

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**[MILIMANI LAW COURTS]**  
**THE CIVIL APPELLATE DIVISION**  
**(Coram: A.C. Mrima, J.)**  
**CIVIL APPEAL NO. E341 OF 2024**

**-between-**

**BRENDA AKINYI AYERE.....**  
**APPELLANT**

**-versus-**

**1. PIUS WEKESA WANYAMA**  
**2. MOGO AUTO LIMITED.....**  
**RESPONDENTS**

*(Being an appeal from the judgment and decree of Hon. J. W. Nasimiyu (Resident Magistrate/Adjudicator) delivered on 26<sup>th</sup> February, 2024 in Nairobi [Milimani] Small Claims Case No. E5105 of 2023)*

**JUDGMENT**

1. The Appellant herein, *Brenda Akinyi Ayere*, filed *Nairobi [Milimani] Small Claims Civil Suit No. E5105 of 2023* [hereinafter referred as **'the suit'**] against the Respondents for general damages, special damages, costs and interests as a result of a road traffic accident that allegedly occurred on 8<sup>th</sup> September 2023 involving motor vehicle registration number *KAR 271J* in which she was traveling as a passenger and motor vehicle registration number *KDB 642P*.
2. It was the Appellant's case that the Respondents' motor vehicle registration number *KDB 642P*, [hereinafter referred to as **'the offending vehicle'**] was solely liable for the accident in issue based on the particulars of negligence as stated in the Statement of Claim and the Appellant's statement on record. The Respondents vehemently denied liability by filing a Statement of Defence. The suit was canvassed by way reliance of the filed documents without calling any witness as provided for under Section 30 of the Small Claims Court Act.

3. The parties filed written submissions and the trial Court rendered its judgment on 26<sup>th</sup> February 2024 and dismissed the suit for want of proof of negligence. The Court, however, stated that had the suit succeeded, it would have awarded the following reliefs: -

- |    |                            |   |                       |
|----|----------------------------|---|-----------------------|
| a. | <i>General Damages</i>     | - | <i>Kshs. 90,000/=</i> |
| b. | <i>Special damages</i>     | - | <i>Kshs. 5,550/=</i>  |
| c. | <i>Costs and interests</i> |   |                       |

4. **Aggrieved by the judgment**, the Appellants filed a Memorandum of Appeal dated 8<sup>th</sup> March 2024 and raised the following grounds: -

- a. *THAT the learned trial magistrate erred in law and in fact in failing to analyse all the relevant evidence availed at the trial and award the Plaintiff the relief sought in the Plaintiff.*
- b. *THAT the learned trial magistrate erred in law and in fact by failing to find that the Plaintiff had proved his case on a balance of probabilities.*
- c. *THAT the learned trial magistrate erred in law and in fact by misdirecting itself and addressing the matter as having proceeded as Formal Proof and further addressing it as a part-heard as evident in the Judgment.*
- d. *THAT the learned trial magistrate erred in law and in fact by dismissing the Plaintiff's case by disregarding the Doctrine of Res ipsa loquitur.*

5. The Appellant prayed that the judgment of the trial Court be set aside. In bolstering the appeal, the Appellant filed written submissions dated 5<sup>th</sup> September 2024 where she cited several decisions in support of the appeal. Opposing the appeal, the Respondents filed his written submissions dated 11<sup>th</sup> September 2024 relying on several decisions to persuade this Court to dismiss the appeal with costs for lack of merit.

6. As the first and final appellate Court, this Court is under a duty to only consider matters of law. That is pursuant to Section 38 of the Small Claims Court Act. Whereas there has been no universally accepted definition of the term '*matters of law*', there has been some working definitions thereto. The term '**point of law**' may also be referred to as '**matter of law**'. The **Black's Law Dictionary** defines '*a matter of fact*' and '*a matter of law*' as follows: -

**Matter of fact:** A matter involving a judicial inquiry into the truth of alleged facts and **Matter of law:** A matter involving a judicial inquiry into the applicable law.

7. Lord Denning, J in **Bracegirdle vs. Oxley** (2) [1947] 1 ALL E.R. 126 at p 130 in espousing the two terms had the following to say:

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.... The question whether a determination by a tribunal is a determination in point of fact or in point of law frequently occurs. **On such a question there is one distinction that must always be kept in mind, namely, the distinction between primary facts and conclusions from those facts.** Primary facts are facts which are observed by the witnesses and proved by testimony; conclusions from those facts are inferences deducted by a process of reasoning from them. The determination of primary facts is always a question of fact. It is essentially a matter for the tribunal who sees the witnesses to assess their credibility and to decide the primary facts which depend on them. The conclusions from those facts are sometimes conclusions of fact and sometimes conclusions of law. In a case under the Road Traffic Act, 1930, s. 11, the question whether a speed is dangerous is a question of degree and a conclusion on a question of degree is a conclusion of fact. The court will only interfere if the conclusion cannot reasonably be drawn from the primary facts, and that is the case here. **The conclusion drawn by these justices from the primary facts, was not one that could reasonably be drawn from them.**

8. Drawing from the above, the Court of Appeal in **Bashir Haji Abdullahi v Adan Mohammed Nooru & 3 others** [2014] eKLR sated as under: -

