REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. E109 OF 2025

ELIDA ATIENO OCHOLA ……..……..... 1ST APPELLANT

DANIEL OTIENO …….....…….……. 2ND APPELLANT

WATU NOMINEES COMPANY LIMITED ……..…….. 3RD APPELLANT

- VERSUS -

IGNUS JUMA NYADENGE ……..… RESPONDENT

(Being an appeal from the Judgment and decree of Hon. J.K. Kimetto PM delivered on the 804/2025 in Maseno SPMCC No. E040 of 2022, Ignus Juma Nyadenge v Elia Atieno Ochola and 2 Others)

J U D G M E N T

1. The respondent filed the primary suit before the trial court vide a plaint dated **26/4/2022** for general damages and special damages of **Kshs. 22,464/-.** This was in respect of injuries sustained following a road traffic accident that occurred on or about the **14/01/2022**.

2. The appellants entered appearance and filed a statement of defence dated **23/08/2022** in which they denied the respondent's claim and claimed contributory negligence on his part.

3. The matter proceeded to trial and by a judgment delivered on **23/07/2024,** the trial court decreed as follows: -

    a) ***Liability 100%***

    b) ***General damages Kshs. 550,000/-***

    c) ***Special damages Kshs. 22,464/-***

Net award Kshs. 572,464/-

4. Being dissatisfied with the said judgment/decree, the appellants lodged this appeal vide the Memorandum of Appeal dated **6/05/2025** and raised eleven (11) grounds of appeal that can be summarized as follows: -

    a) The trial court erred in holding the appellants 100% liable for the accident in the absence of evidence proving such negligence.

    b) The trial court erred in in failing to find that the respondent departed from his pleadings and pursued an entirely different case in his evidence.

    c) The trial court erred in relying on police abstract that had been found to be irrelevant in determining ownership of motorcycle registration number KMFR 314L.

    d) The learned trial court erred in relying on the hearsay evidence of Pw3 whose evidence was irrelevant, inconsistent and amounted to inadmissible hearsay.

    e) The trial court erred in holding that the respondent's case was uncontroverted on account of the appellant's failure to call evidence whereas the respondent did not adduce any credible evidence.

    f) That the trial court erred in relying on unproduced documents to decide the case contrary to law.

    g) The trial court erred in law and in awarding special damages that were not proved.

5. On **23/6/2025**, the Court directed that the appeal be disposed off by written submissions. However, as at the time of writing this judgment, only the appellant's submissions were on record.

6. The appellants submitted that the trial court misapprehended the evidence presented before it and proceeded to apportion liability based on unpleaded facts. That the trial court relied on an un-produced document, the police abstract, to establish ownership of the motorcycle alleged to have caused the accident.

7. That there were inconsistencies in the respondent's evidence regarding how the accident occurred and thus, even if the trial court was to apportion liability, it ought to have apportioned liability equally between the appellants and the respondent.

8. That the only proven special damages amounted to **Kshs. 4,000/-** as the invoice for medical expenses of **Kshs. 20,414/-** did not amount to evidence of payment.

9. This being a first appeal, the Court is duty bound to evaluate the evidence before the trial court afresh and come to its own independent findings and conclusions. See **Selles & Anor v Associated Motor Boat Co Ltd & Others [1968] EA 123.**

10. In **Gitobu Imanyara & 2 others v Attorney General [2016] eKLR**, the Court of Appeal held that: -

> ***"This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the***

High 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 allowances in this respect."

11. Before the trial court, the respondent testified as **Pw1**. He adopted his witness statement dated **26/02/2022** as his evidence in chief. He told the court that he was riding his motorcycle when he was knocked down on the centre of his right side by an oncoming motorcycle. That as a result of the accident, he sustained injuries, a fracture to his right hand and head as well as other injuries below his armpit.

12. That he lost sight in his right eye, could not see properly with his left and could not lift his right hand. He produced his ID as **PExh1**, demand letter as **PExh5**, Invoice from JOOTRH dated **21/01/2022** as **PExh6(a),** a receipt from **Dr. Okombe** for **Kshs. 1,500/-** as **PExh6(b)**, search from NTSA as **PExh8** and a receipt from Iris Eye Clinic for **Kshs. 2,500/-** as **PExh10**.

13. **Pw2 Professor Were Okombo** testified that, he examined the respondent on the **14/02/2022** for injuries alleged to have been sustained in a road traffic accident. That the respondent had sustained a fracture to the head and right hand, bruises on the right shoulder, knee and leg. That during his examination, the respondent had not yet recovered and he recommended that he continues to receive treatment and engage with physiotherapy. He produced his medical report dated **14/02/2022** as **PExh7**.

14. **Pw3 George Muita,** a Senior Clinical Officer at Ahero County Hospital testified that he examined the respondent on the **25/01/2022**, a week after the accident. On examination, he noted that the respondent had received treatment where he was stitched, had an X-ray done on the right hand, a CT scan of the head and plaster applied to the right upper limb. He produced the P3 Form dated **25/01/2022** as **PExh3**.

