



REPUBLIC OF KENYA



**Ituru v Douglas (Civil Appeal E114 of 2023)
[2024] KEHC 6094 (KLR) (Civ) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6094 (KLR)

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

CIVIL

CIVIL APPEAL E114 OF 2023

HI ONG'UDI, J

MAY 30, 2024

BETWEEN

FAITH MWARI ITURU APPELLANT

AND

SAMUEL K. DOUGLAS RESPONDENT

*(Being an appeal from the Judgment of Mr. S. A Opande – Principal
Magistrate delivered on 6th October, 2023 in Nairobi CMCC No. 8834 of 2021)*

JUDGMENT

1. Faith Mwari Ituru the appellant herein sued Samuel K. Douglas the respondent for special and general damages arising from an accident that occurred on or around 11/03/2020 along Haille Selassie avenue. The accident was allegedly caused by the respondent who was the rider of the motorcycle KMER 012Z on which she was a pillion passenger. The respondent did not enter appearance and the matter proceeded to hearing undefended. Thereafter the learned trial Magistrate delivered the Judgment dated 6th October, 2023 dismissing the plaint with no order as to costs.
2. Being aggrieved by the Judgment the appellant filed this appeal citing the following grounds:
 - i. The learned magistrate erred by dismissing the plaint.
 - ii. The court erred by basing his decision on the issue of ownership of the motorcycle which was not contested by any party. No party invited a decision on ownership.
 - iii. The court erred by failing to notice that the defendant had been named as the rider in the produced police abstract whose contents had not been controverted.



- iv. The learned magistrate erred by following a decision which does not represent the law on formal proof or assessment of damages.
 - v. The court erred by basing its decision on an authority it never invited the plaintiff/appellant to comment on or to address court thereon.
 - vi. The trial court erred by failing to advert to and to apply the overriding objectives and or Article 159 of *the Constitution* of Kenya, 2010.
3. The appellant is the only witness who testified before the lower court. She adopted her witness statement plus documents she produced as EXB1 – 6 which she relied on. The documents were: P3 form, police abstract, two medical reports, two receipt for shs 5200/= and a letter to the respondent’s Insurers Monarch Insurance Co. Ltd

Appellant’s submissions

4. The appellant’s submissions were filed by Nelson Kaburu & Co Advocates and are dated 11th March 2024. Counsel submitted that the trial court misdirected himself by basing his decision on the issue of ownership of the motorcycle which was not contested by any party. He argued that since an *ex parte* Judgment had been entered against the respondent for failing to enter appearance ownership of the motorcycle was not contested. On whether a police abstract is sufficient to prove ownership he referred to the case of *Jotham Mugalo V Telkom (K) Ltd Kisumu HCCC No 166 of 2001*, where it was held that a police abstract being a public document can be proof of ownership unless challenged by the opposing party.
5. He further cited the case of *Bernard Muia Kilovoo V Kenya Fresh Produced Exporters [2020]* eKLR where the Court of Appeal held that the appellant had proved ownership of the motor vehicle on a balance of probabilities despite not producing a copy of records. Also see: *Joel Muna Opiya V East African Sea Food Ltd [2013]* eKLR.
6. Counsel while relying on *Rosemary Wanjiku Kungu V Francis Mutua Mbuvi & Another [2014]* submitted that the appellant being a passenger cannot be liable as she was not in control, of the motor bike. It is counsel’s contention that once interlocutory Judgment was entered and formal proof directed the issue of liability was sorted. He referred to the case of *Peter Njoroge Kamau V A.G. [2017]* e KLR where the Court of Appeal held:

“The question of liability was a non-issue. It was a foregone conclusion, once an interlocutory judgment was regularly entered, it meant that there was judgment on liability and the only other step remaining was assessment of damages. It would be absurd to have judgment on liability entered and then backtrack to impugn such judgment. The learned Judge fell into error in this regard”.

Also see *Abdullah Ibrahim Ahmed V Lem Lem [2013]* eKLR.

