



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL APPEAL NO. E214 OF 2023

DANIEL MWANZIA MWANGANGI.....
APPELLANT

VERSUS

MERCY NZIKU MWANZIA.....
RESPONDENT

*(Being an appeal from the judgment of Hon M. Thibaru
(Resident Magistrate) delivered on 28th August 2023 in
Machakos Small Claim Court Case No. 137 of 2023*

JUDGMENT

1. In the court below the Appellant through an amended statement of Claim dated 5th April, 2023 claimed from the Respondent special and general damages, costs and future medical expenses arising from an accident involving him and the Respondent's vehicle Reg. No. KCW 371P. The accident was said to have occurred along the Wote-Mwani Road on 11th February 2023. The Appellant purported to have sustained blunt injury to the left shoulder, lower back, left lower limb and left side of the pelvic region as well as a fracture of the left tibia/fibula bones.

2. In her statement of defence, the Respondent vehemently denied the occurrence of the accident and the particulars of negligence and urged the court to dismiss the suit with costs.

3. After hearing two witnesses for the Appellant's and considering the evidence, the learned Adjudicator found that the Claimant had not proved his case on a balance of probability and dismissed the suit with costs to the Respondent.

4. Being aggrieved, the Appellant preferred this appeal. The appeal is premised on the following grounds:-

“a. That the learned Adjudicator erred in law and in fact by failing to consider the entirety of the Appellant's pleadings witnesses and evidence.

b. That the learned Adjudicator erred in law and in fact by relying on extraneous considerations and arriving at a wrong conclusion of the facts and law.

c. That the learned Adjudicator erred in law and in fact by failing to consider the severity of injuries sustained by the Appellant and the medical evidence availed and thus arriving at an award that was inordinately low.”

5. Counsel for the parties consented to canvassing the appeal by way of written submissions. The Respondent did not file submissions.

6. In submissions dated 13th May 2025, the Appellant submitted that his evidence was uncontroverted and the Defence by

itself was insufficient to challenge the Appellant's evidence; that based on the police abstract from Makueni police station there was no doubt that the accident occurred; that the accident resulted to severe injuries to the Appellant; that the accident was a result of the failure by the Respondent to control his motor vehicle and causing it to overturn and hence the decision of the Adjudicator should be set aside and the Respondent found 100% liable, given that the driver had a higher duty of care than the pedestrian.

7. Additionally, Counsel for the Appellant submitted that the injuries sustained had been proven by the medical report and compensation of Kshs 800,000 would be sufficient compensation for the same as well as Kshs. 130,000/= for future medical expenses and special damages of 35,781/=. In support of his submissions, Counsel for the Appellant placed reliance on the cases of **Billiah Matiangi v Kisii Bottlers Limited & another [2021] eKLR**, **Wellington Nganga Mathiora v Akamba Public Road Services Ltd & Anor [2010] eKLR**, **Mary Njeri Murigi v Peter Macharia & another [2016] eKLR**, **Juma v Rabote (Suing as the legal representative of the Estate of Leonard Taabu Rabote (Deceased) (Civil Appeal E044 of 2022) [2023] KEHC 2909 (KLR)**, **Mohammed Younis Quereshi & another v Chris Maina Mathu [2020] eKLR** and **Orix Oil (Kenya) Limited vs Paul Kabeu & 2 others (2014)e KLR**.

Analysis and determination

8. The court has considered the record, the memorandum of appeal as well as submissions of the parties. The duty of this court as an appellate court exercising jurisdiction under the Small Claims Court under **Section 38 of the Small Claims Court Act** which section provides as follows;

“38. Appeals

(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.

9. The jurisdiction of the High Court based on the above section is limited to matters of law only. Having gone through the memorandum of appeal and the grounds set out therein, I note that the Appellant raises issues of both law and fact. Most of the grounds of appeal are premised on the allegations that the learned adjudicator erred in both the law and fact. The court will therefore focus on the issues of law only.

10. The question before this court is whether the Appellant proved his case in the court below, on a balance of probabilities, which is the standard of proof in civil cases. The Appellant contends that the evidence that was produced was not disputed as the Respondent only filed a defence which defence is not itself evidence. I agree fully with the

submissions of the Appellant on the effect of failure to produce evidence and in so doing I find support in the finding of Odunga J (as he then was) in **Linus Nganga Kiongo & 3 Others V Town Council Of Kikuyu [2012]eKLR** where he analysed this issue and stated as follows;

“What are the consequences of a party failing to adduce evidence?”

In the case of Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002 Justice Lesiit, citing the case of Autar Singh Bahra and Another vs. Raju Govindji, HCCC No. 548 of 1998 stated:

“Although the Defendant has denied liability in an amended Defence and Counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st Plaintiff’s case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”

Again in the case of Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001 the Learned Judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged.

The case of Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in

Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997 said:

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations ... Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence.”

11. The defence on the record does not therefore amount to evidence as would have controverted the evidence of the Appellant. It is but a mere pleading.
12. From the record, it is not disputed that on 11th February 2025 an accident involving the Appellant occurred along Wote - Mwani road. This was proved by the oral evidence of the Appellant and CW2 (a police officer who visited the scene of the accident) as well as the police abstract dated 1st March 2023.
13. However, the gravamen of this claim is whether the Respondent was liable for the accident which occasioned the injuries to the Appellant. In his evidence the Appellant stated that he did not see the vehicle that hit him. The police officer (CW2), who claims to have attended the scene of the accident did not find the motor vehicle at the scene so he did not see

it. There was no direct witness to the accident and it is therefore difficult to determine whether the registration number of the accident motor vehicle was the one assigned to it let alone whether it belonged to the Respondent. I am therefore in agreement with the Adjudicator's finding that the case against the Respondent was not proved to the required standard which is on a balance of probabilities. It is trite that in cases of negligence there can be no liability without fault and the trial Adjudicator was therefore correct in dismissing the claim.

14. As is the procedure, the Adjudicator was still obligated to assess the quantum of damages and I find no error in her assessment. It is my finding that the award would have been reasonable to compensate the Appellant for the injuries sustained.

15. This appeal is not merited and it is dismissed with costs to the Respondent.
Orders accordingly.

Judgment signed, dated and delivered virtually this 27th day of November, 2025.

**E. N. MAINA
JUDGE**

IN THE PRESENCE OF:

Ms Muthoki for Appellant

No appearance for Kimondo Gachoka for Respondent

C/A: Geoffrey

ORIGINAL