REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT THIKA

CIVIL APPEAL NO. E232 OF 2024

SAMUEL THIONG'O MUNGAI..... APPELLANT

VERSUS

PETER THIONG'O KINUTHIA..... RESPONDENT

(*Being an appeal from the Judgment and decree of Hon. Tracy Wachira delivered on 30th July 2024 in Small Claims Court Cause SCCC 188 of 2024)*

JUDGEMENT

1. The Respondent lodged a claim against the appellant vide a Statement of Claim dated 9th February 2024, seeking compensation for material damage of a motor vehicle as a result of a road traffic accident which occurred on 22nd February 2021 along Thika Superhighway, within Kiambu County.

2. The claim was based on allegations that on or about 22nd February 2021 at around 1915 hrs, the Respondent's authorized driver was lawfully driving motor vehicle registration number KCQ 897C along Thika Superhighway, within Kiambu County when the appellant, who was the driver of motor vehicle registration number KBU 824S hit the Respondent's motor vehicle on the rear.

3. It was alleged that the appellant negligently drove motor vehicle registration number KBU 824S in a dangerous, careless and reckless manner. Resulting in extensive damage of the Respondent's motor vehicle. The Respondent's insurer repaired the subject motor vehicle and he therefore instituted this suit under the doctrine of subrogation for recovery of Kshs. 225,590, being

assessment fees, cash in lieu of repairs, loss of use and tracing fees.

4. The Appellant denied the claim vide the Reply to Statement of Claim dated 16th May 2024 where he stated that the accident was occasioned by the negligence of the Respondent who was driving under the influence of alcohol and was overtaking without indicating. The Appellant further alleged that the Respondent used his seniority to force the junior traffic officers to record that the Appellant was to blame for the accident.

5. When the matter proceeded to trial, PW1 Peterscoff Mutua from Britam testified by adopting his witness statement and list of documents as exhibits. On cross-examination, he testified that the Respondent repaired the vehicle by himself, and the expenses were reimbursed to him as per the assessment report. A re-inspection report was undertaken confirming the repairs.

6. James Kamau Kariuki testified on behalf of the Appellant. He testified that he is a driver of matatu KBU 824S. He adopted his witness statements and bundle of documents as exhibits. He clarified that he had no documentation to show that the Respondent's vehicle was to blame for the accident.

7. At the end of the trial, the court relied on the doctrine of res ipsa loquitor and stated that negligence could be inferred from the facts of the case. The Appellant, despite denying liability, failed to provide any documentation to support his oral testimony. The allegation that the Respondent's driver was under the influence was not supported by evidence, neither was there evidence to support the allegation that the Respondent unfairly used his seniority to influence the outcome of the conclusions by the junior traffic officers. Therefore, the court found the Appellant 100 % liable for the accident.

8. The court noted that the special damages of Kshs. 225,590 had been proved and proceeded to award the same to the Respondent. Costs for the suit were also assessed at Kshs. 20,000.

9. Aggrieved and dissatisfied with the decision of the trial court, the appellant lodged the instant appeal on grounds that:
   i. The learned adjudicator erred in law and acted without evidence when she found that the Respondent had proved liability on the part of the Appellant.
   ii. The learned magistrate erred in law when she misapplied the doctrine of res ipsa loquitor while the same was not applicable and, in doing so, wrongly shifted the burden of proof to the appellants.
   iii. The learned magistrate erred in law and in fact by disregarding the appellant's testimony when the same was not rebutted by failure on the part of the Respondent to call a witness.
   iv. The honourable learned magistrate erred in law and fact when she issued the orders that she did.

10. The appellant prayed that the appeal be allowed and the judgement dated 30th July 2024 and the decree of the trial court be set aside and substituted with an order dismissing the Respondent's suit at the trial court.

11. The court directed that the matter be canvassed through written submissions.

12. The appellant submitted that the Respondent failed to prove his case to the required standard as neither the Respondent nor his son was called to testify in court as a witness. Moreover, the investigation officer was not called to testify and give the court a clear picture of how the

accident occurred and who was to blame for the accident. The Respondent having failed to prove his case on a balance of probabilities was not entitled to the reliefs sought. There was also no direct evidence tendered on liability by the Respondent that called for the Appellant's rebuttal. Furthermore, the pleaded particulars of negligence were not proved and even though the police abstract indicated that motor vehicle registration number KBU 824S was liable for the accident such evidence was not in itself sufficient to prove negligence.

13. On quantum, the appellant submitted that the Respondent was the author of his own misfortune and was therefore not entitled to any award as compensation. He therefore urged that the appeal be allowed and the decision of the trial court be set aside.

14. The Respondent submitted that he had duly proved his case before the trial court to the required standard by pleading the doctrine of res ipsa loquitor. The police abstract that was produced in court was clear that the Appellant was responsible for the accident. The appellant's liability therefore remained unchallenged and for that reason the Respondent contended that the Appellant was 100% liable for the accident.

