



**Wainaina v West Kenya Sugar Company Ltd (Civil Appeal
46 of 2023) [2025] KEHC 3134 (KLR) (13 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3134 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL 46 OF 2023
SC CHIRCHIR, J
MARCH 13, 2025**

BETWEEN

GEOFFREY KAMAU WAINAINA APPELLANT

AND

WEST KENYA SUGAR COMPANY LTD RESPONDENT

JUDGMENT

1. The Appellant sued the Respondent in the lower court seeking for damages for injuries, and other incidentals, sustained following a road accident which occurred on 15/11/2022.
2. The trial court heard the case and, in the end, dismissed the claim for want of proof.

Memorandum of Appeal

3. Aggrieved by the outcome, the Appellant proffered this Appeal while setting out the following grounds:
 - a. That the learned Magistrate erred in law and fact in finding that the appellant had not proved his case on a balance of probability.
 - b. That the learned Magistrate erred in Law and fact in her failure to appreciate that in Civil matters, proof is to be on a balance of probability and by her Judgment raised the bar to that of proof beyond reasonable doubt.
 - c. That the learned magistrate erred in law and fact in finding that the Appellant failed to prove fault on the part of the Respondent when the respondent admitted that he swerved towards the right side of the road and collided with the Appellant.
 - d. That the learned magistrate erred in law and fact by failing to appreciate the appellant's written submissions.



- e. That the learned Magistrate erred in both law and fact by not granting the prayers sought when the statement of claim had merit.
 - f. That the learned Magistrate erred in law and fact in not considering contributing negligence as claimed by the Respondent.
 - g. That the learned Magistrate erred in law and in fact by failing to appreciate that there was no eye-witness to this incident yet there was ample evidence to show that the accident involved the respondent's motor vehicle and the Appellant's motor vehicle, therefore would have allowed parties 50%: 50% on liability.
 - h. That the learned Magistrate erred both law and fact in not considering all the facts and circumstances of the case.
 - i. That the learned Magistrate erred in law and in fact by relying on wrong principles of law to arrive at the judgment.
 - j. That the learned Magistrate failed to adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision unsustainable in law.
4. The appeal was prosecuted by way of written submissions.

Appellant's Submissions

5. It is the appellant's submissions that the appellant submitted sufficient evidence to prove that the Respondent was responsible for the accident. The appellant further submits that in the event that there was no clear evidence on how the accident occurred, then liability should have been apportioned equally. In this regard the appellant has relied on the decision in the case of *Kennedy v Abednego Ubole* [2021] eKLR. The appellant finally urges the court to award damages on the basis of the injuries sustained.

Respondent's Submissions

6. It is the respondent's submissions that on the basis of Section 38 of the Small Claims Act (SCA), the Appeals to this court is on issues of law only; that a perusal of the memorandum of appeal shows that the appellant is inviting the court to delve into issues of fact; that the only ground of appeal that touches on a point of law is on whether the trial court raised the standard of proof for civil cases.
7. The respondent further refutes the submission that the standard of proof was raised higher than that of balance of probabilities and argues that the appellant did not simply present any evidence to support his case.
8. In the alternative, the respondent submits that there was no evidence indicating that the appellant was qualified to drive the vehicle he was driving; that on the occurrence of the accident, the respondent's version of the events was more plausible. It is further submitted that even from the police records there was no conclusive evidence as to who was at fault. The Respondent points out that there was no sketch plan of the scene for instance, produced to show the point of impact on the road.

Analysis and Determination

9. The appeal to this court from the Small Claims is final, and the issues to be taken up are points of law only (Ref Section 38 of Small claims Act(SCA)).