15. **Pw4 PC Hillary Masiga** testified on an accident that occurred on **4/04/2019** which was not the accident subject of this suit. His testimony thus had no probative value.

16. On the **8/10/2024,** the parties agreed to produce an X-ray report dated **12/09/2022** and medical report by **Dr. Tobias Otieno** as **PExh11** and **DExh1**, respectively.

17. The respondent closed his case and the appellants similarly closed their case without calling any witness in their defence.

18. On liability, the appellants were held 100% liable for causing the accident. In **Stapley v Gypsum Mines Limited (2) (1953) A.C 663 at P. 681** reiterated in the case of ***Ndatho v Chebet (Civil Appeal 8 of 2020) [2022] KEHC 346 (KLR) (16 March 2022) (Judgment)*** Lord Reid reasoned that: -

> ***"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 fact of each particular case. One may find that a matter of history, several people***

have been at fault and that if anyone 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 cause the accident. I doubt whether any test can apply generally."

19. It is trite law that he who alleges must prove. ***Section 107 (1) of the Evidence Act, Cap 80 Laws of Kenya***, provides that: -

"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."

20. In **Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334**, the Court of Appeal held that: -

"As a general proposition under Section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

21. Accordingly, it was the respondent's duty to produce evidence that the appellants were liable for causing the accident that led to him getting the injuries pleaded.

22. The appellants submitted that the trial court misapprehended the evidence presented before it and proceeded to apportion liability based on unpleaded facts.

23. In paragraph 6 of his plaint dated **2/04/2022**, the appellant pleaded as follows: -

> ***"On or about the 14/1/2022 the plaintiff was carefully riding a motor bike Reg No. KMFM 12E of Honda make along Kisumu – Bondo road while at Obambo area the plaintiffs motor bike was hit by M/V REG No. KMFR 314L of TVS make while carelessly and recklessly driving at a very high speed caused the said motor bike to veer off its lane and onto the plaintiff's motor bike lane and thereby hitting his motor bike. As a result of the impact, the plaintiff sustained injuries and damages which he blames on the negligence and claims herein."***

24. At the trial, the respondent adopted his written statement dated **26/04/2022** as his evidence in chief and in paragraph 2 of the said statement he stated: -

> ***"While at near Obambo area, our said motor bike was hit by another motor bike Reg No. KMFR 314L of TVS make. Its rider who was carelessly and dangerously riding at a very high speed entered the main road from a feeder road without first stopping and thereby causing the said motorbike to hit ours."***

25. The respondent went further into details in his testimony by stating "***that he was riding his motorcycle when he was knocked down on the centre of his right side by an oncoming motorcycle.***"

26. From the foregoing, it is clear that contrary to the allegations by the appellants, it is clear that the evidence presented by the respondent supported his pleadings on the nature of how the accident occurred.

27. Juxtaposed against this testimony, is that the appellants did not call any evidence in support of their defence. They failed to give any version of events that was contrary to what the respondent had alleged and testified on. They never challenged or contradict the testimony of the respondent.

28. In **Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 14 others [2012] eKLR,** the court stated as follows: -

> ***"In my view, a statement made on oath should as a matter of fact be expressly denied on oath. If not challenged, it remains a fact and the truth for that matter."***

29. In **Moltex Knitwear limited v Gopitex Knitwear Mills limited Nairobi (Milimani) HCCC No., 834 of 2002**, Lessit, J (as she then was) citing the case of ***Autar Singh Bahra and another v Raju Govindji, HCCC No. 548 of 1998*** appreciated that:

> ***"Although the defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and counter-claim are***

unsubstantiated. In the circumstances, the Counter-claim must fail."

30. In **Trust Bank Limited v Paramount Universal Bank Limited & 2 others Nairobi (Milimani) HCCS No 1243 of 2001,** the court stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements that are unsubstantiated. In the same vein, the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them remained uncontroverted and therefore unchallenged.

31. In **Karuru Munyororo v Joseph Ndumia Murage & another Nyeri HCCC No 95 of 1988**, Makhandia, J (as he then was) held that: -

"The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon."

32. In the circumstances, I am persuaded that the trial court considered the evidence tendered within the appropriate legal framework in arriving at a sound finding that the respondent had proved his case on a balance of probabilities. The appellants Statement of Defence remained mere statements devoid of any evidential value.

33. Accordingly, I find no basis upon which this Court can interfere with the trial court's finding on liability.

34. The appellants also impugned the judgement on account that the same was based on an irrelevant police abstract, whose authenticity was wanting and further that, the testimony of **Pw3**, amounted to hearsay.

