



REPUBLIC OF KENYA



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**Muchiri v Gicheru (Civil Appeal 159 of 2015)  
[2022] KEHC 11489 (KLR) (3 August 2022) (Judgment)**

Neutral citation: [2022] KEHC 11489 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL 159 OF 2015**

**MW MUIGAI, J  
AUGUST 3, 2022**

**BETWEEN**

**JEREMIAH NYAGA MUCHIRI ..... APPELLANT**

**AND**

**HIUHI GICHERU ..... RESPONDENT**

*(Being an appeal from the Judgment of Hon. L. Simiyu, Senior Resident  
Magistrate at Machakos in CMCC No.275 of 2011, Jeremiah Nyaga Muchiri  
vs. Hiuhi Gicheru & Christine Muthoni Muiru delivered on 8th October, 2015)*

**JUDGMENT**

**Plaint filed on 9.05/2011**

1. The Appellant instituted a suit Machakos CMCC No. 275 of 2011 against the Respondent seeking general damages for pain and suffering and loss amenities, Special Damages of Kshs.32,200/-, cost of the suit and interest on above at court rates.
2. The Appellant pleaded that on 30<sup>th</sup> May, 2008, he was lawfully driving motor vehicle registration number KAQ 100W Toyota Hilux Pick-Up along Machakos-Kitui Road when the Respondent either by himself or his driver carelessly and negligently controlled, managed and/or drove motor vehicle registration number KBA 571N that he permitted it to lose control, veer onto the lane of motor vehicle registration number KAQ 100W and collide therewith.
3. The Appellant pleaded that the Respondent or his driver drove the said motor vehicle KBA 571N without regard to the safety of other road users at a fast speed that was excessive and failed to swerve, brake and/or otherwise control the said motor vehicle to avoid the collision. According to the Appellant, the Respondent or his driver drove without any care and/or attention.



4. In his witness statement filed on 4<sup>th</sup> November, 2014, the Appellant stated that the Respondent's motor vehicle registration number KBA 571N left its lane while facing Kitui direction, it veered onto the Appellant's motor vehicle registration number KAQ 100W lane facing Machakos Town. He stated that the Respondent's motor vehicle was being driven at a high speed yet the road at the scene had loose chippings. According to the Appellant, his motor vehicle was hit while on the proper lane and pushed into a ditch.

#### **Defendants defence filed on 7/11/2016.**

5. The Respondent denied each and every allegations contained in the Complaint save for the jurisdiction of the Trial Court and averred that if the accident occurred, it was solely caused or substantially contributed to by the negligence of the Appellant. According to the Respondent, the Appellant as the driver of his motor vehicle joined a major highway from a minor road without giving any or any sufficient regard for other motor vehicle reasonably expected to be using the said road. He asserted that the Appellant obstructed the path of travel of motor vehicle registration KBA 571N and was being driven in an erratic zig-zag manner.
6. In his statement, the Respondent stated that motor vehicle registration number KAQ 100W was driven at high speed from a feeder road joining the main road and did not stop to give way. According to the Respondent, the accident happened on his motor vehicle lane. He stated that the driver should have stopped and given way to other vehicles on the main road before joining the main road from the feeder road.

#### **Formal proof hearing**

7. PW1, Jeremiah Nyaga Muchiri stated that on 30.5.2008 he was assigned to collect Macadamia nuts behind Machakos Girls with motor vehicle KAQ 100W Toyota Hilux. He stated that the nuts were to be delivered to Muranga. It was PW1's testimony that while at a junction he drove into the road successfully but there was a lorry oncoming from Machakos town that hit his motor vehicle. He stated that the lorry was speeding and he slid out of its lane and was in middle of the road one tyre in his lane. It was his testimony that he flashed his front indicators and swerved to the extreme left but his motor vehicle was still hit and thrown in a ditch. He stated that he lost consciousness but regained it while at Machakos Level 5 Hospital. According to PW1, he suffered injuries on the head, a fracture to the right humerus bone (plates inserted) and on the left clavicle bone (plates inserted). He stated that he was taken to Nairobi South B Hospital where the plates were inserted. According to PW1, he also went to Machakos Level 5 Hospital and attended clinics at Kenyatta National Hospital where he also paid. He stated that has not fully recovered since the joint with plates experience tenderness on exertion and when it is cold.
8. PW1 produced the police abstract, P3 Form, copy of motor vehicle records, demand letter, treatment notes, bundle of receipts and marked Dr. Musyoka's medical report. He claimed damages and costs of the suit.
9. Dr. Susan Mogaka, stated that she is a private medical practitioner at Machakos Medical Clinic qualified with McHB. She stated that she examined Jeremiah Nyaga Muchiri on 26<sup>th</sup> April, 2011, 3 years after the accident. She stated that PW1 had been treated at Machakos General Hospital and South B Hospital. According to PW2, PW1 sustained a fracture of left clavicle and right humerus and dislocation of clavicle joint externally. PW2 stated that PW1 complained of chest pains, inability to perform manual work, tenderness of fracture. PW2 opined that the serious injuries were two fractures



