



**Cheptum v Cupstone Travel Limited & another (Civil Appeal E1006 of 2022)  
[2024] KEHC 16787 (KLR) (Civ) (14 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 16787 (KLR)

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

**CIVIL**

**CIVIL APPEAL E1006 OF 2022**

**NIO ADAGI, J**

**AUGUST 14, 2024**

**BETWEEN**

**ALEX NENUGE CHEPTUM ..... APPELLANT**

**AND**

**CUPSTONE TRAVEL LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**MORRIS ODHIAMBO ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the Judgment of Hon. H. Ngángá (SRM) in  
Milimani Nairobi CMCC. No. E2747 of 2020 delivered on 22/11/2022)*

**JUDGMENT**

1. The Appellant in the Memorandum of appeal dated 3/4/2020 has raised 10 grounds of appeal which basically challenge the judgment of the trial court on liability.
2. This being a first appeal, I am reminded of the primary role as a first appellate court namely, to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in *Selle & another v Associated Motor Boat Co. Ltd.& others* and in *Peters v Sunday Post Limited* (1968) EA 123, (1958) EA page 424
3. In the case of *Mursal & another v Manese* (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) (6 April 2022), the court held that:-

A first appellate court has jurisdiction to reverse or affirm the findings of the trial court.  
A first appeal is a valuable right of the parties and unless restricted by law, the whole case



is therein open for rehearing both on questions of fact and law. The judgment of the appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it.

4. A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section 78 of *Civil Procedure Act*, a court of first appeal can appreciate the entire evidence and come to a different conclusion.
5. The Appellant filed a suit against the Respondents in a Plaint dated 3/4/2020 for damages as a result of injury, pain, damage, loss and suffering occasioned when the Appellant motor cyclist on motor cycle registration number KMCA 227Z when motor vehicle registration number KCP 743W being driven by the 2nd Respondent and owned by the 1st Respondent, got involved in a road traffic accident that occurred on 9/11/2019 along Thika Road at Mathare area.
6. It was the Appellant's case that on 9/11/2019 he was lawfully riding motor cycle registration Number KMCA 227Z along Thika road at Muthainga area when the driver of motor vehicle registration number KCP 743W drove carelessly and lost control of the vehicle causing the same to collide onto the motor cycle causing him serious injuries. He stated that the motor vehicle hit the motor cycle at the left front side. He blamed the 2nd Respondent who was at the time of the accident driving the stated motor vehicle with the authority of the 1st Respondent for being negligent and thereby causing the accident.
7. It was the Respondent's case that the accident was wholly caused and or substantially contributed to by the Appellant who was the author of his own misfortune. DW1, Morris Odhiambo stated that on 9/11/2019, he was driving motor vehicle registration number KCP 743W (a bus) along Thika road from the general direction of Murang'a towards Nairobi central business district. He stated that he got to Mathare area at 3.00 pm driving at 50 KPH while keeping to the outer lane of the one-way conveyor. It was his statement that as he approached Muthaiga foot bridge, a matatu suddenly switched lanes and occupied the outer lane on which he was driving before stopping abruptly.
8. DW1 informed the court that he applied emergency brakes and stopped motor vehicle registration number KCP 743W but while stationary, he heard a loud bang from the rear of the bus when he alighted, he found a motor cycle registration number KMCA 227Z and its rider lying on the tarmac. He stated that the rider had rammed into the rear body of motor vehicle registration number KCP 743W.
9. The Appellant produced an abstract dated 4/12/2019 which shows that the matter was pending under investigations. On the other hand, the Respondents produced a police abstract dated 31/8/2020 issued to the 2nd Respondent. In the said abstract the motor cycle KMCA 227Z was blamed for causing the accident. The Appellant stated that it was the motor vehicle which hit him. The 2nd Respondent has produced a certificate of examination of motor vehicle KCP 743W which shows that the rear bumper was clouded. The Appellant did not call the investigating officer to corroborate his case. The Respondents produced a police abstract which confirmed the results of the investigation which blame



Appellant for causing the accident. There was corroboration by the certificate of examination which said that it was the motor cycle which most likely hit the motor vehicle from the rear.

10. Upon considering the evidence adduced, the trial court observed as follows:

“The onus of proof is on who alleges. The plaintiff has failed to prove that it was the motor vehicle driver by the 2nd defendant which hit the motor cycle. Indeed the defendants have wisely demonstrated that it was the motor cycle which failed to keep the safe distance and rammed into the motor vehicle from behind. I find the plaintiff was wholly to blame and the author of his own misfortunes. He has failed to prove his case on a balance of probability.

11. The trial court went on to state that:

In the event, I would have found the defendant to blame, I would be obliged to consider the injuries sustained by the plaintiff. the plaintiff sustained fracture lower 1/3 right tibia and fracture right lateral malleolus and deep wound right ankle. I have considered the submissions filed and cases with similar injuries. I find an award of Kshs. 600,000/- as general damages would have been reasonable, I would also have awarded the plaintiff special damages of Kshs. 3,550 for the medical examination and fees for obtaining copy of records.

12. In the end, the trial court found that the Appellant had failed to prove his case and dismissed the suit with costs to the Respondents.

13. It is following that judgment that the Appellant lodged the appeal herein which this court has to consider.

14. I have perused the Record of Appeal, considered and weighed the evidence that was adduced and rival submissions on the appeal and I now proceed to determine the appeal herein.

15. It cannot be gainsaid that in civil proceedings the standard of proof is one on a balance of probabilities as emphasized in the case of *Kanyungu Njogu Vs Daniel Kimani Mwangi* [2000] eKLR where it was held that when the court is faced with two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other.

16. As regards the question of burden of proof Section 107(1) of the *Evidence Act* (Cap 80) is instructive providing thus:

“Whoever desires 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.”

Sub-section 2 of the foregoing provision adds as follows:

“When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

17. The Respondents produced in evidence a police abstract dated 31/8/2020 issued to the 2nd Respondent and listed as number 3 on the Defendant’s list of documents dated 20/1/2022.

In the said abstract the motor cycle KMCA 227Z was blamed for causing the accident.

The Appellant did not object and or challenge the said police abstract.



18. In the case of Ignatius Makau Mutisya Vs Rueben Musyoki Muli [2015] eKLR it was held that:

“When a police abstract is not challenged and is produced in court without any objection the contents cannot be denied.”

19. In the circumstances, the Appellant did not prove his case on a balance of probabilities. Guided by the decisions in Kanyungu Njogu Vs Daniel Kimani Mwangi (supra), this court finds no reason at all to disturb the trial court’s finding on the issue of liability.

20. Had this court reversed the trial court’s finding on liability, it would have upheld the proposed award on general and special damages.

21. It is my finding that this appeal is not merited. It is consequently dismissed with no order as to costs.

**DATED, SIGNED & DELIVERED VIRTUALLY AT MACHAKOS THIS 14<sup>TH</sup> DAY AUGUST 2024**

**NOEL I. ADAGI**

**JUDGE**

