



REPUBLIC OF KENYA



KENYA LAW
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**Kimuli v Iregi (Civil Appeal 614 of 2019)
[2025] KECA 1480 (KLR) (12 September 2025) (Judgment)**

Neutral citation: [2025] KECA 1480 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 614 OF 2019
DK MUSINGA, M NGUGI & FA OCHIENG, JJA
SEPTEMBER 12, 2025**

BETWEEN

SAMSON MULYUNGI KIMULI APPELLANT

AND

KIBUCHI J. IREGI RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (Gikonyo, J.)
dated 28th October 2019 in HCCA No. 96 of 2015 Consolidated with HCCA No. 146 of 2015)*

JUDGMENT

1. The appeal before us involves a dispute between Samson Mulyungi Kimuli, the appellant, and Kibuchi J. Iregi, the respondent, concerning a road traffic accident. The case was initially filed at the High Court in Nairobi, as Civil Suit No. 445 of 2011. It was later transferred to the Chief Magistrate's Court, Milimani Commercial Courts, and became Civil Suit No. 6561 of 2013.
2. The appellant claimed that he was hit and severely injured on 30th July 2010, around 9:00 pm, by motor vehicle registration number KBD XXXW, which was driven negligently by the respondent or his agent. The accident allegedly occurred on a murram road, between Masinga and Kivandini. The appellant alleged that the vehicle veered off the road at a high speed, striking his right leg.
3. The appellant stated that his right leg was amputated above the knee, leading to a 50% permanent incapacity. He sought general damages for pain, suffering, and loss of amenities, as well as special damages of Kshs. 30,200. He also claimed for loss of earnings and earning capacity, stating that he was a shoe vendor earning Kshs. 20,000 per month. Additionally, he claimed the cost of an artificial limb, estimated at Kshs. 100,000, which would need to be changed every five years.
4. The respondent conceded that he was the owner of motor vehicle KBD XXXW but denied being the driver. He specifically denied that any accident involving his vehicle occurred on 30th July 2010. The respondent also alleged that if an accident did occur, it was solely caused by the appellant's negligence



- and/or carelessness, citing particulars such as crossing the road at an undesignated place, obstructing the vehicle's lawful path, failing to keep a proper lookout, and jaywalking. The respondent also denied that the appellant sustained the claimed injuries or losses.
5. During the hearing of the case, the appellant testified that he was off the road when the lorry veered off and hit him. He stated he saw the vehicle's lights and its registration number, KBD XXXW.
 6. Dr. Waweru, a medical doctor, produced a medical report confirming the amputation of the appellant's right leg above the knee and estimating the cost of a prosthesis at Kshs. 100,000 each, and explaining that the prosthesis would require changing every five years.
 7. Cpl. Stephen Kiuna, a police officer from Matuu Police Station, produced a police file, including a police abstract report and an Occurrence Book (OB) extract. He stated that the OB entry did not initially indicate the motor vehicle registration number or who made the report, but a later entry on 2nd September 2010, by Cpl. Kamau, identified the vehicle as KBD XXX with the logo "Mshiriki". He also mentioned an eyewitness who saw the lorry with the "Mshiriki" logo.
 8. Charles Kiarie, the respondent's conductor, testified that on the date of the alleged accident at 9:00 pm, they were in Matuu, not Kavwea. He denied that the vehicle was involved in any accident. He admitted the vehicle was previously called "Mshiriki". He also stated he did not record any statement with the police.
 9. In a judgment dated 6th March 2015, the trial court found that motor vehicle registration number KBD XXXW was involved in the accident. The court noted that the respondent did not show that another lorry with the name "Mshiriki" existed.
 10. The court apportioned liability of 40% against the appellant and 60% against the respondent. This was based on the reasoning that if the lorry had its lights on at night, the appellant should have been able to see it, even if it veered off the road.
 11. The court awarded damages as follows:
 - a. General damages: Kshs. 2,500,000.
 - b. Cost of prosthesis: Kshs. 1,000,000 (for 10 changes at Kshs. 100,000 each).
 - c. Diminished earning capacity: Kshs. 1,000,000 (as a global award due to lack of proof of income)
 - d. Special damages: Kshs. 30,200. Total damages: Kshs. 4,530,200.
Net amount after 40% contributory negligence: Kshs. 2,718,120.
 - e. Costs of the suit, witness expenses for one attendance, and interest.
 12. Being aggrieved by the apportionment of liability against him at 40%, the appellant filed Nairobi High Court Civil Appeal No. 96 of 2015. The respondent also filed Nairobi High Court Civil Appeal No. 146 of 2015, appealing against the trial court's finding of liability and the assessment of damages, which he alleged were excessive.
 13. The appeals were consolidated on 26th February 2019, with Civil Appeal No. 96 of 2015 designated as the pilot file. Both parties filed written submissions in support of their respective appeals and opposition to the other party's appeal.
 14. The High Court in the Judgment dated 28th October 2019, and signed on 19th September 2019, reviewed the evidence presented, noting inconsistencies in witness statements and the police