- that had healed well with inability to do manual work and lift heavy objects. According to PW2, she did not assess any permanent disability. He produced his medical report as PEx 8.
10. The Appellants case was closed. The Defendant's case was closed without his testimony.
  11. The Trial Magistrate delivered judgment on 4.07.2013 but on 10.10.2014, by consent, the ex parte judgment and all consequential evidence was set aside. The consent was adopted as an order of court. PW1 and PW2 were recalled to testify.
  12. PW1, Dr. Susan Nzioka stated that the Appellants sustained a chest injury, right upper arm, left collar bone, fracture of the right humerus bone and left clavicle collar bone, dislocation of the sterno clavicle bone. She stated surgery was done and was admitted upto 8.6.2008.
  13. In cross-examination by Mr.Washu, PW1 stated that she examined the patient 3 years after the accident. She stated that the patient had no new scar or she had treated the Plaintiff earlier. According to PW1, the patient had responded well to treatment. She did not assess any permanent disability. It was PW1 testimony that the treatment records she perused were made in 2008 in July and August.
  14. In re-examination by Ngolya, PW1 stated that once there is a fracture, it is a point of weakness. According to PW1, the patient had internal fixation and had recovered from the surgery to remove them.
  15. PW2, No. 72566 PC Emmanuel Mung'aro from traffic department Machakos police station stated that he had records for an accident that happened on 30.5.2008. It was PW2 testimony that the accident involved motor vehicle registration numbers KAQ 100W and KBA 571N Isuzu Lorry. According to PW2, Jeremiah Nyaga Muchiro was involved as a driver of the pickup. He stated that the report was by a phone call. He stated that an abstract lifts information from the OB. He produced the police abstract.
  16. In cross-examination by Mr.Wachira, PW2 stated that Jeremiah was charged for causing the accident after investigations were completed. He stated that OB reads that motor vehicle KAQ 100W was from Machakos Girls High School and was joining Machakos-Kitui road while KBA 571N, the lorry was from Machakos heading to Kitui direction. That the pick-up failed to give way as it was joining the main road and was hit by the lorry. According to PW2, this were the circumstances KAQ was blamed and its driver Jeremiah was charged.
  17. In re-examination by Mr.Ngolya, PW2 stated that he did not witness the accident but he has told court what he recorded in the OB by the complainant Muchiri and PC Waigero. He stated that the two officers went to the scene after the phone call but are not witnesses in court. According to PW2, he has given court the facts as recorded in OB. He stated that Jeremiah was blamed and charged but he didn't know the outcome of the case. He stated that the OB reads that the lorry hit the pick-up which failed to give way as it joined the Mau road.
  18. PW3, Jeremiah Nyaga Muchiri stated that on 30.5.2008, he was from Machakos Girls to pick Maize and Macadamia nuts heading towards Machakos Town. That at the junction he stopped, checked and drove into the road and upon joining the main road, he saw an oncoming motor vehicle which was speeding from the town. It was PW3 testimony that the road had been newly built and had loose chippings. He stated that on bend, the lorry drove into his lane and PW3 to flash lights causing the driver to veer off the road. According to PW3, his motor vehicle was hit and thrown into a ditch on the extreme left side. He stated that he lost consciousness. According to PW3, the side of the lorry hit the pick-up. He stated that he woke up at Machakos Level 5 Hospital and was in the morning transferred to South B Hospital in Nairobi. PW3 blamed the driver of the lorry for leaving his lane into PW3 lane. According to PW3, the driver was not careful and was speeding.



