

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
CIVIL APPEAL NO. E339 OF 2024

CAR & GENERAL (TRADING) LIMITED.....
APPELLANT

-VERSUS-

JAMES MACHARIA.....RESPONDENT

(Being an appeal from judgment and decree of the Small Claims Court at Ruiru (Hon. T.J. Khalimesi PM) claim number E470 of 2024 dated 15th November 2024)

JUDGMENT

The respondent had sued the appellant in the Ruiru small claims court seeking compensation in form of special and general damages arising from an accident that occurred on 21-03-2023 involving motor cycle registration number KMEL 122Q (hereinafter referred to as 'the motor cycle') which was alleged to belong to the appellant, motor vehicle registration number KDB 240V and the respondent. The appellant denied owning the motor cycle and upon hearing, the trial court found the appellant 100 per cent liable and awarded the respondent Kshs 150,000.00 in general damages, Kshs 5,550 in special damages, costs of the suit and interest.

The above judgment gave rise to this appeal in which the appellant has raised the following five grounds of appeal;

1. *That the learned trial Magistrate erred in fact and in law by according liability to the appellant despite the fact that the appellant was not the owner*

in possession, control and/or management of the suit motorcycle at the time of the accident.

- 2. That the learned trial Magistrate erred in fact and in law by failing to consider the appellant's submissions and authorities on liability hence arriving at an erroneous decision.*
- 3. That the learned trial Magistrate erred in fact and in law by awarding damages that were inordinately high to constitute a miscarriage of justice in the circumstances of the case.*
- 4. That the learned Magistrate erred in fact and in law on ownership and liability despite proof given by the appellant contrary to the decisions of superior courts.*
- 5. That the learned trial Magistrate's judgment was wholly not supported in law by evidence tendered in court by the parties.*

This appeal was heard by way of written submissions with the appellant filing submissions dated 24-07-2025 and the respondent filing his submissions dated 20-08-2025. The main contest in the appeal is ownership, possession and control of the motor cycle and the quantum of general damages for pain and suffering.

In his submissions, the respondent has raised a preliminary point which needs to be disposed of before the court delves into the merits of the appeal. The respondent has submitted that this appeal is on matters of facts and as such this court lacks jurisdiction over it pursuant to Section 38(1) of the Small Claims Court Act which provides as follows;

‘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.

It is true that appeals to this court from the small claims courts are restricted to matters of law only. Where the law restricts appeals to matters of law only, the appellate court should not interfere with the trial court's findings on facts unless the decision is too irrational or perverse that it should not be allowed to stand. The Court of Appeal in ***Charles Kipkoech Leting v Express (K) Ltd & another (2018) KECA 187 (KLR)***, emphasised this legal position by holding 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 versus Mugiria [1983] KLR 78, Kenya Breweries Ltd versus 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 versus 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.’*

A matter of law is that which seeks to interrogate the application of the law to facts pleaded or advanced by the parties in their evidence. The memorandum of appeal in this matter talks of errors of law and facts. For the court to decide whether an appeal is based on matters of law or facts, it needs to go beyond the memorandum of appeal and look into the issues in contest. The fact that the memorandum states that there are errors of law or fact does not mean that the court should take what the memorandum says without analysing the issues in contention. The court should not be swayed by the way the grounds of appeal are couched.

At the centre of the appeal on liability is the trial court's finding that the appellant was liable despite there having been evidence that it had sold the motor cycle to Khetia Drapers Limited. If indeed there was evidence that the appellant had sold the motor cycle or had no possession, control or beneficial interest in the same and the court disregarded that evidence, that in my view would fit into the bracket of matters of law. It would in my view be perverse for the trial court to go against clear evidence produced before it and the appellate court would be justified to interfere with the decision even in cases where appeals are limited to matters of law. The appellant is questioning applicability of Section 8 of the Traffic Act and whether the appellant sufficiently rebutted the assumption of the law under the said Section. In these circumstances, I hold that this court has jurisdiction to entertain this appeal on issue of liability.

It is trite that a first appellate court must handle the appeal as if it was conducting a re-hearing of the case where it must re-evaluate the evidence produced by the parties in the trial court and come to its own independent conclusion but always bearing in mind that it did not take the evidence of the witnesses and did not have an opportunity to observe their demeanour.

In view of the above position in law, this court will re-look into the evidence of the parties relevant to the finding on liability. Going by the submissions of the parties, I discern that the contest on liability is based on ownership of the motor cycle and not how the accident occurred or negligence and that is where I will restrict my analysis and determination.

According to the statement of claim, the motor cycle was at the time of the accident being driven by the agent of the appellant. The respondent produced a police abstract dated 24-03-2023 which showed the owner of the motor vehicle registration number KBD 240V was one Fred Muathi. When it came to the motor cycle, the abstract only showed its details without disclosing the owner of the same. In addition, the respondent produced a copy of record which shows that the motor cycle was registered to the appellant.

