REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT THIKA

HCCOMMA NO. E021 OF 2024

PETER NYURURU KIMANI................................1ST APPELLANT

GITHUYA TRANSPORTERS LIMITED...............2ND APPELLANT

VERSUS

TIMOTHY MWENDWA MUTUI.......................1ST RESPONDENT

SAMUEL GICHO MWAI..............................2ND RESPONDENT

(*Being an appeal from the whole judgment of the resident magistrate at Thika delivered by Hon. M.W. Kamau on 15th August 2024 in SCCC E861 of 2023)*

JUDGEMENT

1. The Claimants moved the honourable trial court vide a Statement of Claim dated 1st August 2023. The claim was for compensation for loss or damage to property which occurred on or about the 3rd January 2023. The property was valued at Kshs. 867,190.00. It was alleged that the 1st Appellant was the registered owner of motor vehicle registration no. KBS 286V Mitsubishi bus while the 2nd Appellant is the beneficial owner.

2. It was also alleged that on 3rd January 2023, the 1st Respondent was the registered and/or beneficial owner of motor vehicle registration no. KBW 117B Toyota MarkX while the 2nd Respondent was the beneficial owner and or driver of motor vehicle registration no. KBW117B Toyota Mark X. The Appellant's agent was driving motor vehicle registration number KBS 286V along the Thika Matuu road and upon reaching Maguguni area, the 1st Respondent so

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negligently, carelessly and or recklessly managed motor vehicle registration number KBW 117B that it lost control and hit the Appellant's vehicle from the front right-hand side with a resultant compressive force towards the rear. As a result, motor vehicle KBS 286V was extensively damaged and the Appellants incurred special loss and special damage in repairing it. The Appellant's thus claimed special damages of Kshs. 867,190.00 from the Respondents plus interest on the principal amount.

3. The Respondent denied the claim and in the alternative pleaded that if in fact the accident did occur on 3rd January 2023, it was caused by the Appellants' agents, employee or servant.

4. The matter proceeded to trial where CW1 testified that he went to the scene of the accident on the material day before the vehicle was towed away from the scene. That both vehicles were at the scene and his vehicle was on the left side while the other vehicle was in the middle of the road. That the 1st Respondent was the one driving the vehicle registration KBW 117B on the day of the accident, while the 2nd Respondent was the insured as per the records. That he paid Kshs. 50,000.00 to Directline Assurance because there were injured people in vehicle.

5. CW2 testified that he is an assessor at Red Valuers and Assessors Thika Branch. He assessed motor vehicle registration KBS 268B on 5th January 2023 and produced a report for the same. He noted that impact was from the right side of the vehicle. There was no damage on the left side, however, the front panel centre bolt was damaged. The rear wind screen was damaged on the rear left. The vehicle did not have any pre accident defects. The repair was valued at Kshs. 425,000.00 and the vehicle took about two weeks to be back on the road.

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6. CW3 No. 239758 is a police officer stationed at Ngoliba Traffic Base as Deputy Base Commander. He testified that the road accident occurred on 3rd January 2023 along Thika Matuu road at Maguguni area near Zane petrol station at around 1145 hours involving KBW 117B Toyota Mark X and Motor vehicle KBS 286V Mitsubishi Minibus of 2TS Sacco. That KBW 117B was driven by the 1st Respondent from Matuu general direction to Thika general direction while KBS was driven by the 2nd Respondent heading towards Matuu. On reaching location of accident, KBW MarkX left its proper lane entering the opposite lane causing both vehicles to collide as a result some of the passengers in both motor vehicle sustained injuries. The accident was booked under OB No. 13/03/01/23. The IO issued an abstract for motor vehicle KBS 286V. Motor vehicle KBW 117B Toyota Mark X was blamed for accident as it left its proper lane. He clarified that he did not visit the scene, he relied on the police records. He could not tell the position of the vehicle at the time of the accident.

7. CW4 states that KBW 117 B was speeding approximately 100kph while he was driving at about 50kph. He saw the vehicle when it was about 20 metres away that's why he didn't see it from far. The driver of KBW was trying to evade a motor bike. He swerved to the right as he was heading towards Matuu. When the accident occurred, his vehicle went to the right and Mark X was on the right-hand side. KBW was overtaking motor cycle and when he hit brakes, he lost control and he swerved right to evade the KBW.