19. PW3 stated that he sustained blunt injury to the head and right hand, fracture of left clavicle, general injuries to the chest and injury to legs. According to PW3, he was admitted at South B Hospital till 8.6.2008. That it was at South B Hospital that monthly consultation was done by Dr. Kibogo. He stated that he attended clinics at Kenyatta National Hospital. It was PW3 testimony that at Level 5 Hospital he paid 1,500/- and was issued with a receipt for the P3 Form. That he paid Kshs. 450 for 1 day admission at Level 5 Hospital. He stated that he paid Kshs. 20,000/- for treatment at South B as well as consultation and X-rays. He stated that he paid Kshs.1, 100/- at Kenyatta National Hospital.
20. PW3 produced trial court records as exhibit for case number 207/2009 in which he had been charged and acquitted. PW3 stated that he had not healed as he experiences pain on hands and chest upon exertion. He stated that he was unable to return to work. He asked for damages, costs and interest.
21. In cross-examination by Mr.Muchira, PW3 stated that he was acquitted because the driver of the lorry was at fault and not because there were no witnesses. He stated that the witnesses testified but he could not recall their names and when they testified.
22. It was PW3 testimony that on 30.5.2008, he was from Machakos Girls area driving on the feeder road on the right that faces Machakos Town. According to PW3, he had driven to about 50m on the main Kitui road where he looked left and right and there was no motor vehicle. He stated there were no other junction nearby. According to PW3, KBA was on the main road (Kitui Road). He stated that he was with loader known as Mutua but he didn't intend to call him as a witness as there is no need to call him.
23. According to PW3, he didn't know whether Christine Muthoni, the owner of KAQ 100W had paid material damage to Hiuhu Gicheru and had never seen the payment document which was a Claim Settlement document. That it was a letter from Amaco Insurance where a cheque of Kshs. 380,000/- had been enclosed. He could not recall the insurance of KAQ 100W.
24. PW3 stated that he knew the police had blamed him for joining the main road without looking out. According to PW3, he was not knocked at the junction. He stated that Kitui road is main road and the road he had been was a feeder road. According to PW3, he was knocked after the junction since was already on the highway. He stated that the police lied.
25. It was PW3 testimony that it is not true that the police, his employer and its insurance blamed him for the accident.
26. In re-examination by Mr. Ngolya, PW3 stated that his employer did not admit the accident. He stated that his evidence is that the lorry left its lane entered into PW3 lane and hit PW3 motor vehicle. That the driver of the lorry was at fault. According to PW3, the owner of the motor vehicle is the Defendant hence there is no need to get another witness as the evidence is sufficient.
27. DW1, Hezbon Githu Njogu adopted the contents of his witness statement. DW1 stated that on 30.5.2008 he was from Machakos heading to Masii aboard a lorry registration number KBA 571N Mistubishi as the driver. According to DW1, he was descending a slope and while near Machakos Girls, a pick up registration KAQ 100W Toyota Hilux drove into the road suddenly from a feeder road and knocked the left side of the lorry. He stated that the Pick-up was driven into the road without looking and failed to give way. According to DW1, the police came to the scene. That the result of the investigation show pending before court. He stated that the driver of KAQ one Jeremiah Nyagah was charged. According to DW1, he testified in the case.
28. He stated that photographs of the motor vehicle he was driving were not taken. According to DW1, the lorry was not on its left of the Pick-up. According to DW1, had the Pick-up joined the road it could



- be head on collision. DW1 produced the photographs but the Trial Magistrate noted that the same were not taken by the police. According to DW1, the Appellant was blamed for the accident.
29. In cross-examination by Mr. Ngolya, DW1 stated that the owner of the motor vehicle was Michael but his boss was Hiuhu Gicheru. DW1 stated that he was in the company of Naftali and another going to fetch sand in Masii. It was DW1 testimony that he was going down a slope where the road was under construction as there were loose chippings on the road. DW1 stated that when he saw the Pick-up it was off the road and it was 10 m. According to DW1, he hooted and tried to brake but the driver of the Pick-up did not stop but drove into the road and was hit. He stated that the Pick-up had not joined the left facing Machakos. He could not recall where the Pick Up fell as one faces Machakos. According to DW1, his statement reads that the motor vehicle was from a junction and the two motor vehicles collided. He stated that he did not know who took the photographs.
  30. DW2, Naphtali Kamore Kamau stated that he was a turnboy in motor vehicle KBA 571N, Lorry. That while they heading towards Masii side and while on a slope near a junction near Machakos Girls a Pick Up appeared suddenly joining the main road. According to DW2, they were on the highway. That the Pick-Up did not stop to give way. According to DW2, the Pick Up hit the Co-driver side. It was DW2 testimony that their driver braked but the Pick Up hit co-driver/passengers side of the lorry. He blamed the driver of the Pick-Up for failing to stop and give way.
  31. In cross-examination by Mr. Ngolya, DW2 stated that they were on a slope heading towards Masii. That their motor vehicle was in good condition. He stated that there is a slope at the scene. According to DW2, he could see the speed gauge. He stated that he saw a motor vehicle going down the hill could speed. He stated that there was road works and loose chippings. It was DW2 testimony that the Pick Up did speed into the road very fast. According to DW2, whether the lorry was speeding or not if the pick-up driver observed the rules and gave way there would be no accident. He stated that in his opinion the Pick Up knocked the lorry and fell on their right which was the left as one faces Machakos.
  32. According to DW2, he doesn't know where the photographs of the lorry were taken. He stated that the photographs do not show the left side damaged. It was DW2 testimony that the saw the Pick Up when it was 5m away, spoke to the diver and told him that the Pick Up would kill them. According to DW2, the Pick Up appeared from a junction from a feeder road to join the main road.
  33. In re-examination by Mr. Wachira, DW2 stated that his statement is clear that the Pick Up was from a feeder road and was joining a main road. That PEx 2 a photographs show the left side knocked and the door damaged.
  34. DW3, Michael Gicheru Hiuhu stated that he paid excess levy of Kshs. 400,000/- but Amaco through his insurance, First Assurance refunded Kshs. 385,000/- as per a letter dated 2.4.2015. According to DW3, Amaco had insured the Pick Up.
  35. In cross-examination by Mr. Ngolya, DW3 stated that he paid excess because it was in the contract. He stated that his motor vehicle is KBA 571N and not KBA 517N which was typing error.
  36. DW4, Godfrey Njenga stated that he worked for First Assurance Company Ltd as a Claims Controller. He stated that they has insured the Defendant's motor vehicle registration number KBA 571N. He stated that the third party whose motor vehicle KAAQ 100W insured by Amaco Insurance had been charged in court for careless driving. It was DW3, testimony that the insurer of the 3<sup>rd</sup> Party compensated them.
  37. In cross-examination by Mr. Ngolya, DW3 stated that they demanded from the owner of Motor vehicle KAQ 100W for the repair costs which was paid by Amaco through a Knock for Knock agreement. According to DW4, Amaco admitted liability by settling the compensation. It was DW4 testimony



