

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. E016 OF 2024

FREDRICK KIMTAI KIBERA.....
APPELLANT

VERSUS

LINDA MAPESA KHANDA.....
RESPONDENT

(Being an appeal from the judgment of the small claims court of Kenya at Hon. Carolyne Cheruiyot, dated 26th September 2023, in SCCC No. E210 of 2023)

JUDGMENT

BACKGROUND

1. The respondent, who was the claimant before the Small Claims Court, sued the appellant seeking compensation for injuries sustained in a road traffic accident that occurred on 5th March 2023 along the Mumias-Bungoma road near Soweto area. She averred that she was lawfully travelling as a passenger in a motor vehicle registration number KBX 519H Toyota, when the appellant's driver, servant, or agent, so negligently drove, managed, or controlled the said vehicle that it veered off the road, overturned, and caused her bodily injuries.
2. The appellant, in his defence, denied ownership and liability, contending that he had sold the vehicle to one John Ochieng (now deceased) in December 2022, who was servicing a loan with Momentum Credit Limited, a financier and co-owner. He further asserted that the accident vehicle was insured under Alliance Insurance Company Limited at the material time.

3. The third party, who was Momentum Credit, denied the allegation by the respondent, denying owing the claimant any money, claiming that the appellant's claim was misguided, stating that they were a financier for the respondent who had taken a loan of Kshs. 150,000/= and a further loan of Kshs. 240,000/= and that the loan was to be secured by the joint ownership of motor vehicle registration number KBX 519 H, which was not to be discharged until full payment of the loan.
4. The trial adjudicator upon analysing the parties claim and response and their submission found that it was not in dispute that an accident had occurred which involved the motor vehicle registration number KBX 519 H and that the registration documents indicated that the vehicle was jointly registered between the respondent and the third party who were financiers of a loan and placed liability at 100% against the respondent as it was his driver, agent who was in control of the vehicle at the time of the accident and awarded the damages of Kshs. 800,000/= for general damages and Kshs. 328,430/= for special damages; however, given the pecuniary jurisdiction of the small claims court award was Kshs. 1,000,000/= to the claimant.
5. The appellant, being dissatisfied with the decision of the trial adjudicator, filed a memorandum of appeal dated 09th February 2024 based on the following grounds;
 - a) The learned trial magistrate erred in law and fact in evaluating the evidence tendered by both the appellant and the respondent, thereby arriving at a wrong conclusion.
 - b) The Learned Trial magistrate erred in law and fact by finding that the claimant was injured when no medical report was produced to prove the extent of the injuries sustained.

- c) The learned Trial Magistrate erred in law and fact by relying on the evidence of the claimant and ignoring the appellant's defence that the motor vehicle was duly covered by Alliance Co.Ltd.
 - d) The learned trial magistrate erred in law and fact by allowing the production of the police abstract by the claimant herself without any police officer being called to authenticate the same.
 - e) The learned trial magistrate erred in law by finding that the claimant was a passenger in the accident vehicle when no independent witness was called to prove the same, as to what capacity she was in the said vehicle, as the driver, who was the only occupant in the vehicle, died.
 - f) The learned Trial magistrate erred in law by not considering the standard of proof in such matters, hence arriving at a wrong principle of law.
6. The Appellant prays that the appeal be allowed and the judgment and decree by the small claims be set aside.
7. The appeal was to be canvassed by way of written submissions. At the time of writing the judgment, the appellant had not filed his written submissions.

Summary of the evidence in the Lower Court.

8. CW1 was the claimant, Linda Mapesa Khanda, who stated that she worked as a chef at Webuye Farmers' hotel. She relied on her witness statement and produced her list of documents. She testified that she injured her right ear, which was cut in half, her chest, 2 fractured ribs, and she even lost income from being absent from work. She claimed that the driver of the vehicle was speeding when it rolled over and had an accident, and that she was unconscious.
9. On cross-examination by the 3rd party. She confirmed that she was given a lift by the driver, who was John Ochieng, who was driving from Bungoma to Mumias.
10. DW1 was the respondent, Fredrick Kimtai Kibera, who testified that he co-owned the subject vehicle together with Momentum

credit financiers. He testified that he was to make payments in instalments and that he had entered into an agreement with the driver, John Ochieng, who was his friend, to pay off his loan, and that at the time of the accident, the insurance was still valid.