In normal and ordinary circumstances, a victim of a road traffic accident would not know the owner of the vehicle involved and is reasonably expected to conduct a search and preliminary investigations. The victim cannot do that elsewhere except from the custodian of the details and proprietorship of motor vehicles. Once the victim produces documents from the custodian that shows the registered owner, the burden to prove ownership otherwise than what is shown in the documents is on the registered owner. In ***Muhambi Koja v Said Mbwana Abdi (2015) KECA 635 (KLR)***, it was held that;

‘To begin with, in the absence of evidence to the contrary, the registration certificate or log book of a motor vehicle or an extract of the record issued by the Registrar of Motor Vehicles constitute the best evidence to prove ownership of a motor vehicle.’

In response to the claim, the appellant stated that it had merely sold the motor cycle to Khetia Drapers Limited who had the actual, possessory and beneficial ownership thereof. When it came to evidence, the appellant called one Joseph Mulwa who was its administrative, legal, and compliance clerk. He testified that the appellant was a motor cycles dealer engaged in the supply and sale of motor cycles and tricycles. He added that, the appellant had sold the motor cycles to Khetia Drapers Limited and that the said Khetia Drapers Limited were not their agent.

In cross-examination, the appellant's witness admitted that the appellant was the registered but not beneficial owner of the motor cycle. He produced invoice dated 24-04-2018, police abstract dated 24-03-2023 and the appellant's list of employees as at 31-03-2023. The details in the police abstract were the same as that produced by the respondent while the list of employees had nothing to do with proof of ownership of the motor cycle. The only relevant document in proof of liability was the invoice.

The invoice which is also titled as a delivery note shows the customer as Khetia Drapers Limited. It has list of fourteen motor cycles which were allegedly sold to the customer at a total price of Kshs 1,302,000.94 inclusive of VAT with payment period being 21 days. The motor cycle in question in this matter was one of them. There is nothing in the invoice to show that these motor cycles were delivered to Khetia Drapers Limited which is shown to have been based in Kitale other than in some terms and conditions shown thereunder stating that it undertook to take possession within thirty days and conversely thereunder also acknowledged taking possession. In my assessment, the above invoice does not amount to delivery.

There is nothing to show that this invoice was paid neither is there evidence that the customer paid for the motor cycles. The owner of a motor vehicle is under a legal obligation to notify the registrar of motor vehicles of any change of ownership and whoever fails to do so should be held liable for any damage or loss to third parties. The appellant did not even attempt to show that it transferred ownership of the motor cycle to the said Khetia Drapers Limited. The invoice is dated 24-04-2018 while the accident occurred on 21-03-2023. I refuse to accept that the appellant just sat pretty for almost five years holding onto a motor cycle it had sold. If indeed it did so, it should take responsibility for that indolence.

The appellant has submitted that the police abstract it produced shows that the motor cycle was insured in the name of Emmanuel Karani and that was enough for the court to find in its favour. The alleged evidence of insurance is said to be the police abstract produced as defendant's exhibit 2. I have not seen those details in the police abstract and even if they were there, I take position that it would not be enough proof of ownership of the motor cycle by the said Emmanuel Karani. It would even complicate the issue for the appellant. The appellant's defence was pegged on the allegations that it had sold the motor cycle to Khetia Drapers Limited. The appellant did not show correlation between the said company and the person it referred to as Emmanuel Karani. The onus was on it.

The appellant did not see it fit to issue a third-party notice to the said customer and the court being a court of law, it could only rely on evidence produced before it. The only evidence available to the court was that the motor cycle was registered to the appellant and it was entitled and right to find as it did. I see no reason of disturbing the trial court's finding on liability.

On quantum which is of course a matter of law, the appellant claims that the damages awarded were too high. I have looked at the injuries sustained by the respondent which were blunt injury to the right side of the pelvic and blunt injury to the right leg. I have also compared the injuries with those involved in authorities cited by the parties. The appellant proposes that the quantum should be in the region of between Kshs 50,000.00 and Kshs 100,000.00 and asks this court to award Kshs 75,000.00 while the respondent maintains that the award by the trial court was reasonable and adequate. Each of the parties cites authorities which pulls in their favour.

In my view, the award of Kshs 150,000.00 was not too high as to amount to an erroneous estimate. It is trite that an award of damages is at the discretion of the trial court and an appellate court should be hesitant in interfering with the same unless it is demonstrated that the quantum was too high or too low as compared to other decided cases of similar nature or the court considered a factor it should not have considered or failed to consider a factor it should have considered.

Based on what I have stated above, I find this appeal lacking in merits. The same is dismissed with costs to the respondent.

Dated, signed and delivered at Nairobi this **28th** day of **November**
2025.

B.M. MUSYOKI
JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Mr. Kamau Muriuki for the appellant and Miss Penza holding brief for Mr. Njagi for the respondent.

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