10. The respondent has argued that save for ground 2 of the memorandum of Appeal, the other grounds are on issues of facts ,which this court should not therefore delve into.
11. The imperative question is, what are issues of law? In *Munya v IEBC & 2 Others* [2014] KESC 38 (KLR). The supreme court, after extensively considering the findings of other jurisdictions on the interpretation of the phrase ; “issue of law”, identified 3 elements of what constitutes “issues of law” . The elements are as follows:
 - a).The technical element; involving the interpretation of a constitution of statutory provision.
 - b).The practice element; involving application of *the constitution* and the law to a set of facts or evidence on record.
 - c).The evidentiary element: involving the evaluation of the conclusions of a trial court on the basis of the evidence on record.
12. I am of the view that grounds 2, 9 and 10 of the Memorandum of Appeal, are issues of law in accordance with element (c) above. The question of whether the correct standard of proof was applied and whether the trial court applied the correct principles of law in its decisions are all issues of law. Ground 10 is basically challenging the conclusions of the trial court on the basis of the evidence presented to the court. This is an issue falling under the evidential element. This ground therefore meets the 3rd element of what constitutes basis of law.
13. In view of what I have sated in paragraph 12 am satisfied that the Appeal is majorly on grounds of law and therefore it is properly before this court.
14. On grounds 2 and 9 of the Appeal, I agree with the respondent that the Appellant has failed to pinpoint any finding by the trial court where it can be said the standard of proof demanded of the Appellant went beyond the standard of prove in civil cases, that is on a balance of probabilities.
15. On the alleged breach of the principles of law, apart from the terse plea on ground 9, the Appellant has failed to address this issue in the submissions. It has not told the court which wrong principle of law did the trial court rely on.
16. What the appellant has done is to make an terse statements without caring to back them up with evidence. The memorandum of Appeal is by its nature a pleading. It is in the submissions, whether oral or written that the Appellant should submit evidence in support of the various grounds of Appeal . The grounds of Appeal are not evidence. The onus of proof as always is on who alleges. The Appellant utterly failed in this regard.I therefore dismiss grounds 2 and 9 for want of proof.
17. On ground 10 ,the conclusion of the trial court was that on a balance of probabilities, the Appellant failed to prove his case.The question which this court is required to determine is whether that conclusion is supported by evidence on record. And in determining that question, this court would then have to look at the evidence vis-à-vis the conclusion.
18. The Appellant relied on both written and oral testimony. In paragraph 2 of his written statement filed on 26/7/2023, the appellant stated: “That on or about 15th November, 2023 at 7.pm, I was travelling as a driver aboard motor vehicle Registration Number KBW 716F along Kakamega-Bungoma road when at Ekamo Area Motor vehicle registration number KCR 937Q / ZF 9475 which was being so carelessly and/or negligently driven lost control and hit the motor vehicle I was driving, occasioning the severe injuries” . On paragraph 6 he stated “I blame the driver of the motor vehicle registration number KCR 937Q/ZF 9475 for inter alia driving at a speed that was excessive and unsafe ,driving without due care, attention and concentration, failing to keep a proper look out, failing to maintain



proper control of the motor vehicle and suddenly and without warning hitting another vehicle (sic) occasioning me grave injuries”. In his oral evidence he stated “I blame the driver of that vehicle Reg No. KCR. He came from behind, hit my vehicle from behind. I was on the left, he came my side”. At cross examination he stated: “I was hit from behind. There were others vehicles behind but I cannot remember but I only remembered the vehicle which hit me. The vehicle in front. He hit bumps and came to my side and hit me on my lane, hit me from behind and went on a ditch. On my right driver’s side is the point of impact behind the driver’s sit (sic). The accident was on my lane”.

19. The above was the entire Appellant’s testimony on how the accident occurred. I have found it necessary to reproduce the entire testimony for purposes of interrogating the conclusions arrived at by the trial court, as aforesaid. These are my observations:
 - a). I agree with the trial court that there was no evidence to support the facts made on the pleadings. Evidence is supposed to breathe life into ,and must be in sync, with the pleadings. I note for instance that whereas the issue of being knocked from rear stand out in the oral evidence, there was no such plea in the particulars of negligence. Also plea of defective vehicle was not supported by the evidence.
 - b). Paragraph 2 of his witness statement is almost a replica of paragraph 4 of his statements of claim. It is as though the pleading was copied and pasted as a testimony. In effect therefore, the evidence did not breathe any life to the pleadings.
 - c). Further reading through his oral evidence in court one wonders from which direction the appellant was hit. He stated that he was hit from behind; that the respondent’s vehicle hit the bumps and came to his side. If he was hit from behind, how did he know the hitting of the bumps is what made the other vehicle swerve off its lane and consequently hit his vehicle. Again, he went on to state that the point of impact on his vehicle behind the driver’s seat. How this was possible when the other vehicle hit his from behind? Perhaps it is not impossible, and can be explained. However, the very person who had the responsibility to explain failed completely to do so.
20. It is abundantly clear to me that the appellant brought the suit to court but lacked the will to prosecute it or the facts simply failed to fit the way he would have wanted to.
21. The onus of proof was on the plaintiff, he carried the legal burden to prove his case. As pointed out by the respondent, availing the sketch plan would have helped him explain for instance where the point of impact was. Thus he failed to tell demonstrate to the court that the accident occur and how was the defendant at fault. I entirely agree with the trial court that the respondent testimony paints a clearer picture on what transpired.
22. In a nutshell therefore on the basis of the evidence presented, the trial court’s conclusion that the claimant/Appellant failed to prove his case on the balance of probability was accurate. I have no reason to fault it.
23. The appellant has argued that considering that the occurrence of the accident is not disputed, the liability should have been apportioned on 50/50 basis. However, this was not a case where there were two clear yet varied versions of how the accident occurred. The appellant’s version was incoherent. It could not have been a basis for determining the respondent’s culpability. Thus the Appellant can not use his omissions ,or gaps in his testimony to plead for apportionment . Having failed to demonstrate how the respondent was to blame ,the case failed.
24. As pointed out by the trial court, there can be no liability without fault. The fact that an accident occurred does not perse imply negligence on the apart of the respondent.



25. The Appeal has no merit. It is hereby dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT ISIOLO THIS 13TH DAY OF MARCH
2025**

S. CHIRCHIR

JUDGE.

In the presence of:

Godwin Luyundi- court Assistant.

