

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL APPEAL NO. E229 OF 2024

BETWEEN

ALEX LETOIRE alias ALEX LETORE.....

APPELLANT

AND

ELIZABETH KAVINDU MULONZI.....

RESPONDENT

*(Being an appeal from the judgment and decree of Hon. M.
Thibaru delivered on 12th August 2024 in SCCC No. E460 of 2024
at the Small Claims Court in Machakos)*

JUDGMENT

Background

1. The appellant seeks to overturn the decision rendered in the Small Claims Court (SCC) No. E460 of 2024. The genesis of this case can be traced to a Statement of Claim dated 27th March 2024, filed by the respondent at the SCC. Herein, the respondent averred that she was a passenger in Registration no. KTWC 865N. She claimed that the appellant negligently drove motor vehicle registration number KCT 728B that it lost control and caused a head on collision with Registration no. KTWC 865N. She claimed that as a consequence of this

accident, she sustained several bodily injuries and suffered loss and damage.

2. This claim was undefended and an interlocutory judgment dated 3rd June 2024 was entered against the appellant. The appellant was found 100% liable for the accident. The respondent was awarded Ksh.150,000 as general damages and Ksh.7,010 as special damages. She was also awarded costs and interest at court rates from the date of the judgement.
3. This caused the appellant to file an urgent application dated 5th June 2024 seeking for, among other orders, stay of execution of the decree, for the court to set aside the *ex parte* judgment as well as leave to enter appearance out of time and file his response to the Statement of Claim.
4. On 6th June 2024 the court certified the application urgent, ordered an *inter partes* hearing for 13th June 2024 and stayed execution of the judgment till 13th June 2024.
5. The appellant then filed a response to the Statement of Claim dated 15th July 2024, denying the respondent's claim in its entirety and averred that the driver of KTWC 865N lost control and hit him.
6. Upon hearing both parties, the trial court set out two issues for determination that is the question on liability and quantum. In a judgment dated 12th August 2024, adjudicator found that the respondent had proved her case on a balance of probability and found the appellant 100% liable for the

accident. On quantum, the trial court considered the respondent's medical report and held that an award of Kshs.160,000 was sufficient compensation. The trial court also awarded special damages of Ksh.7,010, costs and interest at court rates from the date of judgment. A 30 day stay of execution was granted.

7. This decision aggrieved the appellant who lodged this appeal vide the Memorandum of Appeal dated 29th August 2024 raising thirteen (13) grounds reproduced verbatim as follows. That:-

(1) The learned magistrate erred in law by relying on the uncorroborated evidence of a single witness.

(2) The learned magistrate erred in fact and in law by relying on the police abstract and the medical report, whose makers neither testified nor produced the said documents in court.

(3) The learned magistrate erred in fact and in law by allowing the respondent to produce the police abstract and the medical report, while the said respondent was neither the maker of any of the documents nor an expert witness.

(4) The learned magistrate distorted the proceedings by stating in her judgement, that the police abstract was produced by consent of

the parties, while there never was no such a consent.

- (5) The learned magistrate erred in fact and in law by finding the appellant 100% liable for injuries arising out of an accident involving two vehicles, that is motor vehicle Registration Number KCT 728B and motor scooter Registration Number KTWC 865N.*
- (6) The learned magistrate failed to take into consideration the fact that the primary duty of care was owed to the respondent by the owner of the motor scooter Registration Number KTWC 865N in which the respondent was a fare paying passenger.*
- (7) The learned magistrate misdirected herself by finding that the appellant was, in law, obligated to apply for a third-party notice to issue against the owner of moto scooter registration number KTWC 865N, who was not a party to the suit.*
- (8) The learned magistrate misdirected herself in law by failing to acknowledge that no suit shall be defeated by reason of misjoinder or non-joinder of parties, and that the court ought to deal with the matter in controversy so far as*

regards the rights and interests of the parties actually before the Court.

(9) The learned magistrate erred in fact and law by finding that, in the absence of the doctor's testimony in court and production of the medical report, the respondent had proved that she actually suffered injuries to warrant an award of Kshs.160,000/=.

