



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Gichuru v Ariwi & another (Civil Appeal E201 of 2024)  
[2026] KEHC 2798 (KLR) (26 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 2798 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL E201 OF 2024  
FN MUCHEMI, J  
FEBRUARY 26, 2026**

**BETWEEN**

**ALFRED MWAURA GICHURU ..... APPELLANT**

**AND**

**SHEM ARUNGU ARIWI ..... 1<sup>ST</sup> RESPONDENT**

**KEN MBAYA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the Judgment and Decree of Hon. J. K. Tawai (RM/Adjudicator)  
delivered on 15th June 2024 in Thika Small Claims Court SCCC No. E142 of 2024)*

**JUDGMENT**

**Brief facts**

1. This appeal arises from the judgment of Thika Resident Magistrate/Adjudicator in SCCC No. E142 of 2024 whereby the trial court dismissed the appellant's claim for lack of proof.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 6 grounds of appeal summarized as follows:-
  - a. The learned adjudicator erred in law by failing to consider all the documentary evidence filed thus arriving at an erroneous decision.
  - b. The learned adjudicator erred in law by disregarding the appellant's pleadings on account of failure to particularize negligence whilst the court is not wholly bound by the rules of evidence.
3. Parties disposed of the appeal by way of written submissions.



### **The Appellant's Submissions**

4. The appellant relies on Section 3(3), 24 and 34 of the [Small Claims Court Act](#) and the cases of *Kenyatta National Hospital vs Dorcas Odongo & Another* [2021] eKLR and *Wachira & Another vs Republic & Another* [2003] eKLR and submits that specifically pleading the particulars of negligence were not mandatory as long as the allegation of negligence was made in the pleadings. The appellant further refers to Section 17 and 30 of the [Small Claims Court Act](#) and submits that the procedure in the Small Claims Court is simple and relaxed and it is aimed at moving away from the complexities of procedure and evidence to enable ordinary citizens to have easier access and time in courts. To support his contentions, the appellant relies on the cases of *Elrons Limited vs Basil* [2024] eKLR and *Abel Mogaka Onkundi vs Francis Mwaura Chege* [2025] KEHC 8913 (KLR).

### **The Respondents' Submissions**

5. The respondents refer to Section 38 of the [Small Claims Court Act](#) and the cases of *Joseph Wanyoike Kuria vs Patrick Kinyanjui Mwangi Civil Appeal No. E204 of 2024* [2025] KEHC; *Otieno Ragot & Company Advocates vs National Bank of Kenya Limited* [2020] eKLR and *Kenya Breweries Ltd vs Godfrey Odoyo* [2010] eKLR and submits that the appellant's grievances are predominantly factual and fall outside the scope of appellate review as the appellant is dissatisfied with the manner in which the learned adjudicator assessed the pleadings and evidence.
6. The respondents submit that while the [Small Claims Court Act](#) provides for simplified procedure, it does not abrogate fundamental principles of substantive law including the requirement that a claimant must plead and prove his case. The respondents further rely on Section 24 of the [Small Claims Court Act](#) and the case of *Mboga vs Mwambodze (Civil Appeal E139 of 2023)* [2024] KEHC 7376 (KLR) and submits that liability cannot arise in the absence of fault and that negligence must be established on a balance of probabilities. The appellant made general allegations that they drove negligently but failed to demonstrate, through credible evidence, how they breached a duty of care. Relying on the case of *Ondimu vs Keragori* [2025] KEHC, the respondents argue that the burden of proof rested with the appellant in establishing negligence and the lower court could not presume negligence in the absence of credible and cogent evidence. Upon failing to establish liability, the lower court could not award damages. To support their contentions, the respondents refer to the case of *Mwenda vs Mutembei (Civil Appeal E010 of 2021)* [2023] KEHC 20889 (KLR).

### **Issues for determination**

7. The main issues for determination are:-
  - a. Whether the appeal is defective.
  - b. Whether the failure to plead particulars of negligence rendered the claim defective.
  - c. If not, whether the appellant proved his case on a balance of probabilities.

### **The Law**

8. The Court of Appeal while referring to a second appeal, which is essentially on points of law and thus similar to the duty of this court under Section 38 of the [Small Claims Court Act](#), set out the duty of



the second appellate court in the case of Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited [2020] eKLR as follows:-

I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below considered matters that they should have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

9. In distinguishing between matters of law and fact the Court of Appeal stated in Kenya Breweries Ltd vs Godfrey Odoyo [2010] eKLR as follows:-

I have anxiously considered the pleadings, the evidence on record, the judgment of the learned Senior Resident Magistrate and the judgment of the superior court, the grounds of appeal, the submissions of the learned counsel as well as the authorities to which we were referred. First, this is a second appeal. In a first appeal the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyse it, evaluate it and come to its own independent conclusion. In other words, a first appeal is by way of retrial and facts must be revisited and analysed a fresh. See *Selle and Another vs Associated Motor Boat Company Limited and Others* (1968) EA 123. In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

#### **Whether the appeal is properly before the court**

10. Section 38 of the Act provides:-

A person aggrieved by the decision or an order of the court may appeal against that decision or order to the high Court on matters of law.

