



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**CIVIL APPEAL NO. E081 OF 2024**

**BETWEEN**

**BENARD OKOMO AWILI..... APPELLANT**

**AND**

**PETERLIS ONYANGO ARIKA..... 1<sup>ST</sup> RESPONDENT**

**WAHAB TRADING LIMITED..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment in the Rongo Principal Magistrate's PMCC No. E011 of 2023 by Hon. S. Mutava – Resident Magistrate.*

**JUDGMENT**

1. Benard Okomo Awili, the appellant, was the plaintiff in the Rongo Principal Magistrate's PMCC No. E011 of 2023. He had brought a claim for general and special damages following a road traffic accident involving motor vehicle KCV 085D, in which he was a passenger and un-registered tuk-tuk. He sustained injuries and subsequently filed the suit. The claim was dismissed.
2. The appellant was dissatisfied with the judgment and filed this appeal through Nelson Jura & Company Advocates. He presented the following grounds of appeal:
  - a) The learned trial magistrate erred in law and in fact when she held that the respondents were not liable for the occurrence of the accident in total disregard of the factual basis and evidence on record, thereby leading to a wrong conclusion on liability.
  - b) The learned trial magistrate erred in law and in fact by disregarding the appellant's testimony when the same was not rebutted by failure on the part of the respondents to call a defence witness.

- c) The learned trial magistrate erred in law and in fact when she failed to consider all the relevant facts and erroneously assessed the quantum payable as general damages to the appellant at an inordinately low amount of Kshs. 30,000.00.
  - d) The learned trial magistrate erred in law and in fact by failing to exercise her discretion on the award of costs in a judicious manner.
3. The respondents were represented by KRK Advocates. They urged the court to dismiss the appeal for want of merit.
4. As the first appellate court, I recognise my responsibility to thoroughly examine all the available evidence, given that I did not have the opportunity to observe the witnesses during their testimony. The **Selle vs Associated Motor Boat Co. Ltd. [1965] E.A. 123** case establishes that the first appellate court must review and assess the evidence presented in the trial court and draw its conclusions accordingly.
5. Benard Okomo Awili (PW1), the appellant, in his evidence in chief, blamed the driver of the motor vehicle he was travelling in for the accident. He, however, contradicted himself during cross-examination and blamed the tuk-tuk driver. He said this driver hit the matatu he was a passenger.
6. The testimony of PC Dickson Agumba, given in Rongo CMCC 10 of 2023, was accepted. He stated that the accident occurred on the lane of the motor vehicle with registration number KCV 085D. He blamed the tuk-tuk driver for the accident.
7. From the evidence of the appellant and that of PC Dickson Agumba, it was clear that the respondent could not be blamed for the accident. There was no evidence attributing any fault to the respondent. In the case of **Kiema Mutuku vs Kenya Cargo Hauling Services Ltd [1991]2 KAR 258**, it was held that:

*There is yet no liability without fault in the legal system in Kenya, and the plaintiff must prove some negligence against the defendant where the claim is based on negligence.*
8. The finding by the learned magistrate on liability cannot be faulted.
9. The appellant sustained the following injuries:
  - a) Tenderness on the chest;
  - b) Bruises on lower knee joints;
  - c) Bruises on the left leg.

10. The learned trial magistrate mentioned that if the appellant had established the respondent's liability, she would have awarded Kshs. 30,000 in general damages. This amount was excessively low. If liability had been proven, I would have awarded Kshs. 100,000.
11. The conclusion of the above analysis of the evidence on record is that the appeal has no merit. The same is dismissed with costs.

**Delivered and signed at Migori, this 24<sup>th</sup> day of February 2026**

**KIARIE WAWERU KIARIE**

**JUDGE**