



**Walukwe v Kassam Hauliers Limited & another (Civil Appeal
E118 of 2024) [2025] KEHC 12072 (KLR) (30 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 12072 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E118 OF 2024**

**F WANGARI, J
APRIL 30, 2025**

BETWEEN

AMOS ODHIAMBO WALUKWE APPELLANT

AND

KASSAM HAULIERS LIMITED 1ST RESPONDENT

KASSAM DAIRY LIMITED 2ND RESPONDENT

JUDGMENT

1. This is an Appeal from the Judgment and Decree of Hon. M. Nabibya, Principal Magistrate dated 26/03/2024 arising from Mombasa CMCC No. E883 of 2021. The Appeal is on both liability and quantum.
2. The Memorandum of Appeal raises only two issues, that is: -
 - a. Liability
 - b. The Quantum of Damages
3. The Plaintiff dated 07/06/2021, claimed damages for an accident that occurred on 13/03/2021 (it is noted that the typed date was 13/4/2021 before changing the date to 13/03/2021) involving Motor Vehicle Registration Number KTCB 339H owned by the 2nd Defendant and the 1st Defendant was the insured/ beneficial owner, and motorcycle registration no. KMEU 791J which was being ridden by the Plaintiff/ Appellant.
4. It was pleaded that the Appellant was lawfully riding his motorcycle along Magongo-Mirituni road when the Respondents' authorized driver negligently drove his motor vehicle knocking down the Appellant, sustaining serious injuries.



5. The Plaintiff set forth particulars of negligence for the accident motor vehicle. The Plaintiff pleaded Ksh. 87,150/= as Special Damages and injuries as follows:
 - a. Deep cut on the head
 - b. Deep cut on the right knee
 - c. Fracture of the right humerous arm bone
 - d. Fracture of the tibia and fibula (ankle fracture)
 - e. Abrasion of the right arm
6. The Respondents entered appearance and filed Defence denying the particulars of negligence and injuries pleaded in the Plaint.
7. The Trial Court heard the parties and proceeded to render judgement where the Appellant's suit was dismissed, on grounds that there was inconsistency on the date of the accident.
8. Aggrieved by the finding of the Trial Court, the Appellant lodged a Memorandum of Appeal dated 24/04/2024, hence this Appeal.

The Appellants' case

9. The Appellant, Amos Odhiambo Walukwe, who testified as PW2 gave evidence as per his witness statement. He gave evidence that on 13/03/2021, he was riding his motorcycle at around 8pm, and he kept to his lane. There was an oncoming tractor which had one headlight and the tractor came to his lane knocking him down. He suffered injuries and was treated. He blamed the Respondent's driver for the accident. He produced medical documents and medical bill of Kshs.83,150 which is yet to be paid. He prayed for compensation.
10. On cross examination, he admitted that the road had potholes. He denied hitting a pothole then hitting the tractor. He reiterated that it was the tractor that came to his lane and hit him.
11. His witness Cpl. Abdillah, a traffic police officer gave evidence that he took over the matter from the investigating officer who had since been transferred from the station. He said that he relied on the evidence in the Police Abstract and the O.B. he said the accident occurred on 14/03/2021 and the tractor driver was to blame for he was driving in the middle of the road. He however stated that no charges were preferred.
12. The Appellant also called Dr. Ajoni Adede relied on his medical report dated 24/05/2021. The Appellant had suffered fractures of the right elbow, right tibia and fibula (ankle fracture), deep cut on the head and right knee. He was admitted in hospital for 9 days and suffered partial disability of 12%.

The Respondent's Case.

13. The Respondents closed the defence case without calling any witnesses.

The Appellants' Submissions.

14. The Appellants faulted the trial court for dismissing the suit on account of inconsistency of dates of the accident, yet in the testimony of witnesses and the documentary exhibits, it was discernable that the accident occurred on 13/03/2021. That despite the discrepancy, the trial court in her judgment found that the Respondents' driver was to blame for the accident. Further, the said discrepancy did not negate the court's finding that the Respondents were to blame for the accident.



