

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
CIVIL DIVISION
CIVIL APPEAL NO. E072 OF 2023

JACOB MUIRURI GITHAMBO **APPELLANT**
VERSUS
PETER NZIOKA SAMMY **RESPONDENT**

(Being an Appeal from Judgement of Hon. I. F Koome, Senior Resident Magistrate in Thika Civil Suit No. E443 of 2022 delivered on 7 December 2023)

JUDGEMENT

1. By Plaintiff dated 3 August 2022, the Appellant instituted proceedings against the Respondent seeking:
 - (i) General damages for pain, suffering and loss of amenities;
 - (ii) Special damages
 - (iii) Loss of earnings for 4 months;
 - (iv) Costs and interests of the suit.

2. The particulars of the suit are that on 8 March 2022, the Appellant is said to have been offloading sand from a motor vehicle registration number KCL 267Y registered in the name of the Respondent at Maguguini Shopping Centre, when the said vehicle took off without warning and ran over the Appellant. As a result of the accident, the Appellant sustained serious injuries, which included blunt injuries to the head and anterior chest wall and bruises to the right hand.

3. The Appellant's case, supported by his testimony as PW2, was that on the material date, he was engaged as a casual sand loader. He testified that he was lawfully aboard the Respondent's lorry, in the process of offloading sand, when the Respondent's driver, Peter Mbunzi King'oo, DW1, negligently and without warning, drove the motor vehicle forward. As a result, the Appellant was thrown off the lorry and was ran over by the rear wheels, thus sustaining severe injuries.
4. The Respondent's case, advanced through the testimony of the driver, DW1, was that the Appellant was not offloading sand. DW1 testified that the lorry was already in motion, proceeding to an offloading site. He stated that he did not see the Appellant but suddenly heard screams from members of the public, which caused him to stop. Upon alighting, he was informed that the Appellant had attempted to hike a ride by unlawfully clinging to the rear right side of the moving lorry, but had slipped, fallen, and was consequently run over by the rear right tyres.
5. In the Statement of Defence, the Respondent pleaded the defence of *volenti non fit injuria*, asserting that the Appellant was the author of his own misfortune.
6. In its judgement, the trial court dismissed the Appellant's suit with costs, finding that the Appellant had failed to prove his case against the Respondent on a balance of probabilities and holding the Appellant 100% liable for the accident.
7. Aggrieved by the judgement, the Appellant lodged this appeal, raising 16 grounds. These grounds can be consolidated into 2 primary issues for determination by this Court: Liability and Quantum.
8. The appeal was canvassed by way of written submissions.

Analysis and Determination

9. The duty of a first appellate court is well settled. It entails revisiting, re-evaluating and considering afresh the evidence presented before the trial court for the appellate court to make its own independent conclusions bearing in mind that unlike the trial court, it did not have the benefit of seeing or hearing the witnesses and give due allowance for that disadvantage. This was set out in the case of ***Selle & Another vs Associated Motor Boat Company Limited, [1968] EA 123.***

10. It is trite that though an appellate court has mandate to interfere with findings of fact made by a trial court, this mandate should be exercised cautiously and only when it is clear that the trial court's decision or finding of fact was not based on any evidence or was based on a misrepresentation of the evidence or on wrong legal principles.

11. In adherence to this binding principle, this Court has meticulously re-examined the Record of Appeal, the documentary exhibits produced and the submissions filed by both parties, to determine whether the trial court's conclusions can be supported.

12. The Appellant's 16 grounds of appeal are almost entirely dedicated to challenging the trial court's finding on liability. The central thrust of the appeal is that the trial court believed the wrong narrative and gave improper weight to the documentary evidence. This Court shall analyse the key pillars of the evidence.

The Fatal Contradiction

13. The most significant challenge to the Appellant's case arose not from the defence, but from the Appellant's own evidence. The Appellant testified that when the lorry came, he and others climbed on it and were in the process of offloading the sand, when the driver moved. He fell. To support his case, the called PW1, PC Lisbeth Bundi, who produced the Police Abstract (Plaintiff Exhibit 1). PW1 testified that the victim was a pedestrian, and confirmed this on cross examination.
14. The Police Abstract produced by the Appellant as a supporting document identifies the Appellant as a person injured, and listed him as a pedestrian.
15. It is a fundamental principle of evidence that a party is bound by the testimony of their own witnesses, unless that witness is declared hostile and cross-examined. PW1 was not declared hostile. The trial court was, therefore, presented with two irreconcilable versions from the Appellant's case alone: (1) PW2's claim of being a lawful loader *on* the lorry, and (2) PW1's testimony and Plaintiff's Exhibit 1, which placed the Appellant off the lorry as a pedestrian.
16. This internal contradiction did not merely weaken the Appellant's case. It fatally undermined the very foundation of his claim. The trial court did not err in identifying and relying upon this contradiction. It created profound and justifiable doubt as to the veracity of the Appellant's entire narrative.

The Sole Eyewitness

17. The Appellant argues that his testimony as the sole eyewitness to the negligent act of the driver ought to have been preferred over the testimony of DW1, who admitted that he did not witness the accident. The Appellant cited Stephen *Kivuti Kiura v Anastacia Murugi Muthui & another eKLR*, where

a driver who claimed he only heard a bang and did not see the pedestrian he hit was found 100% liable. The Appellant's reliance on the *Kivuti case* is misplaced. In that case, the driver had a clear duty to observe the pedestrian, who was lawfully on the side of the road before the driver veered off the road and struck him. The driver's failure to see what he ought to have seen was the very essence of his negligence.

