



REPUBLIC OF KENYA



**KENYA LAW**  
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**Adenyo v Nyathira (Civil Appeal E179 of 2023)  
[2025] KEHC 1538 (KLR) (14 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1538 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL E179 OF 2023**

**A MSHILA, J**

**FEBRUARY 14, 2025**

**BETWEEN**

**BERNARD ONYANGO ADENYO ..... APPELLANT**

**AND**

**LEONARD NGOTHO NYATHIRA ..... RESPONDENT**

*(Being an appeal from the original judgment delivered by Hon. P. M. Mugure (PM) dated 31st May, 2023 at Limuru SPMC NO. E033 of 2020)*

**JUDGMENT**

**Background**

1. By a Plaint filed on 5<sup>th</sup> November, 2020, the Appellant sued the Respondent seeking compensation for general damages for pain, suffering and loss of amenities, special damages of Kshs. 3,550 /=-, costs and interest.
2. The Appellant averred that on 5<sup>th</sup> September, 2020 he was a lawful passenger along Nairobi-Naivasha Highway at Kamandura Area, when the Respondent or his driver/employee/servant agent so negligently drove motor vehicle registration number KCD 355T that it lost control and collided with the Appellant's motor vehicle as a result of which the Appellant sustained injuries being a swollen, bruised-left temple, a swollen, tender-right leg, right foot, a swollen, tender-left leg and bouts of headaches.
3. The Respondent filed his defence denying the contents of the Plaint specifically the particulars of negligence. In any case, the accident if any was said to have been caused by the negligence of the Appellant.
4. The matter was heard and determined and the trial magistrate found that the Appellant's claim on liability had failed as such the court dismissed the entire suit with costs to the Respondent.



5. The Appellant being dissatisfied with the lower Court's judgment has preferred the present Appeal. In his Memorandum of Appeal, he has listed seven grounds of appeal as follows:-
- a. That the Learned Magistrate erred in law and in fact by failing to appreciate that the Plaintiff had correctly pleaded that he was a lawful passenger along the Nairobi-Naivasha highway in Kamandura Area when the motor vehicle registration number KCD 355T being negligently driven by the defendant, lost control and knocked him causing him serious injuries.
  - b. The Learned Magistrate erred in law and in fact by failing to appreciate the Plaintiff's witness statement dated 30<sup>th</sup> October, 2020, the Plaintiff's witness statement dated 25<sup>th</sup> January 2021, the Plaintiff's testimony on 15<sup>th</sup> February 2023 and the Plaintiff's submissions dated 24<sup>th</sup> March 2023, where the Plaintiff explained that he was a lawful passenger in a Nissan Registration number KCS 069F when he witnessed the motor vehicle registration number KCD 355T lose control and drive to their lane, colliding with the motor vehicle the Plaintiff was in, causing him serious injuries.
  - c. The Learned Magistrate erred in law and in fact by failing to appreciate the produced police abstract dated 13<sup>th</sup> September 2020 which indicated that the Plaintiff sustained injuries because of the material accident.
  - d. The Learned Magistrate therefore erred in law and in fact by holding that the Plaintiff had failed to prove liability against the defendant yet the Plaintiff's evidence was uncontroverted by the defendant.
  - e. The Learned Magistrate erred in law and in fact by failing to appreciate the evidence in the police abstract that blamed the motor vehicle registration number KCD 355T for causing the accident.
  - f. The trial court, therefore, erred in law and misdirected itself when it failed to consider the Plaintiff's evidence, submissions and authorities.
  - g. The Learned Trial Magistrate erred in law in dismissing the suit with costs.
6. The appeal was canvassed by way of written submissions. The Respondent was non-participatory in this appeal.

### **Appellant's Submissions**

7. The Appellant submits that it is the duty of the appellate court to re-evaluate the evidence and make its own independent conclusion. Reliance was placed in the case of *Selle vs Associated Motorboat Company* 1968 EA 123. It was submitted that the main issue was that in the Plaintiff's statement that he was a lawful passenger but the same was not mentioned in his witness statement that he was a lawful passenger aboard motor vehicle registration number KCS 069F. Counsel further submitted that the abstract indicated that two vehicles KCS 069F and KCD 355J were involved in the accident and KCD 355T was to blame. The court was said to have failed to reach a determination on liability due to these inconsistencies which counsel submits are minor errors by counsel rather than a fundamental flaw in the claim as such the trial court should have considered the merits of the case.
8. The court was urged to appreciate the Plaintiff's statement dated 25/1/2021 which indicates that the Plaintiff was a passenger when the accident happened as well as the Plaintiff's statement. Counsel relied on Article 159(2)(d) of *the Constitution* as well as case law among them the case of *Dakianga Distributors (K) Ltd vs Kenya Seed Company Limited* 92015) eKLR. The court was urged to find that the Respondent was



100% liable for the accident and award general damages of Kshs. 150,000/= and special damages of Kshs. 3,550/= costs in both courts plus interest.

