

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CIVIL APPEAL NO. E026 OF 2024

SAMUEL MAINA GATERE.....

APPELLANT

VERSUS

SAMUEL KARIUKI NJIHIA.....

RESPONDENT

J U D G M E N T

1. This appeal arises from the judgment of the learned Magistrate delivered on 11TH July 2024 in Nanyuki SCC No. E017 of 2024 wherein the trial court dismissed the Appellant’s suit for failure to prove negligence on the part of the Respondent and thus rejected the claim for damages.

2. The Appellant was the plaintiff before the trial court. He instituted the suit seeking special damages for costs of repair to his motor vehicle arising from a road traffic accident

alleged to have occurred on 13th October 2024 involving motor vehicles registration number KCM 933X and KCP 094T belonging to the Appellant and the Respondent respectively.

3. Being dissatisfied with the dismissal of his claim, the Appellant lodged the present appeal.

1. THAT the learned trial magistrate erred in law and fact by denying the Appellant special damages of Kshs. 291,496/=.
2. That the learned trial magistrate misdirected herself and based her findings of special damages on wrong considerations.
3. That the learned trial magistrate erred and misdirected herself in fact and law by not awarding special damages to the Appellant and thus failed to appreciate the principles applicable in the award of damages.
4. That the learned trial magistrate erred in law and in fact by failing to consider the Appellant's

submissions and judicial authorities on quantum
thereby not awarding any quantum.

4. The Appellant faults the trial court for, inter alia:
 - a. Failing to find the Respondent liable despite evidence that the Appellant was hit from behind;
 - b. Disregarding the police abstract which the Appellant contends showed the Respondent was at fault; and
5. As a first appellate court, this Court is obligated to reconsider and re-evaluate the evidence on record and draw its own conclusions, bearing in mind that it neither saw nor heard the witnesses testify. This principle was restated in **Selle v Associated Motor Boat Co. Ltd [1968] EA 123.**
6. The Appellant's evidence as contained in his witness statement was that on the material day he was lawfully on the road when the Respondent's motor vehicle hit him from the rear. He produced a police abstract in support of his claim.

7. Notably, the Appellant did not call any independent eyewitness to the accident. He also did not tender evidence describing the manner in which the Respondent drove, such as excessive speed, failure to keep a proper lookout, or failure to maintain a safe distance.
8. The police abstract produced indicated, at the column marked "*Results of Investigations*", that the matter was "*referred to insurance*". No party was indicated as having been charged or found culpable.
9. It is settled law that negligence is a question of fact which must be pleaded and proved. The mere occurrence of an accident does not, of itself, give rise to liability.
9. The burden of proof lies on the plaintiff throughout, pursuant to sections **107, 108 and 109 of the Evidence Act (Cap 80 Laws of Kenya)**. This burden does not shift merely because a defendant fails to testify or because the matter proceeds by way of formal proof.
10. In **Charterhouse Bank Ltd (Under Statutory Management) v Frank N. Kamau [2016] eKLR**, the Court

of Appeal reiterated that even where a matter proceeds by formal proof, the plaintiff must still discharge the burden of proof on a balance of probabilities.

11. In the case of **Kirugi and Another v Kabiya & 3 others [1987] KLR 347** the Court of Appeal held that,

“The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof”.

12. Likewise, failure by a defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard hence in **Gichinga Kibutha v Caroline Nduku [2018] eKLR** the Court held that;

“It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest.”

13. In the present case, the Appellant’s evidence on liability was limited to the assertion that he was hit from behind. He did not adduce evidence demonstrating how the Respondent was negligent in the manner of driving. There was no

evidence on speed, braking, traffic conditions, or conduct immediately preceding the collision.

14. The allegation of being hit from behind, without more, is insufficient to establish negligence. Each case must be determined on its own facts, and liability does not arise automatically merely because a collision occurred from the rear.

14. The place of a police abstract in proof of negligence is well defined. Courts have consistently held that a police abstract is not conclusive proof of negligence.

15. In **Kennedy Nyangoya v Bash Hauliers [2016] eKLR**, the court held that a police abstract only confirms that an accident occurred and the parties involved, but does not, on its own, establish liability.

16. In this case, the police abstract did not indicate that the Respondent was to blame. To the contrary, the entry under "*Results of Investigations*" stated that the matter was "*referred to insurance*", which cannot be equated to a finding of fault.

17. No investigating officer was called to testify, and no sketch maps, investigation reports, or traffic charges were produced to support the Appellant's claim.
18. In the absence of cogent evidence on the manner of driving of the Respondent, the trial court correctly found that negligence was not proved on a balance of probabilities.
19. The trial magistrate cannot be faulted for declining to speculate or infer negligence where the evidentiary threshold had not been met.
20. Upon re-evaluation of the entire record, this Court finds that the Appellant failed to discharge the burden of proof placed upon him by law. The learned Magistrate properly directed himself on the law and evidence.
21. Consequently, the appeal lacks merit. I make the following orders;

1. The appeal is hereby dismissed in its entirety.

2. The judgment of the trial court is affirmed.

3. Each party is to bear its own costs.

**Dated signed and delivered this 10th day of February
2026.**

A.K. NDUNG'U

JUDGE