that they have not counterclaimed for material damage because Amaco settled their claim which was the claim of Hiuhu to their satisfaction.

### **Trial court's judgment delivered on 8/10/2015**

38. The Trial Magistrate found that the evidence of the police officer, Mr. Mung'aro is in agreement with the evidence of DW1 and DW2 and inconsistent with that of the Plaintiff(PW3), the Appellant herein. It was her observation that the Plaintiff's evidence, police records and the photographs produced before the Trial Court, the Plaintiff lied to court on the circumstances surrounding the commission of the accident.
39. The Trial Magistrate held that it is not possible that motor vehicle KBA 571N Lorry impacted motor vehicle KAQ 100W which was oncoming and extensive damage is on its rear side and in particular to the passenger door. According to the Trial Magistrate, the evidence illustrates the impact was from the left side which clearly supports the evidence of police and the defence that the Plaintiff was joining the main road without outlook and rammed into the side of KBA 571N, Lorry.
40. It was the view of the Trial Magistrate that the acquittal of the Plaintiff in traffic case is not proof that the court found him blameless. He held that the payment for the material damage in a knock to knock agreement by the third party was an admission of liability for the driver who is the Plaintiff. He held the Plaintiff 100% liable.
41. On quantum of damages that would have been awardable to the Plaintiff, the Trial Magistrate found that the special damages of Kshs. 32,200/- had been proved. Regarding general damages, the Trial Magistrate made an award of Kshs. 700,000/- guided by the principle that related injuries attract similar awards, passage of time and inflationary rate.
42. Regarding future medical expenses, the Trial Magistrate observed that the Plaintiff was entitled for removal of the plates but no sum had been pleaded or lead in evidence or proposed by the medical doctor in the documents or at all.
43. In the end, the Trial Magistrate dismissed the Plaintiff's (Appellant) suit with costs to the Defendant (Respondent).

### **Memorandum of appeal filed on 13/10/2015**

44. Aggrieved, the Appellant has appealed to this Court citing the following grounds:-
  - (1) That the Learned Trial Magistrate erred in law and in fact by not finding and holding that the Appellant had proved his case on a balance of probabilities.
  - (2) That the Learned Trial Magistrate erred in law and fact when she relied on hearsay evidence tendered by the Respondent in his Defence to dismiss the Appellant's suit.
  - (3) That the Learned Trial Magistrate erred in law and fact by relying on unpleaded, falsified and patently inconsistent Defence evidence to dismiss the Appellant's suit.
  - (4) That the Learned Trial Magistrate erred in law and fact by deliberately failing to painstakingly evaluate and scrutinize the Appellant's pleadings, evidence and submissions on record consequent upon which she dismissed an otherwise legally substantial suit.
  - (5) That the Learned Trial Magistrate erred in law and fact by finding in favour of the Respondent when she held that the Appellant's employer had admitted liability yet no documentary exhibit was tendered in evidence to prove the alleged admission.



