

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIVASHA**  
**CIVIL APPEAL NO. E027 OF 2025**

**ROSEMARY WAMBUI MWANGI.....**  
**.....APPELLANT**

**VERSUS**

**KIBET YEGON.....1<sup>ST</sup>**

**RESPONDENT**

**ERIC KIPKORIR KOROS.....2<sup>ND</sup>**  
**RESPONDENT**

**(Being an appeal from the Judgment and Decree of Hon. E.Kemei  
(Adjudicator) in Naivasha SCCC No. E623 of 2024 delivered on 6<sup>th</sup> March,  
2025)**

**JUDGMENT**

**Background facts**

1. By a Statement of Claim dated 4<sup>th</sup> September 2024, the Respondents instituted suit against the Appellant seeking judgment in the sum of Kshs. 560,144/-, compensation, costs of the claim, and interest thereon.
2. The Respondents' case was that on or about 22<sup>nd</sup> September 2021, their authorized driver was lawfully driving motor vehicle registration number KCX 309Z along Narok-Mai Mahiu Road when the Appellant, through her authorized agent, driver, and/or servant, negligently and carelessly drove motor vehicle registration number

KAW 840V, causing it to collide with the Respondents' vehicle and thereby extensively damage it.

3. by a response dated 23<sup>rd</sup> October 2024, the Appellant contended that the Statement of Claim disclosed no cause of action. She further denied ownership of motor vehicle registration number KAW 840V and asserted that she was not the driver responsible for the accident.
4. In a reserved judgment delivered on 6<sup>th</sup> March 2025, the learned trial magistrate found the Appellant wholly liable for the accident. The court awarded the Respondents damages in the sum of Kshs. 560,144/-, together with costs and interest of the suit.
5. Aggrieved by the said decision, the Appellant lodged the present appeal by way of a Memorandum of Appeal dated 17<sup>th</sup> March 2025, seeking orders that the judgment and decree of the trial court be set aside and that her claim be heard on its merits.
6. The appeal is premised on the following grounds:

**a) THAT the learned magistrate erred in law and fact in relying on hearsay evidence of the assessor and police officer.**

**b) THAT the learned magistrate erred in law and fact in failing to note that the suit before it belonged to the plaintiff's/respondent's case (*sic*)**

- c) **THAT the learned magistrate erred in law and fact in failing to note that the plaintiff/respondent never testified in support of its case before the trial court.**
- d) **THAT the learned magistrate erred in law and fact in failing to note that in absence of a claims form being adduced as an exhibit by the plaintiff/respondent before the trial court a claim for compensation could not have crystallized.**
- e) **THAT the learned magistrate erred in law and fact in failing to note that it was the plaintiffs/respondent who were to testify before the trial court that the first insurance company had reimbursed them for a claim under subrogation to crystallize.**

7. Parties have canvassed the appeal by way of written submissions which the court has duly read and now reproduces only a summary thereof.

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

8. The Appellant submits that the Respondents' claim is founded on the doctrine of subrogation. In support of this position, she relies on **Eastern Produce Kenya Ltd v Rongai Workshop & Transporters Ltd (Civil Appeal No. 125 of 2018 [2023] KEHC 24810 (KLR))**, to expound the principle of subrogation. In that case, the Court held that once an insured suffers a loss and the

insurer compensates the insured upon the crystallization of the insured risk, the insurer becomes entitled to recover the amount paid from the third party responsible for the loss.

9. The Appellant further relies on the decision of the **KwaZulu-Natal High Court in Nkosi v Mbatha (AR20/10) (2010) ZAKZPHC 38**, where it was held that:

**“A subrogation claim must be specifically pleaded and clearly proved. The Plaintiff’s pleadings must disclose that her motor vehicle was insured, that the insurer had fully indemnified her for the loss suffered, and that any amount recovered from the Defendant would be paid over to the insurer. Departures from proper pleadings may cause prejudice. A party cannot raise a new issue at trial that was not disclosed in the pleadings, nor mislead the opposing party as to the nature of the claim.”**

10. The Appellant contends that, in the present case, the Respondents failed to properly establish the basis of their claim against her. She submits that the Respondents did not attend court to lay a proper evidentiary foundation, nor did they formally produce the motor accident claim form, which was merely marked for identification as MFI-1. The Appellant argues that this document would have initiated the compensation process on behalf of the

insurer, and its failure to be produced as an exhibit materially weakens the Respondents' claim.

