

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA
CIVIL APPEAL NO. E014 OF 2024

PAUL IRURA MURIITHI

----- **APPELLANT**

-VERSUS-

THE GUARDIAN COACH LIMITED -----
RESPONDENT

***(Being an Appeal from the Judgment/Decree delivered
by Hon. J. Ndeng'eri (PM) on 20th February 2024 in
Naivasha CMCC No. 565 of 2018)***

JUDGMENT

- 1.** The Appellant was the Plaintiff in the trial court where he sued the Respondent vide a Plaint dated 28th June 2018 seeking damages and costs. His claim arose from a road traffic accident that occurred on 20th August 2017 along the Naivasha–Nakuru Road at Marura area, involving motor vehicle registration numbers KCD 139J, in which he was a passenger, and KCM 788A, allegedly negligently driven by the Respondent’s driver, agent, servant and/or employee. He averred that he sustained a blunt injury to the forehead leading to soft tissue injuries, severe soft tissue injuries to both knees.
- 2.** The Respondent entered appearance and filed a Statement of Defence denying liability and attributing negligence to the Appellant and the driver of motor vehicle registration No. KCD 139J, putting the Plaintiff to strict proof.

3. At the hearing, the Appellant testified and adopted his witness statement dated 28th June 2018. He produced the Demand Letter (P.Exh1), Treatment Card (P.Exh2), Medical Report (P.Exh3), Receipt for Special Damages (P.Exh4), P3 Form (P.Exh5), Copy of Records for motor vehicle registration No. KCM 788A (P.Exh6) and National Identity Card (P.Exh7)
4. The Police Abstract was produced through **No. 91714 PC Josphat Makau (PW2)**.
5. The Respondent closed its case without calling any witnesses.
6. In a judgment dated 20th February 2024, the trial court found that the Appellant had not proved his claim on a balance of probabilities and dismissed the suit with costs.
7. Aggrieved by the trial court's decision, the Appellant filed the present Appeal vide a Memorandum of Appeal dated 22nd February 2024, seeking to set aside the judgment, entry of judgment in his favour, assessment of general and special damages, and costs.
8. The Appellant listed the following grounds of appeal in the memorandum of appeal: -
 - a) ***The Learned Magistrate erred in law and in fact in holding that there was no proof of injuries yet the Plaintiff produced treatment notes, P3 Form, and medical report which were not controverted.***
 - b) ***That the Trial Magistrate erred in failing to find that the evidence and material medical reports tendered herein established/proved to the***

required standard injuries sustained by the Appellant.

- c) The Learned Magistrate erred in law and in fact by disregarding the Plaintiff's testimony when the same was not rebutted by failure on the part of the Respondent to call a defence witness.**
- d) The Learned Magistrate misdirected herself in the appraisal of the evidence by failing to consider that the authenticity of the police abstract had not been rebutted.**
- e) The Learned Magistrate misdirected herself in the appraisal of the evidence by failing to consider that the authenticity of the Treatment Card, hospital receipts and medical report had not been rebutted.**
- f) That the trial magistrate erred in fact and in law by writing a judgment that is not only incomplete but also not based on proper evaluation and consideration of pleadings, evidence on record, submissions and applicable law and principles for the award of damages.**
- g) The Learned Magistrate erred in law and in fact by failing to appreciate that the Appellant's case had no inconsistencies that could warrant it to be dismissed.**
- h) That the trial magistrate erred in fact and in law by failing to award the Appellant general and**

special damages despite the Appellant having proved her (sic) case to the required standard.

9. The appeal was canvassed by way of written submissions which I have considered.
10. The Appellant contended that his evidence was uncontroverted and admitted without objection. He submitted that trial court misdirected itself by raising issues not pleaded or contested and that minor inconsistencies should not defeat a personal injury claim. He added that the dismissal was based on a misapprehension of evidence.
11. The Respondent, on the other hand, submitted that the appeal is an abuse of court process, that the Appellant failed to produce primary treatment notes and that the patient card contradicted the pleaded injuries. It was the Respondent's case that the injuries allegedly discovered months later could not be attributed to the accident. He added that the trial court properly evaluated the evidence and reached the correct conclusion.