18. The present case is distinguishable. DW1's admission that he did not see Appellant is not, in itself, an admission of negligence. On the contrary, it is entirely consistent with the Respondent's narrative. A driver's primary duty of care is to observe the road ahead of him. DW1 testified that he was concentrating on moving ahead. This duty does not ordinarily extend to maintaining a simultaneous watch for persons attempting to unlawfully board the rear or sides of a moving commercial vehicle. Therefore, the DW1's admission that he did not see the Appellant does not assist the Appellant's case. It corroborates the Respondent's narrative that the incident occurred out of the driver's line of sight, at the rear of the vehicle.

The Probative Value of Documents Admitted by Consent

19. This was a major point of contention. At the close of the defence case, the Appellant's counsel agreed to have a report produced by consent and proceed to submit on its contents. The trial court then recorded that the Defendant's case was closed. The report in question was the Investigation Report by Forefront Investigators Ltd dated 24 March 2022 (Defendant Exhibit 1).
20. The Appellant now argues that the trial court erred in relying on the Report, terming it as hearsay, one-sided and biased. The Report contains a verbatim transcript of the Ngoliba Police Station OB entry No. 14/8/3/2022, which states:

"...when one Jacob Muiruri Githambo tried to steal a ride by hiking or climbing the said lorry using the right side in order to go and offload sand and in the process slipped and fell and his right leg was run over by the right rear tyre of the said vehicle."

21. In his submissions, the Appellant relied on ***Techard Steam & Power Limited sv Mutio Muli & Mutua Ngao eKLR***, which cited with approval the finding in ***Erastus Wade Opande vs. Kenya Revenue Authority*** that "equally the contents of a police file in respect of police investigations in the accident cannot become evidence in a civil suit even if such file is put in evidence by consent."

22. In opposition, the Respondent relied on ***Eldoret Express Company Limited v Nandabelwa KEHC 3226 (KLR)***. In that case, a party consented to the production of a medical report and later tried to challenge its contents on appeal. The High Court held:

"The Appellant having consented to the production of the only evidence on record cannot at the appellate stage, seek to impugn its authenticity... Having consented to the production of the Report, the Appellant cannot go behind it to request the Court not take it into consideration..."

23. The holding in the ***Techard Steam case (supra)*** is specific to police file, which is a public document comprising a collection of raw, unverified and often preliminary statements. The Investigators Report herein is a different class of document: it is a private expert report, prepared for the specific purpose of the litigation, containing an investigator's findings and conclusions.

24. By expressly consenting to the admission of this report without calling the maker, the Appellant's counsel waived the right to cross-examine the investigator. This waiver covers any objections as to the Report's methodology, the sources it relied upon (including the OB entry), or its alleged "one-sided" nature. The Appellant is now estopped from raising these issues on appeal. The principle articulated in ***Eldoret Express case (supra)*** is the more appropriate one in these circumstances.
25. The trial court was, therefore, fully entitled to receive the report and assign probative value to its entire contents, including the OB extract, which strongly corroborated the Respondent's version of events. The Appellant's grounds of appeal (a), (b), and (c) are consequently found to be without merit.

The Police Abstract

26. The Appellant correctly argues that the findings of the police investigations are not binding on a civil court. This Court affirms the principle from the Court of Appeal in ***Calistus Ochien'g Oyalo & Others vs. Mr. & Mrs. Aoko, Civil Appeal No. 130 of 1996***, which held that police do conduct their investigations for their purpose and a party cannot be expected to direct them on how to do it. The police decision to charge, or not to charge, is not conclusive proof of civil negligence.
27. However, the trial court did not treat the Police Abstract as binding. The court treated it as evidence. It was a piece of evidence, produced by PW 1 whose contents formed one part of a consistent body of evidence that included PW1's oral testimony and the OB entry in Defendant Exhibit. 1. The trial court's error was not in considering the abstract, but rather the Appellant's error was in adducing evidence that contradicted his own case.

Volenti Non Fit Injuria

28. Having re-evaluated the evidence in its totality, the Court must determine which narrative is more probable. The Appellant's version stands alone, uncorroborated, and is directly contradicted by PW1 and his own documentary exhibit (P Exb. 1). The Respondent's version is internally consistent and is strongly corroborated by the testimony of PW1, the Police Abstract and the OB entry in the Forefront Report. The balance of probabilities tilts overwhelmingly in favour of the Respondent. This Court finds as a fact that the Appellant was not offloading sand but was injured while attempting the dangerous and unlawful act of climbing on to a moving commercial vehicle.
29. The Respondent pleaded the defence of *volenti non fit injuria*. The Appellant, by his own volition, exposed himself to the obvious and inherent danger of attempting to board a moving lorry. He was, as the trial court correctly found, the author of his own misfortune. This finding is consistent with judicial precedent, such as in ***Ndeto Nzioka Isavi v Abednego Muiwa Juma & another eKLR***, where a plaintiff who attempted to alight from a moving canter was found to have been the author of his own misfortune.
30. For the foregoing reasons, this Court finds that the Appellant failed to discharge the burden of proof to the required standard. The trial court's finding on liability was sound, comprehensive and fully supported by the weight of the evidence on record.
31. The appeal is hereby found to be without merit and is consequently dismissed. Costs are awarded to the Respondent, assessed at Kshs 50,000/=.

Dated and Delivered at THIKA this 21 day of NOVEMBER

2025

**HELENE R. NAMISI
JUDGE OF THE HIGH COURT**

Delivered virtually in the presence of:

For Appellant: N/A
For Respondent: Ms. Pyoko
Court Assistant: Lucy Mwangi

Judgement