

REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT THIKA  
CIVIL APPEAL NO. E215 OF 2024

PETER THEURI MURAYA.....  
.....APPELLANT

-VERSUS-

JOSEPH MACHARIA  
WAIGWA.....RESPONDENT

*(Being an appeal from the judgment and decree in the Small Claim's Court at Ruiru  
(Hon. J.K. Tawai Adjudicator/RM) dated 19<sup>th</sup> July 2024 in claim number E088 of 2024)*

**JUDGMENT**

The appellant's motor vehicle registration number KCA 080U and the appellant's motor vehicle registration number KDE 772C were involved in an accident on 1-10-2022. By a statement of claim dated 9-02-2024, the respondent sued the appellant for recovery of damages to his motor vehicle as a result of the accident. In answer to the claim, the appellant denied liability and instead blamed the respondent and pleaded a counterclaim of Kshs 87,720.00.

The matter was heard through viva voce evidence where the respondent called four witnesses and the appellant testified on his side. The trial court by judgment dated 19<sup>th</sup> July 2024 found that the appellant's motor vehicle was to blame for the accident and entered judgment against the appellant and in favour of the respondent on liability at 100 per cent, special damages of Kshs 294,520.00 plus

interest and costs of Kshs 30,000.00. This judgment precipitated this appeal which is on the following grounds;

- 1. The learned trial Magistrate erred in fact and in law by apportioning 100 per cent liability to the appellant whereas the police abstract produced as respondent's exhibit indicated that the matter was still pending under investigations.*
- 2. The learned trial Magistrate erred in law, fact and principle of well-grounded principle of evidence law by substantially anchoring her judgment on facts deponed by a third party police officer instead of the actual police officer investigating the matter.*
- 3. The learned trial Magistrate erred in law and fact by not adequately verifying the ownership of motor vehicle registration number KCA 080U thereby failing to establish whether the claimant was indeed the correct party to bring forth the suit/claim in court.*
- 4. The learned trial Magistrate erred in law and principle by failing to consider that proof of negligence and contents of a police abstract are not dependent on each other thus misinterpreting well-grounded and agreeable principles of evidence law relating to discharging the burden of proof required in a civil matter.*
- 5. That the learned trial Magistrate erred in law and in fact in making a finding that there was sufficient and consistent evidence to establish the respondent's case when the evidence was contradictory and substantially rebutted by the appellant's evidence through the evidence of the appellant.*

6. *That the learned trial Magistrate erred in applying the wrong principles of law in arriving at his judgment and failing to find that the defence case indeed raised satisfactory answer to the respondent's claim.*
7. *That the learned trial Magistrate erred in law and fact in apportioning liability at the ratio of 100 per cent in favour of the respondent against the weight and presence of contradictory evidence and submissions by the appellant on the issue of liability.*
8. *That the learned trial Magistrate's judgment was unjust and unfair given the weight of evidence and was based on misguided points of fact and wrong principles of law, and has occasioned a miscarriage of justice.*
9. *The learned Magistrate erred in law by awarding costs to the respondent.*
10. *Ultimately, the appellant seeks to have the impugned judgment set aside and for the case to be heard on its merits. Additionally, the appellant requires a stay of execution of the said judgment pending the hearing and determination of this appeal.*

I find ground 4 in the memorandum of appeal misplaced and irrelevant. The issue of ownership of the respondent's motor vehicle did not arise in the trial court and it is interesting that this ground found a space in the memorandum of appeal. The law does not allow introduction of an issue for the first time on appeal. Further, the appellant has not addressed this court on that ground and in the circumstances, I need not take time talking about it.

Another interesting thing about the memorandum is that, ground ten appears to me to be a prayer. In it, the appellant is asking this court for the judgment of the trial court to be set aside and the case be heard afresh on merits yet the judgment followed a meritorious hearing where witnesses were called and parties filed final submissions. In my view, if the appeal is to succeed, there will be no justification for remitting the matter to the trial court for a fresh hearing.