(10) The learned magistrate erred in law by adjusting upwards from Kshs.150,000/= to Kshs.160,000/= the general damages earlier awarded in the ex parte proceedings without any prayer to do so and without any basis for the upward adjustment of the award of damages.

(11) The learned magistrate erred in fact and in law by not taking into account the fact that the particulars of negligence pleaded by the respondent were not specifically proved by the respondent during the hearing of the main suit.

(12) The learned magistrate erred in fact and in law by failing to frame and identify the issues for determination, thereby resulting in a flawed analysis and erroneous judgment that did not address the real matters in controversy between the parties.

(13) The learned magistrate erred in fact and in law by not taking into account the appellant's response, pleadings, testimony and submissions on negligence.

8. The appellant prays that the appeal be allowed with costs to the appellant and that the entire judgment of the SCC dated 12th August 2024 be set aside.
9. The appeal was canvassed by way of written submissions. The appellant filed written submissions dated 20th March 2025 to support his appeal. The respondent filed written submissions dated 30th April 2025 in rebuttal. I have summarised these submissions below.

Appellant's submissions

10. The appellant set out, three (3) issues arise for determination namely; a)whether the uncorroborated evidence of a single witness was sufficient, b)whether the appellant was negligent and, c)whether the appellant is liable for the damages awarded to the respondent.
11. On the first issue, it is submitted that the adjudicator relied on uncorroborated evidence of a single witness and further allowed the respondent to produce the police abstract and the medical report, while the respondent was neither the maker of any of the documents nor an expert witness.

12. It urged that in the absence of the testimony of the driver of the motor scooter in which the respondent was a fare paying passenger, the police officer who investigated the accident and the doctor who treated the respondent, there is no cogent or credible evidence to confirm if and how the accident occurred, and who was to blame. The decisions in **Meshack Mutisya Muasya v Republic [2021] eKLR** and **Ndungu Kimanyi v Republic [1979] eKLR**, are relied on for this contention.
13. The appellant submits that the respondent did not demonstrate that the makers of the medical report or the police abstract were either dead, or could not be found, or were incapable of giving evidence, or that their attendance could not be procured without an amount of delay or expense contrary to section 35 of the Evidence Act. The decisions in **Nairobi Court of Appeal Parkar & another v NQ & 2 others (Civil Appeal 139 of 2020) [2023] KECA 908 (KLR) (24 July 2023)**, **Raphael Kyalo Mwanza v Bob Morgan Services Limited [2022] eKLR** and **Mohammed Hassan Musa & Another v Peter M. Mailanyi & Another [2000] eKLR** are relied on for this contention.
14. On the second issue, it is the appellant's case that for the tort of negligence to be established, a plaintiff must prove that the respondent owed a duty of care, and that there was breach of that duty resulting in injury or damages

to the Plaintiff. He contends that the particulars of negligence pleaded in the Claim, were not specifically proven. It urged that there was no evidence to prove that the appellant acted negligently or did anything to cause the motor scooter registration number KTWC 865N to collide with the motor vehicle registration number KCT 728B.

15. It contended that the adjudicator erred by relying solely on the police abstract, produced by the respondent, which merely proved that the appellant was the beneficial owner of motor vehicle registration number KCT 728B, and not necessarily proof of occurrence of the accident or liability.

16. It urged that the adjudicator found the appellant was 100% liable without considering the duty of care owed by the motor scooter's driver. The decision in **Statpack Industries v James Mbithi Munyao [2005] eKLR**, was relied on in this regard.

17. It is the appellant's case that the adjudicator further misdirected herself by imposing an obligation on the appellant to apply for a third-party notice against the owner of the scooter, KTWC 865N. It is contended that the magistrate failed to appreciate that under Order 1 Rule 9 of the Civil Procedure Rules, no suit shall be defeated by reason of misjoinder or non-joinder of parties. It urged that the failure to join the motor scooter's driver does not automatically transfer liability to the appellant. The decision

in **Departed Asians Property Custodian Board v Jaffer Brothers Ltd [1999] 1 EA 55** is relied on to buttress this assertion.