- (6) That the Learned Trial Magistrate was unfair and biased against the Appellant even at the time of the delivery of judgment in that she delivered her Judgment without any notice to the Appellant or his Counsel.
  - (7) That the Learned Trial magistrate erred in law and fact by assuming that the existence of a traffic case against the Appellant was proof of negligence.
45. The Appellant prays;
- a. That the Judgment of the Trial Court dismissing the Appellant's suit be set aside and that this (Appellate) Court do pronounce Judgment on liability and quantum in favour of the Appellant.
  - b. That costs of this Appeal be borne by the Respondent.

#### **Appellant's Submissions filed on 21.01.2022**

46. On behalf of the Appellant, it was submitted that for the avoidance of doubt, the Appellant was challenging the subordinate court's judgment on liability. According to the Appellant, the Trial Magistrate erred both in law and fact by dismissing the Appellant's claim on liability notwithstanding the fact that the Appellant had proved his case on a balance of probabilities. That the Trial Magistrate misapprehended the principles of law applicable to injury claims involving collision of motor vehicle.
47. It was submitted that the Appellant was categorical that the accident was caused by the negligence of the Respondent's driver who was driving motor vehicle registration number KBA 571N. According to the Appellant, before joining the main road it was well and safe for him to join but after joining and while on his left lane that faced Machakos Town from Kitui direction, the Appellant spotted the Respondent's lorry registration number KBA 571N which was coming from the direction of Machakos Town. According to the Appellant, the lorry was speeding despite the fact that the road had loose chippings at that particular time. That the Appellant flashed at the lorry's driver to warn him but the lorry veered off onto Appellant's lane and violently rammed into the Appellant's motor vehicle registration number KAQ 100W.
48. It was submitted that the Appellant remained consistent and candid that the Respondent's driver/agent was wholly to blame for the occasion of the said accident. According to the Appellant, the accident occurred on the highway after he exited the junction but not at the junction as suggested by the Respondent.
49. According to the Appellant, the charges of careless driving vide the Traffic Case No. 247/2009(Machakos) Republic vs. Jeremiah Muchiri Nyaga were terminated against him and was acquitted under Section 210 of the Criminal Procedure Code.
50. It was submitted that the Respondent relied on the contradicting evidence of DW1 and DW2 version of events to dispute the Appellant's version of events in that DW1 and DW2 stated that the accident occurred at a junction and DW1 stated that the road was under construction and had loose chippings. That the Trial Court dismissed the Appellant's version of events.
51. According to the Appellant, the police officer did not contradict the Appellant's evidence on the circumstances surrounding the accident and neither did it support the Respondent's allegations that the Appellant was to blame. It was submitted that the Respondent did not bother to call the police officer to produce a sketch plan(If any) to reinforce DW1 and DW2 evidence or disapprove the Appellant's testimony on how and where the collision between the motor vehicle occurred. According to the Appellant, in the absence of sketch plans, the Appellant's evidence displaced that of



the Respondent's witnesses hence the Trial Magistrate misdirected herself by holding that the traffic officer's testimony supported the Respondent's defence and further that the Trial Magistrate relied on photographs that did not emanate from the Police Traffic Department but from the Respondents. According to the Appellant, the photographs amounted to hearsay evidence which the Trial Court should have disregarded.

52. It was submitted that the fact that the Appellant was charged for careless driving did not imply that he was responsible for the accident hence the Trial Court fell in error of law and fact to place much reliance on the Traffic charge. The Appellant placed reliance on the case of judgment of Platt JA and Apaloo JA. in *Chemwolo & Another vs. Kebended*(1986) KLR 492,(1986-1989)EA 74 and the cases of *Zarina Akbarali Shariff & Another vs. Noshir Pirosesha Sthna & Others*(1963) EA 239 and in Civil Appeal No.E18 OF 2020(Machakos) *Joshua Mulinge Itumo(Suing for and on behalf of the Estate of Damaris Musyimi-Deceased)vs. Bash Hauliers Ltd & Another*(2021)eKLR.
53. It was submitted that the Appellant discharged his burden in terms of Section 107 of the *Evidence Act* by proving that the Respondent's motor vehicle was speeding moments before the accident and that road had loose chippings at the scene of the accident. That the condition of the road made it impossible for the Respondent's driver to control the motor vehicle registration number KBA 571N.
54. According to the Appellant, the Respondent was vicariously liable for the negligence of his agent since his reliance on the unsigned, invalid and unauthenticated letter dated 16.09.2009 to exonerate himself was unsupported and an afterthought. It was submitted that exhibit 5, a letter dated 23.09.2009 is unrelated to the Appellants claim as it refers to motor vehicle registration number KBA 517N and not KBA 571N and its author was not called to testify.
55. The Appellant urged the court to find that the appeal has merit and allow it.

