Lekuraiyo (Suing on behalf of Winfred Naisherua) v Kobia (Civil Appeal E026 of 2024) [2025] KEHC 18181 (KLR) (Civ) (3 December 2025) (Judgment)

Neutral citation: [2025] KEHC 18181 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ISIOLO

CIVIL

CIVIL APPEAL E026 OF 2024

SC CHIRCHIR, J

DECEMBER 3, 2025

BETWEEN

LAZARUS LEKURAIYO (SUING ON BEHALF OF WINFRED NAISHERUA) .... APPELLANT

AND

NICOLAS KOBIA .... RESPONDENT

(An appeal from the judgment and decree of Hon. E Tsimonjero (SRM) delivered on 7/11/2023 in Isiolo CMCC No. E044 OF 2021)

JUDGMENT

1. The Appellant herein filed suit seeking for damages and incidental loss suffered as a result of a road accident which occurred on 13th March 2021 along the Ngaremare area on the Isiolo- Moyale highway. The Appellant blamed the Respondent's driver for carelessly and negligently driving motor vehicle registration number KCE 862Q ISUZU Lorry, causing a stone or brick that it was transporting to fall and hitting the Appellant's vehicle KUW 503 Toyota Land Cruiser. The Appellant states that he and his passenger sustained injuries as a result.

2. At the conclusion of the hearing the trial court delivered judgement in which it held that the Appellant failed to prove his case, and dismissed the suit.

Memorandum of Appeal

3. The Appellant was the aggrieved by the outcome, and proffered this Appeal. In his Amended Memorandum of Appeal dated 15th December 2023 he has set out the following grounds:

   1. That the learned magistrate erred in fact and in law by dismissing the plaintiff's suit with costs.

2. That the learned magistrate erred in law and fact by failing to consider the Appellants statements and documents that were filed and produced in court

3. That the learned magistrate erred in law and fact by failing to consider the submissions made by the Appellant on quantum and liability and the legal authorities provided thereof hence arriving at an erroneous decision.

4. That the learned magistrate erred in law and fact by disregarding the Isiolo base commander's testimony that the defendant's lorry was transporting sand and building blocks.

5. That the learned magistrate erred in law and fact by failing to hold that the defendant is fully to blame for the occurrence of the accident despite the police abstract which was filled after inspection of the defendant's lorry and blaming the respondent for the occurrence of the accident.

6. That the learned magistrate erred in law and fact by dismissing the plaintiff's suit notwithstanding the fact that the defendant never produced any evidence to exonerate him from liability nor to counter the evidence on the police abstract.

7. That the learned magistrate judgement as a whole is not supported by evidence rendered in court by the parties and the relevant legal principles.

8. That the learned magistrate erred in law and fact by holding that the Appellant didn't prove liability despite overwhelming evidence by the Appellant.

4. The Appeal proceeded by way of written submissions.

Appellant's Submissions

5. The Appellant states that PW2, the police officer, told the court that the building stone which hit the Appellant's lorry was from the respondent's lorry; that this was the most important piece of evidence but which the trial court disregarded. That further, the police abstract (PEx 5) produced by PW2 put the blame on the defendant for the subject accident. The Appellant submitted that a police abstract being a public document is a prima facie evidence of ownership and negligence if not rebutted; that in this case, there was no rebuttal. In this regard the Appellant has relied on the decision in the case of Wellington Nganga Muthiora vs Akamba Public Road Services Ltd & Another, (2010) eKLR, .

6. The Appellant argues that the trial court erred in dismissing the suit notwithstanding the fact that the defendant never produced any evidence to exonerate him from liability nor to counter the evidence on the police abstract

7. The Appellant submitted that the defendant casually testified and stated he did not know what happened and what caused the accident. He further states that it is settled law that where the driver cannot give explanations on the cause of the accident, the plaintiff's version is the one to be believed.

8. The Appellant faulted the trial court for concluding that the Respondent's lorry was "full bodied" and covered without any evidence, arguing that a stone cannot just fall and end up hitting another vehicle unless there was careless driving which resulted in the material falling from the moving vehicle.

9. The Appellant concludes by stating that all the evidence pointed to the Respondent is to be blamed 100% for the occurrence of the accident, and the magistrate erred in holding that the appellant didn't prove liability despite overwhelming evidence.

Respondent’s Submissions

10. It is the Respondent's submission that the trial court rightly found that the Appellant failed to prove his case on liability to the required standard. The Respondent denied causing the alleged accident. He sates that he was driving from the direction of the Archer's Post while transporting sand and not stones; that the carrier of the vehicle Lorry was completely covered to the extent that it would have been possible for its contents to fall off and hit other road users.

11. The Respondent argues that the Appellant's version of events does not logically add up; that it could not have been possible for the lorry to have been filled to the brim with stones; and finally that the Isiolo- Moyale road is generally levelled and materials are unlikely to fall, unless the impact on the vehicle emanated from outside.