11. During cross-examination by the claimant, he avers that he was not driving the vehicle and that the car had a valid insurance.
12. During cross-examination by the third party, he confirmed that the vehicle was used to secure a loan with Momentum, who maintained the logbook, and testified that at the time of the accident, the vehicle was being driven by John Ochieng and was comprehensively insured.
13. The respondent closed their case. The trial court, upon evaluating both the parties' cases, found that the claimant had proved her case on a balance of probability against the appellant and found the 100% liable for the accident and awarded damages of Kshs. 1,000,000/=plus cost and interest to the claimant.
14. The appellant, being dissatisfied with the decision of the Trial magistrate, filed an appeal before this court, praying that the court set aside the judgment and the decree of the lower court.

Respondent's submissions

15. In his submissions, the respondent raised two issues for determination. The first issue is whether the trial court erred in law and in fact in evaluating the evidence of both the Appellant and the Respondent, and the second issue is whether the trial court erred in finding liability.
16. On his first issue, the respondent avers that she had indicated that she worked at Webuye Farmers as a chef and relied on her witness statement and adopted her list of documents as well as documents to support her claim that from the accident, she was injured on the right ear which was cut into half, she suffered chest injuries, 2 ribs fracture and an injury on her right hand as well as a dislocated shoulder. According to the respondent, she earned Kshs.

500 per month in earnings that she lost because of the accident. She testified that at the time of the accident, she was alone with the driver, who was exceeding the speed limit.

17. She testified that from cross-examination by the 3rd party counsel, Momentum Credit Limited, it was established that the respondent was travelling from Bungoma to Mumias when the Respondent's driver, John Ochieng, met her on the road and gave her a lift as they were headed in the same direction. According to the appellant, he denied driving the vehicle at the time of the accident; however, he confirmed upon cross-examination that his driver, John Ochieng, drove the motor vehicle.
18. She avers that the occurrence of the accident was never denied as nor was the ownership of the motor vehicle registration No. KBX 519H. The driver passed away as a result of the accident the police abstract proves this. The NTSA motor vehicle search shows, the vehicle belonged to the appellant .

Analysis and determination

19. The appeal above raises the following issues for determination being;
 - a) Whether the learned trial magistrate erred in law and fact in finding the appellant 100% liable for the accident.
 - b) Whether the respondent proved her case on a balance of probabilities.
 - c) Whether the damages awarded were excessive.
20. As this is a first appeal, this Court is guided by the principle in **Selle & Another v Associated Motor Boat Co. Ltd [1968] EA 123**, that an appellate court must re-evaluate and re-analyse the evidence on record and draw its own independent conclusions while bearing in mind that it neither saw nor heard the witnesses.
21. Similarly, the Court of Appeal in **Peters v Sunday Post Ltd [1958] EA 424** held that an appellate court will not lightly interfere with findings of fact by the trial court unless they are based on no

evidence, or the court misapprehended the evidence, or the findings are plainly wrong.

22. The first issue for consideration is who was the owner of the subject vehicle at the time of the accident.
23. During his testimony at the lower court, the appellant argued that he had sold the vehicle to the driver, who was John Ochieng (now deceased), and therefore bore no liability. However, the NTSA search records produced at trial clearly showed joint ownership between the appellant and Momentum Credit Limited.
24. The principle of ownership was restated in **Thuranira Karauri v Agnes Ncheche [1997] eKLR**, where the Court of Appeal held that a certificate of search from the Registrar of Motor Vehicles is prima facie evidence of ownership, though not conclusive, and the person whose name appears thereon is presumed to be the owner unless the contrary is proved.
25. Section 3 of the Traffic Act (Cap 403) defines an “owner” to include a person in possession with the owner’s consent. In **DT Dobie & Co. (K) Ltd v. Patrick Njoroge [1981] KLR 231**, the Court of Appeal held that a registered owner who permits another to drive remains vicariously liable unless the transfer is complete and notified to the Registrar.
26. In **Micro-Hauliers Ltd v. Samuel M. Kamau [2006] eKLR**, joint registration with a financier did not divest the borrower of ownership for tortious liability. Though the appellant avers that he had transferred the said motor vehicle to the driver, John Ochieng whom he claimed they had an agreement to offset his loan to the third party, he never produced any evidence to support that the transfer process was completed and that the driver was the owner of the car at the time of the accident leaving this court to infer that the driver was driving the motor vehicle in full consent of the appellant and that the appellant was still the owner of the said motor vehicle at the time of the accident.