15. On liability, the Appellant and the Police officer gave corroborating evidence that the driver of the tractor was to blame for the accident. Respondents having not adduced evidence in support of their case, the Appellant's evidence remained un rebutted and uncontroverted.
16. On quantum, the Appellant submitted that an award of Kshs. 2,000,000/= would be sufficient as damages for pain and suffering. Reliance was made on the cases of Mwangi v Siloma & ano (Civil Appeal E102 of 2022) [2023] KEKC 26140 (KLR) and George William Awuor v Beryl Awuor Ochieng [2020] eKLR.
17. On special damages, it was submitted that the Appellant proved the same and Kshs. 87,150/= ought to have been awarded.
18. On the part of the Respondent, it was submitted that the amendment of the date of the Plaintiff was done in the copy of the Record of Appeal, yet the initial pleadings were never amended. The Appellant was therefore amending pleadings after trial. It was submitted that the Appellant had made an application to amend the pleadings after trial, which application was denied by the court. The Appellant should therefore be bound by its pleadings. The case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR was relied on.
19. The Respondents further submitted that even though the Respondents did not call any witness and the Appellant evidence remained uncontroverted, the onus is upon the Appellant to prove his case on a balance of probabilities. Reliance was made on the case of Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & ano. [2016] eKLR.
20. It was submitted that the glaring variance between the pleadings and the testimony of the witnesses made the Appellant's case fatal. They prayed that the appeal be dismissed or in the alternative, the court be guided by the lower court Respondent's submissions on liability and quantum of damages.

Analysis

21. 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.
22. In the cases of Peters vs 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...”
23. In *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in



mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

24. I have perused the Record of Appeal filed in Court and the written submissions and authorities cited in support and opposition to the Appeal. The main reason for dismissing the Appellant's suit in the lower court was the discrepancies in respect to the date of accident.
25. The Plaint attached to the Record of Appeal had the date of the accident handwritten as '13th March, 2021' after the word 'April' was cancelled. The Respondents submitted that the Plaint with the date of accident as 13/03/2021 was amended for purposes of filing the appeal while in fact, the Plaint on record has the date of 13/04/2021 as the day the accident occurred. The Respondent attached the said Plaint in their submissions.
26. I have also perused through the documents produced as exhibits. The Witness Statement stated the date of the accident as 13/04/2021 but the month of 'April' cancelled and replaced with 'March' which is handwritten. The Police Abstract indicates the date of accident as 13/04/2021. The P3 Form had the initial date of accident as 24/03/2021 which was cancelled and the date of 13/03/2021 inserted.
27. Upon oral evidence, the Appellant stated that the date of accident was 13/03/2021. The Police Officer gave evidence that the accident occurred on 14/03/2021. Based on the above, there are glaring discrepancies on the date on accident both in the oral and documentary evidence.
28. I note that on 08/02/2021, when the matter came up for mention to confirm filing of submissions, the counsel for the Appellant sought to amend the Plaint and the Witness Statement to have the date of the accident read as 13/03/2021. The application was disallowed as the pleadings had already been closed. The Party was directed to file a formal application, but from the record, no such application was filed.
29. I do concur with the Respondent that a party should be bound by its own pleadings. The Appellant had the opportunity to amend the pleadings, that even after the trial magistrate directed that a formal application be filed since the pleadings had closed, the Appellant did not do so. I find that the trial court was in order in dismissing the suit as both the oral and documentary evidence was not in consonance with the pleadings. I find no reason to disturb the finding of the court.

Quantum

30. Even though the court did not give a finding on quantum, this court has a duty to assess the damages that would have been payable in the event the Appellant was successful. The Appellant submitted that an award of Kshs. 2,000,000/- would be adequate compensation while the Respondent submitted in the trial court that Kshs. 300,000/= would be sufficient.
31. In *EWO (suing as the next friend of a minor COW) v Chairman Board of Governors-Agoro Yombe Secondary School* [2018] eKLR the Plaintiff sustained a fracture of the right mid shaft femur with tibia fibular fracture and facial injuries with bruises. The court upheld the award of Kshs. 800,000/= in general damages in 2018.
32. Further, in the case *Thomas Mwendu Kimilu v Anne Maina & 2 others* [2008] eKLR and *Jacinta Wanjiku v Samson Mwangi* [2006] eKLR of the Court awarded Kshs. 700,000/= for the Plaintiff who sustained fracture of the right tibia and fibula, fracture of the humerus and amputation of the finger in 2006.
33. There is no dispute that the Appellant suffered multiple fractures and deep cut wounds. He developed 12% partial disability. In consideration of the comparable award to the injuries sustained, I take into consideration inflation and changes in economic times from the time the above decided cases



were decided. An award of Kshs. 1,000,000/= in General Damages would in my view be adequate compensation.

34. On costs, under the circumstances, this litigation must come to an end. Each party to bear its costs.

Determination

35. In the upshot, I make the following orders: -

- a. The Appeal has got no merits and is hereby dismissed.
- b. Each party shall bear its own costs in the Appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON 30TH DAY OF APRIL, 2025.

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F. WANGARI

JUDGE

In the presence of;

Mr. Ngaine Advocate for the Appellant

Mr. Kiriimi Advocate for the Respondent

M/S Norah, Court Assistant