All the other grounds of appeal can be collapsed to one issue, that is, who between the parties, who should bear liability and to what extent? Having gone through the proceedings and the testimonies of the witnesses, I must first make a decision on whether the issue I have identified concerns a matter of law or fact. This is because my jurisdiction on appeal from a Small Claims Court is limited to matters of law only. Section 38(1) of the said Act provides that;

*‘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.’*

The difference between matters of law and those of facts is that in matters of facts, the court is concerned with finding out the truth of what has been pleaded or claimed while a matter of law involves application of the law in the pleaded facts, evidence adduced and identified issues. It has been held that where the law restricts appeals to matters of law only, the appellate court lacks jurisdiction to go into issues of facts unless it is demonstrated that the trial court ignored some material evidence or the decision is too perverse that a court of law or tribunal properly applying its mind would not reach such a decision. In ***Ahamad Abolfathi Mohammed & another v Republic (2018) KECA 743 (KLR)***, the Court of Appeal restated this position in law by citing *Karingo v Republic (1982) KLR 213* thus;

*‘This is a well-established principle and is aptly articulated in the authorities cited by the appellants such as Karingo v. Republic [1982] KLR 213.*

*In M’Riungu v. Republic [1983] KLR 455, this Court was empathic that:*

*“[W]here a right of appeal is confined to question of law, 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 as holdings of fact and law and it should not interfere with the decision of the trial court or the first appellate court unless it is apparent that on evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law”.*

In this matter, the appellant has submitted that the trial court disregarded judicial precedents that hold that, a police abstract is not proof of negligence and that she heavily relied on information contained in the abstract produced by the respondent which indicate that the appellant’s motor vehicle was to blame which was against the weight of evidence. If indeed the trial court ignored some material evidence which led her reach a wrong conclusion, this court would be within its jurisdiction to entertain this appeal. In order to interrogate this issue, I will have to examine the testimonies and evidence of the parties.

The respondent’s first witness, a corporal Eveline Muthengi produced a police abstract in respect of the accident and stated that motor vehicle registration KDE 772C was to blame for failing to give way and using the wrong way thereby hitting KCA 080U. When she was cross-examined, she admitted that she was not the investigating officer and that motor vehicle registration number KCA 080U was damaged at the front while KDE 772C was damaged at its rear side. In her judgment, the trial court in short analysis of the evidence stated as follows;

*‘The claimant produced police abstract dated 3-10-2022, the same blamed motor vehicle registration number KDE 772C for the accident. The same was produced without any objection by the respondent.*

*In the case of **Dorcas Wangithi Nderi v Samuel Kiburu Mwaura & Another (2015) KLR**, held that if a police abstract is produced without any objection, its contents cannot be denied.*

*This court therefore finds the respondent’s driver 100 per cent liable for the accident and respondents is vicariously liable for the accident being the owner of motor vehicle KDE 772C as shown by copy of records obtained on 30<sup>th</sup> January 2024’.*

It is clear to me that the trial court based her judgment on the contents of the abstract and the fact that it was produced without any objection. I do not subscribe to the position that a document once produced without objection cannot be questioned. The fact that a document has been admitted in evidence does not mean that it should not be subjected to evidential and probative value test. Such a document is evidence just like the oral testimony given by the parties and must have its contents subjected to scrutiny of authenticity, truth and veracity. In my view, by relying on the police abstract only as foundation of liability without giving any weight to the oral testimonies of the parties and other pieces of evidence, the trial court erred in law and as such the appeal involves a matter of law and I therefore have jurisdiction to handle it. I am guided by authority of **Kenneth Nyaga Mwige v Austin Kiguta & 2 others (2015) KECA 334 (KLR)**, where the Court of Appeal held that;

*‘Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record.’*

Having found as have above, I proceed to examine the testimony of the parties to ascertain whether the finding on liability at 100 per cent against the respondent can stand. According to the proceedings, the respondent adopted his statement dated 14-06-2024 which appears on page 93 of the record of appeal. According to the statement, the respondent confirmed that the accident occurred and added that after investigations by the police, motor vehicle registration number KDE 772C was blamed.

