



**Gathii v Masaku (Civil Appeal E023 of 2024)
[2025] KEHC 12567 (KLR) (3 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12567 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E023 OF 2024
RC RUTTO, J
SEPTEMBER 3, 2025**

BETWEEN

JAMES MWARIRI GATHII APPELLANT

AND

EVERLINE NDUNGE MASAKU RESPONDENT

(An appeal from the judgment and decree of the Small Claims Court at Thika (M.W. Kamau, RM/Adjudicator.) delivered on 8th February 2024 in SCCC No. E647 of 2023)

JUDGMENT

1. This appeal arises from the decision of the small claims court. In a statement of claim dated 10th July 2023, the appellant alleged that on 21st January 2023, while lawfully riding his bicycle along the Thika Garissa Road near Metro, the respondent or her authorized driver negligently drove motor vehicle registration number KDK 797H causing it to swerve and encroached onto the appellant's side of the road. The vehicle collided with the appellant, as a result of the accident, the appellant sustained a fracture of the right mid 1/3 femur. He sought for general damages, special damages of Kshs.57,860.00 costs and interests of the suit.
2. By judgment dated 8th February 2024, the trial court dismissed the suit finding it unmerited and awarded costs to the respondent. Aggrieved by these findings the appellant to filed a memorandum of appeal dated 13th February 2024 raising seven grounds summarized as follows: the trial court erred in finding that he failed to prove his case on a balance of probabilities in spite of his documentary and oral evidence as well as his written submissions; the trial court erroneously condemned him to a higher standard of proof than is required in civil cases; the respondent failed to avoid the accident; and the doctrine of res ipsa loquitor was not applied by the trial court. For those reasons, he prayed that his appeal be allowed, the judgment of the lower court be set aside and apportion liability and award damages, costs of this appeal and those of the trial court.



3. The appeal was disposed of by way of written submissions. In his written submissions together with a list of authorities dated 9th August 2024, the appellant summarized the evidence presented at trial. He contended that the respondent had seen him emerge from between parked lorries and applied emergency brakes, indicating awareness of his presence. He urged that, the respondent as a motor vehicle operator owed a heightened duty of care to the potential danger posed by vehicles when driven negligently.
4. The appellant pointed out that the police abstract did not assign blame to either party. He criticized the trial court for failing to explain its reasoning in siding with the respondent. He invoked the doctrine of *res ipsa loquitor* urging that the nature of the accident was sufficient to infer negligence. He urged this court to make a finding that the respondent was 100% liable in negligence and adopt the trial court's analysis on quantum as follows: general damages of Kshs.800,000.00 and special damages of Kshs.17,860.00. The appellant further prayed for costs of this appeal.
5. The respondent opposed the appeal through written submissions and a list of authorities dated 21st August 2024. She submitted that the trial court did not err in dismissing the appellant's claim in its entirety since he failed to discharge his burden of proof to the required standard. She argued that the trial court considered all relevant factors and arrived at a just conclusion. She further asserted that the appellant's evidence was inconsistent and did not demonstrate that the respondent was responsible for the injuries he had sustained. In contrast, she claimed to have clearly demonstrated that she was not responsible for the accident.
6. Lastly, the respondent submitted that the appeal was incompetent under section 38 of the [Small Claims Court Act](#) which restricts appeals to the High Court to matters of law only. In her view, the appeal focused on issues of fact, particularly liability, which falls outside the scope of permissible appeals. To support her position, she cited the decision in *Ojwang vs. Kara & another* [2024] KEHC 3131 (KLR) and urged the court to dismiss the appeal with costs.
7. Upon reviewing the parties' written submissions, the record of appeal, and the applicable law, as rightly pointed out by the respondent, the jurisdiction of this court under section 38 (1) of the [Small Claims Court Act](#) limits an appeal against a decision of the small claims court to matters of law only. Before delving into the evidence of the parties before the trial court, I find it prudent to address whether the appeal is competent in light of the provisions of the law.
8. The appellant memorandum of appeal raised several grounds of appeal purely centered on liability which is a factual issue. He urged that the trial court failed to apply the doctrine of *res ipsa loquitor* asserting that the mere occurrence of an accident was sufficient to infer negligence. He also maintained that the evidence on record demonstrated that he had proved on a balance of probabilities that the respondent was liable in negligence for the accident.
9. The respondent urged this court to make concurrent findings with the decision in *Ojwang vs. Kara & another* (Supra) that held as follows:
 - “ 31. The first issue for consideration is whether these two issues of liability and interest constitute points of law or fact. This is so because section 38 (1) of the [Small Claims Court Act](#) is explicit that 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.
 32. I have considered the many grounds of appeal which are, indeed, unnecessarily verbose and hence my reduction into two and the two main issues extracted



therefrom. It is trite that a point of law is a term for a matter of law in a case that will depend on existing statutes and not from a matter of fact.

33. In my view, issues of liability for the alleged breach of contract were determined by the Adjudicator on a factual basis that the agreement in issue between the parties was clear that it was the 2nd respondent who was to transfer the vehicle to the claimant and that being a factual issue, there is no other interpretation in law that would change the situation to shift the blame to the 1st respondent. I do not find any issue of law raised capable of being determined by this court, contrary to the factual findings by the Adjudicator, based on the agreement.

34. I find that the issues on liability as determined by the Adjudicator in the case herein do not constitute points of law. Accordingly, I decline to delve into matters of liability of the 1st respondent as they are matters of fact as decided upon by the Adjudicator.”

10. From the evidence at trial, it is apparent that the adjudicator found the appellant testimony inconsistent and unreliable. The court observed that from his evidence alone, it was unclear from his account whether the accident occurred on his lane, while crossing the road or on the pathway and therefore off the road.
11. The trial court further noted that the appellant at some point suggested that he was stationary, at another he was riding his bicycle. The claimant added that he saw the car on his side and was hit. He stated that the vehicle hit him on his side, however, when re-examined, he stated that the vehicle was from Nairobi while he was from Makongeni when the vehicle encroached on his lane. The court concluded that his evidence was totally unreliable.
12. Upon reviewing the respondent’s evidence, the trial court found her account to be consistent and credible. That there was a believable chain of events from her testimony since she did not give conflicting evidence. In her view, the appellant attempted to cross the road, suddenly entered the road on her right-hand side as a result causing the accident. In the court’s view, the appellant was responsible for the accident as he crossed the road without being careful and failed to observe whether it was safe. The court concluded that the appellant had failed to exercise due care when crossing the road. Consequently, the trial court held that the appellant had not proved, on a balance of probabilities that the respondent was negligent and liable for the accident.
13. This court finds that the issue of liability as addressed by the adjudicator, was thoroughly examined based on the factual evidence presented at trial.
14. Those were indeed clear issues of fact, not law and therefore fall outside the scope of appellate jurisdiction under section 38(1) of the *Small Claims Court Act*, which permits appeals only on matters of law. I agree with the respondents position and precedent set in *Ojwang vs. Kara & another* (Supra) which confirms that liability assessments are factual determinations. Accordingly, this appeal does not meet the legal threshold and it is hereby dismissed with costs to the respondent.
15. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 3RD DAY OF SEPTEMBER 2025.

RHODA RUTTO

JUDGE

In the presence of;



.....Appellant

.....Respondent

Selina Court Assistant

