



**Kioko v Makau (Civil Appeal 88 of 2022) [2024] KEHC 9638 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9638 (KLR)

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

**CIVIL APPEAL 88 OF 2022**

**H NAMISI, J**

**JULY 26, 2024**

**BETWEEN**

**BOSCO WAMBUA KIOKO ..... APPELLANT**

**AND**

**JOEL MATHEKA MAKAU ..... RESPONDENT**

*(Being an Appeal against the Judgement and decree of Hon. B. A. Luova, Resident Magistrate delivered on 6th June 2022 in Machakos SCCC No. E085 of 2022)*

**JUDGMENT**

1. This is an appeal against the judgement of Hon. B. A. Luova, Resident Magistrate, in which the Appellant has raised the following grounds:
  - i. That the Learned trial Magistrate erred in fact and in law by failing to give concise statement of the case, points of determination, decision thereon and reasons for his judgement;
  - ii. That the learned trial Magistrate erred in law and in fact in failing to consider the Appellants submissions thereby ignoring relevant guiding facts to reach a fair and reasoned determination and thereby dismissed appellant's suit;
  - iii. That the learned trial Magistrate erred in fact and in law by dismissing the Appellant's cases without justification and failing to appreciate the fact that the Claimant had proved his case on a balance of probabilities that the Respondent was to blame for the accident;
  - iv. That the learned trial Magistrate erred in fact and in law by dismissing on the basis that the Claimant had not particularised his claim despite the Claimant testifying in court and stating the injuries he had sustained and proceeding to produce medical document in support of the injuries he had sustained which was in line with the blunt injury he has pleaded and therefore prejudicing the claimant;



- v. That the learned trial Magistrate erred in law and in fact by applying wrong and inapplicable principle of law in civil case and which did not form any basis to warrant his determination on liability and general damages;
2. The appeal arises from proceedings in the Small Claims Court in respect of a road traffic accident that occurred on 23rd February 2022 along Machakos – Mbooni Road involving the Appellant’s motorcycle registration number KMFA 367D and the Respondent’s motor vehicle registration number KDD 221F. In his Statement of Claim dated 4th April 2022, the Appellant indicated the injuries sustained as “severe life-threatening bodily injuries to the Claimant which included blunt injury.” The Appellant’s claim was for general damages, special damages in the sum of Kshs 4,650, costs of the suit as well as interest.
  3. The Respondent filed a Response to Claim dated 21st April 2022, in which he blamed the Appellant for negligence. In the response, the Respondent indicated that he tried to swerve to avoid the Appellant, but his efforts were futile. The Appellant’s motorcycle and the Respondent’s motor vehicle brushed each other on the side, causing some damage and the Respondent’s motor vehicle ended up in a ditch by the roadside.
  4. At the hearing, the Appellant adopted his witness statement as his evidence in chief. He testified as to the injuries sustained, namely head injury, blunt injury (upper incision cracked), injury on the right arm and injury on the knee. The Appellant produced various documents including the P3 Form, Police Abstract, Treatment Notes from Machakos Level 5 Hospital, Medical Report dated 7th March 2022 and receipts for amounts paid (Kshs 4,650/-). On his part, the Respondent adopted his witness statement but did not produce any documents.
  5. Parties then filed written submissions on liability and quantum of damages. The Appellant urged the trial court to award general damages for pain and suffering and loss of amenities in the sum of Kshs 400,000/-, while finding the Respondent to be 100% liable. The Respondent argued that the injuries sustained attract an award of Kshs 60,000/- for general damages, and that liability ought to be apportioned in the ration of 70:30 in favor of the Appellant.
  6. In its judgement dated 6th June 2022, on the issue of liability, the trial court apportioned liability in the ratio 30:70 as against the Respondent. On the issue of quantum, the trial court held that the evidence tendered on quantum was not supported by the pleadings. The court relied on the cases of *Raila Amolo Odinga & Anor v IEBC & 2 Others* [2017] eKLR, *Daniel Otieno Migore v South Nyanza Sugar Co Ltd* [2018] eKLR as well as *Treadsetters Tyres Ltd v Wekesa Wepukhulu* [2010] eKLR. In the latter case, the court held thus:

“In cases of tortuous claims based on negligence, injuries and special damages must be specifically pleaded. They cannot be imagined or inferred. The court’s road maps are the pleadings on record if a party alleges he suffered an injury, he must particularize the same so that the defendant can specifically respond to the claims. One must plead the nature and extent of injuries suffered. This is a mandatory requirement of law...”
  7. Based on these authorities, the trial court held that the claim was not proved and dismissed the suit with costs to the Respondent.

### **Analysis & Determination**

8. Section 38 of the *Small Claims Court Act* provides as follows:



1. A person aggrieved by the decision or an order of the Court may appeal against that decision or an order to the High Court on matters of law;
  2. An appeal from any decision or order referred to in sub section (1) shall be final.
9. In the case of *Otieno, Ragot & Company Advocates v National Bank Kenya Ltd* [2020] eKLR, the Court of Appeal addressed the duty of a court considering points of law.

“This is a second appeal. I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below-considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. (See: *Stanley N. Muriithi & Another v Bernard Munene Ithiga* [2016] eKLR).”