#### **Respondent's submissions filed 28.02.22**

56. On behalf of the Respondent, it is submitted that Trial Magistrate did not error in finding that the Appellant was 100% liable for the accident and consequently dismissed the suit. According to the Respondent, the Appellant failed to give way while joining Machakos-Kitui road. That the Appellant was blamed by the police for causing the accident.
57. Reference was made to the OB that is said to contain information that the pick-up driven by the Appellant failed to give way as it joined the major road. It was submitted that the Appellant was on a minor road. That the Trial Court proceedings contained at page 46 line 10 of the Record of Appeal, show that the Appellant stated that he was on a feeder road and at page 49 lines 1 and 2, he stated that he was blamed for joining the main road without proper look out. At page 49 lines 13, it is stated that the Appellant suddenly drove from a feeder road and knocked down the side of the Respondents lorry and at page 51 lines 7 and 8, the Respondent's driver stated that the Appellant did not stop but drove into the road. At page 52 lines 10 and 1, 53 lines 5 it is stated that the Appellant did not give way while at pages 53 lines 17 and 18, it is stated that the Appellant drove from a feeder road and was joining the main road.
58. It was submitted that the Appellant through his insurer paid the Respondent for the motor vehicle damages hence an admission on liability as seen at page 56 lines 19-22 and page 60 line 11. Reference was made to page 8 lines 28, page 9 lines 1-4 where the Trial Court held that the evidence of PW2 (Police constable) and the Respondent's driver and the turn boy supported the position that the Appellant was joining a main road hence the Trial Court did not error to find that the Respondent's motor vehicle was on the main road of Machakos-Kitui Road while the Appellant was driving from a feeder road.



Reliance was placed on the findings by the Kitale High Court in Civil Suit No. 65 of 2005, *Fredrick Wanjao Masibo vs. Henry Kipkorir Rotich & 2 Others*.

59. According to the Respondent, the findings of the police investigations were not challenged. He urged this court to uphold the findings of the Trial Court and dismiss the appeal with costs.

### **Determination**

60. I have considered the grounds of appeal, evidence on record, submission and the cases relied upon by parties.

61. This being the first appellate court, its powers are stipulated under Section 78 of the [Civil Procedure Act](#), thus:-

“Powers of appellate court

- (1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—
- (a) to determine a case finally;
  - (b) to remand a case;
  - (c) to frame issues and refer them for trial;
  - (d) to take additional evidence or to require the evidence to be taken;
  - (e) to order a new trial.

62. It was held by the East African Court of Appeal in *Selle vs. Associated Motor Boat Co.* [1968] EA 123 that:

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the 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, in particular the court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

63. The same Court in *Peters vs. Sunday Post Limited* [1958] EA 424, held that:

“Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law, an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this



opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight.

64. The Trial Magistrate dismissed the Appellant's suit Machakos CMCC No. 275 of 2011 with costs to the Respondent. According to the Trial Magistrate, the Appellant was 100% liable based on the viva voce and documentary evidence of the police officer (PW2) Mr. Mung'aro who had been called to testify in support of the Appellant's case. It was the finding of the Trial Magistrate that the police officer's evidence supported DW1 and DW2 evidence.
65. The only issue that emerges for determination is whether the Appellant proved his case on a balance of probabilities against the Respondent and the appropriate quantum of damages.
66. The drivers of the two motor vehicles involved in the accident testified before the Trial Court. The Appellant (PW1) drove motor vehicle registration number KAQ 100W, Pick Up while Hezbon Githu Njogu drove motor vehicle registration number KBA 571N, Lorry. Their testimonies were each supported by witnesses, the police officer (PW2) in the Appellant's case being the witness whose evidence led to the outcome of the judgment appealed against by the Appellant. That instead of his evidence supporting the Appellant's case, his evidence supported the defence case. In a nutshell the Appellant failed to discharge the burden of proof in his claim against the Respondent.
67. It is trite law that whoever alleges must prove. Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

“Burden of proof

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

68. Sections 109 and 112 of the same Act provides:

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him

69. In *Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, in which the Court of Appeal held that:

“As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue

There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”



70. I also make reference to The Halsbury's Laws of England, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

71. The legal burden of proof solely rest with the Plaintiff and if discharged by the Plaintiff, it shifts to the Defendant to rebut the Plaintiff's case depending on the evidence adduced by the Plaintiff. The Defendant has the evidential burden of proof. See Supreme Court in *Raila Amolo Odinga & Another vs. IEBC & 2 Others* (2017) eKLR.

