



**Betty v Fanaka M-Erchants Limited & another (Civil Appeal
E481 of 2023) [2025] KEHC 9160 (KLR) (Civ) (29 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 9160 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL APPEAL E481 OF 2023**

AM MUTETI, J

MAY 29, 2025

BETWEEN

EDMOND LILOVA BETTY APPELLANT

AND

FANAKA M-ERCHANTS LIMITED 1ST RESPONDENT

GEORGE CHEGE MAINA 2ND RESPONDENT

(Being an Appeal from the judgment of Honorable J.P.A Aduke Senior Resident Magistrate (SRM) delivered on 9th May 2023 in Milimani CMCC NO.7176 OF 2018)

JUDGMENT

Introduction

1. The Appellant herein being aggrieved and dissatisfied with the judgment of the Honourable JPA Aduke SRM delivered on 9th May 2023 in Milimani CMCC NO. 7176 OF 2018, appeals to this court against the said judgment and raises the following grounds:
 - i. That the learned trial magistrate erred in law in failing to judiciously analyse the appellant's documentary evidence on record hence arriving at a decision that there was no copy of motor vehicle search on record, a decision that was erroneous and resulted into a miscarriage of justice.
 - ii. That the learned trial magistrate erred in law and fact in framing foreign and strange issues not pleaded by either parties and making a determination on the same hence dismissing the appellant's suit, a decision that was manifestly unjust and erroneous altogether.



- iii. That the learned trial magistrate erred in law and fact in failing to find liability against the defendants despite overwhelming evidence to the contrary, a decision that was wholly erroneous and manifestly unjust.
 - iv. That the trial magistrate erred in law in failing to assess damages despite dismissing the suit.
 - v. That the trial magistrate erred in law and fact by dismissing the appellant's claim.
 - vi. That the Appellant shall upon receipt of the typed proceedings file a supplementary memorandum of appeal to include other grounds and reasons that may become apparent therein.
2. The Appellant proposes to ask this Honourable Court for the following orders:
- a. That the judgment of the lower court in CMCC NO. 7176 of 2018 Milimani Chief Magistrate's Court, delivered on 9th May 2023 be set aside in its entirety.
 - b. That judgment be entered in favour of the appellant against the respondent as prayed for in the plaint.
 - c. That in the alternative, the Honourable court does analyse the evidence, submissions on record and the applicable provisions of the law and make its own findings.
 - d. That the Appellant be awarded costs both in the lower court and for this appeal.

Appellant's Case

3. The appellant vide a plaint dated 20th March 2018 and filed on the same day, instituted this suit against the respondents seeking damages as a result of an accident that occurred on 19th March 2017 involving him and motor vehicle registration number KAT 519L.
4. The respondents filed their statement of defence denying that they were negligent and who reckless as result of which the accident happened.
5. The respondents blamed the Occurrence of the accident on the appellant.
6. The issues that arise in the appeal according to the appellant are:-
- a. Whether an accident occurred on 19th March 2017 involving the Appellant and motor vehicle registration number KCD 302Y?
 - b. Who was the Owner of the said motor vehicle on the said date?
 - c. Who was to blame for the accident?
 - d. What is the quantum of damages payable to the appellant if any?
7. In his evidence in chief the appellant produced a police abstract report from Muthangari Police Station as evidence of the occurrence of an accident as pleaded involving him and motor vehicle registration number KAT 519L. This evidence was not rebutted in view of the fact that the defendants did not adduce any evidence of their own to the contrary. Indeed, the plaintiff's evidence was not even shaken on cross-examination, since the defendants opted not to attend court to cross-examine the plaintiff.
8. The appellant therefore urged the court to find there was proof of the occurrence of the accident and that the respondents having failed to challenge that evidence, the trial court erred in law by failing to enter judgment for the appellant.