### **Trial Court's Evidence**

9. Benard Onyango Adenyo (PW1) adopted his witness statement dated 25/1/2021. He prayed to be compensated because he still had challenges to work.
10. In cross examination he stated that he went to Limuru Nursing Home where he was treated on the same day. He stated that he was injured despite having fastened his safety belt. He indicated that he paid cash at the hospital and was issued with the receipts. He stated that he saw the registration number KCS on the night of the accident.

### **Issues For Determination**

11. Having read and considered the submissions by the Appellant and the case law relied upon, the main issue for determination is whether the trial court misdirected itself in dismissing the Appellant's claim on liability.
12. As aptly stated by the Court of Appeal in *Paramount Bank Limited v First National Bank Limited & 2 others* (Civil Appeal 468 of 2018) [2023] KECA 1424 (KLR) (24 November 2023) (Judgment) this Court has to start its analysis and determination by reiterating that this Court's mandate in a first appeal is to independently re-appraise the evidence and draw our own conclusions. (See *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR).
13. A first appeal means that the whole case is open for rehearing both on questions of fact and law. A first Appellate Court is the final court of fact and a litigant is entitled to a full, fair, and independent consideration of the evidence at this stage. The first appeal has to be decided on facts as well as on law. This had to be done within the scope of Section 78 of the *Civil Procedure Act* which states;-
  - “(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.
  - (2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”
14. The standard of proof in civil cases is on a balance of probability and that the burden of proof is on the party alleging the existence of a the Laws of Kenya) which provides that:-



Section 107 (1) and (2) of the Evidence Act (Chapter 80 of fact which he wants the Court to believe. This is anchored in

“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”

and that :-

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

15. In *Miller .V. Minister Of Pensions* 1947 ALL E.R 372, Lord Denning summarized the application of the standard as follows;-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in criminal cases. If the evidence is such that the tribunal can say: We think it more probable than not; the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof 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’ explanations are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

16. Following the above standard the Court of Appeal in *James Muniu Mucheru v National Bank of Kenya Limited* [2019] KECA 1058 (KLR) held that ‘Courts will make a finding based on which party’s version of the story is more believable.’

17. This Court agrees with the trial court that indeed parties are bound by their pleadings as was stated by the Court of Appeal in *Independent Electoral and Boundaries Commission & another v Mule & 3 others* [2014] KECA 890 (KLR).

18. Nevertheless, the law is blind to the trivial. It is clear from the evidence that an accident occurred between vehicles registration nos. KCD 355T and KCS 069F. Although the Appellant did not mention in the Plaintiff that he was a passenger in KCS 069F, he mentioned that he was a passenger and suffered injuries as a result of the said accident.

19. It was proved that indeed vehicle registration no. KCD 355T was to blame and that is why the Appellant laid its claim totally against the said motor vehicle. This evidence was not controverted as the Respondent never testified nor called any witnesses.

20. This court is guided by the principle of *deminis non curax lex* and that the mere fact that the Plaintiff states that the Plaintiff was knocked down does not in itself make the entire claim unsustainable. The essence of the suit, which is evident in the totality of the pleadings and the evidence adduced, is that an accident occurred and the Appellant was injured as a result. The Appellant blamed the Respondent for the injuries suffered and that evidence is uncontroverted.

21. This court is satisfied that Appellant proved his case to the required standard, that is on a balance of probabilities.

### **Findings And Determination**

22. For the forgoing reason this court makes the following findings and determinations;



- i. This Court finds that the Appeal is meritorious and it is hereby allowed,
- ii. The judgment on liability delivered on 31/05/2023 is hereby set aside and substituted with a judgment entered in favour of the Appellant/Plaintiff against the Respondent/Defendant as follows;
- iii. On liability : The Respondent is found to be 100% negligent and liable for the injuries suffered by the Appellant.
- iv. On quantum of damages : General damages shall be as assessed by the trial court in the sum of Kshs. 150,000/- ;
- v. Special damages : in the sum of Kshs. 3,550/-;
- vi. The Appellant shall have costs and interest only on the Appeal.

Orders Accordingly.

**DATED SIGNED AND DELIVERED AT KIAMBU VIA TEAMS THIS 14<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**A. MSHILA**

**JUDGE**

In the presence of;

Sanja – Court Assistant

Mwongeli -h/b for Macharia – for the Appellant

N/A – for the Respondent