18. On the third issue, the appellant submitted that the adjudicator erred in law by finding that, in the absence of the doctor's testimony in court and production of the medical report, the respondent had proved that she suffered injuries to warrant an award of Kshs.160,000.
19. It further contended that the adjudicator adjusted the award of general damages upwards from Kshs.150,000 to Kshs.160,000 from what was awarded in the *ex parte* proceedings. That the general damages award was enhanced without any basis. The appellant urges the court to be guided by the decisions in **Ndung'u Dennis v Ann Wangari Ndirangu & another (2018) eKLR, Civil Appeal No. 54 of 2016, Goerge Kinyanjui t/a Climax Coaches & Another Hussein Mahad Kuyate [2016] eKLR, Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another [2017] eKLR, and Simon Taveta v Mercy Mutitu Njeru [2014] eKLR**, in this regard.
20. In conclusion, the appellant submits that the respondent failed to prove negligence against the appellant by failing to discharge both the legal and evidential burden of proof.

Respondent's Submissions

21. The respondent submitted to the issues for determination as raised by the appellant. On the first issue, the respondent relies on Section 143 of the Evidence Act, and the Court of Appeal decision in **Jared Koita Injiri v Republic [2018] KECA 78 (KLR)** to contend that it was discretionary upon the respondent to decide the number of witnesses to call at trial.
22. It is submitted that the evidence of the respondent at trial was cogent and credible in so far as it was corroborated by the police abstract, medical report, and other documentary evidence produced therein.
23. It is submitted that Section 35(2) of the Evidence Act, accords the court discretion in admitting into evidence a statement made in a document without the maker being called as a witness to the proceedings. It contended that the trial court did not err in law or principle in admitting the police abstract and medical report in evidence.
24. It is further submitted that appellant's counsel indicated to the court at trial that she did not intend to cross-examine the makers of the documents produced in evidence by the respondent and therefore, the production of the said documents was done with both parties consent.
25. On the second issue, it is submitted that the respondent's evidence at trial was corroborated by her bundle of documents, including the police abstract and medical report. The decision in **Joel Muga Opija v East**

African Sea Food Limited [2013] KECA 181 (KLR), is relied on to reinforce this assertion.

26. It is the respondent's submission that where a statement or report has been produced and admitted in evidence, it is the prerogative of the adverse party to raise an objection as to the production of the document, or challenge the accuracy of its contents by producing evidence that controverts the said contents.

27. The respondent urges that where a party does not object to the production of such a document in evidence at trial or challenge its contents, it cannot raise that objection at the appellate stage. The decision in **Kenya Power & Lighting Company Limited v AMK (Suing as the mother and next friend of JMK - Minor [2021] KECA 52 (KLR)** is relied on to buttress this assertion.

28. The respondent asserts that although the appellant denied her claim in his response to the Statement of Claim and averred that the accident was caused by the negligence of the driver of the motor vehicle in which she was a passenger, the respondent did not give any evidence to support this averment. It is further asserted that the respondent did not join the said driver as a third party to the suit so that the trial court could determine his liability. The Court of Appeal decision in **Edward Mariga through Stanley Mobisa Mariga v Nathaniel David Schulter & another [1997] eKLR**, and the decision in **Kenya**

Commercial Bank vs Suntra Investment Bank Ltd (2015) eKLR, are relied on, respectively, for these assertions.

29. On the third issue, it is the respondent's case that she pleaded and proved all the injuries she suffered by way of the medical report and treatment notes.

30. On the question quantum of damages, the respondent relies on the decisions in **Samuel Muthama v Kenneth Maundu Muindi Machakos Hcca No. 102 of 2008**, and **Channan Agricultural Contractors Ltd v Fred Barasa Mutayi (2013) eKLR** to urge that in her appeal, factoring in the impact of the injuries she sustained, considering the age of the aforementioned comparable cases and the rate of inflation, the trial court's award of Kshs. 160,000 in general damages is reasonable in the circumstances of the case.

31. The respondent submits that she pleaded and proved special damages of Kshs. 7,010.00 and the same was awarded as pleaded and proved. She concludes by submitting that this appeal lacks merit and ought to be dismissed in its entirety and the Judgment in the trial court upheld.