- investigation. The court specifically highlighted that key witnesses were not called to testify and that the police abstract entry regarding the vehicle's full registration number was made on an unexplained side margin over a month after the incident.
15. The High Court found that the appellant did not prove his case on a balance of probabilities that the accident was caused by the lorry registration number KBD XXXW.
 16. Consequently, the appeal by the respondent succeeded; the appeal by the appellant was dismissed for lack of merit; the judgment by the trial court was set aside, and the original claim in the primary suit was dismissed; and each party was ordered to bear their own costs of both the appeal and the primary suit.
 17. Dissatisfied, the appellant lodged the present appeal. The grounds for this appeal include, inter alia:
 - a. The learned judge erred in his exposition and/or appreciation of the appellate approach to a first appeal.
 - b. The learned judge erred in his appreciation of the evidence, basing his decision on statements made by persons not called to testify.
 - c. The learned judge erred by finding that the Occurrence Book (OB) record was not explained, or that one month was too long for the police to get vehicle details.
 - d. The learned judge erred by failing to take into account probabilities and particular circumstances while assessing the evidence.
 - e. The learned judge erred by failing to find that the police abstract and OB record constituted proof on a balance of probabilities in the absence of contrary evidence.
 - f. The learned judge erred by failing to give reasons for faulting the trial court's findings on liability or proof of the motor vehicle involved.
 - g. The learned judge erred by approaching the appeal and suit from a standard of proof higher than proof on a balance of probabilities.
 - h. The learned judge erred by applying the wrong legal principles.
 18. The relief sought by the appellant in this appeal is for the appeal to be allowed with costs, and for the High Court judgment to be set aside, and substituted with orders reinstating the judgment of the trial court. The appellant further seeks that liability be apportioned at 100% against the respondent or at a lesser percentage of contributory negligence by the appellant.
 19. When the appeal came up for hearing on 25th March 2025, Mr. Kaburu, learned counsel, appeared for the appellant. However, there was no representation from the firm of MNM Advocates LLP, which was on record for the respondent, despite being served with a hearing notice.
 20. Mr. Kaburu relied on the appellant's written submissions and list of authorities, without further highlighting.
 21. On the question of whether the High Court's finding of weak evidence regarding vehicle identification and the absence of the eyewitness (Paul Ndiku) could be fairly impeached. Mr. Kaburu responded that they relied on police investigations and the OB record, which were not challenged, and that the vehicle's details were conclusively investigated by the police. He told this court that the eyewitness was not available to testify.



22. Regarding police investigations and how information leading to Corporal Kamau's insertion of the vehicle registration in the OB on 2nd September 2010, Mr. Kaburu conceded that the source was not disclosed in the record. He stated that the court assumed that the police conducted investigations.
23. In his written submissions, the appellant stated that he relied on police investigations, which conclusively established the involvement of the motor vehicle KBD XXXW in the accident. He noted that this conclusion was recorded in the Occurrence Book (OB) and police abstract, which the appellant asserted were not challenged before the trial court.
24. The appellant contended that the trial court's findings were supported by the record, which included the police abstract and OB entries. He relied on the cases of Joel Muga Opija vs. East Africa Sea Food Ltd [2013] eKLR and Anne Ayuma Harrison vs. Simon Githure Marungo [2014] eKLR to emphasize that police abstracts and OB records, as public documents, constitute robust circumstantial evidence and primary evidence that, if not controverted, can prove a vehicle's involvement in an accident.
25. The appellant faulted the High Court for its finding that there was no robust circumstantial evidence. He argued that the High Court misapprehended the evidence, misapplied legal principles, and failed to account for particular circumstances or probabilities in evaluating the evidence, such as the respondent had not shown that another lorry named "Mshiriki" existed; the lorry was positively identified on a balance of probability; loaders confirmed they were on the road that day; and the appellant consistently mentioned KBD Mshiriki.
26. The appellant further submitted that the vehicle was previously known as "Mshiriki" and the vehicle was later repaired and repainted, suggesting an attempt to conceal the evidence.
27. Addressing the issue of eyewitnesses, the appellant pointed out that, while the High Court noted that the person who claimed to have seen the vehicle was not called as a witness, he relied on the police officer's testimony, who produced a police file and OB extract related to KBD XXXW. Nevertheless, the appellant urged the court to assume that the police conducted investigations and rely on the conclusions from the said investigations, even if the specific investigative steps were not apparent from the records they kept.
28. The appellant submitted that the respondent's conductor denied involvement and did not record a police statement. The appellant asserted that the conductor's evidence was devoid of rebuttal or probative value, and did not challenge the appellant's evidence.
29. The appellant also submitted that the High Court erred by dismissing the appeal without careful consideration of contributory negligence. He urged us to allow the appeal in terms of prayers (a) and (b) of the memorandum of appeal and to determine the appeal fully, despite the lack of benefit from the first appellate court's considerations on the issue of contributory negligence.
30. This is a second appeal. Section 72(1) of the *Civil Procedure Act* stipulates the grounds upon which this Court can entertain a second appeal from the appellate decree of the High Court. Those grounds comprise matters of law. In Charles Kipkoech Leting vs. Express (K) Limited & Another [2018] eKLR, this Court held that:

