

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA NAIROBI**  
**CIVIL APPELLATE DIVISION**  
**HCCA E051 OF 2024**

**STEPHEN KAVUKUA.....1<sup>ST</sup> APPELLANT**

**VERSUS**

**PETER KIOKO NDOLO.....**  
**RESPONDENT**

**GILBERT MWACHOFI KITOLOME.....**  
**RESPONDENT**

**JUDGEMENT**

1. This is an Appeal against the decision of the Lower Court finding on a material damage Claim. The history of this matter is that the Claimant sued the Respondent for an accident that occurred causing damages to his Motor Vehicle which he later repaired. I have read the submissions and it is my opinion that the key issue to be determined is liability given inconsistencies bedeviling this case. The trial Magistrate had to summon one PC Mwanake who was the investigating officer to explain the discrepancy in the matter and to clarify why two distinct Police abstracts were issued over the same accident. One abstract blamed KCV 642K while the other stated that the matter was pending investigation. This to me is a serious matter and it is my

hope that the Police will investigate this matter because it is an impediment to Justice delivery.

2. The Plaintiff testified that his vehicle was hit on the rear side by the defendant's Vehicle. According to the PW2, the Defendant who was behind him wanted to overtake his motor vehicle and when he saw an oncoming car, he had to swerve back to the lane right behind the Plaintiff's motor vehicle and as a result, he hit the Plaintiff motor vehicle on the rear right side. The impact on the Defendant Motor Vehicle was on the front left side. In Re-examination, the Plaintiff said that there was a car between his car and the Defendant vehicle with him (Plaintiff) being in front. This evidence was corroborated by Pw3 who allegedly saw the accident happen. PW1, the owner of the Motor Vehicle said that the police abstract issued on the 19th day of June 2023, blamed the Defendant's Motor vehicle. This was further supported by photos in the assessment report which was produced as an exhibit. On his part, DW1 testified that he was on the main road when the Plaintiff Motor vehicle which was being driven at a slow speed joined the road from Huruma flats. He said that the Plaintiffs car was hit on the right rear side (From his photos) but denied that the Plaintiff's exhaust which was bend was as a results of the accident. He further said that the left front side of his motor vehicle was damaged as a results of the accident. In cross examination, the Dw1 said that his motor vehicle was

damaged from the front left side to the rear and that if he had hit the Plaintiff motor vehicle on the rear, the bumper of his motor vehicle could have been damaged.

3. From the evidence of the witnesses, it is clear that they have given different versions on how the accident occurred and at this juncture I will go all the way to create imagines on possible scenarios as per their descriptions. Below therefore are the possibilities of how the accident occurred;

**The Plaintiff description of the accident:**

4. The Plaintiff said that his motor vehicle was hit on the rear right side by the Defendant's front left side. The photo produced appears to support this version. according to the Plaintiff and his witnesses, the Defendant attempted to overtake the Plaintiff's motor vehicle but upon seeing an oncoming motor vehicle, he swerved back to the lane he was using with the plaintiff causing the accident. The question therefore is, in a such scenario, can the vehicles be damaged as depicted in the photos? To interrogate this deeply, I have drafted a sketch which I mark as "A". In the sketch, the point of impact on both vehicles clearly aligns itself to the description by the plaintiff on how the accident occurred. When the Defendant vehicle swerved to the left, it is very possible for it to hit the rear right side of the Plaintiff vehicle. In fact, the Defendant agreed that the left front side

towards the rear of his vehicle was damaged. The explanation by the defendant that had he hit the Plaintiff motor vehicle from behind, the bumper of his motor vehicle could have been damaged cannot be the only explanation of an accident in such circumstances. This is because it is possible that when the Defendant swerved to the left, the Plaintiff's motor vehicle was still on its side and the swerve was not 'complete' so as to hit the plaintiff motor vehicle in the rear bumper. In other words, the Defendant's motor vehicle simply 'slapped' the Plaintiff's Motor vehicle on the right rear side while attempting to return to their lane.

### **The description by the Defendant.**

5. The Defendant said that he was on the highway when the Plaintiff joined the Junction without giving way. I have drafted possible scenario based on this testimony. In the first sketch which I mark as "B" there is an assumption that the Plaintiff motor vehicle was joining the road from the right to the left side of the Defendant motor vehicle which is at the main road. From the sketch it can be seen that if this was the case, the Plaintiff's Motor vehicle would have been hit on its left rear side and not right rear side as agreed by both parties meaning that this would not be the case. In the second scenario, Sketch 'sketch C' if the Plaintiff's motor vehicle was joining the road from the left side of the Defendant motor vehicle to the right side, the damage on

the Defendant motor vehicle would have been on the front right side and not front left side as per the evidence by both parties. Clearly therefore, the description on how the accident occurred by the Defendant is impractical and goes against his very same evidence. The issue raised as to whether the Plaintiff was drunk or not is bereft of prove and besides not all "drunk" drivers are responsible for all accidents.

6. The onset of the above is that I find that the accident occurred as described by the Plaintiff. Traffic rules are clear on overtaking or the car behind. To this end, I find the defendant liable at 100%.

### **Quantum**

7. The trial Court's finding on quantum was correct and based on receipts specially this being a claim under material damages and so I shall not interfere

### **Conclusion**

8. The trial Magistrates apportionment of liability is reversed by my finding that the Defendant was liable at 100% otherwise quantum will remain the same. The Respondent shall have costs of this Appeal.

**DATED, DELIVERED VIRTUALLY AND SIGNED ON THIS 17<sup>TH</sup> DAY OF NOVEMBER 2025.**

**HON L P KASSAN**

**JUDGE**

**In the presence of;**

Opatu for Appellant

No appearance for Respondent

Carol - Court Assistant

**30 days stay granted**

ORIGINAL