Analysis and determination

7. Having carefully considered the grounds of appeal, record of appeal, plus the appellant and the law the only issue I find falling for determination is whether ownership of the motorcycle KMER 012Z was proved, or was meant to be proved.
8. This being a first appeal this court has a duty to re-evaluate and re-consider the evidence on record and arrive at its own independent conclusion. It must also bear in mind that it did not hear nor see the witnesses and give an allowance for that. See *Selle V Associated Motor Boat Company Ltd* and others



(1968) E.A 123; Mwana Sokoni V Kenya Bus Services Limited (1982 – 1988) 1KAR 278; Kiruga V Kiruga (1988) KLR 716.

9. There is no dispute that an interlocutory Judgment was entered against the respondent in default of appearance. The matter was then fixed for *ex parte* hearing for formal proof. The learned trial Magistrate found that despite the interlocutory Judgment the appellant had a duty to prove ownership of the motorcycle by availing a copy of records from the National Transport and Safety Authority. He relied on the case of Josaphat Muthuri Kinyua & 5 others V Fabiano Kamanga M'etirikia [2012] eKLR in support.
10. In the present case the respondent was served with the pleadings which clearly show that the respondent was the rider of the motorcycle. He did not enter appearance nor file any defence.
11. During the formal proof the appellant produced a police abstract dated 17/3/2020 from the OCS Kilimani police station. This police abstract shows the respondent as the owner of the motor cycle. It further shows Monarch Insurance Company Ltd as the Insurer of the motor cycle. The P3 form issued by the police at Kilimani shows that the police received the report of the accident on the same day it occurred, ie. 11th March, 2020. The abstract was only issued on 17th March 2020 after investigations had been conducted.
12. The trial Magistrate's request for more documents could only have been necessary if the respondent had entered appearance and filed a defence denying the claim. In the case of Thurairaja Kaururi Vs Agnes Mucheche (1977) e KLR the Court of Appeal stated thus:

“The plaintiff did not prove that the vehicle which was involved in the accident was owned by the defendant. As the defendant denied ownership, it was incumbent on the plaintiff to place before the Judge a certificate of search signed by the Registrar of motor vehicles showing the registered owner of the lorry. Mr. Kimathi, for the plaintiff, submitted that the information in the police abstract that the lorry belonged to the defendant was sufficient proof of ownership. That cannot be a serious submission and we must reject it”.

See also: Joel Muga Opinja Vs East Africa Sea Food Ltd. (supra).
13. Finally, on this issue, I am well guided by the Court of Appeal decision in Peter Njoroge Kamau V Attorney General (supra). I find that the learned trial Magistrate erred by demanding for a copy of records from NTSA when in actual fact the respondent did not challenge ownership of the motorbike. In any event the appellant produced the police abstract which was sufficient evidence on an uncontested issue.
14. The learned trial Magistrate in his Judgment indicated what he would have awarded had the claim been successful. He would have awarded general damages of Ksh 200,000/= and special damages of Ksh 5,200/=.
15. The appellant in the Memo of appeal requested this court to re-assess the general damages. From the pleadings, the P3 form and the medical reports the appellant suffered blunt soft tissue injuries on the scalp, face and left knee. The appellant had in the lower court sought for an award of Ksh 400,000/= while relying on two cases namely:
 - i. Joseph Njoroge Kariuki V Mary Nyambura Machakos HCCA No. 42 of 2009 as quoted in Kamenju Charles V Gideon Muia Mutisya [2014] eKLR where an award of Ksh 400,000/= was made for soft tissue injuries.



- ii. Duncan Mwende & 2 others V Sila Kinyua Kithela [2018] eKLR where an award of Ksh 350,000/= was made for soft tissue injuries.
16. I have considered the awards made in the said decisions. The injuries suffered by the appellant herein were equally soft tissue injuries but less serious than those suffered by the respondent in the Duncan Mwenda case (supra). The liability in this case is at 100%. In my assessment an award of Ksh 270,000/= will suffice. The proved special damages are Ksh 5,200/=.
17. I therefore allow the appeal and set aside the lower court's Judgment and substitute it with a Judgment in favour of the appellant in the following terms:
 - a. Liability at 100%
 - b. General damages Ksh 270,000/=
 - c. Special damages Ksh 5,200/=
 - d. Costs in the Lower court and High court to the appellant
 - e. Interest on (b) at court rates from date of lower court Judgment while interest on (c) at court rates from date of filing suit.
18. Orders accordingly

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 30TH DAY OF MAY, 2024 IN OPEN COURT AT NAKURU

H. I. ONG'UDI

JUDGE