“Our mandate..., 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...”
31. We have carefully considered the record, submissions by the appellant, the authorities cited, and the law. The issues for determination are whether the High Court erred in its treatment of the standard



- of proof and evidentiary burden; whether the High Court erred in reversing the trial court's findings on liability; whether the circumstantial evidence presented was sufficient to sustain the trial court's finding; and whether this appeal is meritorious.
32. The central issue in this appeal, as it was before the High Court, is whether the appellant discharged the legal burden of proving that the accident involved the respondent's motor vehicle, KBD XXXW, and that it was caused by the respondent's negligence.
33. It is trite law that the burden of proof in civil matters lies on the party who alleges, as provided under section 107(1) of the *Evidence Act*. The provision states that:
1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 2. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.
34. Further, Section 108 of the *Evidence Act* provides that:
- “The onus of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”
35. The burden and standard of proof in civil cases was discussed in the case of Ignatius Makau Mutisya vs. Reuben Musyoki Muli [2015] eKLR, where this Court, while quoting Lord Denning in *Miller vs. Minister of Pensions* [1947] 2 All ER 372, stated as follows:
- “That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘we think it more probable than not’, the burden is discharged, but if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally unconvincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”
36. Similarly, in *Mbuthia Macharia vs. Annah Mutua & Another* [2017] eKLR, the court stated as follows on the incidence of the legal and evidentiary burden of proof and the shifting thereof:
- “The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes an evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of the trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence...”
37. The appellant contends that the High Court imposed a higher standard akin to criminal proof. However, the learned Judge evaluated whether the appellant had discharged the burden of proving, on a balance of probabilities, that motor vehicle KBD XXXW was involved in the accident and that it was negligently driven.
38. The appellant had the initial legal and evidentiary burden to prove his case on a balance of probability that the vehicle that hit him belonged to the respondent. It is only after the appellant had discharged



that burden that the evidentiary burden was expected to move to the respondent to adduce evidence in rebuttal.

39. The appellant heavily relied on the police investigations and the resultant OB entry and police abstract as conclusive proof of the vehicle's involvement. While police documents can indeed provide robust circumstantial evidence, their probative value depends on their reliability and the basis of the information contained therein.
40. The High Court specifically noted that the appellant claimed that he saw the registration number and provided it to the police, yet the police did not initially record the full number. This raises a pertinent question as to why, if the information was readily available, it was not immediately recorded.
41. The critical OB entry by Corporal Kamau, inserting the full registration number (KBD XXXW) a month later, was noted by the High Court to be a "side entry" on the margin of an earlier report and was "not explained whatsoever". This Court, during the hearing, directly questioned Mr. Kaburu on the source of Corporal Kamau's information, and Mr. Kaburu frankly conceded that the source was not disclosed in the record. His suggestion that the Court should assume that they did investigations and rely on the conclusions from the investigations, even if the specific steps were not apparent from the records they kept, is unconvincing and cannot be a substitute for actual evidence. This Court cannot base its findings on mere assumptions, especially when a crucial piece of evidence, the source of the vehicle particulars, is missing and unexplained.
42. The High Court also found it "baffling" why the police took over one month to establish the vehicle details, despite having a trade name like "Mshiriki" and a partial registration number. This casts further doubt on the thoroughness and reliability of the police investigation as presented.
43. The High Court highlighted that the key eyewitness, Paul Muluu Ndiku, who supposedly described the lorry, was not called to testify in court, and his statement was not tested. This Court sought clarification on this, and Mr. Kaburu stated that the witness was "not available, unfortunately". The mere unavailability of a crucial witness, without a compelling explanation or attempt to compel attendance, weakens the case, as their written statement remains untested and carries limited probative value.
44. The learned Judge noted substantial omissions and contradictions in the appellant's testimony. Specifically, the appellant claimed the accident occurred at 9:00 pm, while two witnesses relied upon by the police indicated the event occurred at 12:00 noon on the same date. This fundamental inconsistency regarding the time of the accident severely undermines the credibility of the appellant's narrative and the reliability of the police statements that referred to these witnesses.
45. The High Court correctly stated that the burden of proof lay squarely on the appellant to prove his case on a balance of probabilities, particularly regarding the involvement of the respondent's vehicle. The High Court explicitly found that the trial magistrate erred by shifting the burden to the respondent when it concluded that the defendant had not shown that there was another lorry that existed with the logo Mshiriki distinct from his. This was a critical misdirection by the trial court, as the onus was on the plaintiff to prove his case, not on the defendant to disprove a hypothetical scenario.
46. To our minds, the learned Judge evaluated the evidence on a balance of probabilities, and there is no evidence that the applied standard was higher than required in law.
47. It is common ground that the trial court relied on circumstantial evidence. The court relied on the appellant's claim of seeing the lights and number plate of the respondent's vehicle; a delayed OB entry by Corporal Kamau, over a month after the alleged accident; and the name "Mshiriki" as a linking factor; while the High Court found this chain to be tenuous, noting key weaknesses, such as, the person