Analysis and Determination

32. I have considered the grounds of appeal, read through the record of appeal and the submissions of the parties. Before framing the issues for determination, I must point out

that appeals from the SCC are governed by the provisions of Section 38 of the Small Claims Act which provides as follows:

(1) A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.

(2) An appeal from any decision or order referred to in subsection (1) shall be final.

33. Black's Law Dictionary defines matters of fact and matters of law as: -

“Matter of fact: 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.”

34. The Supreme Court has binding precedent on what constitutes appeals on matters of law only. In **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others, Petition 2B of 2014 [2014] eKLR**, the Court in paragraph 80 delivered itself as follows:

“From the foregoing review of the comparative judicial experience, we would characterize the three elements of the phrase “matters of law” as follows:

(a)the technical element: involving the interpretation of a constitutional or statutory provision;

(b)the practical element: involving the application of the Constitution and the law to a set of facts or evidence on record;

(c)the evidentiary element: involving the evaluation of the conclusions of a trial Court on the basis of the evidence on record.

The court went on to explain at paragraph 81 (c): “the conclusions arrived at by the trial Judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor, where the appellant claims that such conclusions were based on “no evidence”, or that the conclusions were not supported by the established facts or evidence on record, or that the conclusions were “so perverse”, or so illegal, that no reasonable tribunal would arrive at the same; it is not enough for the appellant to contend that the trial Judge would probably have arrived at a different conclusion on the basis of the evidence.

The court went on at paragraph 81A:

81A. It is for the appellate Court to determine whether the petition and memorandum of appeal lodged before it by the appellant conform to the foregoing principles, before admitting the same for hearing and determination.

82. Flowing from these guiding principles, it follows that a petition which requires the appellate Court to re-examine the probative value of the evidence tendered at the trial Court, or invites the Court to calibrate any such evidence, especially calling into question the credibility of witnesses, ought not to be admitted. We believe that these principles strike a balance between the need for an appellate Court to proceed from a position of deference to the trial Judge and the trial record, on the one hand, and the trial Judge's commitment to the highest standards of knowledge, technical competence, and probity in electoral-dispute adjudication, on the other hand.

35. In ***Mwita v Woodventure (K) Limited & another (Civil Appeal 58 of 2017) [2022] KECA 628 (KLR) (8 July 2022) (Judgment)***, the Court of Appeal at paragraph 12 stated:

“This is a second appeal. Accordingly, the jurisdiction of this Court is limited to consideration of matters of law. As was held in the case of Stanley N. Muriithi & Another v Bernard Munene Ithiga [2016] eKLR, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the court below considered matters it should not have considered, or failed to consider matters it should have considered, or looking at the entire decision, it is perverse. See also Kenya Breweries Limited v Godfrey Odoyo [2010] eKLR in which it was held that: “In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.”

36. The High Court in **Wachira v Mwai (Civil Appeal E022 of 2023) [2024] KEHC 3173 (KLR) (15 March 2024)** sitting on appeal on a SCC matter, held that at paragraph 4:

“The jurisdiction of the Small Claims Court is set out in the Small Claims Court Act. Ipso facto, there is only one chance of Appeal to this court. It is an Appeal on points of law.”

37. Guided by the foregoing, I have carefully considered the Memorandum of Appeal as framed and finds that grounds 4, 5, 6, 9,10,11, 12, and 13 of the Memorandum of Appeal relate primarily to questions of fact and not questions of law. The appellant is asking this court to review the evidence presented and this constitutes a question of fact. In other words, in considering these grounds, the appellant requires me to re-examine the probative value of the evidence tendered at the trial Court, and is inviting this court to calibrate this evidence. I am prohibited from doing so because the aforesated grounds relate primarily to questions of fact. As such, they do not qualify as grounds that can be determined on appeal. I therefore dismiss these grounds *in limine*.

38. Grounds 1, 2, 3, 7, and 8, however raises a matter of law and I shall examine these in turn.

39. Grounds 1, 2, and 3 are somewhat related. They relate to the evidentiary element; involving the evaluation of the conclusions of a trial court on the basis of the evidence on record, and this a question of law.