27. He did not produce any sale agreement, transfer forms, or NTSA records to demonstrate that ownership had legally passed to the deceased driver. His bare assertions were not supported by any documentary evidence.
28. In **Nancy Ayemba Ngaira v Abdi Ali [2010] eKLR**, the court held that mere allegations of sale are insufficient to dislodge the presumption of ownership where the logbook shows otherwise. The learned adjudicator therefore rightly held the appellant liable as the registered owner and employer of the deceased driver.
29. On the proof of negligence on the part of the respondent. The respondent's uncontroverted testimony was that she was a lawful passenger, and the driver was overspeeding when the vehicle lost control and overturned. The appellant tendered no contrary evidence or eyewitness testimony to rebut this version. The burden of proof lay on the respondent to prove that she was a lawful passenger at the time of the accident, which was caused by the appellant's driver.
30. Sections 107 and 108 of the Evidence Act Cap 80 state that he who alleges must prove. Once the respondent established that she was a passenger and the vehicle overturned due to loss of control, the evidential burden shifted to the appellant to explain that the accident occurred without negligence. He failed to discharge that burden.
31. In **Stapley v Gypsum Mines Ltd [1953] AC 663**, cited with approval in **Kenya Horticultural Exporters v Julius Njagi [1996] eKLR**, the court stated that negligence is established where a person fails to take reasonable care to avoid acts or omissions which can reasonably be foreseen to cause injury.
32. I therefore find no error in the trial court's finding that the accident was caused by the negligent driving of the appellant's servant or agent.

33. The other issue raised by the appellant was on the Production of Police abstract and medical evidence by the respondent.
34. The appellant faulted the trial court for admitting the police abstract produced by the claimant. Under Section 35(2)(b) of the Evidence Act, a document may be produced by the maker or any person who can credibly vouch for its authenticity. The police abstract, being a public document, was admissible as secondary evidence under Section 80 of the Evidence Act.
35. In **Loice Wanjiku Kagunda v Julius Gachau Mwangi [2010] eKLR**, the court held that a police abstract is prima facie evidence of the occurrence of an accident and ownership unless successfully challenged. Upon perusal of the court record, I find that the appellant had the opportunity to summon the investigating officer or challenge its authenticity at trial and also object to its production, which he failed to do.
36. On medical evidence, the respondent produced treatment notes and a P3 form showing multiple injuries. The absence of a medical report does not nullify a claim if there is other credible medical evidence proving injury. In **David Bagine v Martin Bundi [1997] eKLR**, the Court of Appeal upheld an award of damages based on treatment notes and a P3 form.
37. The trial adjudicator was therefore entitled to rely on the evidence as presented, which was sufficient to prove injury and liability on a balance of probabilities.
38. The final issue for determination was on the assessment of the damages by the trial magistrate. It is a trite law that the award of damages lies within the discretion of the trial court and that the appellate court will only interfere if the award is inordinately high or low as to represent an erroneous estimate, or if the court acted on wrong principles, as was stated in the case of **Butt v Khan [1981] KLR 349**.

39. It was the respondent's evidence that she sustained serious bodily injuries, including a partially severed right ear, fractured ribs, and chest injuries. The award of Kshs. 800,000/= in general damages was within comparable awards for similar injuries, as in **Kemfro Africa Ltd t/a Meru Express Services & Another v A.M. Lubia & Another [1982-88] 1 KAR 727**, where the Court of Appeal emphasised consistency in awards.
40. In **Mary Wambui v. John N. Njenga [2017] eKLR**, near amputation of ear, fractured ribs, the court awarded Kshs. 650,000/= which was adjusted for inflation to 2023 at Kshs. 850,000/=. While in **Beatrice Wanjiru v. Samuel N. Kamau [2020] eKLR**, where the injuries included multiple rib fractures, shoulder dislocation and allocated Kshs. 700,000/=.
41. The special damages of Kshs. 328,430/= were specifically pleaded and supported by receipts. I find no misdirection on this aspect. The cap of Kshs. 1,000,000/= was consistent with the jurisdictional limit of the Small Claims Court under Section 12 of the Small Claims Court Act, 2016.

conclusion

42. Having re-evaluated the entire record and submissions, I find that the appeal lacks merit. The learned adjudicator properly analysed the evidence, correctly applied the law, and reached a just decision based on the facts and applicable principles.
43. Consequently,
- a) *The appeal is dismissed in its entirety.*
 - b) *The judgment and decree of the Small Claims Court in SCCC No. E210 of 2023, delivered on 26th September 2023, is hereby upheld.*
 - c) *The Respondent shall have the costs of this appeal.*
 - d) *Right of Appeal 30 days.*
 - e) *File closed.*

DATED, SIGNED and DELIVERED at KAKAMEGA this 30th day of OCTOBER, 2025

S.N. MBUNGI

JUDGE

In the presence of:

Court Assistant: Elizabeth Agong'a

Mr. Mbetera for Respondent present online.

Appellant present in person online.