



REPUBLIC OF KENYA



**Detco Limited v Muriungi (Civil Appeal E135 of 2024)  
[2025] KEHC 9701 (KLR) (3 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 9701 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E135 OF 2024  
SM GITHINJI, J  
JULY 3, 2025**

**BETWEEN**

**DETCO LIMITED ..... APPELLANT**

**AND**

**FESTUS MURIUNGI ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon. Lilian Wangari Maina  
(RM) in SCCC No. E366 of 2024 Meru delivered on 13th of August, 2024)*

**JUDGMENT**

1. This Appeal arises from the judgment of the learned Resident Magistrate Hon. Lilian Wangari Maina delivered on 13/08/2024 in *Meru Small Claims Court Case No. E366 of 2024* wherein judgment was entered in the following terms;
  - a. Liability 85%
  - b. Liquidated Damages Ksh. 150,730
2. Aggrieved by the said Judgment, the Appellant set forth the following grounds in the Memorandum of appeal dated 28<sup>th</sup> August, 2024;
  1. The Learned Trial Magistrate erred in law and fact by misapprehending the evidence on record thereby arriving at a wrong determination on apportionment of liability.
  2. The learned Trial Magistrate having found for a fact that the primary suit was a claim of subrogation fell into error by awarding an award that was more than what the insurance paid.
  3. The Learned Trial Magistrate erred in law and fact by determining that the claim in the primary suit was one of subrogation when in essence the material ingredients were lacking.



4. The Learned Trial Magistrate erred in law when she failed to find that in the absence of a reply to defence by the claimant to traverse the particulars of negligence in the response amounted to an admission.
5. The judgment/decreed is untenable in Law.

### **Evidence at trial**

3. CW1 Robert Tumno Pole testified that a non-injury accident report was made on 4/7/2023 by Raphael Koome involving Motor Vehicle Registration No. KCH 668 B, pick-up and Motor Vehicle Registration No. KDA 024 Z Isuzu Lorry. The report said that the 2 vehicles were at the car wash when the car wash boy suddenly opened the door of the pick-up which was extensively damaged by the moving lorry. After investigations, it was established that the driver of the lorry namely Denis Kaimenyi was to blame for the accident and he was subsequently charged for driving without due care. He produced the police abstract for KCH 668 B and the receipt for his court attendance as exhibits. The accident took place at 8.00 p.m and the scene was visited at about 8.30 p.m.
4. CW2 Festus Muriungi Gikunda, the Respondent herein and the Claimant in the trial court adopted his witness statement dated 1/7/2024 as his evidence in chief and produced the documents filed therewith as exhibits. He stated that his vehicle was comprehensively insured by Pacis Insurance Company, and he had already received payment of Ksh. 150,000 or thereabouts from the insurer. He bought a new door for his vehicle at Ksh. 90,000 while the damaged one was taken by the insurance company. He denied that the door had been suddenly opened as alluded to by CW1. His driver Raphael Koome and he were at the scene of the accident and thus they both witnessed it.
5. RW1 Eric Mutuma Obadah, the Director of the Appellant herein adopted his statement dated 12/7/2024 as his evidence in chief. He told the court that he personally knew the Respondent. He was at the car wash when the driver of motor vehicle Registration No. KCH 668 B suddenly and without a warning opened the driver's door wide open that it collided with the rear tyre area of motor vehicle Registration No. KDA 024 Z which was in motion. When police from Meru Police Station visited the scene, they established that the driver of the pick up was the one to blame for the accident. The claim was exaggerated because the damage from the photos was minor, and the amounts sought to be recovered were not supported by documentary evidence, since the door was not entirely replaced but only repaired.