Issue for Determination

12. The Appellant raised eight (8) grounds of appeal, the gravamen of which was that the trial court failed to properly evaluate uncontroverted medical evidence and wrongly dismissed the claim.
13. This Court is guided by the duty of a first appellate court as stated in ***Selle vs. Associated Motor Boat Company***

(1968) EA 123, where the East Africa Court of Appeal held, Per Sir Clement:

“This court must consider the evidence, evaluate itself and draw its own conclusions. Though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (see also Abdul Hamond Sarif vs. Ali Mohamed Solan [1955] 22 EACA 270)”

14. The sole issue for determination is whether the Appeal is merited.

Analysis and Determination

15. It is trite that he who asserts must prove (*onus probandi actori incumbit*). This principle is codified under **Sections 107-109 of the Evidence Act**, which provides that:

107. Burden of proof.

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that

those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden.

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact.

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

- 16.** Accordingly, it was incumbent upon the Appellant to prove, on a balance of probabilities, that he sustained the pleaded injuries as a result of the accident.
- 17.** The Appellant argued that the medical documents produced were uncontroverted and that the trial court erred by dismissing the suit notwithstanding the Respondent's failure to call evidence. Reliance was placed on ***Trust Bank Ltd vs. Paramount Universal Bank Ltd & 2 Others HCCA No. 1243 of 2001*** where it was held, inter alia, that failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.
- 18.** The Respondent countered that the injuries were not proved, pointing to material inconsistencies between the treatment notes, P3 Form and medical report. They relied

on ***Timsales Limited vs. Wilson Libuywa Nakuru*** HCCA No. 135 of 2006 and ***Fadna Issa Omar vs. Malne Sirengo Chipo & 3 Others*** (2016) eKLR where the court emphasized that a medical report is of no use unless it is supported by initial treatment notes.

19. It is settled law that the burden of proof does not shift merely because the defence elects not to call evidence. In ***Evans Otieno Nyakwana vs. Cleophas Bwana Ongaro*** [2015] eKLR, Majanja J. stated:

“...As a general proposition 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 (1) of the Evidence Act (Chapter 80 of the Law of Kenya), which provides: “107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist...”

20. In the instant case, the trial court found significant inconsistencies in the Appellant’s medical evidence, noting, in part, as follows:

“...The court considered the documents filed by the Plaintiff especially with regard to treatment. It was his testimony that he was treated at Nakuru PGH. the P3 Form produced was filled at the Naivasha Sub-County Referral Hospital on 20th September 2019. At this point

in the analysis of the matter, the court noted that the plaintiff was first attended at Nakuru PGH on the night of the accident. The court wondered how the medic from Naivasha Sub-County Referral Hospital relied on records that they did not have. Put in another way, the primary treating facility was Nakuru PGH, it behove upon the plaintiff to avail the P# at the facility for purposes of filling the P3... ..would the age of the injuries be three hours post the accident yet the P3 was filled a month after the accident? ...There are gaps in the evidence....”

- 21.** A careful perusal of the record of appeal reveals that while the Appellant testified that he was first treated at Nakuru Provincial General Hospital, the P3 Form (P.Exh5) was filled and signed at Naivasha Sub-County Referral Hospital approximately one month later. The P3 Form however indicates that the injuries were three hours old and consisted of torn and blood-stained clothing. I note that the injuries noted in the P3 form are not consistent with the injuries in the initial treatment notes from Nakuru, which only recorded pain in the right upper forearm without swelling or wound.
- 22.** I further note that these inconsistencies were neither explained nor reconciled. Furthermore, the P3 Form made no reference to the initial treatment notes from Nakuru

Provincial General Hospital, notwithstanding the fact that it was the primary treating facility.

23. In the circumstances of this case, this Court is unable to ascertain, with certainty, the nature of injuries that the Appellant sustained in the accident in question. I find that the contradictions in the documentary evidence undermine the probative value of the Appellant's case.

24. I therefore find, as did the trial court, that the Appellant did not discharge his burden of proof on a balance of probabilities.

Disposition

25. Having found that the trial court properly analysed and evaluated the evidence and arrived at the correct conclusion I find that there is no basis for interference with the trial court's verdict.

26. In sum, I find that the appeal lacks merit and I hereby dismiss it with costs to the Respondent which I hereby assess at Kshs. 20,000.

27. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIVASHA THIS 5th DAY OF MARCH, 2026.

**HON. W. A. OKWANY
JUDGE
05/03/2026**

FOR APPELLANT MS Kirui for Mboga

FOR RESPONDENT N/A

COURT ASSISTANT Karani

ORIGINAL