



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwangi v Mburu (Civil Appeal E082 of 2024)  
[2025] KEHC 6942 (KLR) (22 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6942 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL E082 OF 2024**

**FN MUCHEMI, J**

**MAY 22, 2025**

**BETWEEN**

**KENNEDY KAMAU MWANGI ..... APPELLANT**

**AND**

**SAMUEL MUTURI MBURU ..... RESPONDENT**

*(Being an Appeal from the Judgment and Decree of Hon. Sylvia A. Wayodi (RM/Adjudicator)  
delivered on 11th April 2024 in Thika Small Claims Court SCCC No. E1066 of 2023)*

**JUDGMENT**

**Brief facts.**

1. This appeal arises from the judgment of Thika Resident Magistrate/Adjudicator in SCCC No. E1066 of 2023 in a claim that arose from a motor vehicle accident whereby the court found the appellant fully liable and awarded the respondent special damages of Kshs. 561,650/-.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 5 grounds summarized as follows:-
  - a. The learned adjudicator erred in law by finding that the appellant was fully liable for causing the accident.
  - b. The learned trial magistrate erred in law and in fact in failing to appreciate that a police abstract cannot be used as conclusive evidence of the accident.
  - c. The learned trial magistrate erred in law by awarding the respondent special damages amounting to Kshs. 561,650/- yet the respondent had only proved Kshs. 329,650/-.
  - d. The learned trial magistrate erred in law and fact by finding that the respondent had produced proof of repair costs amounting to Kshs. 311,280/-.



3. Parties disposed of the appeal by way of written submissions.

### **The Appellant's Submissions.**

4. The appellant submits that according to the respondent, he was driving his motor vehicle registration number KBT 537Y on 8<sup>th</sup> July 2021 along Thika Superhighway at Juja Highpoint when he slowed down at some bumps and the appellant rammed into the rear of his said motor vehicle. The appellant argues that the respondent blames him for encroaching onto the correct lane of his said motor vehicle registration number KBT 537Y and driving while intoxicated. The appellant further argues that the respondent did not prove he was intoxicated and further he was not charged in court for the said offence since the police made their way to the accident scene.
5. The appellant submits that the police abstract dated 9<sup>th</sup> June 2021 relied on by the respondent indicates in paragraph 2 that the case is pending under investigations yet in paragraph 3, it indicates that the he is to blame for the accident. the appellant argues that the police have not concluded on who to charge as they do not know who was to blame for the accident. Thus, the appellant argues that it does not make sense to proceed and blame one party for the accident yet they had already admitted that they had not done enough investigations to arrive at that conclusion. The appellant relied on the cases of Peter Kanithi Kimunya vs Aden Guyo Haro [2014] eKLR and Thurairara Karauri vs Agnes Ncheche CA 192/96 and submits that a police abstract can only prove that the said accident was reported and not which party was to blame for the accident.
6. The appellant submits that it is standard procedure for a vehicle that has been extensively damaged to be inspected by an appointed vehicle examiner appointed under Section 3 of the Traffic Act and thereafter a certificate of examination and test of vehicle is issued showing the extent of the damage. The appellant submits that the respondent did not produce the said certificate but instead produced an assessment report by a private assessment firm which he submits is bias and exaggerates the repair estimates. The appellant further submits that the respondent did not produce photos of the scene of accident or even a sketch may by the police.
7. The appellant submits that he was driving on the said road at around 9.45 pm. Within the speed limit when he suddenly rammed into the respondent's motor vehicle which was stationary on the highway. The hazards on the said motor vehicle were not on and the respondent had not erected the red warning reflector triangle on the road to warn the other road users. The appellant refers to Section 107 of the Evidence Act and submits that whoever alleges must prove and the respondent alleged that he was to blame for the accident but failed to sufficiently prove the same.
8. The appellant refers to the case of South Nyanza Sugar Co. Ltd vs Hezron Ndarera Mogwasi [2010] eKLR and submits that although the respondent claimed for Kshs. 561,650/-, he only proved the sum of Kshs. 222,370/-. The appellant further submits that the trial court held that the respondent proved the sum of Kshs. 329,650/- but it proceeded to award him Kshs. 561,650/- as special damages.
9. The appellant submits that an inspection or re-inspection report is just a report but not proof of the amount spent in repairing a motor vehicle. Amounts spent in repairing a motor vehicle can only be proved by producing receipts. The appellant submits that the trial court did not interrogate the receipts that were produced properly and went with what was indicated on the inspection report to render its decision.