### **Submissions**

6. The Appellant through the firm of Mokua Obiria & Ass. Advocates filed submissions dated 18<sup>th</sup> October, 2024, faulting the trial court for awarding a sum which exceeded the one paid by the insurer, contrary to the doctrine of subrogation. Counsel submitted that in subrogation, the insurer is put in the position of the insured and is entitled to claim compensation from the 3<sup>rd</sup> party tortfeasor and the compensation is not more than what has been paid to the insured. Counsel faulted the trial court for apportioning liability at the ratio of 85:15 yet it had been established that the accident was solely caused by the negligence of the Respondent and/or his driver.
7. The Respondent through the firm of Kamotho Njomo & Company Advocates filed submissions dated 6/11/2024. Counsel submitted that the appeal was incompetent for want of a certified decree, and cited *Lucas Otiemo Masaye v Lucia Olewe Kidi* (2022) eKLR. Counsel submitted that the Respondent had proved on a balance of probabilities that the Appellant was liable for the accident, and cited *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) (Judgment) and *Rosemary Wanjiru Kungu v Elijah*



*Macharia Githinji & another* (2014) eKLR. Counsel asserted that the failure by the Respondent to file a response to the Statement of Claim did not amount to an admission because there was no provision in the rules guiding the Small Claims Court to do so. Counsel cited *Kenya Power & Lighting Company Limited v Julius Wambale & another* (2019) eKLR and *Richard v Njeru* (Civil Appeal 181 of 2021) [2022] KEHC 17083 (KLR) (14 October 2022) (Judgment) on the circumstances under which the doctrine of subrogation applies, and prayed for the dismissal of the appeal with costs.

### **Analysis and Determination**

8. This being a first appeal, the court is obliged to reconsider and re-evaluate the evidence adduced in the trial court and draw its own conclusions.
9. In *Selle & another v Associated Motor Boat Co. Ltd* [1968] EA, the court held as follows: “This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”
10. I have considered the appeal herein, the trial court’s judgment which is the subject of this appeal as well as the submissions by counsel.
11. From the grounds of appeal, the twin issues for determination are whether the apportionment of liability was proper and whether the award of general damages of Ksh. 150,730 was justified.
12. Before I delve into the merits of the appeal, it is prudent to address the issue raised by the Respondent whether the appeal is incompetent for want of a certified decree.
13. Order 42, Rule 13 (4) (f) of the *Civil Procedure Rules* provides that; “Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say — (a) the memorandum of appeal; (b) the pleadings; (c) the notes of the trial magistrate made at the hearing; (d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing; (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate; (f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal: Provided that— (i) a translation into English shall be provided of any document not in that language; (ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).”
14. In *South Nyanza Sugar Co. Ltd v Daniel Obara Nyandoro* (2010) eKLR, the court (D. Musinga J, as he then was) held that; “In my view, it will amount to miscarriage of justice for this court to strike out the appeal for the reason as advanced by Mr. Ogweno when the appeal had already been admitted and directions taken in the presence of counsel for both parties. In any event, the lower court record is before this court and no prejudice will be occasioned to the Respondent by reference to the same. In addition, it will be against the spirit of overriding objectives of the *Civil Procedure Act* as stated under Section 1A and 1B for this court to summarily reject the appeal for want of decree.”
15. I find that since a copy of the judgment appealed from has been attached, no prejudice is conceivable, and the Appellant’s failure to attach a certified decree, is a mere procedural technicality, which does not go to the root of the appeal. Besides, Order 42 Rule 13 (4) (f) of the *Civil Procedure Rules* aforesaid is not coached in mandatory terms as it gives an Appellant the leeway to file either the judgment appealed from, order or decree.