40. On ground 1, the appellant’s case is that trial court erred by relying on uncorroborated evidence of a single

witness. The respondent on the other hand argues that based on section 43 of the Evidence Act, it was discretionary upon the respondent to decide the number of witnesses to call at trial. Further, it is her case that her evidence at trial was cogent and credible in so far as it was corroborated by the police abstract, medical report, and the other documentary evidence produced therein.

41. Ground 2 faults the trial court for relying on the police abstract and the medical report, whose makers neither testified nor produced the said documents in court while ground 3 faults the trial court for allowing the respondent to produce the police abstract and the medical report, when the respondent was neither the maker of the documents nor an expert witness. The appellant argues that this was contrary to section 35 of the Evidence Act while the respondent argues that section 35 (2) of the Evidence Act gives the court discretion to admit this evidence absent the makers of the police abstract or the medical report.

42. The Small Claims Court Act, is categorical that the SCC is not bound wholly by the rules of evidence. Section 32 in part provides:

32. Exclusion of strict Rules of evidence

(1) The Court shall not be bound wholly by the Rules of evidence.

(2) Without prejudice to the generality of subsection (1), the Court may admit as

evidence in any proceedings before it, any oral or written testimony, record or other material that the Court considers credible or trustworthy even though the testimony, record or other material is not admissible as evidence in any other Court under the law of evidence.

(3) Evidence tendered to the Court by or on behalf of a party to any proceedings may not be given on oath but that Court may, at any stage of the proceedings, require that such evidence or any part thereof be given on oath whether orally or in writing.

(4) The Court may, on its own initiative, seek and receive such other evidence and make such other investigations and inquiries as it may require.

43. It is therefore evident that the Small Claims Courts are intended to ensure that small claim matters are dealt with efficiently without the burden of strict procedural rules at a minimum cost to the parties.

44. This court notes that the trial court considered the respondent's testimony which it found credible. It also considered the police abstract. It concluded that the police abstract showed the appellant as the beneficial owner of the

motor vehicle registration number KCT 728B. It also considered the medical report and found that the respondent sustained blunt injuries to the head, chest, hand and knee. The trial court cannot be faulted in its conclusions on the basis on the evidence in record. It acted well within the bounds of section 32 of its governing Act. Grounds 1,2 and 3 therefore fail.

45. Grounds 7 and 8 are also related. In ground 7, the appellant contends that the trial court misdirected itself by finding that the appellant was, in law, obligated to apply for a third-party notice to issue against the owner of motor scooter registration number KTWC 865N, who was not a party to the suit.

46. In ground 8, he appeals that the learned magistrate misdirected herself in law by failing to acknowledge that no suit shall be defeated by reason of misjoinder or non-joinder of parties, and that the court ought to deal with the matter in controversy so far as regards the rights and interests of the parties actually before the court.

47. On these two grounds, the respondent's case is that appellant ought to have joined the driver of motor vehicle registration number KTWC 865N as a third party to the suit so that the trial court could determine his liability.

48. Rule 16 (1) of the Small Claims Court Rules provides:

16. Respondent may join third parties.

(1)Where a respondent who has filed a response reasonably believes that another person (hereinafter referred to as "the third party") is liable to pay all or any part of the claimant's claim, the respondent may make a claim against the third party by filing a Third Party Notice in Form SCC 4 as set out in the First Schedule hereto, and joining the third party in the proceedings, before the date fixed for hearing of the respective claims."

49. Therefore, based on Rule 16 (1), the appellant, being the respondent in the trial court, being convinced that the driver of motor vehicle registration number KTWC 865N was liable, ought to have joined him as a third party. Thus, the trial court cannot be faulted in its finding on this.

50. I am also convinced that the trial court dealt with the matter in controversy regarding the rights and interests of the parties actually before it. Accordingly, grounds 7 and 8 fails.

51. In conclusion, I find no reason to interfere with the decision of the trial court.

52. The appeal fails. Each party to bear its own costs.

It is so ordered.

Dated, signed and delivered at Machakos this 14th day of October, 2025.

RHODA RUTTO
JUDGE

In the presence of;

.....Appellant

.....Respondent

Selina Court Assistant

COOPER