12. The respondent has further cast doubts on the Appellant’s testimony which he states, appeared contradictory. He points out that at some instances the Appellant suggested that someone from the respondents lorry could have thrown a stone while maintaining the stone fell.

13. It is the respondent’s further submissions that the police evidence presented by PW2 was deficient; that the witness was not the investigating officer in the first place; that he did not visit the scene, and did not witness the occurrence of the accident

14. While relying on the court’s decision in the case of Wangongu v Kithinji & 2 others (2024) eKLR, the respondent argues that a police abstract cannot be a conclusive proof of negligence, where the Appellant fails to adduce adequate evidence demonstrating the how the accident occurred.

15. The Respondent submitted that should the Court finds that liability was proven, damages awarded must be directly proportional to the injury suffered and reflect comparable awards. He proposes an award of Kshs. 100,000/= as general damages for the 1st Appellant and ksh. Ksh.60,000 for the 2nd Appellant.

Analysis and determination

16. I have considered the memorandum of Appeal, the trial court record and the submissions of the parties, and in my view the following issues arise for determination:

    a). Whether the Appellant proved his claim on liability.

    b). Whether the Appellant is entitled to the reliefs sought.

17. It is trite law that on a first appeal, this Court is obligated to reconsider and re-evaluate the evidence on record and draw its own conclusions. However, in re-evaluating the evidence, the appellate court must make allowance for the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it. (see :Selle & Ano Vs Associated Motor Board Company and Others [1968]EA 123.)

18. The Appellant adopted his written statement in which he stated that the lorry was transporting building bricks which fell due to carelessness. During cross-examination, he told the court that the lorry was coming from Archer’s post, while he was headed in the opposite direction. He stated the back carriage was open. The Traffic Officer (PW2), blamed the respondent for careless driving and not covering the luggage/stones. He stated that the lorry was carrying sand and stones. However, under cross-examination he told the court that he was not the investigating officer, did not visit the scene and did not produce a sketch map.

19. The Respondent on the other hand testified that the lorry was a full body make, fully covered and was transporting sand and not building stones. He denied that any brick could fall off since he was carrying sand.

20. The main point of contention in this case whether the Respondent's lorry was carrying stones or sand. While the Appellant stated that the respondent was carrying stones, the respondent insist that he was carrying sand. The police officer states that it was both sand and stones.

21. The sand could not have cracked the windscreen, let alone cause injury to the occupants of the Appellant's vehicle. The onus was therefore on the Appellant, as the then plaintiff, to prove that the respondent was carrying stones . It is both statutory and trite law that the party who alleges must prove the facts necessary to sustain his or her claim. The following sections of the *Evidence Act* are relevant:

    107. Burden of proof.

        (1) 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.

        (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

        108. Incidence of burden.

        The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

    109. Proof of particular fact.

        The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

22. The above stated burden of proof as well as the standard has been a subject of discussion in various past decisions of the courts . In Palace Investments Limited v Geoffrey Kariuki Mwenda & another [2015] KECA 616 (KLR) the Judges of appeal held that: "in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-. "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not. This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

23. To the extent that there was contestation on what was being ferried in the lorry, and therefore could be the thing that fell off and hit the Appellant's vehicle, Am entirely in agreement with the trial court that more corroborative evidence was required. The photographs of the Lorry, while still loaded with whatever it was carrying, for instance, would have resolved the question of whether a stone could have indeed fallen off the lorry. A visit to the accident scene by the traffic police would have helped them ascertain if there was a stone or debris of a stone on the scene. Further such a stone or debris would also have been available inside the Appellant's car. It is rather odd that despite the unique circumstances of the accident, the Appellant did not find it necessary to collect such evidence as aforesaid .

24. The Appellant has argued that the contents of the police abstract should have been conclusive proof of what transpired. However the person who produced the abstract (PW2) ,was not the investigations

officer , and therefore could not have been in a position to defend the content of the abstract. All that the abstract has stated is that the owner of the lorry was to blame. There was no further evidence, which ought to have been provided by the investigations officer, on how he arrived at that conclusion.

25. In any case the lack of rebuttal from the defence on the contents of the police abtract did not exempt the Appellant from the duty to prove their case. In the case of Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Ano. [2014] KECA 642 (KLR), the court of appeal had to say about the lack of rebuttal by the defence:It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where thedefendant did not appear, formal proofproceedings are conducted. The claimant layson the table evidence of facts contended against the defendant. And the trial court has aduty to examine that evidence to satisfy itselfthat indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side".

26. It is trite law that there can never be liability without fault. In this regard this court relies on the decision of the court of Appeal in the case of Kiema Muthuku v Kenya Cargo Handling Services Ltd (1991) 2 KAR 258,: where the court stated : " There is, as yet, no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence."

27. I find no basis of interfering with the trial findings of the trial court. The Appeal lacks merit. It is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT ISIOLO, THIS 3RD DAY OF DECEMBER, 2025.

S. CHIRCHIR

JUDGE.

In the presence of:

Roba Katelo- court Assistant

Mr. Kiama for the Respondent