9. On the issue of the ownership of the motor vehicle registration Number KAT 519L the appellant submitted that they adduced evidence during the trial to prove that the 1st respondent was the beneficial owner and the 2nd defendant as the driver of motor vehicle KAT 519L respectively.
10. No evidence was adduced to rebut the appellant's evidence thus the appellant submitted that they had proved on a balance of probabilities that the 1st defendant was the owner of the said motor vehicle and that the 2nd defendant was the driver of Motor vehicle registration number KAT 519L at the time of the accident. The trial court therefore erred in determining that the appellant had not established the ownership of the motor vehicle.
11. The appellant produced in their list of documents a copy of motor vehicle records from the Registrar of motor vehicles showing that the registered owner of the motor vehicle as at 4th September 2017 was Fanaka Merchants Limited thus there was no doubt that the 1st respondent was the owner of the motor vehicle and that the 2nd respondent as per the police abstract was the driver.
12. The appellant submitted that the purpose of a police abstract is to show that an accident was reported and not determine the liability of parties. The appellant relied on the case of *Peter Kanithi Kimunya v Aden Guyo Haro* {2014} eKLR where the court held that a police abstract is not proof of occurrence of an accident but of the fact that following an accident, the occurrence thereof was "reported" at a particular police station.
13. The appellant testified that he was lawfully and carefully travelling as a fare paying passenger in motor vehicle registration number KAT 519L along Naivasha Road and when he reached at his designated stage, the 2nd Defendant stopped the said motor vehicle so that the Plaintiff could alight.
14. As the plaintiff was alighting, the 2nd Defendant negligently and recklessly started moving the said motor vehicle and in the process of alighting, the Plaintiff fell down and the rear tyre of the said vehicle ran over his legs as a result of which he sustained serious injuries thereto.
15. The respondents did not call any evidence during the hearing. Consequently, the appellant's evidence remained un rebutted.
16. The appellant went on to submit that the failure by the respondents to call any evidence in rebuttal rendered the statement of defense mere statements. The appellant cited the case of *Mutiga Kamai v Pius Muthuri Mukaria* {2020} eKLR where Justice Mabeja observed;

"moment the appellant failed to tender any evidence in support of his defense, the defense became a mere piece of paper on record with mere allegations that could not rival tested testimony of the plaintiff. The plaintiff's evidence was in the circumstances uncontroverted and the trial court was entitled to rely on the same".
17. The same principle and position of law was adopted in *Trust Bank Limited v Paramount Universal Bank Limited* {2009} eKLR by Lessit J as she then was.
18. The appellant having been the victim and having testified, the court ought to have believed in him and entered judgment in his favor. The appellant went further to argue that he was driven out of the seat of justice through technicalities and that resulted into an injustice.
19. The appellant went further to submit that the trial court erred in not assessing damages even though it had dismissed the suit. The law requires the court to pronounce itself on the amount of damages it would have awarded had the appellant succeeded and by failing to do so the learned honorable



magistrate erred in law. See *Lei Masaku v Kaplama Builders Ltd* Civil Appeal No. 40 of 2007 (2014) eKLR and *Frida Agwanda \$ Ezekiel Onduru Okech v Titus Kagichu Mbugua* (2015) eKLR.

20. The appellant urged this court to adopt the quantum as computed by him in the lower court.

Quantum

21. In his medical report dated 11th December 2017, Dr. W.M. Wokabi confirmed that the appellant sustained a fracture of the shaft of the right femur. Surgical metallic implant was inserted.

22. The doctor also opined that the Plaintiff sustained extensive deep skin loss (degloving injury) on the left calf.

23. The doctor further opined that the appellant would have to undergo a surgery to remove the metal implant after two years estimated at a cost of Ksh.120,000/=. The evidence of the doctor was not rebutted.

24. The appellant argued that a sum of Kshs. 1,500,000/= would reasonably have compensated the appellant herein.

25. The appellant cited the following decided cases as giving comparable awards for similar injuries:

1. Makueni HCCA No. 158 Of 2017, *Teresia Ngugi & Anor v Michael Masia Kimende*.

The Respondent sustained injuries similar to those sustained by the plaintiff herein including a compound fracture of the right femur. He was awarded Kshs. 2,000,000/= at trial. On appeal the same was reduced to Kshs. 1,500,000/=

2. Voi HCCA No. 9 Of 2017, *P.n. Mashru Limited v Omar Mwakoro Makenge Alias Omar Masoud*.

The respondent herein sustained fracture of the femur distal third and fracture of the temporal bone with haematoma. The trial court awarded the Plaintiff Kshs. 1,200,000/= as general damages. The same amount was upheld on appeal.

3. Meru HCCA No. 67 Of 2016, *Isaac Mworira M'nabea v David Gikunda*

The respondent herein sustained a mild head injury and a compound fracture of the right tibia fibula bones. The lower court awarded him Kshs. 600,000/= as general damages. The same was enhanced to Kshs. 1,000,000/= on appeal.

26. The appellant testified that he can no longer do his Masonry work. That evidence was corroborated by Dr. Wokabi who said that the plaintiff cannot walk or run fast.

27. Evidence was also adduced to prove that that the appellant worked as casual labourer prior to the accident. However, he can no longer do so. He has thus lost his earning capacity.

28. According to the medical report of Dr. Wokabi, the appellant was 41 years at the time of examination. Even though he did not plead how much he was earning, minimum wage for a casual labourer is provided in the Minimum Wage Registrations of 2018. The minimum wage of a casual labourer within municipalities is Kshs. 12926.55. The plaintiff herein would have worked for at least 15 years before the statutory retirement age of 60 years.