10. Similarly in the case of *Mwita v Woodventure (K) Limited & another (Civil Appeal 58 of 2017)* [2022] KECA 628 (KLR) (8 July 2022) (Judgment), the Court of Appeal stated:

-“This is a second appeal. Accordingly, the jurisdiction of this Court is limited to consideration of matters of law. As was held in the case of *Stanley N. Muriithi & Another v Bernard Munene Ithiga* [2016] eKLR, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the court below considered matters it should not have considered, or failed to consider matters it should have considered, or looking at the entire decision, it is perverse. See also *Kenya Breweries Limited v Godfrey Odoyo* [2010] eKLR in which it was held that: “In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.”

11. The duty of this Court in this instance is similar to that stated herein above, which is essentially limited to points of law. In the case of *J N & 5 Others v Board of Management, St. G School Nairobi & Another* [2017] eKLR, in addressing a point of law and a point of fact, Justice Mativo stated thus:

“In law, a question of law, also known as a point of law, is a question that must be answered by applying relevant legal principles to interpretation of the law. Such a question is distinct from a question of fact, which must be answered by reference to facts and evidence as well as inferences arising from those facts.

In law, a question of fact, also known as a point of fact, is a question that must be answered by reference to facts and evidence as well as inferences arising from those facts. Such a question is distinct from a question of law, which must be answered by applying relevant legal principles. The answer to a question of fact (a "finding of fact") usually depends on particular circumstances or factual situations.”

12. Turning to the appeal herein, one of the guiding principles set out at section 3 (3) (d) of the *Small Claims Court Act* is that the Court shall adopt such procedures as the court deems appropriate to ensure simplicity of procedure. This court is designed to facilitate the speedy resolution of small financial disputes through cost – effective channels while still adhering to the principles of legal fairness and natural justice. It was set up to ensure simplicity of procedure, accessibility, cost friendliness and cultural appropriateness. As set out in its guiding principles, the procedure of the court is meant to be simple; technical rules about evidence need not apply.



13. Indeed, in the case of *Raila Amolo Odinga & Another v IEBC & 2 Others* [2017] eKLR, the court held in the absence of pleadings, evidence if any, produced by the parties, cannot be considered. In that case, the court went further to state that “Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration.”
14. I am in complete agreement with the holding in the *Raila Amolo Odinga* case. (supra). In the cited case, the Court was categorical that evidence cannot be presented to the court without a basis for such evidence having been laid in the pleadings. The essence of the pleadings is to ensure that the responding party is fully aware of the claim against them and able to defend themselves as conclusively and concisely as possible. As stated, each side needs to be fully aware of the questions that are likely to be raised at trial and have the opportunity to present a concise defence.
15. In the case herein, the Appellant pleaded to have sustained “severe life-threatening bodily injuries.... which included blunt injury”. Though the wording of the same may be wanting and not as succinct as would be expected, the gist of it is that the Appellant had pleaded his injuries. Further, the Appellant attached to his Statement of Claim various documents that indicated the nature of the injuries sustained. It is, therefore, correct to state that right from the commencement of the suit, the Respondent had a clear picture of the claim against him, including the injuries claimed by the Appellant, thus was in a position to adequately prepare a Response thereto and defend himself.
16. Bearing in mind the object and purpose of the Small Claims Court, for the trial court to insist that one must specifically plead the nature of injuries would be to apply technicalities, which goes against the very spirit of the Court. By its very nature, the Small Claims Court is intended to be one where litigants can appear in person, present their claims and be heard in the shortest time possible, without procedural or other technicalities. Imposing strict rules of procedure or evidence is the very last thing that this court ought to do.
17. Without underplaying the importance of succinct pleadings, I find that the trial court misapplied itself in dismissing the Appellant’s claim and have no hesitation in setting aside the judgement of the trial court. I place the blame squarely on Counsel for the Appellant, who drew the Statement of Claim and other documents, who ought to have been succinct and concise in his drafting of pleadings. There ought to be a difference between pleadings drawn by counsel and those drawn by a lay person.
18. At the conclusion of the judgement, the trial Magistrate states thus:

“Had the Claimant proved his case on quantum against the Respondent, I would have been guided by the case of *Justine Nyamweya Ochoki & anor v Jumaa Karisa Kipingwa* [2020] eKLR where the plaintiff suffered blunt object injury to the lower lip, blunt object injury to the chest, blunt object injury to the left wrist and was awarded Kshs 150,000/= on appeal. I would have awarded Kshs 150,000/- for general damages and Kshs 5,200/= for special damages, less 30% contribution.”
19. I will not labour to reassess the damages herein, but instead award the same. Therefore, the judgement of the trial court is set aside and substituted with the following judgement:

Judgement is hereby entered in favor of the Appellant as follows:

General Damages - Kshs 150,000/=

Less 30% contribution - Kshs 45,000/=

Kshs 105,000/=



Special Damages - Kshs 5,200/=

Total Award - Kshs 110,200/=

20. The Appellant is awarded cost of this appeal, assessed at Kshs 35,000/-.

**DATED AND DELIVERED AT MACHAKOS THIS 26 DAY OF JULY 2024.**

**HELENE R. NAMISI**

**JUDGE**

In the presence of:

Ms. Muia h/b Mr. Kitindio..... for the Appellant

N/A..... for the Respondent

