



**Njuguna & another v Kamau & another (Civil Appeal E884 of 2024)
[2025] KEHC 13901 (KLR) (Civ) (25 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13901 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E884 OF 2024

TW CHERERE, J

SEPTEMBER 25, 2025

BETWEEN

GEORGE GIKURI NJUGUNA 1ST APPELLANT

BEDAN NJENGA THENDU 2ND APPELLANT

AND

EDWIN KAMAU 1ST RESPONDENT

BRIAN MAINA 2ND RESPONDENT

(Being an appeal from the judgment and decree in SCCC E6541 of 2022 by Hon. G. Simatwo (RM/Adjudicator) on 13th October 2023)

JUDGMENT

Introduction

1. This appeal arises from the judgement dated 13th October 2023 in *Nairobi SCCC E6541 of 2022* in which the learned adjudicator entered judgment in favour of the 1st Respondent, Edwin Kamau, against the 2nd Appellant and the 2nd Respondent on liability and damages. Being dissatisfied with that decision, the Appellants lodged the present appeal.

The Original Claim

2. The 1st Respondent filed a Statement of Claim dated 21st October 2022 seeking compensation in the sum of KES. 158,998 for material damage to his motor vehicle, registration number KAS 056X, arising out of a road traffic accident. He pleaded that on 21st May 2022, the 2nd Appellant, who was riding the 1st Appellant's motorcycle KMEE 415D, negligently dropped luggage on the road and came to an abrupt stop. The claimant applied emergency brakes to avoid colliding with the motorcycle, whereupon the



- 2nd Respondent, who was driving motor vehicle KCE 551K, rammed into the 1st Respondent's motor vehicle from behind.
3. As a result of the collision, the 1st Respondent's motor vehicle sustained extensive damage, and the loss was assessed at KES. 152,998 together with assessment and re-inspection fees of KES. 6,000. The Appellants denied liability and blamed the 1st Respondent for careless driving. The 2nd Respondent also denied negligence, contending that he had been struck from behind by another unknown vehicle which propelled him forward.
 4. After a full trial, the learned Adjudicator apportioned liability at 70% against the 2nd Appellant and the 30% against the 2nd Respondent. The court awarded the 1st Respondent the full sum of KES. 158,998 together with costs and interest, and further held that the claim was properly instituted within the doctrine of subrogation.

The Appeal

5. The Appellants challenged the judgment on several grounds, including that the date of the accident had not been proved, that ownership of the motorcycle had not been established, and that the claimant lacked legal standing. They further argued that negligence had not been proved against them, that the trial court improperly relied on uncertified photographs contrary to section 106B of the [Evidence Act](#), and that their submissions had been ignored. They also contended that the court erred in finding that the claim was grounded in subrogation.
6. The appeal was canvassed by way of written submissions. The 1st Respondent opposed the appeal and supported the trial court's judgment, while the 2nd Respondent aligned himself with the Appellants.
7. This being a first appeal, this Court is under a duty to re-evaluate the evidence, assess and weigh it as a whole, in order to arrive at its own findings and independent conclusion.
8. In doing so, the Court has to take into consideration that it neither saw nor heard the witnesses testify. This duty was well set out by the predecessor of this Court in *Okeno v Republic* [1972] EA 32 as follows:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v R.*, [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v R.*, [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses," see *Peters v Sunday Post*, [1958] EA 424.

Issues for Determination

9. From the pleadings, grounds of appeal, and submissions, the following issues arise for determination:
 1. Whether the date of the accident was proved.
 2. Whether ownership of the motorcycle and legal standing were established and whether the trial court properly invoked subrogation.
 3. Whether negligence was proved against the Appellants and/or the 2nd Respondent.



4. Whether the trial court erred in admitting or relying on uncertified photographs.
5. Whether the trial court failed to consider the submissions of the parties.