*.... That reasoning has been adopted in this jurisdiction. In **A.G. Vs. DAVID MURAKARU** [1960] EA 484, for instance, Chief Justice Ronald Sinclair sitting with Rudd J. adverted to the factual foundations of legal questions by stating that an appellate court restricted to determining questions of law may yet quite properly interfere with the conclusion of a lower court if the same is erroneous in point of law. **This is the case where that lower court arrives at a conclusion on the primary facts that it could not reasonably come to. Such a conclusion or decision becomes an error in point of law. See also PATEL vs. UGANDA** [1966] EA 311 and **SHAH Vs. AGUTO** [1970] EA 263.*

9. Earlier, the Court of Appeal in **M’riungu and Others -vs- R** [1982-88] 1 KAR 360 observed thus: -

*.... We would agree with the views expressed in the English case of **Martin v Glyneed Distributors Ltd (t/a MBS Fastenings)** [1983] 1 CR 511 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 as holdings of law or mixed findings of fact and law, and, it should not interfere with the decision of the trial of 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 law.***

10. Later, the Court of Appeal in **Charles Kipkoech Leting -vs- Express (K) Ltd & another** [2018] eKLR discussed what entails matters of laws as the Court considered its role as a second appellate Court. It observed thus;

*.... Our mandate is as has been enunciated in a long line of cases decided by the Court. See **Maina -vs- Mugiria** [1983] KLR 78, **Kenya Breweries Ltd v Godfrey Odongo**, Civil Appeal No. 127 of 2007, and **Stanley N. Muriithi & another v 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.....*

11. And, in ***Peter Gichuki King'ara vs. IEBC & 2 others***, Nyeri Civil Appeal No. 31 of 2013, Court of Appeal held that a decision challenged on the basis of wrongful exercise of discretion raises a point of law. [See also ***Twaher Abdulkarim Mohamed v Independent Electoral and Boundaries Commission (IEBC) & 2 others***, (2014) eKLR].
12. From the foregoing, an appeal on matters of law calls upon the appellate Court to steer clear of findings of fact derived from primary evidence and to also restrain itself from treating findings of fact as holdings of law or mixed findings of fact and law unless the findings or conclusions are so perverse as to defeat the object of justice. In other words, where the findings or conclusions could not be reasonably derived from the primary facts, then such transcends to matters of law.
13. Turning back to the matter at hand, the record has it that the suit was heard on the basis of *Section 30 of the Small Claims Court Act*. Therefore, the parties only relied on the documents filed and the Court eventually rendered a judgment. Therefore, the role of this appellate Court is to answer the question as to whether the conclusions derived from the primary facts by the trial Court were within the law.
14. This Court has carefully perused the Statement of Claim, the accompanying documents and the Respondents' documents as well. The Appellant pleaded her case in the Claim based on the tort of negligence and through her statement. She also availed documents which included medical evidence and the offending vehicle's ownership vehicle. She also produced a Police Abstract that confirmed that the first Respondent was the driver of the

offending vehicle. On their part, the Respondents filed a Response to the Claim where it denied liability and, in the alternative attributed negligence to motor vehicle registration number KAR 271J, the vehicle in which the Appellant was travelling as a passenger.

15. As said, the documents were admitted as evidence and were not impugned in any way. Further, the Statement of Claim narrated how the accident occurred and captured the particulars of negligence on the part of the Respondents. There was also the Appellant's Statement which corroborated the Statement of claim. Apart from denying liability and accusing motor vehicle registration number KAR 271J, the Respondents did nothing more. They neither impugned the Appellant's documents on record nor did they take out any step to involve the motor vehicle registration number KAR 271J in the suit in any manner whatsoever.
16. Legally speaking, the Appellant bore the legal and evidential burden of proof throughout the suit. However, the evidential burden of proof would ordinarily shift to the other party once evidence is adduced. The Appellant relied on her claim, statement and the documents which were never impugned. To this Court, the Appellant adduced sufficient evidence proving that she was not negligent in the circumstances of the case and as such, the evidential burden of proof shifted to the Respondents. Since the Respondents failed to controvert the Appellant's case, the evidential burden of proof did not shift back to the Appellant and as such the suit was proved on the balance of probabilities as required in law. As there was no evidence proving that the Appellant contributed to the accident, having been a passenger, the Respondents would be wholly liable. It is on the foregoing that this Court, with tremendous respect, finds that the trial Court erred in dismissing the suit for want of proof of negligence since that conclusion of the primary facts was not supported in law.

17. Having so said, this Court has also reviewed the proposed awards by the trial Court which it would have rendered had the suit succeeded. To this Court, the awards are fair and reasonable and are hereby adopted in this discussion.
18. In the end, the appeal is merited and this Court hereby makes the following final orders: -

**[a] The appeal is allowed and the part of the judgment of the trial Court delivered on 26<sup>th</sup> February 2024 dismissing the suit for want of proof of liability is hereby set-aside and is substituted with an order finding that the suit was successful since the Appellant proved negligence, jointly and severally, against the Respondents and that the Respondents are wholly liable.**

**[b] The awards proposed by the trial Court on damages are hereby upheld and adopted as part of the judgment in the suit. The general damages shall attract interest from the date of judgment in the suit whereas the special damages shall attract interest from the date of filing of the suit. The Appellant shall also have costs of the suit.**

**[c] Further, the Appellants shall have costs of this appeal which are hereby assessed at Kshs. 15,000/=.**

Orders accordingly.

**DELIVERED, DATED and SIGNED at NAIROBI this 10<sup>th</sup> day of February, 2026.**

**A. C. MRIMA**

**JUDGE**

**Judgment virtually delivered in the presence of:**

**Miss Nyambura**, Learned Counsel for the Appellant.

**Mr. Adede**, Learned Counsel for the Respondents.

**Michael/Amina** - Court Assistants.