



REPUBLIC OF KENYA



**Mutiso v Musili (Civil Appeal E229 of 2023)
[2025] KEHC 9488 (KLR) (26 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9488 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS**

CIVIL APPEAL E229 OF 2023

EN MAINA, J

JUNE 26, 2025

BETWEEN

ROBERT MULI MUTISO APPELLANT

AND

JOHN MUSILI RESPONDENT

(Being an Appeal against the Judgement of the Honourable M. Thibaru (Small Claims Court Machakos Law Courts in SCCOMM no. E271 of 2023 delivered on 24 th August 2023)

JUDGMENT

1. This appeal arises from the dismissal of the Appellant's claim against the Respondents for compensation for injuries allegedly sustained in a motor accident involving a motor vehicle REG NO KTWC 349Q belonging to the Respondents. The accident allegedly occurred on 28th January 2023 at Kaseve along the Machakos-Kitui Road. The Appellant attributed the accident to negligence on the part of the Respondents.
2. The 1st Respondent opposed the claim in its memorandum of claim dated 22nd May 2023 and averred that it was merely a creditor of the 2nd Respondent having financed him to purchase the vehicle. It averred that its name was added to the vehicle's log book to secure the loan and to prevent the 2nd Respondent from disposing the vehicle without its (1st Respondent's) knowledge. The 1st Respondent contended that it was never in possession of the vehicle and hence it was not vicariously liable for the accident. The name of the 1st Respondent was subsequently struck out from the suit and is not a party to this Appeal.
3. The 2nd Respondent, now Respondent in this appeal, filed a response to the claim dated 25th May 2023 in which, while conceding the occurrence of the accident, it vehemently denied any negligence attributed to its driver and put the Appellant to strict proof thereof. It also denied the particulars of injuries and special damages and attributed the accident to negligence on the part of the Appellant for



- inter alia, not wearing a helmet, exposing himself to risk, failing to take measures to avert the accident, engaging in his on frolics while travelling in the vehicle and for being generally negligent and careless.
4. At the hearing the Appellant called three witnesses but his case was dismissed despite the Respondents not calling any witnesses. Aggrieved by the dismissal he preferred this appeal.
 5. Briefly, the Appellant's case was that he was a fare paying passenger in the motor vehicle REG NO KTWC 349 Q; that the vehicle was being driven at such a high speed that it overturned upon being hit at the rear by another vehicle. He testified that although he did not see the vehicle that hit them, he heard a bang at the rear and knew they had been hit. He stated that as a result of the accident he sustained injuries for which he was treated at the Machakos Level 5 Hospital. In support of his case he tendered a medical report prepared by Dr. Titus Ndeti Nzei, a receipt for Kshs 5000/ of the report and a police abstract.
 6. After considering the evidence adduced by the Appellant and the submissions by both sides the trial Magistrate found that the appellant had not proved his case as against the respondent on a balance of probabilities, in that his evidence absolved the 2nd Respondent of negligence and dismissed the claim with costs to the respondent.
 7. The grounds of appeal are that: -
 - a. The learned adjudicator erred in fact and in law by dismissing the appellant's suit against the evidence placed before her.
 - b. The learned adjudicator erred in law and in by holding that the appellant had failed to discharge the burden of proof against the evidence and submissions presented in court.
 - c. The learned adjudicator erred in fact and in law by reaching a conclusion that is contrary to the evidence before her, the relevant facts of the case and the appellant's submissions.
 - d. In all the circumstances of the case, the findings of the learned magistrate were characterized by misapplication of the law, misapprehension of the facts of the case, consideration of irrelevant matters and wrong exercise of discretion
 - e. The learned adjudicator erred in fact and in law by failing awarding cost to the appellant.
 8. The appeal was canvassed by way of written submissions.

Submissions

9. Learned Counsel for the Appellant submitted that the Appellant who was a fare paying passenger proved on a balance of probabilities that the accident occurred; that it was as a result of negligence on the part of the Respondent, that he sustained injuries and the respondent was liable for the accident. That the doctrine of *res ipsa loquitur* should have been applicable to hold the respondent 100% liable for the accident.
10. Counsel reiterated that from the evidence tendered it was obvious that the appellant was merely a passenger and sustained bodily injuries as testified by the medical doctor and that Kshs 200,000 would be reasonable and adequate compensation for the injuries as was observed by the trial court. He injured this court to allow the appeal and award the Appellant the said sum as general damages as well as a sum of Kshs 7700 as special damages specifically pleaded and proved.



11. On his part, learned Counsel for the Respondent submitted that the Appellant's claim was not proved on a balance of probabilities, that no evidence was adduced to prove negligence against their driver.

Analysis and Determination

12. This being the first appellate court I have reconsidered the evidence in the court below so as to arrive at my own independent conclusion, albeit taking into account that I did not hear and see the witnesses and made provision for that. I have also considered the submissions of the parties in this appeal, the cases cited and the law.
13. Since occurrence of the accident, ownership of the vehicle and fact of the Appellant were not disputed, the only issue for determination in this appeal is whether negligence and hence liability was proved against the Respondent on a balance of probabilities and if it was the quantum awardable to the Appellant.
14. In this case, the Appellant testified that the vehicle was being driven at such a high speed that when it was hit at the rear by another vehicle it overturned. This evidence was not controverted. The only reason his case was dismissed was because of his evidence that they were rammed at the rear by another vehicle. However, from his testimony it is clear that he attributed the accident to excessive speed on the part of the Respondent not the other driver. He was certain that the cause of the accident was the manner in which the vehicle in which he was travelling was being driven. This case is in my view distinguishable from that of *Charterhouse Bank Limited (Under Statutory Management) v Frank N Kamau* [2016] eKLR, cited by the learned magistrate, as in this case the Appellant's evidence is credible and believable. If the Respondent's case was that negligence was on the part of the other driver then it was up to him to have added the said driver as a third party. In the premises I find that the learned magistrate erred in principle in dismissing the Appellant's case despite there being evidence which proved negligence on a balance of probabilities and more so given that the evidence was not rebutted. In the premises I hereby set aside the learned magistrate's finding on liability and substitute it with a finding of liability at 100% in favour of the Appellant against the Respondent.
15. On quantum the learned Magistrate correctly found that an award of Kshs 200,000 would have been adequate as damages for pain, suffering and loss of amenities. I have perused the medical report and precedents cited by Counsel and the learned magistrate and I agree that the said sum is not only reasonable but also adequate and award the same. The specials of kshs7,700/ were specifically pleaded and also proved and are therefore awarded.
16. The upshot is the appeal is merited and is allowed and judgment entered for the Appellant against the Respondent as follows-
 - a. Liability 100% in favour of the Plaintiff against the Respondent.
 - b. General damages Kshs.200,000.
 - c. Special damages Kshs.7,700
 - d. Costs of this appeal and in the court below.
 - e. Interest on the special damages from the time of filing suit.
 - f. Interest on the general damages from the date of the judgment in the court below.

Orders accordingly.

JUDGMENT SIGNED, DATED AND DELIVERED ON THIS 26TH DAY OF JUNE 2025.



E. N. MAINA

JUDGE

In The Presence Of:

Ms Masila Advocate for the Appellant.

Mr. Mwanzia Advocate for the Respondent.

Geoffrey – Court Assistant.

