



**Ndonji v Jarine Investment Limited (Civil Appeal E423 of 2023)
[2026] KEHC 45 (KLR) (Civ) (15 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 45 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E423 OF 2023

FR OLEL, J

JANUARY 15, 2026

BETWEEN

FRED OKOTH NDONJI APPELLANT

AND

JARINE INVESTMENT LIMITED RESPONDENT

*(Being An Appeal From The Judgment/decree Of The Honourable D.s Aswani (rm/adjudicator)
Delivered On 27Th April 2023 In Milimani Commerical Court Claim No. E2551 Of 2022)*

JUDGMENT

A. Introduction

1. This appeal arises from the Judgment/decree of Hon D.S.Aswani (RM/Adjudicator) dated 27th April 2023, where she dismissed the Appellants' suit on the basis that he had not sufficiently discharged the burden of proof to show that the respondent was negligent and as a result caused the accident, which damaged his motor vehicle registration No KCG 444P Jeep Wrangler.
2. In his statement of claim filed before court, the Appellant had averred that he was the registered/beneficial owner of motor vehicle registration No KCG 444P Jeep Wrangler (hereinafter referred to as the 1st suit motor vehicle), while the respondent was the register or beneficial owner of motor vehicle registration No KCL 718M Isuzu Pick up (hereinafter referred to as the 2nd Suit Motor Vehicle). On 30th May 2021, the 1st suit motor vehicle was being lawfully and carefully being driven along Kenol -Sagana Road around Makuyu Boys School, when the 2nd suit motor vehicle was carelessly and negligently driven and/or controlled that violently crash into the 1st suit motor vehicle, reason whereof the said car had to be repaired at a cost of Kshs.189,280/=, which the Appellant claimed plus costs of the suit and interest.



3. The respondent filed their statement of response dated 20th September 2022 and denied in toto all the averments made in the statement of claim. In the alternative, they stated that it was the driver of the 1st suit Motor vehicle, who was negligent in her driving and as a result had caused the said accident. The respondent further denied that any damage occurred on the 1st suit Motor vehicle and thus urged the court to dismiss the primary suit.
4. At trial only the Appellant and his witness testified, and adduced evidence in support of the claim, while the respondent opted to close their case without calling any witness. Upon considering the evidence tendered and submission filed, the trial court held that the Appellant had failed to establish the respondent's liability to the required standard and thus dismissed the suit with costs to the respondent.

B. The Appeal

5. Being dissatisfied by this judgment, the appellant filed his memorandum of appeal dated 25.05.2023, and premised the Appeal on grounds that;
 - a. The learned Trial Magistrate erred in law and in elevating proof in Civil proceedings to that above the balance of probabilities.
 - b. The learned Trial Magistrate misdirected herself in law by holding that the Appellant failed to prove the uncontroverted particulars of negligence.
 - c. The learned Trial Magistrate misdirected herself in law in referring to pleadings by the respondent as evidence.
 - d. The learned Trial Magistrate erred in law in relying on the respondents witness testimony, when the respondent had not testified.
6. The Appellant thus urged this court to find that the appeal filed had merit, the judgment/ decree of the trial court be set aside and judgment be entered in his favour as prayed for in the statement of claim.
7. The Appeal was canvassed by way of written submissions.

B. Submissions

8. The Appellant relied on their submissions dated 18th June 2024, where they faulted the trial courts evaluation of the evidence especially relating to liability, which was to be determined on a balance of probability. The Appellant had provided Cogent uncontroverted evidence, through his eye witness (PW2) demonstrating that the 2nd suit motor vehicle was being driven at high speed, had failed to keep distance and as a result had rammed into the rear of the 1st suit motor vehicle. The traffic police too, came to the scene and had independently established this fact; that blame for the said accident laid squarely on the shoulders of the respondent's driver.
9. The Appellant having discharged the burden of proof to the required standard of preponderance of probabilities, the evidential burden shifted on the respondent to call his eye witness to disapprove the Appellants evidence but he had failed to do so. The trial's court finding on this issue was therefore illogical and was an error, which ought to be corrected. Reliance was placed on *Palace Investment Ltd Vrs Goffrey Kariuki Mwendwa & Another (2015) Eklr*, *Michael Hubert Kloss & Another Vrs David Seroney & 5 Others (2009) Eklr*, *Bwire Vs Wayo & Soiloki (Civil Appeal 032 of 2021){2022}KEHC 7(KLR)* & *Kamau Vrs Kamau & Another (Civil Appeal 159 of 2019),{2023}KECA 187 (KLR)* Which all discussed the parameters /concept of burden of proof .



10. Additionally, it was the Appellants contention that the respondent also did not challenge the police abstract produced as an exhibit, which also expressly stated that his driver was to blame for causing the said accident. Notably, traffic police officers had come to the scene at the time of the accident, examined the scene in the presence of both parties before establishing the respondent's fault. The police findings did buttress the eye witness evidence and it was a further error for the trial court to ignore the same and arrive at a different finding.
11. The Appellant further faulted the trial court for relying on the respondents witness statement, explaining how the accident occurred, yet the said witness did not testify before court. It was settled law that pleadings are not evidence and in absence of any cogent evidence, such pleadings remain mere allegations. Reliance was placed on *Netah Njoki Kamau & Another V Eliud Mburu Mwaniki* (2021) Eklr, *North End Trading Company Limited (Carrying on the business under the Registered name of Kenya Refuse Handler's Ltd) Vrs City Council of Nairobi* (2019) Eklr and *Kenya Kazi Limited Vs Nandwa* (1988) Eklr.
12. Finally, having pleaded, and demonstrated that it was the respondent's driver, who was negligent, it was not incumbent upon them to join any third party, who was not to blame for the said accident. Reliance was placed in the case of *John Kibicho Thirima Vs Emmanuel Parsmei Mkoitiko* (2017) Eklr, & *Welch Vs Standard Bank Limited* (1970) EA 115, to emphasis on this issue.
13. In conclusion, the Appellant urged this court to set aside the trial courts finding on liability and substitute it with a finding that he had proved his case beyond reasonable doubt and enter judgment in his favour. He also prayed for costs of this Appeal.
14. The respondent did not file their submissions in opposition to this Appeal.