29. The appellant therefore computed the loss of earning capacity to amount to 12,000 x 12 x 15 years = Kshs. 2,160,000/=

30. Special damages were pleaded and proved which amounted to Ksh 2,650.



31. The appellant pleaded with this court to consider granting him costs both in this court and the lower court.

Respondent's Case

32. The respondents did not file submissions even though the court had on the 9th May 2024 issued directions to parties to file the same.
33. Ms Muthiani appeared before this court on 13th Feb 2025 and informed the court that they had filed their submissions and served the respondents.
34. The respondents did not appear during the mention for directions when the court reserved the matter for judgment.
35. The court will therefore deal with the matter based on the material placed before it.

Analysis And Determination

36. The duty of this court as a first appellate court is to analyze the evidence adduced in the lower court re-evaluate it and draw its own conclusions from that evidence appreciating the fact that the court unlike the lower court did not have the advantage of seeing or hearing the witnesses. See *Selle \$ another v Associated Motor Boat Co. Ltd* (1968) EA 123
37. The appellant is the only one who led evidence in the lower court. That evidence was uncontroverted and thus remained unchallenged.
38. The trial magistrate in the considered view of this court did not address his mind to the documents adduced in evidence by the appellant.
39. The motor vehicle records produced by the appellant showed that as of the 4th September 2017 motor vehicle KAT 5191 was registered in the name of Fanaka Merchants ltd the 1st respondent in this matter. The 1st respondent did not offer any evidence to controvert that. Similarly, the driver indicated in the police abstract as having been in control of the motor vehicle on the material day of the accident was one George Chege Maina the 2nd respondent.
40. The trail court in its judgment made two key observations. That the vehicle record did not show at the time of the accident on 17th March 2017 who was the registered owner of the vehicle.
41. Further, the person named in the police abstract as having been injured was one Desmond Mwandi and not the appellant herein.
42. The court raises a valid point in that even though the respondents did not offer any evidence, once the allegation they owned the motor vehicle at the time of accident was denied, the appellant was under duty to establish that fact.
43. Section 107(10) of the *Evidence Act* places the evidential burden on the party who wishes to have the court give judgment as to any legal right or liability dependent on the existence of facts which he asserts. The party has a duty to prove that those facts exist and thus it was incumbent upon the appellant to prove that on the date that he alleged the 1st defendant through the 2nd defendant caused the accident the 1st responded was the registered owner of the motor vehicle.
44. It would be wrong to assume that that was the position because motor vehicle ownership can change. The registrar of motor vehicles must be in this day and age must be able to provide a report that directly speaks to the status of the registration of the motor vehicle on the date of the accident.



45. The failure to adduce that evidence rendered the case of the appellant inconclusive on that fact.
46. Further, the name of the injured person in the police abstract is different from that of the appellant. The difference in name was not explained at the trial. It created doubt in the mind of the trial court whether the person was the same person captured in the abstract.
47. The issues goes to the root of the claim. The appellant did not explain the variance in name thus he did not discharge the burden of proof under Section 108 of the Evidence Act.
48. The fact of his identity as the person who was injured in the accident and recorded in the abstract was a fact was within his knowledge. He ought to have proceeded under section 108 and 109 of the Evidence Act to explain that variance.
49. In Statpack Industries v James Mbiti Munyao Nairobi HCCA NO. 152 OF 2003 Justice Visram (as he then was) stated :- “that a person making an allegation must prove the causal link between someone’s negligence and his injury. He stated that a plaintiff must adduce evidence from which on a balance of probability a connection between the two may be drawn”(emphasis mine).
50. The appellant must prove that it is indeed him that suffered the injury and where the identity of the injured party is not properly established, the suit by the appellant would crumble under its own weight.
51. It is important to point out that we are living in interesting times when individuals who are not victims of an accident gather the courage of a vicious litigants and file fraudulent claims in our courts to get compensation knowing too well that they did not suffer injury. The identity of an accident victim is crucial to recovery of damages.
52. The appellant in this case did not discharge the burden of proof on a balance of probabilities thus the learned honorable magistrate was right in dismissing the suit.
53. The court however agrees that the learned Honorable magistrate ought to have assessed damages payable to the appellant in any event.
54. The upshot of the above analysis is that the appeal fails and the same is dismissed with no order as to costs since it was undefended.
55. It is so ordered.

DATED, SIGNED AND DELIVERED IN VIRTUAL COURT AT NAIROBI THIS 29TH DAY OF MAY 2025.

A. M. MUTETI

JUDGE

In the presence of:

Kiptoo: Court Assistant

Njuguna holding brief Kabita for the Appellant

No appearance for the Respondent

