



**Gakere v Kahiu (Civil Appeal 284 of 2023) [2024] KEHC 9323 (KLR) (19 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9323 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL 284 OF 2023  
MA OTIENO, J  
JULY 19, 2024**

**BETWEEN**

**PETER MWAURA GAKERE ..... APPELLANT**

**AND**

**MILLICENT WAIRIMU KAHIU ..... RESPONDENT**

*(Being an appeal from the Judgment of Honourable O.J. MUTHONI, RM)  
delivered at Thika on 29th June 2023 in Thika SCCC No. E0647 of 2022)*

**JUDGMENT**

**Introduction**

1. This appeal emanates from the judgment delivered on 29<sup>th</sup> June 2023 in Thika Small Claims Court (SCC) No. E0647 of 2022. The claim was as a result of a road traffic accident where the Respondent sought compensation for material damage on motor vehicle registration number KCW 753D which occurred on 20<sup>th</sup> June 2021 involving the Appellant's motor vehicle registration number KAV 338M.
2. On 29<sup>th</sup> June 2023, the trial court delivered its judgment in favour of the Respondent finding the Appellant 100% liable for the accident. The court consequently awarded Kshs. 272, 880/- in special damages, being the cost of repairs of the motor vehicle registration number KCW 753D. Costs of the suit and interest were also awarded in favour of the Respondent.
3. Aggrieved by the decision of the trial court, the Appellant filed this appeal vide a memorandum of appeal dated 12<sup>th</sup> July 2023 raising 11 grounds of appeal which I need not reproduce here. A perusal of the grounds of appeal as well as the Appellant's submissions reveals that the appellant's main and only ground of appeal is on the issue of liability.
4. The Appellant therefore prays that the appeal be allowed and that the judgment of the trial court delivered on 29<sup>th</sup> June 2023 on liability and quantum be set aside. The appellant is also seeking to have the costs of the appeal.



## Submissions

5. The appeal was canvassed by way of written submissions. The Appellant's submissions are dated 31<sup>st</sup> May 2024 whilst that of the Respondent is dated 6<sup>th</sup> June 2024.
6. In his submissions, the Appellant argued that the trial court erred by holding him 100% liable for accident, ignoring the conflicting evidence adduced before court on the issue of liability. According to the Appellant, there were two police abstracts; one produced by him which blamed the Respondent and the other, produced by the Respondent which did not assign liability on any party.
7. The Appellant further submitted that in view of the conflicting evidence on the issue of liability, it was not only unjust, but also unlawful for the trial court to find that he was wholly to blame for the accident.
8. It was the Appellant's submissions that the Respondent did not provide any tangible evidence capable of discharging the burden of proof imposed under Section 107 of the *Evidence Act*. The Appellant went on to discredit the evidence of the investigating officer, No. 79440 Cpl. Linet Makuti who testified as CW1 and blamed the Appellant for the accident. According to the Appellant, to the extent that CW1 was not at the scene, she could not competently testify on who was to blame for the accident.
9. It was further the Appellant's argument that the testimony by CW1 contradicted the police abstract produced by the Appellant which blamed the Respondent for the accident. Citing Civil Appeal E018 of 2020(Christine Kalama v Jane Wanja Njeru & another [2021] eKLR) the Appellant argued that the oral testimony by the investigating officer blaming him for the accident could not outweigh the documentary evidence, that is, the police abstract produced by the Appellant.
10. The Appellant argued that the trial magistrate overlooked the fact that under the *Traffic Act*, the Respondent also owed him a duty of care, in his capacity as a road user. Citing the case of Equator Distributors v Joel Muriu & 3 others [2018] eKLR on the issue of duty of care by motorists to other road users, the Appellant asserts that both the Appellant and the Respondent owed each other a duty of care and consequently the Appellant should not carry the blame alone.
11. On his part, the Respondent in his submissions argued that this court lacks jurisdiction to entertain this Appeal. According to the Respondent, this appeal is purely on matters of fact which is outside the jurisdiction of this court pursuant to the provisions of Section 38 of the *Small Claims Court Act*.
12. According to the Respondent, unless there is gross breach of rules of natural justice, an appeal over evidence is an appeal on fact. The Respondent position is that in this case, there was no breach of rules of natural justice and therefore this court, exercising its appellate jurisdiction on this matter, ought to accept and be bound by the factual findings of the trial court.
13. The Respondent further argued that in any event, CW1, the investigating officer who visited the scene and recorded statements from both parties blamed the Appellant for the accident. According to the Respondent, this testimony by the investigating officer corroborated her evidence on who was to blame for the accident.
14. Based on the above, the Respondent sought to have the appeal be dismissed with costs to the Respondent.