B. Analysis and Determination

15. I have considered this appeal, submissions and the impugned judgment. I have also considered the decisions relied on and perused the trial court's record. This being a first appeal, it is by way of a retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence afresh and draw its own conclusions on it. The court should however bear in mind that it did not see the witnesses as they testified and give due allowance for that. (see *Selle v Associated Motor Boat Co Ltd & Others* [1968] EA 123).
16. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal held:

“ This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect”.
17. In *Nkube v Nyamiro* [1983] KLR 403, the same court stated that :

“ A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion”.



18. Section 38 of the *Small Claims Court Act* provides that appeals from the said court shall be only on issues of law. Thus having reviewed the evidence adduced and issues raised, I find that the only point of law, which arises for determination is whether the trial court rightly adjudged the issue of liability.
19. It is well settled that where a trial magistrate/judge has apportioned liability according to the fault of the parties, his apportionment should not be interfered with on appeal, save in exceptional cases; as in where there is some error in principle or the apportionment is manifestly erroneous. See *Khambi and Another vs. Mahithi and Another* [1968] EA 70.
20. That seems to have been the position as well in *Isabella Wanjiru Karangu vs. Washington Malele* Civil Appeal No. 50 of 1981 [1983] KLR 142 and *Mahendra M Malde vs. George M Angira* Civil Appeal No. 12 of 1981, where it was held that apportionment of blame represents an exercise of a discretion with which the appellate court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle.
21. The Appellant and his witness, who was the driver of the 1st suit motor vehicle at the time of the accident, testified and produced their claim supporting documents. PW2 explained that on the material day, she was driving the 1st suit motor vehicle along Kenol- Sagana Road, when at Makuyu Boys secondary school, the 2nd suit motor vehicle rammed into the motor vehicle immediately behind her and it caused the said motor vehicle to ram into the rear of the 1st suit Motor vehicle. Traffic police officers came to the scene and also established the fact that it was the 2nd suit motor vehicle, to blame for the said accident and specified so in the police abstract.
22. The Appellant averred that as a result, he had incurred costs of Kshs.189,280/= to repair the 1st suit motor vehicle and to have it assessed and thus urged the trial court to award him the same. The respondent opted not to call any witness and closed their case. Upon considering the evidence adduced the trial magistrate faulted the Appellant for failing to enjoining the other 3rd motor vehicle involved in the said accident, failing to produce the accident scene sketch plan and not adducing evidence to corroborate PW2's testimony. She thus proceeded to dismiss the suit on the basis that liability was not proved.
23. The appellant's evidence was not rebutted in any manner as the respondent never called any witness to testify. It remains basic law that the only forum where the same could have been challenged was at trial and not through written submissions unless on issue of law. Since the respondent failed to call any witness the appellant's evidence was remained uncontroverted and thus proved.
24. In *Motrex Knitwear Vs Gopitex Knit wear Mills Ltd Nairobi (Millimani)HCCC NO 834 OF 2002* Lessit J citing the case of *Autar Singh Bahra & Another Vs Raju Govindji, HCCC NO 548 OF 1998* where it was appreciated that;

“ Although the defendant has denied liability in the amended defence and counter claim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st plaintiff case stands unchallenged but also that the claims made by the defendant in his defence are unsubstantiated. In the circumstances, the counter claim must fail.”



25. In the case of shaneebal limited Vs County Government of Machakos (2018) eKlr , Odunga J relied on the case of Trust Bank Ltd Vs Paramount Universal Bank Ltd & 2 others Nairobi (Millimani) HCCS No 1243 OF 2001 where it was held that;

“ it is trite that where a party fails to call evidence in support of its case, that parties pleadings remain mere statements of fact since in doing do the party fails to substantiate its pleadings and in the same vein the failure to adduce evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged”

26. Unfortunately the trial magistrate fell in error, in insisting that the 3rd motor vehicle involved in the said accident ought to be have been enjoined but the said holds no water as the Appellant sufficiently demonstrated that it was the 2nd suit motor vehicle, that rammed into the said 3rd motor vehicle and it in turn, (out of chain reaction), rammed into the rear side of the 1st suit motor vehicle. Further, it was not necessary for the Appellant to produce the accident sketch map as the eye witness evidence had sufficiently established “causation of the said accident”.

E.Determination

27. Having considered all the grounds raised in this Appeal, I do find that the same has merit and the Appeal is allowed.

28. The Judgment/ decree of the trial court dismissing the primary suit is set aside and substituted with a finding that the respondent was 100% liable for the accident that occurred on 20th May 2021 involving the two suit motor vehicles herein.

29. The special damages having been proved at trial, I do enter judgment in favour of the Appellant in the sum of Kshs.189,280.00/= plus interest at court rates from the date of filing the suit until date of payment in full.

30. The Appellant will also have costs of the primary suit and costs of this Appeal assessed at Ksh.100,000/= all inclusive.

31. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MARSABIT THIS 15TH DAY OF JANUARY, 2026.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Team this 15TH day of JANUARY 2026.

In the presence of: -

.....Appellant

..... Respondent

..... Court Assistant

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