35. It is worth noting that **Pw4 PC Hillary Masiga** testified on an accident that occurred on **4/04/2019** which was not the accident the subject of this suit. The trial court, at page 2 paragraph 2 of the judgment proceeded to dismiss the testimony of **Pw4** holding that the same had no "***probative value or nexus connecting it with the abstract as he also admitted that he did not investigate the case but one PC woman Charity Kathure did. He just produced the abstract and it forms part of the exhibits to be considered and analysed.***".

36. A further reading of the record reveals that the trial court did not proceed to consider the said abstract. The allegation that the trial court relied on the police abstract in determining ownership of motorcycle registration number **KMFR 314L** is therefore unfounded.

37. To the contrary, in the second last paragraph of page 2 of the judgment, the trial court determined ownership based on **PExh8,** a copy of records from NTSA, that was produced by consent of all parties on the **8/10/2024.** The said copy of records showed that the said motorcycle was registered in the name of the 3rd appellant.

38. The trial court proceeded to note that: -

> ***"… whereas the abstract shows that, the 1st defendant was the insured/beneficial owner and the 2nd defendant was the rider. A charge of careless driving was preferred against the rider. With the above evidence on record, I conclude that the plaintiff did not just***

imagine the defendants' m/vehicle registration number and decided to sue but I find that he has the preponderance of evidence over the nil evidence tendered by the defendants."

39. As earlier stated, the mere fact that the appellants did not call evidence in support of their case did not absolve the respondent from proving his claim against them. Indeed, to suggest that the minute a defendant participates in a trial and does not call evidence, a plaintiff's case is proved, would breed an absurdity. See **Margaret Wanjiru Ndirangu & 4 others v Attorney General [2020] KECA 683 (KLR)**.

40. In this regard, it is immaterial that the appellants did not call evidence. They were not bound to, so long as they did not admit the claim. That is the law as confirmed in **Dave v Business Machine Ltd [1974] E.A 69** where the Court held that: -

"Now if an appearance had been entered and the defence filed and if only failure on the Defendant's part had been failure to appear, either personally or through his advocate on the day the suit was called on for hearing, then I think the plaintiff ought to have been called upon formally to prove his claim, that is to say, to prove everything the burden of proof of which, on the pleadings, lay on him in order to establish his claim. [He did not do so]".

41. In **Charterhouse Bank Limited (Under Statutory Management) v Frank N. Kamau [2016]** eKLR, the Court of Appeal held: -

"The suggestion, however, implicit in some of the decisions quoted above, that in all and sundry civil cases the failure by the defendant to adduce evidence in support of his defence means that the

plaintiff's case is proved on a balance of probabilities cannot possibly be correct. It is also obvious to us that in some of those decisions the question whether the plaintiff has, in the absence of evidence from the defendant, proved his case on a balance of probabilities, was conflated and confused with the distinct issue of the effect of the defendant's failure to testify when he had filed a defence and a counter-claim. While the defendant's failure to testify has fatal consequences for the counter-claim because the onus is on him to prove it on a balance of probabilities, it does not necessarily have the same consequence for the defence where the onus is on the plaintiff to prove his claim on a balance of probabilities ...".

42. Consequently, the evidence on record shows that the respondent only proved ownership of motorcycle registration no. **KMFR 314L** on the part of the 3rd appellant. This is so since the abstract showing the 1st and 2nd appellants' as beneficial owner and rider of the suit motorcycle respectively was merely marked for identification and was never produced as an exhibit.

43. Finally, on the issue of special damages, the appellants pleaded and submitted that the only proven special damages amounted to **Kshs. 4,000/-** as the invoice of medical expenses for **Kshs. 20,414**/- did not amount to evidence of payment.

44. However, I do note that despite the fact that the respondent did not adduce a receipt from JOOTRH but rather an invoice, there was a receipt dated **22/01/2022** for **Kshs. 20,606**/- attached to the respondent's plaint as part of her pleadings.

45. It is my view that a receipt that is not formally presented as proof of special damages but is included in supporting documents can still be considered as evidence if the court examines it as part of the overall set of proofs. I opine that an invoice is but a proof of liability or obligation on the part of the claimant to settle the same. It is proof of special damage. It remains an obligation to pay. The same was therefore proved.

46. Consequently, I find that the award of special damages was proven by the respondent to the required standard and as such, I find no reason to interfere with the finding of the trial court on the same.

47. The upshot of the above is that I find that this appeal by the 1st and 2nd appellant succeeds but the 3rd appellant fails.

48. The trial court's judgment and decree is hereby set aside as follows;

49. Judgment is hereby entered for the respondent against the 3rd appellant as follows: -

    a) ***Liability 100%***

    b) ***General damages Kshs. 550,000/-***

    c) ***Special damages Kshs. 22,464/-***

    Net award Kshs. 572,464/-

It is so decreed.

DATED and **DELIVERED** at Kisumu this **31st** day of **October, 2025**.

A. MABEYA, FCI Arb

JUDGE