11. The Court of Appeal in *Mwangi vs Wambugu* [1984] KLR 453 commented of what amount to points of law as follows:-

A Court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding; and an appellate court is not bound to accept the trial Judge's finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.

12. Similarly in *Peter Gichuki King'ara vs Independent Electoral and Boundaries Commission & 2 Others* [2014] eKLR the court held that:-

Bearing in mind the above principles, the most contentious issues in this appeal is whether the grounds of appeal are matters of law or facts. Having established that we have jurisdiction to determine only issues of law as per the provisions of Section 85A of the *Elections Act*, to us the whole question of whether the trial Judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence with of course the usual caveat, that we did not see the witness demeanor is an issue of law.



13. I have perused the grounds in the memorandum of appeal and noted that the grounds are based on law which essentially revolve around the failure to list the particulars of negligence whereby the appellant argues that the same did not render the claim fatally defective and untenable in law.
14. It is trite law that negligence must be pleaded first before being proved. This principle was enunciated in the case of *East Produce Kenya Limited vs Christopher Astiado Osiro* in Civil Appeal No. 43 of 2001 where the court held:-

It is trite law that the onus of proof is on he who alleges where negligence is alleged the position was well laid in the case of *Kiema Mutuku vs Kenya Cargo Hauling Services Ltd* 1991 where it was held that “there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence.

15. Similarly in *Dharmagma Patel & Another vs T. A (A minor suing through the mother and next friend H.H.)* [2014] eKLR, the court held:-

I also take note of the fact that in our legal system, there is no liability without fault. In this regard see *Kiema Mutuku vs Kenya Cargo Hauling Services Ltd* (1991) 2 KAR 258 where the Court of Appeal held:-

There is, as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence.

The fault has to be pleaded and proved by evidence at the hearing.

16. Thus the issue that arises is whether a claim is valid in law before the Small Claims Court when a party failed to plead the particulars of negligence. Section 3(3) of the *Small Claims Court Act* provides that the court shall adopt such procedures as the court deems appropriate to ensure among other things, simplicity of procedure. Section 24 provides that every statement of claim shall contain the nature of the claim, the summary of the claim among other particulars and that such statement shall be sufficient to inform the claim. Section 34 (1) provides that a claim before the Small Claims Court shall be concluded within sixty (60) days, this being one reason for a simplified procedure of determining cases and giving the claimants access to justice as well as ensuring expeditious disposal of cases.
17. The learned adjudicator in her judgment stated that the appellant did not plead the particulars of negligence as against the respondents and as such she found that the appellant failed to prove liability and dismissed the suit. In the Statement of Claim dated 6<sup>th</sup> March 2024 the appellant stated:-

“On 2/06/2023 at around 2330 hrs when the claimant was lawfully driving his motor vehicle registration number KCA 331E Toyota Rav 4, along Thika Superhighway near Kenyatta University foot bridge within Kiambu County, the 1<sup>st</sup> respondent’s motor vehicle registration number KDE 337J Toyota Land Cruiser, so negligently and/or recklessly drove by himself/driver/employee hit the claimant’s motor vehicle causing extensive damage on both the front and rear side of the vehicle. The claimant incurred repair costs to the tune of Kshs. 397,880/- owing to the respondents’ negligence and which incident would have been easily avoided if at all the 1<sup>st</sup> respondent either by himself/driver/employee and or servant were keen on the road. The claimant now claims reimbursement of all costs incurred on repair to the tune of Kshs. 397,880/-. Despite having issued a notice of intention to sue upon the respondents, the respondents have been adamant and reluctant as to heeding to



the terms the notice. As such the claimant's claim against the respondents is for the payment in full of the claimed amount to the tune of Kshs. 397,880/- and interest at court rates."

18. The claim giving rise to the appeal was filed under the *Small Claims Court Act* where the law provides for a relaxed and flexible procedure. Section 17 of the Act gives the Small Claims Court control of its own procedure in hearing and determining claims before it. Section 30 of the Act allows parties during hearing of their case to choose to proceed by way of documents only without giving oral evidence before the court.
19. Musyoka J in *Elrons Limited vs Basil* (2024) KLR emphasized on the need to adopt a relaxed and simplified nature of proceeding before the Small Claims Court as provided for by the Act. The honourable judge went further to observe that the simplified procedure in the Small Claims Court was aimed at "moving away from the complexities of procedure and evidence to enable ordinary citizens with small claims to have an easier access and time in the courts". He further stated: -