Analysis and Determination

Date of the Accident

10. The 1st Respondent pleaded that the accident occurred on 21st May 2022. In contrast, his witness statement referred to 23rd May 2022, while the police abstract indicated 21st May 2022. At the hearing, he was cross-examined on this inconsistency and he attributed it to an error in his statement.
11. The Appellants argued that the inconsistency was fatal. They relied on the Court of Appeal decision in *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR, where the Court emphasized that pleadings define the scope of litigation, bind the parties and the court, and that evidence inconsistent with pleadings is of no probative value. The Court, in turn, cited with approval the Nigerian Supreme Court in *Adetoun Oladeji (NIG) Ltd v Nigeria Breweries PLC* SC 91/2002, which stated that parties are bound by their pleadings and cannot depart from them at will.
12. The Appellants further cited the pronouncement of the Supreme Court in *Raila Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR where the Court reaffirmed that pleadings define the case a party must meet and that parties are strictly bound by them. The Court observed that to permit a party to advance a case outside its pleadings would amount to trial by ambush and would offend the rules of fair hearing. It further stressed that a trial court is itself bound by the pleadings and may not determine issues that have not been properly raised.
13. Additionally, reliance was placed on *Ayub v Ngure & another* (Civil Appeal 274 of 2017) [2024] KEHC 812 (KLR), where the Court found the discrepancy in the pleaded and proved dates of the accident to be fatal and dismissed the claim.
14. The present case is however distinguishable, for the Statement of Claim and the police abstract consistently cited 21st May 2022, and the only variance was in the witness statement, which was clarified in cross-examination and was not shown to have caused any prejudice to the Appellants.
15. In the result, while the authorities cited by the Appellants underscore the importance of consistency between pleadings and evidence, they do not apply to the facts at hand. I therefore find that the date of the accident was duly proved.

Ownership of the accident motor cycle

16. A copy of records from the Registrar of Motor Vehicles was produced in evidence, demonstrating that motorcycle KMEF 415D was registered in the name of the 1st Appellant. Although the pleadings referred to KMEE 415D, the Appellants themselves conducted their defence on the basis that the motorcycle that the 2nd Appellant was riding belonged to the 1st Appellant at the material time.
17. The Court of Appeal in *Thuranira Karauri v Agnes Ncheche* [1997] eKLR affirmed that a certificate of search or copy of records from the Registrar of Motor Vehicles constitutes prima facie evidence of ownership. The Court held that unless rebutted by credible contrary evidence, the registered owner is deemed to be the legal owner.
18. In the present case, no such contrary evidence was adduced. I therefore find that ownership was duly proved.



3. Subrogation

19. The trial court found that the claim was properly instituted under the doctrine of subrogation. Subrogation is an equitable principle in insurance law. It arises when an insurer, having indemnified its insured, steps into the insured's shoes to pursue recovery from the wrongdoer. In *Castellain v Preston* (1883) 11 QBD 380, Brett L.J. described contracts of insurance as contracts of indemnity, designed to make the insured whole but never to afford profit.
20. In *Kenya Airfreight Handling Limited v Indemnity Insurance Company of North America Corporation & Swiss Airport Transport Company Limited* [2001] eKLR, the High Court explained that subrogation allows an insurer who has compensated its insured to enforce the insured's rights against third parties. However, the court stressed that the insurer's right is derivative and must be properly pleaded.
21. In *Fourways Travel Services (A) Ltd v Drumcon (1972) Ltd* [2015] eKLR, Kasango J. held that subrogation must be specifically pleaded and proved, and that permitting an insured already *Mwashuma v Mohammed Sajjad & another* [2015] eKLR - Civil Suit 79 of 2012 the court dismissed a claim where subrogation had not been pleaded though the insured had been indemnified.
22. From these authorities, three principles are clear: subrogation arises only upon indemnity; it is a derivative right usually enforced in the name of the insured; and it must be specifically pleaded. In this case, the claimant testified that he personally paid for the repairs and was awaiting reimbursement from his insurer. He had not been indemnified at the time of suit. The claim was therefore not one of subrogation but a direct claim in his personal capacity.
23. The trial court therefore erred in invoking subrogation. As the Court of Appeal stated in *National Bank of Kenya Ltd v Wilson Ndolo Ayah* [2009] eKLR, courts are bound to apply the law and cannot sanction what is contrary to it. That misdirection, however, was not fatal, for the 1st Respondent's claim was independently sustainable as a direct cause of action cause of action in his own right.