8. RW1 testified that he had driven to Kitui approximately 105kms from Kitui to Ngoliba. His vehicle suffered damage on the entire front, he blamed KBS for the accident. He was at the scene when the police arrived. The car had been sold to him by Mwai a week prior to the accident. He had not taken out a new insurance cover as the vendor

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had not cancelled the previous cover. He was just grateful that no one had lost his life because of the accident. The bus was overtaking at a corner. It tried to go back to its lane and it was speeding and when it was about to enter its lane, it began swaying left and right. He hit emergency break and his car twisted a little bit. He was hit while he was on his lane.

9. RW2 testified that the Mark X was hit on the left side. He was in the vehicle when the accident occurred. A passenger was severely wounded. He saw the bus from the right, it tried to overtake. The road was slippery the car tried to avoid hitting the bus but the car tilted and slipped in the middle of the road and the bus hit it.

10. RW3 confirmed that he sold the car to the 1st Respondent, including the use of his insurance for a few days. He had no insurable interest in the car as he had transferred it to the 1st Respondent.

11. At the end of the trial, the court in finding the 1st Respondent's testimony as more credible, determined that the Appellant's driver was liable for the accident. It is the appellant's driver who veered off to the Respondent's lane, thus resulting in the accident.

12. On quantum, the court found that the claimant had only proved special damages of Kshs. 435,230.00 and Kshs. 79,350.00 as loss of user. Ultimately the court dismissed the claim.

13. Aggrieved and dissatisfied with the decision of the trial court the appellant lodged the instant appeal urging the following grounds:
    i. The learned trial magistrate erred in law by totally ignoring the evidence tendered by the claimants and more so the evidence of an independent witness.

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ii. The learned magistrate erred in law by failing to appreciate and consider the evidence of the independent investigation officers who processed the scene of accident immediately after it occurred and who blamed the respondent wholly for the accident.
iii. The learned trial magistrate erred in law by failing to appreciate that liability is attached to a party to an accident based on the point of impact and not the resting place of the accident motor vehicles.
iv. The learned trial magistrate erred in law in purporting to rewrite the pleadings and evidence of parties and thus rendered a wrong conclusion.
v. The trial magistrate erred in law by stepping and or entering the arena of litigation by becoming a witness in the case, a defence counsel and illegally departing from the seat of an adversarial adjudicator thus arrived at a wrong decision.
vi. The learned magistrate erred in law by assuming the role of an investigator, defence counsel and adjudicator in clear breach of rules of procedure, evidence and natural justice.
vii. The learned magistrate erred in law by relying on presumption as opposed to evidence thus rendered a wrong decision.
viii. The learned trial magistrate erred in law in failing to appreciate that special damages are allowed upon being pleaded and proved.
ix. The learned magistrate erred in law by applying double standards on the evidence tendered.

14. Therefore, the appellant prayed that the appeal be allowed and the finding of the trial court be set aside.

15. The court directed that the appeal be canvassed through written submissions.

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16. The Appellant submitted that the appeal complies with **Section 38 (1) of the Small Claims Court Act** as all the nine grounds of appeal are issues of law. in any case the question on the way the evidence was presented, considered and a final decision arrived at is a question of law.

17. The appellant further faulted the trial court for failing to consider the testimony of the police officer yet he was a crucial independent witness in the case. Had the court considered the testimony of the police officer (CW3), it would have arrived at a different determination. It was the appellant's submission that the court misapplied the strict rules of evidence, it also took an inquisitory route at arriving at the said impugned decision and therefore arriving at the wrong finding.

18. The Respondent submitted that the trial court properly directed itself in law and fact in arriving at its decision on the way the accident occurred. This appeal therefore is an invitation to the court to arrive at a different finding on fact contrary to **Section 38 (1)** which provides that appeals from the Small Claims courts to the High Court shall only be on matters of law.

19. As a result, the limitation to appeal on issues of law only is jurisdictional in nature and any invitation to determine the factual issues of a dispute is outside the scope of the High Court moved pursuant to **Section 38 (1) of the Act**.

20. It was further submitted that the allegation that CW3 was an independent witness is untrue as he did not know how the accident occurred. He was neither the investigating officer nor did he produce the investigation file. It is therefore false to claim that his evidence was ignored when in fact his evidence was not direct.

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21. Ultimately, the Respondent submitted that the appeal be dismissed with costs.

