respondents. The appellant dismissed the appellant's case for failure to prove negligence.
2. The appellant was dissatisfied with the decision and has brought this appeal where he has set out the following grounds;
 1. The learned trial magistrate erred in law and fact and misdirected himself when he failed to consider the appellant's submissions on both points of law and fact.
 2. The learned magistrate's decision was unjust against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.



3. That the learned magistrate erred in law and fact in finding that the appellant did not prove his case on a balance of probabilities.
 4. That the trial magistrate erred in law and in fact by wrongly evaluating the evidence on record more so CW1's and CW3's evidence as to the occurrence of the accident and therefore arrived at a wrong conclusion and judgment on liability.
 5. That the learned magistrate erred in law and in fact disregarding the appellant's submissions on liability and the applicable laws thereby arriving into wrong decision and judgment.
3. The appellant has couched the memorandum of appeal in a manner that shows that the issues he raised are both on law and facts. Black's Laws Dictionary has made distinction between matters of law and matters of fact as follows;

‘Matter of facts as: A matter involving a judicial inquiry into the truth of alleged facts and
Matter of law: A matter involving a judicial inquiry into the applicable law.’

4. With the above distinction, I will deal with the grounds of appeal in succession and for reasons to be given thereafter, make a decision as whether or not they raise issues of law or facts.
5. The first and fifth grounds of appeal complain that the honourable adjudicator failed to consider the appellant's submissions on both points of law and facts. In his entire submissions, the appellant has not told this court which parts of his submissions on either points of law or point facts, were ignored or not considered. The appellant has gone on to make submissions for this court to make a finding in his favour on issues of liability and quantum but has not specified which portion of his submissions were ignored. Ignoring pleadings or argument of parties to a suit may pass as a matter of law. But in this matter, I do not see which submissions or evidence of the appellant were ignored. I have gone through the judgment of the adjudicator and in my view, the court analysed the evidence on liability and was satisfied that the appellant had not proved liability against the respondents. It is therefore my finding that this ground of appeal has no merit.
6. In his 2nd ground of appeal, the appellant faults the adjudicator for having reached a decision that was unjust against the weight of evidence and based on misguided points of fact and wrong principles of law. I have gone through the judgement and I do not see any point of law arising from the judgment when the same is juxtaposed with this ground of appeal. The weight of evidence and whether or not it was enough to prove liability is to me, a matter of fact. The same goes onto inquiry as to the truthfulness of the pleaded fact. There cannot be a matter of law when the court analysis how an accident occurred unless there is an issue that concerns the legality or lawfulness on how the evidence was taken. I therefore hold that this ground though drafted as raising an issue of law, is in all fours a matter of fact.
7. For the same reasons given in the paragraph above, I hold the opinion that the 3rd ground of appeal is also based on matters of facts. In this ground, the appellant claims that the adjudicator was wrong in finding that he had not proved his case on a balance of probabilities. Even looking at the appellant's submissions, it is clear that the issues raised by the appellant are on the measure of the truthfulness of the evidence produced by the parties. The adjudicator was entitled to make decision based on the evidence produced in proof of facts pleaded before her. The same position holds for ground number 4.
8. No matter how much the appellant dresses the memorandum appeal with legalese to appear as if there is a matter of law therein, the inevitable outcome of the analysis of his complaints about the judgment would be on factual issues. This court must resist the temptation to get into that. In Bashir



Haji Abdullahi vs Adan Mohammed Nooru & 3 Others (2014) eKLR the Court of Appeal addressed this point and reiterated its own holding in M’riungu & Others Vs R (1982-88) 1 KAR thus;

‘We would agree with the views expressed in the English case of Martin v Glyneed Distributors Ltd (t/a MBS Fastenings) (1983) 1CR 511 that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat finding of fact as holding of law or mixed finding of fact and law, and, it should not interfere with the decision of the trial or first appellate court unless it is apparent that; on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.’

9. Having found as I have above and being bound by the decision of the Court of Appeal cited above, it follows that my hands are tied by section 38(1) of the *Small Claims Court Act* which provides as follows;

‘A person aggrieved by the decision or order of the Court may appeal against that decision or order to the High Court on matters of law.’

10. I cannot overturn the decision of the adjudicator on issues of facts and in the circumstances this appeal lacks merit and it is consequently dismissed with costs to the respondents.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF NOVEMBER 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT

Judgment delivered in presence of:

Miss Nambala for the appellants; and

Mr. Muthoka for Mr. Ombati for the respondent.

