



**Amoro v Kisumu Concrete Product Limited (Civil Appeal  
E123 of 2024) [2025] KEHC 6729 (KLR) (23 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6729 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL E123 OF 2024  
BM MUSYOKI, J  
MAY 23, 2025**

**BETWEEN**

**JULIUS ONGERI AMORO ..... APPELLANT**

**AND**

**KISUMU CONCRETE PRODUCT LIMITED ..... RESPONDENT**

*(Being an appeal from judgment and decree of the Senior Principal Magistrate's Court at Winam (D.K. Mtai PM) in civil case number E201 of 2022 dated 17th May 2024)*

**JUDGMENT**

1. The appellant sued the respondent in the subordinate court claiming special and general damages as compensation for injuries sustained in an alleged accident involving motor vehicle registration number KCL 266R belonging to the respondent which the appellant claimed to have hit him along Kisumu-Busia road. The respondent filed its defence and denied the occurrence of the accident. The Honourable Magistrate found that the appellant had not proved the identity of the motor vehicle which hit him and dismissed the case on 17-05-2024 hence this appeal.
2. This being a first appeal, this court will re-evaluate and re-consider the evidence of the parties as produced in the trial court and come to its own independent conclusion but bearing in mind that it did not take the evidence of the parties nor have the advantage of observing the demeanour of the witnesses. This is the established principle as it was held in *Otieno v Republic* (2025) KEHC 5845 (KLR), thus;  

First appellate court is obligated to re-evaluate the evidence and make its own conclusions, bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses.'
3. The appellant called five witnesses in support of his case. According to his witness statement which he fully adopted, the appellant told the court that on 5-02-2022, he was riding a bicycle on the left side of



- the road from the airport to Kisumu town when he was hit from behind and an eye witness escorted him to hospital, then they reported to the police station. He claimed to have been injured on the back, chest, hands and the knees. He blamed the driver of the motor vehicle.
4. The appellant added that one David Masanga Otoi who witnessed the accident told him that the motor vehicle that hit him was KCL 226R a lorry which did not stop. He was issued with a police abstract and a P3 form from the police station which as per the recorded proceedings, he produced as exhibits. He went on to produce a copy of record for motor vehicle registration number KCL 266R as his exhibit 6.
  5. In cross-examination, he insisted that he was hit from behind and taken to hospital by a good samaritan and that he reported the accident on the same date after he was released from the hospital. He stated that he went to report the accident alone.
  6. PW2 was Philip Kilimo a clinical officer at Kisumu County Hospital. He produced P3 form for the appellant which was filed on 7-06-2022 with history of having been hit by a motor vehicle at Bandani area and sustained soft tissue injuries. The degree of injuries was classified as harm. He also produced X-ray report and treatment notes from the said hospital as plaintiff's exhibits 5 and 2 respectively. Upon being cross examined, he stated that he did not treat the appellant on the date of the accident. He only filled the P3 form.
  7. Kennedy Opiyo Omondi, a clinical officer produced a medical report on the appellant dated 14-02-2023. He testified that he examined the appellant with a history of having been involved in a road traffic accident. In preparing the medical report the witness relied on his history, treatment notes and P3 form. His findings were that the appellant at the time of examination was still on painkillers and had a lumber consort belt. He added that the appellant required post traumatic counseling and supplementary drugs for pains.
  8. The witness added in cross examination that, the report indicated that the accident was on 20-12-2022 although the treatment notes indicated 5-02-2022 as the date of the accident. He also said that he did not treat the patient and that he did not do a follow up. He classified the injuries as soft tissue.
  9. The fourth witness for the appellant was PC Joshua Otieno who at the time was attached to Kisumu central police station. He said that he was in court to produce a police abstract for an accident that occurred on 5-02-2022 at 10.00 am at Bandani area along Kisumu - Busia road involving motor vehicle registration number KCL 266R a Mitsubishi canter and a pedal cyclist where the cyclist sustained injuries. The report was made to police on 25-03-2022 *vide* occurrence book entry number 62.
  10. PW4 added that the driver of the motor vehicle Kelvin Otieno Odida was arrested on 5-07-2022 and charged with careless driving contrary to Section 49(1) of the *Traffic Act* and failing to report an accident contrary to Section 73(3) as read with Section 75 of the *Traffic Act*. This was in court file number E170 of 2022. He did not give the outcome of the case but stated that the judgment was to be delivered on 27-02-2023 in Kisumu Law Courts.
  11. When he was put to cross-examination, he stated that the victim took time to heal before he reported the accident. The witness added that the investigations officer went to the scene and prepared a sketch map where he found an eye witness known as David Masanga who sold padlocks beside the road. He could not give details of the investigations carried out by the investigations officer.
  12. The last witness was David Masanga who recorded a witness statement on 8-08-2022 which he adopted as his evidence. He told the court that on 5-02-2022, he was hawking his goods towards Bandani estate when he saw motor vehicle registration number KCL 226R coming from the airport knock down a cyclist from behind and the cyclist fell down in a ditch. He rushed to the scene and helped the appellant to stand up. The driver of the lorry did not stop after the accident. The appellant was rushed to Kisumu