22. Although the appellants have listed multiple grounds of appeal, I have identified only two (2) issues for determination namely liability and quantum.
23. On liability, it is not in dispute that an accident happened involving motor vehicle registration KBW 117B and KBS 286V. The issue was not the fact of the accident and the damage to the motor vehicle, but on who was at fault. The real issue is therefore whether the person who had control of the accident vehicles, at the material time, was responsible for the mishap.

24. Was there material to establish liability? The Appellant contended that the 1st Respondent left its proper lane hence causing the accident, the 1st Respondent on the other hand contended that it was the 1st appellant who left its proper lane and veered off to the 1st Respondent's lane. A description which the trial court found credible in so far as the way the accident occurred is concerned.

25. The Appellant faulted the trial court for lacking a legal basis for this finding as CW3, testified that the 1st Respondent was blamed for the accident. But was there negligence? The 1st Respondent contends that there was no proof of negligence, as the 1st Appellant did not witness the accident, and the police officer, who testified, did not investigate it.

26. I agree, that the 1st Appellant was not an eyewitness to the accident. He did not provide evidence on how it happened, and his testimony cannot be used to gauge whether the accident was caused by negligence of the 1st Respondent. That leaves us with the testimony of the police witness. He conceded that he did not investigate the accident, for the investigations were conducted by

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another officer, who had been transferred, as at the date he testified. He testified on the manner of the accident based on the findings and records of the investigating officer. It is crucial to note that the investigating officer himself, was not at the scene during the accident but wholly relied on accounts given to him by others, including CW1. CW3 stated that He said that the 1st Respondent was to blame for the accident.

27. Was the testimony of the police witness adequate, on the matter of liability? I do not think so. The utility of his evidence was that an accident happened, as evidenced by the police abstract that he produced, based on material that he had. He produced no sketches nor drawings of the accident scene or any other evidence to support his colleague's assertion that the 1st Respondent was to blame for the accident.

28. The fact of an accident alone, without more, is not proof of negligence or liability. The 1st and 2nd appellants did not plead res ipsa loquitor. Even if they had, they did not adduce evidence which would have assisted the court to conclude that the events, surrounding the occurrence of the accident, spoke for themselves, or explained themselves, or were obvious proof of negligence. Neither the appellant, nor the police officer, painted a clear picture of how the accident happened, to lay the groundwork, for concluding that the accident was res ipsa loquitor, or spoke for itself.

29. Indeed, it is for this reason that the trial court rejected the appellants' version of the accident and adopted that of the 1st Respondent as being credible. Liability does not attach on account of the mere occurrence of the accident, but on negligence. The 1st Respondent demonstrated that the appellant's agent veered off into his lane thus resulting in the accident.

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30. On the other hand, the appellants established only one aspect of their case on liability, proof that an accident happened. They did not prove the other aspect, that the accident happened because the 1st Respondent was negligent. The duty was on them, the 1st and 2nd appellants, to establish that fact; it was not on the Respondent and his driver, to establish that they were not negligent.

31. Burden of proof in civil cases, such as the instant one, is always on the preponderance of the evidence, or on balance of probability. The mantra is that he who alleges must prove. It is the 1st and 2nd appellants who came to court, claiming that the accident happened, due to negligence on the part of the 1st and 2nd Respondents. They were burdened with proving that negligence, to obtain a judgement in their favour. Both the legal and evidential burdens, to rebut that, if proven, would have shifted to the appellant and his driver, upon the 1st and 2nd appellants discharging that burden in the first place. The 1st and 2nd appellants did not discharge that burden, as they did not prove negligence, and the burden to adduce rebuttal or counterevidence did not shift.

32. On liability, the 1st and 2nd appellants did not establish negligence on the part of the respondents, for them, the respondents, to be held 100% liable, in negligence, for the accident, and the damages occasioned to the appellants' motor vehicle.

33. In view of what I have concluded above, I find no reason to disturb the finding of the trial court on liability as no proof of fault was established, against the 1st and 2nd Respondent. The fact that an accident happened would not be adequate. Some evidence of negligence must be adduced. None was.

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34. The upshot is that the appeal fails and the same is dismissed. Each party to bear its costs.

DATED, SIGNED AND **DELIVERED ELECTRONICALLY** THIS **12TH** DAY OF **MARCH**, 2026.

HON. T. W. Ouya
JUDGE

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