who allegedly identified the lorry was not called as a witness; there was no explanation for the delayed OB entry; and the vehicle's alleged presence at the scene was not independently corroborated.

48. It is trite law that circumstantial evidence must irresistibly point to the respondent's liability and exclude other possibilities. In this case, there was no consistent, unbroken chain linking the respondent's vehicle to the accident. The insertion of the registration number into the side margin of the OB more than a month later without disclosure of its source undermined its probative value.
49. While the police abstract and OB extracts are admissible as public documents under section 35 of the *Evidence Act*, courts have held that a police abstract alone is not conclusive proof of involvement in a road accident.
50. In the persuasive case of *Peter Kanithi Kimunyu vs. Aden Guyo Haro* [2014] eKLR, the Court held that:

“A police abstract is not proof of the occurrence of an accident but of the fact that following an accident, the occurrence thereof was reported at a particular police station.”
51. In this case, the police abstract and OB entry were not corroborated by the investigating officer or an eyewitness. The appellant's counsel also conceded during the appeal hearing that the source of the information inserted into the OB was unknown.
52. The High Court, sitting as a first appellate court, was entitled and required to re-evaluate the evidence and make its own conclusions, as was held in *Peters vs. Sunday Post Ltd* [1958] EA 424. This Court will not interfere with the factual findings of the first appellate court unless they are based on no evidence or are plainly wrong.
53. The High Court scrutinized the inconsistencies in the evidence, the delayed police reporting, the absence of corroboration, and the lack of explanation for crucial evidentiary gaps. It found that the appellant did not discharge his burden of proof. We see no reason to fault that conclusion.
54. Considering the High Court's detailed analysis of these points, coupled with Mr. Kaburu's concessions regarding the unavailability of the eyewitness and the undisclosed source of the critical police information, this Court finds that the High Court's conclusion that the appellant failed to prove the involvement of the respondent's motor vehicle was well-reasoned and supported by the record. The inconsistencies, unexplained elements in the police records, and the failure to call crucial witnesses rendered the evidence insufficient, as found by the High Court.
55. Given that the fundamental issue of liability, specifically, the proof of the respondent's vehicle involvement, was not established, the High Court was justified in dismissing the entire suit. Consequently, the questions of apportionment of liability and quantum of damages become moot.
56. We find no reason to interfere with the judgment of the High Court. The High Court diligently discharged its duty as a first appellate court by re-evaluating the evidence and reaching its own conclusions. It correctly identified the crucial weaknesses in the appellant's evidence regarding the identification of the motor vehicle and the reliability of the police investigation reports, particularly the unexplained entry of the vehicle registration number. The appellant failed to adequately address these concerns, and his counsel's concessions during the hearing before us further reinforced the High Court's findings.
57. The appellant did not meet the burden of proof required to establish the involvement of the respondent's vehicle in the accident.



58. Accordingly, we find that the appeal herein lacks merit and is hereby dismissed. Each party shall bear their own costs of this appeal, consistent with the High Court order.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF SEPTEMBER, 2025.

D. K. MUSINGA (PRESIDENT)

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**JUDGE OF APPEAL
MUMBI NGUGI**

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**JUDGE OF APPEAL
F. OCHIENG**

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