- County Referral Hospital by a good samaritan, treated and discharged home. He blamed the driver of the said vehicle for the accident.
13. In cross examination, he maintained that his statement was correct and that he did not report the accident. He said that it was the appellant who looked for him and told him to testify three months after the accident. He insisted that he knew the registration number of the motor vehicle as KCL 226R. He conceded that the registration number he gave was different from what was in the police abstract that is KCL 266R. He also stated that he had not testified in the traffic case or any other matter in respect of the accident.
  14. The respondent called one witness, Otieno Odida who was its employee as the driver of its motor vehicle registration number KCL 266R. Through his statement dated 11-05-2023, he told the court that he had travelled with the vehicle to Kakamega on the date of the alleged accident. He added that he was never convicted of any offence in respect of the accident.
  15. He admitted in cross-examination that he was arrested on 5-07-2022 and that he was charged with the offence of hit and run and failing to report an accident which were related to this case. He however stated that the accident was brought to his attention after the complainant made the claim to his employer.
  16. The appeal was disposed of by way of written submissions. I have read the appellant's written submissions dated 30-10-2024 and the respondent's submissions dated 14-11-2024. I have also carefully gone through the evidence produced in the trial court as reproduced above together with the exhibits produced in the trial court. I have also read the judgement of the trial Magistrate. I discern from the above that the only issue for determination in this matter is whether the respondent's motor vehicle registration number KCL 266R was involved in an accident with the appellant on 5-02-2022.
  17. The plaintiff pleaded that the accident involved motor vehicle registration number KCL 266R. It is not in dispute that this motor vehicle belonged to the respondent although it had been denied in the defence. Other than the police abstract, all the other pieces of evidence produced by the appellant talk of motor vehicle registration number KCL 226R.
  18. Pleadings are not evidence. A case is proved through adduction of evidence which must flow in tandem with the pleaded facts. Where the evidence adduced by the witnesses is in variance with the pleading, the case must be lost. In *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd* (2018) KEHC 5465 (KLR), Honourable Justice A. Mrima held that;

It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded.'
  19. The appellant has argued that the difference in the registration numbers of the motor vehicle is a minor issue which should be ignored for interest of justice. This court disagrees with that argument. A court of law cannot ignore such vital evidence especially where the same is repeated several times in the same statement by different witnesses. Even in cross examination, the appellant and PW5 insisted that the motor vehicle involved was KCL 226R.
  20. Perhaps the court would have taken that as a mistake if the appellant had sought to amend or rectify the inconsistency during or before the hearing. To make the case worse for the appellant, there were glaring inconsistencies and gaps in the manner in which the events flowed right from the time of the



accident. The vehicle which was involved in the accident was not seized at the scene neither did the police have any primary information other than that given by the appellant and the PW5.

21. If indeed the appellant and PW5 reported motor vehicle registration number KCL 226R, where did the police get KCL 266R? Again, according to the police, the accident was reported more than one and half months later yet the appellant had been treated and discharged the same day. The appellant in his testimony in court stated that he reported the accident the same day but the police record, if the abstract is anything to go by shows that it was reported in 25-03-2022.
22. I find the evidence of PW5 unbelievable. He claimed to have assisted the appellant to get up after he fell in a ditch but he did not bother to make any report. He claims that the appellant went looking for him to testify three months after the accident. If he misread one digit or letter in the confusion, the court cannot assume that the respondent's vehicle was the correct one. He could as well have missed another letter and dragged a different person into the hands of the police.
23. The appellant argues that the respondent should have produced the judgment in the traffic case to prove that its driver was not convicted. The burden of proof in the matter lied with the appellant. He is the one who wanted the court to believe that the driver was convicted and he was the one who stood to lose if there was no proof of conviction.
24. In addition, the police officer told the court that the judgement in the traffic case was to be delivered on 27-02-2023. PW5 testified six months later, that is on 29-08-2023 and told the court that he never testified in the traffic case yet this seems to be the only person who witnessed the accident. In these circumstances, I find that on a balance of probabilities, DW1 was either acquitted or discharged of the traffic offence. I find that the appellant did not prove on a balance of probabilities that the respondent's motor vehicle registration number KLC 266R was the one involved in the accident in issue.
25. The appellant has also claimed that the Honourable Magistrate failed to assess damages. I have read the judgment and as much I can read, the Honourable Magistrate assessed damages which he would have awarded if the appellant had proved his case on liability at Kshs 100,000.00 in general damages. This ground has no basis at all although going by my finding on liability it would not make any difference.
26. The conclusion from the above is that I find no merits in this appeal and the same is dismissed with costs to the respondent.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF MAY 2025.**

**B.M. MUSYOKI**

**JUDGE OF THE HIGH COURT.**

Judgment delivered in presence of Miss Omedo for the appellant for the appellant and in absence of the respondent.