72. In civil cases, proof is on a balance of probabilities. What then amounts to proof on a balance of probabilities? I am fortified by Kimaru, J.(as he then was) expression in *William Kabogo Gitau vs. George Thuo & 2 Others* [2010] 1 KLE 526 where he stated that:

“In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

73. In *Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another* [2015] eKLR, the Judges of Appeal held that:

“Denning J, in *Miller -vs- Minister of Pensions* [1947] 2 All ER 372 discussing the burden of proof had this to say;-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will loose because the requisite standard will not have been attained.”

74. In this appeal, this court notes that the Appellant was found to be 100% liable. The Appellant has urged this Court to set aside and find liability in his favour as well as quantum of damages. It is not in dispute that the two motor vehicles were involved in an accident, one coming from Kitui –Machakos direction while the other Machakos-Kitui direction. Ownership of the two motor vehicles is not in dispute. As to who was driving the motor vehicles at the time of the accident is not in dispute. The two drivers are in agreement that the road had loose chippings.



75. What is in dispute is how the accident occurred and who between the two drivers was to blame or who was negligent. The Appellant and Respondent pleaded particulars of negligence against each other.

### **Liability**

76. The principles guiding the appellate court’s power to interfere with the Trial Court’s finding on liability are well settled. In *Khambi & Another vs. Mabithi and Another* [1968] EA 70, it was held that:

“It is well settled that where a Trial Judge has apportioned liability according to the fault of the parties, his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge”

77. PW2 stated that the police abstract lifts information from the OB and he gave facts as recorded in the OB which was recorded by the Complainant Muchiri and PC Waigero. In re-examination, he stated that he did not witness the accident and neither are the officers who went to scene witnesses in the case. It was PW2 testimony that two officers went to the scene after the phone call. He stated that based on the OB, the Pick Up failed to give way as it joined main road. All his evidence emanated from the OB and the Police abstract recorded by police officers not present in court.

78. Under Section 63 of the *Evidence Act*;

- (1) oral evidence must in all cases be direct evidence.
- (2) For the purposes of subsection (1) of this section, “direct evidence” means—
  - (a) with reference to a fact which could be seen, the evidence of a witness who says he saw it;
  - (b) with reference to a fact which could be heard, the evidence of a witness who says he heard it;
  - (c) with reference to a fact which could be perceived by any other sense or in any other manner, the evidence of a witness who says he perceived it by that sense or in that manner;
  - (d) with reference to an opinion or to the grounds on which that opinion is held, the evidence of the person who holds that opinion or, as the case maybe, who holds it on those grounds:

79. PW2 was not the Scene Visiting Officer who visited the scene after the accident interviewed witnesses and recorded statements, drew the sketch plan and/or road view saw the vehicles after impact and the possible point of impact. Secondly, he was/is not the Investigation Officer of the case so as to inform the Court what investigations were carried out. He was candid and truthful as per the Trial Court record that he lifted the information in the OB and relied on it and it turned out to support the Respondent’s case.

80. The Trial Court was not informed as to the whereabouts of PC Waigero who filled in the OB and why the Officer did not/could not attend Court and testify by adducing direct evidence on the circumstances of the accident. Even better still as was testified to there were 2 Officers who attended the accident scene, what happened to the unnamed Officer that he/she could not attend Court proceedings and adduce direct evidence?