There is nothing in the said statement or oral testimony of the respondent that describes how the accident occurred. The statement gives me an impression that

the respondent did not witness the accident although he, in cross-examination stated that he was on the road headed to Kiambu which is an indication that he was the one driving. The statement is silent on who was driving and so is the police abstract. In the recorded proceedings, the respondent stated that KCA 080U was hit on the front while KDE 772C was hit from behind and both vehicles were in motion. The other witness for the respondent did not say anything that is relevant to the issue of liability.

The appellant told the court through his witness statement dated 14-06-2024 that he was lawfully driving his motor vehicle at 60 kilometers per hour when he noticed a car behind him approaching at a high speed. He attempted to swerve towards his right side as the left side was busy with oncoming traffic. He added that despite his efforts, his vehicle was still hit from behind by KCA 080C at the right side of his rear bumper.

Having examined the testimony of the witnesses, it is my finding that the totality of it all points to the respondent's motor vehicle having been to blame. The police officer who testified was not the investigating officer or an eye witness. In my opinion, it is not a must that a police abstract be produced by the investigating officer. I hold the view that a police officer who has knowledge and has sufficiently interacted with the records held by the police is competent to testify as long as they do so in their official capacity. However, where the evidence is contradicted, controverted or challenged, the officer testifying must give credible evidence which must go beyond a simple production of the police abstract.

In this case, it was not detailed how the conclusion by the police that the appellant's motor vehicle was to blame was arrived at. There was no sketch plan of

the accident or the occurrence book extract which would have given this court an idea of how that conclusion was reached. It is common ground that the two vehicles were moving towards the same direction and that the appellant's motor vehicle was hit from behind. The damages to both vehicles are consistent with the narrative given by the appellant. The respondent's evidence does not give a description of how the appellant's motor vehicle used the wrong road or failed to give way as alleged by the police officer. There was no suggestion that the appellant's vehicle changed the lane or blocked the respondent's way. It has not escaped my mind that the police abstract produced by the respondent did not give the results of the investigations.

The trial court did not indicate why she believed the contents of the abstract produced by the respondent and disregarded the contents of that produced by the appellant neither did she disclose why she disbelieved the appellant's testimony. Both police abstracts were produced without objections and came from the same police station. I believe that if the trial court had put these factors into consideration which she seems not to have, she would have arrived at a different decision on liability.

Flowing from the above discussion, it is my finding that the person to blame for the accident in question was whoever was driving the respondent's motor vehicle. In the circumstances, the finding of the trial court that the appellant was 100 per cent liable is hereby set aside.

What final orders should this court give? As observed earlier, the appellant asked for setting aside of the judgment and sending the file back for fresh trial and I have already held that there is no justification for doing so. I note that the appellant had

pleaded a counter-claim. However, the counter-claim did not have a prayer for entry of judgment for the pleaded sum. The appellant did not in his witness statement ask for judgment against the respondent. He also did not prosecute the counter-claim in the trial court neither has he done so in this appeal and it is not for this court to grant what has not been prayed for or prosecuted.

In conclusion, this court makes the following orders;

1. The judgement and decree in the Small Claims Court at Ruiru claim number E088 OF 2024 dated 19<sup>th</sup> July 2024 is hereby set aside in its entirety and substituted for an order dismissing the claim with costs to the appellant.
2. The appellant shall have the costs of this appeal.

Dated, signed and delivered at Nairobi this **16<sup>th</sup>** day of **January** 2026.

**B.M. MUSYOKI**  
**JUDGE OF THE HIGH COURT.**

Judgment delivered in presence of;

Mr. Kinyanjui holding brief for Mr. Mutegi for the appellant; and

Mr. Musa holding brief for Mr. Otieno for the respondent.