"It could spell doom to the Small Claims Court, reducing it to just another Magistrates Court, or High Court for that matter, bound as they are, by the layers of complex procedure and rules of evidence."
20. The learned adjudicator herein found that the claim of the appellant was not proved for the reason that the particulars of negligence had not been pleaded. The court relied on the case of *Mombasa High Court Civil Appeal No. 223 of 2022 Jerusha Ogwari vs Ibrahim Hersi* in which the court upheld the dismissal of the appellant's claim due to failure to plead particulars of negligence before the Small Claims Court. In my considered view, this decision went outside the letter and spirit of the *Small Claims Court Act*. On the other hand, I find the case of *Elrons Limited* carried on the spirit of the *Small Claims Court Act*.
21. In this appeal, I find that the adjudicator erred in dismissing the appellant's claim for the reason that it was not proved. In my view, the statement of claim spelt out clearly the alleged negligence against the respondents and it was not a requirement of the law to list particulars of negligence so long as the claim was filed under the *Small Claims Court Act*. I therefore find that the appellant's claim was valid and properly before the court.
22. On the issue of liability, the appellant stated in his claim and testified as CW1 that on 2<sup>nd</sup> June 2023 an accident occurred along Thika Superhighway near Kenyatta University foot bridge between his motor vehicle registration number KCA 331E and motor vehicle registration number KDE 337J which belonged to the 1<sup>st</sup> respondent and was being driven by the 2<sup>nd</sup> respondent. The appellant further stated that the accident was caused by the 2<sup>nd</sup> respondent's negligence and he produced a police abstract to that effect which blamed motor vehicle registration number KDE 337J for the accident. From the record, the said motor vehicle was owned by the 1<sup>st</sup> respondent as per the motor vehicle copy of records. The respondents filed their response to the claim and denied all the averments set out in the claim and averred that if an accident occurred, the same occurred due to the negligence of the appellant.
23. During the hearing, the 2<sup>nd</sup> respondent testified that while he was driving motor vehicle registration number KDE 337J from Juja to Nairobi, he encountered the appellant's motor vehicle which was not moving. He further stated that he tried to escape the accident but he could not as there was another motor vehicle moving on his left side and therefore he hit the appellant's motor vehicle on the rear right. The 2<sup>nd</sup> respondent stated that there was no hazards to show that the motor vehicle was on the road and was stationary. Having weighed the evidence of both parties, it is my considered view that the 2<sup>nd</sup> respondent was driving at an excessive speed as demonstrated by the impact of the motor vehicle and damage caused to the appellant's motor vehicle.



24. The evidence of the 2<sup>nd</sup> respondent is that his vehicle hit the appellants stationery vehicle on the road and that he was driving at about 100km per hour. The respondent also testified that the accident was multiple in that several other vehicles were involved in the accident. It was around 23.30 hours and it was raining. For the respondent to be driving at 100 kph in those conditions, the accident was caused by him due to the high speed during the poor weather that must have affected clear vision adversely. The respondent ought to have slowed down during such poor weather condition. Further the 2<sup>nd</sup> respondent hit the vehicle of the appellant when in motion. It was not stationery according to the appellant.
25. It is my finding that the appellant adduced sufficient evidence to prove negligence on part of the 2<sup>nd</sup> respondent. I, therefore, find the 2<sup>nd</sup> respondent full liable.
26. On the issue of damages, the trial court assessed damages at Kshs. 397,880/- as the amount it would have awarded had the appellant proved his case. It is trite law that material damage claim is a special damage claim and thus it ought to be specifically pleaded and proven. The appellant pleaded for a sum of Kshs. 397,880/- and produced an assessment report which estimated the repair costs to Kshs. 397,880/-.
27. In *Nkuene Dairy Farmers Co-operative Society & Another vs Ngacha Ndeiya* (2010) eKLR the Court of Appeal held:-
- In our view special damages in a material damage claim need not be shown to have actually incurred. The claimant is only required to show the extent of the damage and what it would cost to restore the damaged item to as near as possible the condition it was in before the damage complained of. An accident assessor gave details of the parts of the respondent's vehicle which were damaged. Against each item he assigned a value. We think the particulars of damage and the value of the repairs were given with some degree of certainty. In *Ratcliffe vs Evans* (1892) 2QB 524 Bowen LJ said:-
- The character of the acts themselves which produce damage, and the circumstances under which these acts are done, must regulate the degree of certainty, and particularity with which the damage done ought to be stated and proved. As much particularity and certainty must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.
28. The Court of Appeal in *David Bagine vs Martin Bundi* (1996) eKLR in asserting the probative value of an assessor's report reiterated that:-
- The assessor's report was sufficient proof and the failure to provide receipts for any repairs done was not fatal to the respondent's claim.
29. It is my considered view that the appellant specifically pleaded and proved the damages of Kshs. 397,880/- by providing the assessment report in addition to other evidence on record.
30. Thus the judgment by the learned adjudicator dismissing the claim was in my view erroneous in view of the letter and spirit of the Small Claims Act. I hereby set aside the judgment and substitute it with judgment on full liability in favour of appellant against the respondents.
31. The appellant is hereby awarded special damages of Ksh.397,880/= together with costs of the appeal. The costs of the suit in the court below was capped at Ksh.10,000/= and awarded to the respondent. The said judgment having been overturned, the said costs shall go to the respondent payable by the appellant.
32. This appeal is successful and it is hereby allowed.



33. It is hereby so ordered.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 26<sup>TH</sup> DAY OF 2026.**

**F. MUCHEMI**

**JUDGE**