### **The Respondent's Submissions.**

10. The respondent relies on the cases of Achweya vs Onyasi (Civil Appeal E090 of 2024) [2025] KEHC 14 (KLR) (10 January 2025) (Ruling) and Wachira vs Mwai (Civil Appeal E022 of 2023) [2024] KEHC 3173 (KLR) (15 March 2024) (Judgment) and submits that  
  
the appeal is defective pursuant to section 38 of the *Small Claims Court Act* as it is based on facts.
11. The respondent submits that on 8<sup>th</sup> June 2021 he was driving his motor vehicle registration number KBT 537Y along Thika road and on reaching high point area slowed down at the bumps and zebra crossing only for motor vehicle registration number KCR 424K to suddenly ram into the rear of his vehicle as it failed to keep a proper distance and was driven at a high speed.
12. The respondent submits that he alighted to inspect the damage and approached the appellant whose breath leaked of alcohol and he was visibly drunk and rude.
13. The respondent argues that the police blamed the appellant for causing the accident and the police abstract was produced by consent and the appellant did not raise any objection or call the police so as to cross examine on the contents of the police abstract. The respondent further argues that the appellant is estopped from challenging the contents of the police abstract when he chose not to cross examine the maker of the said document.
14. The respondent submits that his evidence was not controverted by the appellant as he did not call a witness and therefore he discharged the burden of proof on a balance of probabilities. To support his contentions, the respondent relies on the cases of Motex Knitwear Limited vs Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002; Trust Bank Limited vs Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001 and Janet Kaphiphe Ouma & Another vs Marie Stopes International Kenya (Kenya) HCCC 68 of 2007.
15. The respondent submits that he pleaded for special damages at the sum of Kshs. 561,650/- as his motor vehicle was duly assessed by Kibmat Loss Assessors who assessed the repairs at Kshs. 311,280/- and charged Kshs. 5,500 for the assessment report and receipt for assessment fees was produced as exhibit 4. The assessment report shows the damaged parts and the replaced parts as well as the picture of the vehicle post accident and post repair.
16. The respondent further submits that the vehicle was repaired by Auto Gurus Body shop and garage who were paid Kshs. 464,280/- and produced the receipt as exhibit 6. The Auto Gurus had purchased the spare parts and availed the receipts which he produced as exhibits 7, 8 and 9 all amounting to Kshs. 204,000/-. After repairs the vehicle was re-assessed to confirm repairs were up to standard and the assessor paid for the reassessment report of Kshs. 2,320 which were produced as exhibit 5. The vehicle was towed from the accident scene by Cealtd Road Rescue Towing, who charged Kshs. 10,000/- which receipt was produced as exhibit 11 and prior to filing the suit, he conducted a search of the appellant's motor vehicle which he incurred Kshs. 550/- and produced a receipt as exhibit 12.

### **Issues for determination.**

17. The main issues for determination are:-
  - a. Whether the appeal is defective.
  - b. Whether liability apportioned by the trial court was against the weight of the evidence adduced.
  - c. Whether the respondent proved his claim for material damage to the required standard.



## **The Law.**

18. The Court of Appeal while referring to a second appeal, which is essentially on points of law and thus similar to the duty of this court under Section 38 of the *Small Claims Court Act*, set out the duty of the second appellate court in the case of *Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited* [2020] eKLR as follows:-

I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below considered matters that they should have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

19. In distinguishing between matters of law and fact the Court of Appeal stated in *Kenya Breweries Ltd vs Godfrey Odoyo* [2010] eKLR as follows:-

I have anxiously considered the pleadings, the evidence on record, the judgment of the learned Senior Resident Magistrate and the judgment of the superior court, the grounds of appeal, the submissions of the learned counsel as well as the authorities to which we were referred. First, this is a second appeal. In a first appeal the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyse it, evaluate it and come to its own independent conclusion. In other words, a first appeal is by way of retrial and facts must be revisited and analysed a fresh. See *Selle and Another vs Associated Motor Boat Company Limited and Others* (1968) EA 123. In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

## **Whether the appeal is defective.**

20. The respondent argues that the appeal is defective pursuant to Section 38 of the *Small Claims Court Act* as it relates to matters of fact.

21. Section 38 of the Act provides:-

A person aggrieved by the decision or an order of the court may appeal against that decision or order to the high Court on matters of law.

22. The Court of Appeal in *Mwangi vs Wambugu* [1984] KLR 453 commented of what amount to points of law as follows:-

A Court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding; and an appellate court is not bound to accept the trial Judge's finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.

23. Similarly in *Peter Gichuki King'ara vs Independent Electoral and Boundaries Commission & 2 Others* [2014] eKLR the court held that:-

Bearing in mind the above principles, the most contentious issues in this appeal is whether the grounds of appeal are matters of law or facts. Having established that we have jurisdiction



to determine only issues of law as per the provisions of Section 85A of the *Elections Act*, to us the whole question of whether the trial Judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence with of course the usual caveat, that we did not see the witness demeanor is an issue of law.

24. I have perused the grounds 1-5 in the memorandum of appeal and note that the grounds are to the effect that the learned adjudicator found the appellant wholly liable for the accident; failed to appreciate that a police abstract cannot be used as conclusive evidence of the accident; by awarding the respondent special damages of Kshs. 561,650/- yet he only proved Kshs. 329,650/- and finding that the respondent had produced proof of repair costs amounting to Kshs. 311,280/-. The grounds as raised by the appellant touch on matters of fact which will require this court to scrutinize and re-evaluate the evidence once more. The jurisdiction of this court as the first appellate court is donated by Section 38 of the *Small Claims Court Act* which provides for appeals on this appeal based on matters of fact and as such, is outside the mandate of this court.
25. It is my finding that this appeal is not properly before the court and is incompetent. Consequently, it is hereby struck out with costs to the respondent.
26. It is hereby so ordered.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 22<sup>ND</sup> DAY OF MAY 2025.**

**F. MUCHEMI**

**JUDGE**