## Analysis and determination

15. This court has considered the memorandum of appeal, the record of appeal as well as the submissions by the respective parties.



16. This is an appeal emanating from the Small Claims Court. Section 38 of the *Small Claims Court Act* under which the appeal has been made provides as follows; -

“(1)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.

(2) An appeal from any decision or order referred to in subsection (1) shall be final.”

17. It therefore follows that an appeal originating from the Small Claims Court to this court can only on the points of law in terms of Section 38(1) of the Small Claims Act. Consequently, this court cannot in such an appeal, entertain an invitation to interfere with the factual findings of the trial court. The duty of this court therefore is equivalent to that of the Court of Appeal in its capacity as a second appellate court.

18. In *Kenya Breweries Ltd v Godfrey Odoyo* [2010] eKLR the Court of Appeal, when dealing with a second appeal, distinguished between matters of law and matters of fact as follows: -

“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 a retrial and facts must be revisited and analysed a fresh, - see *Selle and Another v Associated Motor Boat Company Ltd 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.”

19. Again, in *Charles Kipkoech Leting v Express (K) Ltd & another* [2018] eKLR the Court of Appeal further clarified that where a right of appeal is confined to questions of law only, an appellate court is duty bound to accept the findings of fact by the lower court. That it should not interfere with the findings of the trial on the factual issues unless it is apparent that, based on the evidence on record, no reasonable tribunal or court could have reached the same conclusion. In which case, the holding or decision would be bad in law and therefore qualify to be reviewed on a second appeal. The court stated that; -

“This is a second appeal. Our mandate is as has been enunciated in a long line of cases decided by the Court. See *Maina v Mugiria* [1983] KLR 78, *Kenya Breweries Ltd v Godfrey Odongo*, Civil Appeal No. 127 of 2007, and *Stanley N. Muriithi & Another versus Bernard Munene Ithiga* [2016] eKLR, for the holdings inter alia that, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the 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. See also the English case of *Martin v Glywed Distributors Ltd (t/a MBS Fastenings)* 1983 ICR 511 where in, it was held inter alia that, where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.”



20. The first question for consideration in this appeal is whether the issue of liability as raised in the memorandum of appeal and submissions constitute a point of law or that of fact. This is important because section 38 (1) of the *Small Claims Court Act* is unambiguous that a person aggrieved by a decision or order of the court, may appeal that decision or order to the High Court, but only on matters of law.
21. I have considered the rival submissions by the parties, the evidence on record and the authorities cited by both Counsel. The instant appeal is based largely on the issue of liability. While the Appellant took the position that the trial court ought not to have found him wholly liable for the accident based on fact that there were two conflicting pieces of evidence on the issue of liability, the Respondent on the other hand was of view that the court was right in its finding on the issue of liability, particularly taking into consideration his evidence as corroborated by that of the investigating officer who laid blame squarely at the doors of the appellant.
22. In my view, the question of liability for the accident was determined by the Adjudicator on a factual basis. I note that the trial court based its finding from the evidence of the Respondent and that of the investigating officer. The court found the evidence adduced by the Appellant on the issue of liability to be less credible. All these in my humble view are factual issues. I do not find any question of law raised capable of being determined by this court.
23. Consequently, I decline to interfere with the findings of the trial court on the issue of liability.
24. The next thing I will look at is whether the findings or conclusion of the trial court on the factual issues are so perverse as to be capable of attracting the appellate jurisdiction of this court.
25. In finding the Appellant solely liable for the accident, the trial court stated that it had considered the evidence of the Respondent and his witnesses including that of the CW1, the police officer who investigated the case. That according to the investigating the officer, it was the Appellant who was to blame for the accident.
26. The trial court also considered the evidence adduced by the Appellant and found the same less credible. The trial court noted that the appellant produced a police abstract issued to him by one corporal Makuti, but the Appellant failed to call the said Cpl. Makuti as a witness to verify the veracity of the abstract.
27. After considering the basis of the trial court's findings on the factual issues, I find that the conclusion by the trial magistrate on the factual issues in the case were reasonable and justified in the circumstances, and are therefore not perverse to warrant the attention of this court, exercising its appellate jurisdiction under section 38 of the *Small Claims Court Act*.
28. In the premises, I find the appeal not merited and therefore dismiss the same with costs to the Respondent.
29. It so ordered.

**SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 19TH DAY OF JULY 2024**

**ADO MOSES**

**JUDGE**

Moses – Court Assistant

Ngeresa .....for the Appellant.

Kairu.....for the Respondent.