81. The police officer who testified as PW2, stated that based on the OB, KAQ 100W, Pick Up failed to give way as it joined the main road, Machakos-Kitui Road. According to PW2, an abstract lifts information from the OB. In cross-examination, PW2 stated that he had the OB in court. The Police Officer PW2 confirmed that the OB was recorded by PC Waigero who was not in court to testify. He stated that the two police were not witnesses as they went to the scene after a phone call. The court notes that no explanation was given of the whereabouts of the investigating officer.
82. If the evidence by PW2 which was not direct evidence but hearsay in the circumstances as he did not witness the accident nor visit the scene immediately after or investigate the matter is to be relied on as was relied on by the Trial court, why was the Criminal/Traffic case against the Appellant dismissed under Section 210 CPC? where did the decision to prosecute and prefer the traffic charges against the Appellant emanate from?
83. There is on record uncontroverted evidence of the Appellant being charged of careless driving vide the Traffic Case No. 247/2009(Machakos) Republic vs. Jeremiah Muchiri Nyaga and these proceedings were terminated against him and he was acquitted under Section 210 of the Criminal Procedure Code.
84. It is submitted by the Appellant that a sketch Plan was necessary to reinforce DW1 and DW2 evidence to disapprove how the accident occurred between the two motor vehicles but none was produced in court. The police officer produced only the police abstract to establish the Appellant was charged for careless driving in Traffic Case No. 247 of 2009 and the case was pending in court as alleged but the Appellant stated he was discharged under Section 210 CPC. The Court while stating the purpose of a police abstract, Peter Kanithi Kimunya vs. Aden Guyo Haro [2014] eKLR it was held:
- “ 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.” See Thuranira Karauri vs. Agnes Nchebe, CA 192/96.
85. The Court of Appeal decision of John Wainaina Kagwe vs Hussein Dairy Limited Mombasa Court of Appeal 215/2010 per Githinji, Makhandia and Murgor JJA, the Court of Appeal was categorical that
- “ answers in cross-examination cannot form a basis of a party’s case or built a defence. They must tender evidence in support of the allegation.”
86. The Court finds that the police officer evidence as testified in court, is of very little, if any, evidential value. Having not produced the OB or the sketch Plan and the scene visting officer and/or investigating officer not attending Court to substantiate the contents of the OB, the evidence is devoid of any probative value to buttress the evidence of DW1 and DW2. The police abstract only confirms that the accident was reported. It is not in dispute that the accident occurred and was reported.
87. In the defence case, DW1 Hezbon Githu Njogu the driver of motor vehicle registration number KBA 571N stated that while descending a slope near Machakos Girls, a Pick UP of registration number KAQ 100W drove into the road suddenly from feeder road and knocked the left side of motor vehicle KBA 571N, Lorry. He stated that the Pick Up failed to give him way. That the driver of KAQ 100W drove into the road without outlook. According to DW1, based on the photographic evidence, the lorry was not on its left of the Pick Up. He stated that had the Pick Up joined the road it could have resulted to a head on collision. In nutshell the DW1 and DW2 assertions are that the Pick Up driven by the Appellant had not joined the main road. DW1 stated that the Pick Up had not joined the left lane facing Machakos Town while DW2 stated that the Pick Up hit on their Co-driver’s side. They both stated that the Pick Up failed to stop to give them way.



88. The Court notes that despite DW1 and DW2 stating that they did not know who took the three photographs which show the damage on motor vehicle registration number KBN 571N, they both placed reliance on the photographs and the produced them as Pex 2 in support of the Respondent's case.
89. An objection by Mr. Ngolya for the Appellant to the production of the photographs was overruled by the Trial Magistrate on the basis that it is just for the court to benefit from all evidence hence they were produced as Respondent's exhibit.
90. The objection by Mr. Ngolya was premised on the fact that the Appellant had not been supplied with them and that they had not been taken by the police or they did form part of the list of documents. According to the Appellant, the Trial Magistrate was at fault for relying on unpleaded, falsified and patently inconsistent defense evidence to dismiss his suit. It is submitted by the Appellant that the evidence amounts to hearsay evidence as it did not emanate from the Police Traffic Department but from the Respondent hence they ought to have been disregarded or at least the maker to produce them.
91. The evidence on record before the Trial Court was not direct evidence by any independent witness as to how the accident occurred and who was to blame. The evidence by PW2 is hearsay evidence and in the absence of testimony by the Scene Visiting Officer and/or Investigation Officer to the accident, the entries in the OB and Police Abstract are insufficient to fulfill the burden and standard of proof envisaged under Section 107-109-112 of the Evidence Act. On the other hand, photographs introduced as evidence and relied upon without confirming who and when they were taken was/is not reliable evidence. Article 50(1) & 50(2)(c) of CoK 2010 were not complied with; the defense must be accorded adequate time and facilities to prepare a defence.
92. Therefore, due to the above evaluation and analysis of the evidence on Trial court's record it was not sufficient to draw the finding that the Appellant was to blame for the accident or not in light of hearsay evidence, availability of original record of Traffic Case Proceedings and outcome, proof of the maker of Photographs and direct evidence from the Scene Visiting Officer and/or Investigation Officer. The judgment on liability is set aside and appeal allowed on liability.

### **Quantum Of damages**

93. There is evidence on the Trial Court record that the Insurers compensated each other over the repair of the vehicles. However, no documentary evidence was provided to prove the same. There was no evidence that the Appellant admitted liability normally it is by signing on the Insurance Claim Form upon reporting the accident, admission cannot be inferred.
94. Since judgment on liability has been set aside and consequently the dismissal of Plaintiff's claim and all consequential orders is set aside. The matter shall be reheard in any Court in Chief magistrate's Court.

### **Disposition**

- a. In the premises, the court finds that the Appeal is upheld and Judgment of 8/10/205 set aside and all consequential orders.
- b. The Appeal is upheld with costs to the Appellant.

**DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 3<sup>RD</sup> AUGUST 2022.  
(VIRTUAL CONFERENCE)**

**M.W. MUIGAI**

**JUDGE**