16. On liability, the Appellant and the Respondent, the eye witnesses herein gave conflicting accounts of how the accident occurred. While the Appellant stated that the Respondent's driver suddenly opened the door resulting to the accident, the Respondent was categorical that the door was open the entire time, and had the Appellant's driver exercised a little care, attention and reasonableness, the accident would have been averted.
17. After investigations were carried out, it was CW1's testimony that the Appellant's driver was found to be liable for the accident and he was duly charged. When the witness was however cross examined, he self-conflicted himself when he stated that; "There was no road but where vehicle can move. It is a road both parties are to blame given the car wash boy opened the door suddenly."
18. The Court of Appeal in *Micheal Hubert Kloss & Another v David Seroney & 5 Others* [2009] eKLR stated that: "The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in *Stapley v Gypsum Mines Ltd* (2) (1953) AC 663 at p 681 as follows: 'To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it...The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally.'"
19. In *Khambi and Another v Mahithi and Another* [1969] EA 70, it was held that; "An apportionment of liability made by a trial Judge will not be interfered with on appeal save in exceptional cases, as where there is some error of principle or the apportionment is manifestly erroneous (*Brown v. Thompson* (3) and *Sharriff v. Sethna* (2) followed. The trial Judge had taken into account all material facts and considerations and his apportionment should not be disturbed."
20. I find that it is more probable than not that the Appellant's driver was not keen enough to see the open door of the vehicle in good time to avoid the accident. On his part, the Respondent's driver contributed to the occurrence of the accident by negligently opening the door of his motor vehicle without first ascertaining whether it was safe to do so.
21. I therefore find that both drivers were at fault and the trial court properly exercised its discretion in apportioning liability at the ratio of 85:15, in view of the contradictory evidence on record.
22. On the award of Ksh. 150,730, the Respondent instituted the claim on behalf of Pacis Insurance Company to seek indemnity from the Appellant. The rights of the Respondent's said insurer under the doctrine of subrogation crystallized once compensation had admittedly been fully made to the Respondent.
23. The general principle of subrogation was underscored in *Halsbury's Laws of England* 4<sup>th</sup> Edition 2003 Reissue Vol. 25 at paragraph 490 as follows; "Where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part, of the subject matter insured, he whereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject matter as from the time of the casualty causing the loss. Subject to these provisions, where the insurer pays for a partial loss, he acquires no title to the subject matter insured, or such part of it as may



remain, but he is thereupon subrogated to all the rights and remedies of the assured in and in respect of the subject matter insured as from the time of the casualty causing the loss, in so far as the assured has been indemnified by that payment for the loss.”

24. In *Africa Merchant Assurance Company v Kenya Power & Lighting Company Limited* (2018) eKLR the Court of Appeal had this to say; “26. The essence of the doctrine of subrogation is not in contention. It allows an insurer after compensating an insured for any loss under the insurance contract to step into the shoes of the insured. In that, the insurer is entitled to all the rights and remedies the insured might have against a third party in respect of the loss compensated.”
25. The scope of the application of the doctrine of subrogation was highlighted in *Egypt Air Corporation v Suffolk International Food Processors (U) Ltd and Another* [1999] 1 EA 69 as follows; “It must be observed that the whole basis of subrogation doctrine is founded on a binding and operative contract of indemnity. It derives its life from the original contract of indemnity. It gains its operative force from payment under that contract. In my view the essence of the matter is that subrogation springs not from payment only but from actual payment conjointly with the fact that it is made pursuant to the basic and original contract of indemnity. If then the right of subrogation rests upon payment under a contract of indemnity, how does the matter stand when there is no such contract.”
26. The award of Ksh. 150,730 made by the trial court to the Respondent comprised of Ksh. 105,000 as cash in lieu of repairs, assessment fees of Ksh. 6,680 to Elite Automobile Valuers and Assessors and tracing fees of Ksh. 39,050 to Sunrays General Services Ltd. That sum was specifically pleaded and strictly proved by Respondent’s exhibits 7, 8 and 10 which were duly produced during trial.
27. On whether the Respondent’s failure to respond to the Response to the claim amounted to an admission, there is no requirement under the *Small Claims Court Act* to file a reply to the Response to the claim.
28. The upshot from the foregoing analysis is that the appeal is in want of merit and it is hereby dismissed with costs to the Respondent.

**DATED AND DELIVERED AT MERU 3<sup>RD</sup> THIS JULY, 2025**

**S.M. GITHINJI**

**JUDGE**

Appearances:-

Mr. Keiro Advocate for the Respondent.

Mr. Mokuia Advocate for the Appellant (absent).