Proof of Negligence

24. The Appellants contended that negligence had not been proved. The Court of Appeal in *Kiema Mutuku v Kenya Cargo Hauling Services Ltd* [1991] 2 KAR 258 held that there is no liability without fault, and that a plaintiff must prove negligence where the claim is based on negligence. The High Court in *Eastern Produce (K) Ltd v Osiro* [2006] eKLR reiterated that negligence is established through proof of duty, breach, and resultant damage.
25. The evidence established that the 2nd Appellant negligently dropped luggage on the highway and braked abruptly, creating a hazard. In an attempt to avoid collision, the 1st Respondent applied emergency brakes, whereupon the 2nd Respondent's vehicle collided into his from behind. This sequence was corroborated by the police abstract. The trial court apportioned liability at 70% against the 2nd Appellant and 30% against the 2nd Respondent. Apportionment of liability is a discretionary exercise, and on the evidence before me I find no misdirection. The allocation is not only factually sound but also accords with the broader policy that liability in road traffic cases should fall in proportion to culpability, so as to encourage vigilance and responsible conduct on the road.

Admissibility of Photographs

26. The Appellants further contended that the photographs annexed to the assessor's report were inadmissible for want of a certificate under section 106B of the *Evidence Act*. The Court of Appeal in *Republic v Barisa Wayu Matuguda* [2011] eKLR held that compliance with section 106B (4) is



a condition precedent to the admissibility of electronic evidence. The same principle was reiterated in *County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others* [2015] eKLR and in *Equity Traders Ltd v John & 2 others* [2020] eKLR, where the courts excluded photographs that had not been accompanied by the requisite certification.

27. In the present case, however, the assessor testified viva voce and produced his written report in court. The judgment of the trial court does not suggest reliance on the impugned photographs as the sole basis for its findings. The assessor's oral testimony and the written report were sufficient to prove the extent of damage. Even assuming the photographs were inadmissible, the report itself was properly admitted and provided an adequate evidentiary foundation for the trial court's findings.

Consideration of Submissions

28. The Appellants contended that the trial court ignored their submissions. The Court of Appeal in *Kenya Ports Authority v Kuston (Kenya) Ltd* [2009] 2 EA 212 held that submissions are not evidence and that the mere fact that a judgment does not specifically cite every submission does not mean they were ignored. What matters is whether the court considered the substantive issues.
29. In the present case, there is evidence that the judgment engaged with the core questions of liability, causation, and damages. I am therefore not persuaded that the submissions were disregarded.

7. Costs

30. The general principle is that costs follow the event, though the award of costs remains an exercise of judicial discretion as held in *Republic v Rosemary Wairimu Munene, Ex parte Applicant v Ibururu Dairy Farmers Co-operative Society Ltd* [2014] eKLR).

Conclusion

31. Having reviewed the record, I find that the date of the accident was proved. ownership of the motorcycle was established, and although the trial court erred in invoking subrogation, the error was immaterial since the claim was not a subrogated one. Negligence was proved and liability was properly apportioned. The complaint regarding uncertified photographs was of no consequence, as the assessor's report and oral testimony sufficed. The contention that submissions were ignored has no merit.
32. As was held in *Selle v Associated Motor Boat Co.* [1968] EA 123, an appellate court will not interfere with findings of fact unless they are based on no evidence, on a misapprehension of the evidence, or where the trial court is shown to have acted on wrong principles. The Appellants in this case have fallen short of meeting this exacting threshold.

Orders

32. From the foregoing analysis, I make the following orders:
1. This appeal has no merit and it is dismissed.
 2. The trial court judgment delivered on 13th October 2023 is upheld.
 3. Costs of the appeal are awarded to the 1st Respondent.
- It is so ordered.

DELIVERED AT NAIROBI THIS 25TH DAY OF SEPTEMBER 2025



WAMAE.T. W. CHERERE

JUDGE

Appearances

Court Assistant - Ubah

For Appellants - Mr. Muriithi for Ngithi, Koome & Associates Advocates

For 1st Respondent - N/A M.M.Muriuki & Co. Advocates

For 2nd Respondent - Omuga for Omuma Advocates LLP

