Malale v Nzoia Sugar Company Limited (Civil Appeal E048 of 2021)
[2025] KEHC 13878 (KLR) (30 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13878 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL E048 OF 2021

REA OUGO, J

SEPTEMBER 30, 2025

BETWEEN

JOSHUA MALALE ..... APPELLANT

AND

NZOIA SUGAR COMPANY LIMITED ..... RESPONDENT

(Being an appeal from the judgment (decree) of the subordinate court delivered on 15/3/2019 by Honourable E.N. Mwenda (SRM) Bungoma in Bungoma CMCC No 378 of 2014)

JUDGMENT

1. This is an appeal against liability as entered by the trial court. The appellant seeks that the court re-evaluate the submissions, evidence on record, and the law to arrive at its own findings. The grounds of appeal are as follows:

    1. The learned trial magistrate fundamentally erred in law and fact by failing to appreciate the fact that the defence did not avail any witness in this case, a police officer, to verify if the plaintiff was the one to blame for the accident that occurred.

    2. The learned trial magistrate clearly went against the evidence on record.

    3. The learned trial magistrate totally erred in law and fact by totally failing to take into account the oral and documentary evidence given by the plaintiff/applicant and his witness.

    4. The learned trial magistrate apparently did not analyse the available evidence on record.

    5. The findings are contrary to the law of natural justice and common sense and have resulted into a miscarriage of justice.

2. According to the plaint, the plaintiff who is the appellant herein averred that on 1/1/2024 at 7:00 p.m. he was along Bungoma-Webuye road when the respondent's driver negligently and recklessly knocked him down. The accident was caused by the respondent's negligence for the following reasons:

    i. Failure to maintain their motor vehicle

    ii. Failure to employ a qualified driver

    iii. Speeding unreasonably under the constancies

    iv. Allowing a defective vehicle on the road

    v. Failing to have due care and regard for other road users.

3. The appellant sustained a concussion, soft tissue injuries, a crushed fracture and muscle distrustful the right leg and psychological trauma.

4. The respondent denied the occurrence of the accident and that if an accident occurred, then the same was outside the scope and control of the respondent, hence it cannot be held liable.

5. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first-hand. In the case of Peters v Sunday Post Limited [1958] EA 424, the court therein rendered itself as follows: -

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

6. The appellant testified as Pw1. He testified that he was cycling from Webuye to Bungoma at 7:00 p.m. He blamed the respondent for the accident, explaining that the respondent had knocked him after leaving his lane while overtaking at a corner. The appellant further relied on the evidence of George Wanyama Wakhungu (Pw3), who testified that the appellant was a cyclist and he passed him while heading to Bungoma. According to Pw3, there was an oncoming trailer when suddenly, the respondent's vehicle, trying to overtake the trailer, came into view with its headlights blazing. This was on the corner, and the appellant was on the left side of the road. Pw3 was not able to see due to the blazing lights. He then heard the vehicle hit something, saw a human body up in the air before it fell on the side of the road as a result of the impact. Daniel Mukimweyi (Pw2) did not witness the accident.

7. The respondent driver, Dennis Ochieng Opondo, testified that he was heading towards Mabanga when the appellant joined the road from the left side. To avoid imminent collision, Dw1 applied the brake, but the appellant came into contact with the bumper of the vehicle, and as a result, he fell and sustained injuries. Benard Juma Nyongesa (Dw2), who was aboard in the respondent's vehicle, also gave a similar narration to Dw1 as to what transpired.

8. The appellant, in his submissions, argues that the trial court overlooked the evidence of Pw3 and only relied on the police abstract; however, the maker of the abstract never witnessed how the accident occurred. It was argued that the court ought to find the respondent 100% liable.

9. The respondent argued that the police abstract showed that the cyclist was to blame and that Pw3 was not captured as a witness and therefore his testimony was unreliable. The accident was wholly caused

by the appellant, who was riding without a reflector jacket and got into the road without the proper lookout. The appellant, who has the burden of proof, failed to prove negligence on the respondent.

10. The evidence of the appellant and respondent points to two different ways in which the accident occurred. According to the appellant, the respondent veered off its lane, while the respondent's evidence is that the appellant joined the road on the left side. The trial magistrate discredited the appellant's evidence because he was not a witness captured by the police abstract, and the police abstract relied on, found that the cyclist was to blame for the accident. In Mwema Musyoka v Paulstone Shamwamam Sheli [2020] eKLR, the court stated:

> "I do not agree with the Respondent's submission that the Appellant's vehicle was held liable upon investigations by the Nakuru Traffic Officers on whose behalf no evidence was tendered other than on the alleged investigation and findings. Other than a police abstract, no other document was produced by the investigating officer, having not testified. An entry in a police abstract is not proof of the cause of an accident. Evidence ought to be called to support the credibility or otherwise of the entry more so in a civil suit."

11. The investigating officer in this case was not called to testify. The evidence outside the police abstract revealed that it is not possible to know who caused the accident, according to the testimonies of Pw1, Pw3, Dw1 and Dw3. The appellant and respondent gave evidence on two versions of how the accident occurred, and both versions were plausible. Therefore, liability ought to have been apportioned at 50:50.

12. Consequently, I am constrained to agree with the submissions of the appellant that the trial magistrate fell into error in apportioning liability. The appeal on liability is allowed, and the finding that the appellant did not prove his case is set aside. In lieu thereof, liability is entered against the parties at 50:50.

13. The trial court in its judgment found that it would have awarded Kshs 800,000 as damages. The appellant sustained soft tissue injuries and a crushed right leg, leading to below-the-knee amputation. It was guided by the case of Charles Oriwo Odewo v Appollo Justus Andabwa & Another [2017] eKLR to the Respondent, who suffered an amputation to the right leg below the knee. He would have awarded special damages of Kshs 36,490 and damages for an artificial limb at Kshs 100,000/-. The appellant has not challenged the award of damages; therefore, this court affirms the trial court's award of damages.

14. The appellant shall have the costs of the appeal.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 30TH DAY OF SEPTEMBER 2025

R.E. OUGO

JUDGE

In the presence of:

Mr. Juma Waswa - For the Appellant

Mr. Fundi -For the Respondent

Wilkister -C/A