

REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MERU

CIVIL APPEAL NO. E068 OF 2023

JAMES

MWITI

KIBITI.....APPELLANT

VERSUS

KENYA WILDLIFE SERVICE.....

RESPONDENT

**(Being an Appeal from the Judgment of Hon. E. Ngigi (P.M) in
Isiolo CMCC No. 14 of 2014 delivered on 22/3/2022)**

JUDGMENT

1. This Appeal arises from the judgment of the learned Principal Magistrate Hon. E. Ngigi delivered on 22.3.2022 in Isiolo Civil Suit No. 14 of 2014 wherein the Appellant's suit was dismissed with costs to the Respondent.
2. Aggrieved by the said judgment, the Appellant set forth the following grounds in the Memorandum of appeal dated 3rd May, 2023;
 1. **The Trial Court misdirected itself to find that the Appellant had not proved liability against the Respondent.**
 2. **The Learned Trial Magistrate erred in law and fact for shifting the burden of liability upon the Appellant.**

3. The Learned Trial Magistrate erred in law and fact in failing to address the weight of the pleadings in favour of the Appellant that a cause of action had indeed arose as against the Respondent.

4. The entire judgment of the Trial Magistrate is bad in law.

Oral evidence

3. **PW1 James Mwiti**, the Appellant herein adopted his witness statement dated 13/2/2014 as his evidence in chief. He told the court that, on 9/2/2013 at around 19.00 hours while heading home with PW2, Ken Koome Mungania, he was involved in an accident, as a result of which he sustained injuries. They were about 5 metres from the edge of the road, on the pedestrian walking path, when he was hit from behind by a vehicle. He was in a coma for 3 weeks, he could not endure long periods in the sun, he could not do hard manual duties and his ability to walk was limited.
4. **PW3 Joshua Kibera Chege**, a Medical Doctor and Pathologist produced the Appellant's medical report dated 9/1/2014 as exhibit 7.
5. The Respondent closed its case without calling any witnesses.

Submissions

6. The Appellant, through the firm of Maitai & Co. Advocates, filed submissions dated 22/10/2024. Counsel contended that from the material which was placed before the trial magistrate, there was no doubt that the Respondent was the beneficial owner of the accident motor vehicle, and cited **Gichira Peter v Lucy Wambura Ngaku & Another (2021) eKLR, Muhambi Hoja v Said Mbwana Abdi (2015)**

eKLR, Wellington Nganga Muthiora v Akamba Public Road Services And Another (2010) eKLR and Shivji Premji Varsami & Another v Neema Kazungu (2021) eKLR. Counsel asserted that the Appellant established the particulars of negligence in respect of the Respondent and/or its driver, servant, agent and/or representative,

and cited **Nandwa v Kenya Kazi Ltd [1988] KLR 488 and Regina Wangechi v Eldoret Express Co. Ltd (2008) eKLR.**

7. The Respondent, through the firm of Mwenda Mwarania, Akwalu & Co. Advocates, filed submissions dated 17/3/2025. Counsel faulted the Appellant for failing to distinguish which motor vehicle caused the accident and the owner thereof, and cited **IEBC & Anor v Stephen Mule and Others (2014) eKLR.**

Analysis and Determination

8. This being a first appeal, the court is obliged to reconsider and re-evaluate the evidence adduced in the trial court and draw its own conclusions on the same.

9. In **Selle & another v Associated Motor Boat Co. Ltd [1968] EA** the court held as follows: ***“This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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 allowance in this respect.”

10. I have considered the appeal herein, the trial court’s judgment which is the subject of this appeal as well as the submissions on record.

11. The sole issue for determination therefore is whether the Respondent was liable for the accident.

12. It is undoubtedly clear that the Appellant was involved in an accident on 9/2/2014, consequent to which he sustained serious injuries. What is in dispute is whether the Respondent was liable for the said accident.

13. The age-old principle of law is that he who alleges must prove, as espoused in **Nandwa v Kenya Nazi Ltd [1988] KECA 42 (KLR)**, where the Court of Appeal, cited with approval **Henderson v Henry E Jenkins & Sons [1970] AC 282 at 301**, that, ***“In an action for negligence the plaintiff must allege, and has the burden of proving, that the accident was caused by negligence on the part of the defendants. That is the issue throughout the trial, and in giving judgment at the end of the trial the judge had to decide whether he is satisfied on a balance of probabilities that the accident was caused by negligence on the part of the defendants, and if he is not so***

satisfied the plaintiff’s action fails. The formal burden of proof does not shift. But if in the course of the trial there is proved a

set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendants, the issue will be decided in the plaintiff’s favour unless the defendants by their evidence provide some answer which is adequate to displace the prima facie inference. In this situation there is said to be an evidential of proof resting on the defendants...”

14. At paragraphs 3 and 4 of the plaint, the Appellant pleaded that the Respondent was the owner of both Motor vehicle registration Nos. KAV 888 E and KAV 885 E. Similarly, the Appellant referred to motor vehicle registration No. KAV 885 E Toyota Land Cruiser, as the accident motor vehicle in his issues for determination dated 9/8/2014. The question then begs, which specific motor vehicle, was responsible for causing the accident.

15. In *Joel Muga Opija v East African Sea Foods Ltd [2013] eKLR* the Court of Appeal held that, ***“In our view an exhibit is evidence and in this case the appellant’s evidence that the police recorded the respondent as the owner of the vehicle and Ouma’s evidence that he saw the vehicle with words to the effect that the owner was East African Sea Food were not seriously rebutted by the respondent who in the end never offered any evidence to challenge or even to counter that evidence. We think, with respect that the learned Judge in failing to consider in depth the legal position of***

what is required to prove ownership, erred on point of law on that aspect. We agree that the best way to prove ownership would be

to produce to the court a document from the Registrar of Motor Vehicles showing who the registered owner is, but when the Abstract is not challenged and is produced in court without any objection, its contents cannot be later denied.”

16. In the absence of a police abstract, official registration records or any other documentary evidence to link the ownership of the subject motor vehicles to the Respondent, the trial court was left with no alternative but to properly find that liability had not been proved. It behooved the Appellant to discharge the burden of proof on a balance of probabilities by demonstrating that the accident motor vehicle was owned by the Respondent. Without such nexus, no liability can be apportioned to the Respondent.

17. The upshot from the foregoing is that the appeal is in want of merit and it is hereby dismissed with costs to the Respondent.

DATED AND DELIVERED AT MERU THIS 12TH DAY OF MARCH, 2026.

S.M. GITHINJI
JUDGE

In the presence of:-

Miss Kajuju holding brief for Mr. Mwenda
Mwarania for the Respondent.

Firm of Rimita is for the Appellant (absent).