15. The Respondent urged that the appeal be dismissed with costs.

16. This is a first appeal. As a first appellate court, this Court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, drawing a conclusion from that analysis but bearing in mind the fact that this court did not have an opportunity to see and hear the witnesses first hand. This is captured by **Section 78 of the Civil**

Procedure Act which espouses the role of a first appellate court which is to:

'…… ***re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions.'***

17. I have considered the grounds of appeal, the record of appeal and the submissions of the parties.

18. The doctrine of subrogation is a principle in insurance law that enables an insurer after compensating an insured for any loss under the insurance contract to step into the shoes of the insured. The Court of Appeal in ***Africa Merchant Assurance Company v Kenya Power & Lighting Company Limited (2018) eKLR*** held as follows with regards to the doctrine of subrogation:

> ***"The essence of the doctrine of subrogation is not in contention. It allows an insurer after compensating an insured for any loss under the insurance contract to step into the shoes of the insured. In that, the insurer is entitled to all the rights and remedies the insured might have against a third party in respect of the loss compensated. As it stands, the law in that respect is settled, that is, that an insurer cannot under the doctrine of subrogation institute a suit in its own name against a third party."***

19. For the doctrine of subrogation to be invoked, there are conditions precedent. First, there must be in existence a contract of insurance, risk must have crystallized and there must be actual payments made in order to indemnify the insured. This was held in the case of **Egypt Air Corporation v Suffish International Food Processors (U) Ltd and Another [1999] 1 EA 69**

where the Court defined the basis of the doctrine of subrogation as follows:

> ***"The whole basis of subrogation doctrine is founded on a binding and operative contract of indemnity and it derives its life from the original contract of indemnity and gains its operative force from payment under that contract; the essence of the matter is that subrogation springs not from payment only but from actual payment conjointly with the fact that it is made pursuant to the basic and original contract of indemnity. If there is no contract of indemnity, then there is no juristic scope for the operation of the principle of subrogation."***

20. The existence of an insurance contract between the Respondent and Britam has not been disputed. Also, it is admitted that the claim has crystalized.

21. In this appeal, it is clear that the determination of this appeal revolves around the question whether the respondents proved their case on the balance of probabilities. That the burden of proof was on the respondents to prove their case is not in doubt. In **Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR** it was held that:

> ***"As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore, the evidential burden … is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that***

proof of that fact shall lie on any particular person…The appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side."

22. The question then is what amounts to proof on a balance of probabilities. **Kimaru, J** in **William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526** stated that:

"In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

23. A perusal of the record demonstrates that the Respondent adduced evidence to prove that the appellant was responsible for the accident. The police abstract that was produced and relied on as evidence indicated that the appellant was responsible for the accident. While it is clear that police abstract in and of itself is not proof of liability, there is a need to consider the abstract alongside other pieces of evidence, including witness statements and other circumstantial evidence.

24. Instead of controverting the evidence of the Respondent, the appellant opted to claim that the Respondent used his position as a police officer to influence the outcome of the investigation. Also, his allegation that the Respondent was

under the influence of alcohol was not supported by evidence. Therefore, it is safe to say that the Respondent's version on how the accident occurred was not challenged. Accordingly, I find no reason to disturb the trial court's finding on liability. The appellant is 100% liable for the accident.

25. It is the principle of insurance that the insurer can only be subrogated where it has made payment to the respondent. In the case of **Indemnity Insurance Co. of North America and Another vs Kenya Airfreight Handling Ltd and Another [2004] 1 EA 52** where it was held that:

> ***"Under insurance law principles, for an insurer to be subrogated to the rights of the insured, the latter must have been indemnified by the former; only then can the insurer step into the shoes of the insured."***

26. In the case under consideration, there is no dispute that the respondent`s motor vehicle was damaged during the accident. PW1 testified that the Respondent repaired the subject motor vehicle and was indemnified the same at Ksh. 225,590.00. He produced an assessment report in respect of the cost of repairs undertaken on motor vehicle registration number KCQ 897C. The appellant did not dispute the repairs. Upon examining the evidence adduced before the trial court, I find sufficient evidence to prove that the respondent`s motor vehicle was repaired.

27. I find the payments herein to have been proved on a balance of probabilities. The respondent was accordingly indemnified for the financial loss occasioned by a third party. The appellant did not adduce any evidence to suggest that the money awarded by the trial court was not paid to the Respondent.

28. ***The upshot is that the doctrine of subrogation was properly invoked in this case. I find no merit in the appeal and the same is dismissed with costs to the respondent.***

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

HON. T. W. Ouya
JUDGE

For Appellant…….Ms Ng'eno HB for Ms Wanja
For Respondent……Ms Nduta
COURT ASSISTANT……Brian