11. Further, the Appellant contends that the testimony of the Respondents' two witnesses amounted to hearsay. She submits that PW1's evidence was based on information relayed to her by third parties, while the second witness merely referred to documents and information without demonstrating firsthand knowledge of the material facts. Consequently, the Appellant maintains that the Respondents' claim before the lower court was not properly substantiated and urges this Court to set aside the judgment and decree as issued by the trial court.

#### **Respondents' Submissions**

12. The Respondents identify four issues for determination by the Court. The first issue is whether the learned trial magistrate erred in relying on the evidence of the assessor and the police officer. On it is submitted that the assessor and the police officer, whose evidence the Appellant characterizes as hearsay, were competent witnesses who gave direct and admissible evidence within the meaning of sections 63 and 64 of the Evidence Act. They contend that the assessor personally inspected the subject motor vehicle, assessed the extent of the damage, prepared a report, and produced the same in court.

13. it is further ed that the police officer testified as the maker and custodian of police records and produced the police abstract confirming the occurrence of the accident. According to the Respondents, such documentary evidence is admissible pursuant to sections 35(1) and 80(1) of the Evidence Act.
14. The Respondents further argue that Order 3 Rule 9 of the Civil Procedure Rules permits a party to appear through duly authorized agents competent to prove facts, and that the law does not restrict a plaintiff's case to his or her personal testimony.
15. They contend that the Appellant neither objected to the production of the documents at trial nor controverted the testimony of the Respondents' witnesses by way of contrary evidence.
16. The second issue is whether the claimants' personal testimony was necessary to prove their case. On this point, the Respondents refer the Court to **Julianne Ulrike Stamm v Tiwi Beach Hotel Ltd [1998] KECA 197 (KLR)**, on the application of Order 17 rule 2(1), where the Court held:

**“There is no reference in this rule to the plaintiff himself giving evidence first or at all. But a plaintiff is bound to produce evidence in support of the issues which he is bound to prove, and such evidence can be given by any competent witness, not necessarily himself. A plaintiff does not have to be personally present when**

**represented by duly instructed counsel. It is for a plaintiff's counsel to decide how to prosecute his case. If a plaintiff can prove his case by the evidence of someone else, he does not have to be present at the hearing of the suit. Similarly, if a plaintiff can prove his case by means of legal arguments only, he does not have to be physically present at the hearing of the suit so long as his advocate is present to prosecute the suit. In short, according to Order 17 rule 2(1), a plaintiff can prove his case by the evidence of a witness or witnesses other than himself, or by the arguments of his counsel....”**

17. The Respondents further rely on **Sofie Feis Caroline Lwangu v Benson Wafula Ndote [2022] KEELC 986 (KLR)**, where the Court held that it is not mandatory for a plaintiff to attend court to testify in support of his or her case, provided that the case can be proved through the evidence of other competent witnesses.
18. The Respondents contend that the Appellant has not demonstrated any prejudice occasioned by the claimant's absence, nor any miscarriage of justice arising therefrom.
19. The third issue is whether the Respondents' subrogation claim was properly proved notwithstanding the absence of a claim form or the claimant's personal testimony. In this regard, the Respondents

argue that the existence of a formal claim form is not a legal prerequisite for the crystallization of a subrogation claim. They submit that what is essential is proof of indemnification and causation of loss. According to the Respondents, they adduced sufficient evidence to establish that the accident occurred; that the Appellant's motor vehicle was blamed for the accident; the loss suffered by the insured; and the payment of indemnity by the insurer. They further submit that their documentary evidence, including receipts in proof of indemnity, was formally produced as exhibits, save for the claim form. They emphasize that the Appellant did not object to the production of the documents, with the exception of the claim form. Consequently, they maintain that their subrogation claim was duly proved.

20. The fourth and final issue is whether the Appellant has demonstrated any error in law or fact sufficient to justify setting aside the trial court's judgment or ordering a rehearing. On this issue, the Respondents rely on **Mbogo & another v Shah [1968] EA 93**, and submit that the Appellant has failed to satisfy the established principles for appellate interference namely, that the decision is plainly wrong because the trial court misdirected itself, or acted on matters it ought not to have considered, or failed to consider matters it ought to have taken into account, thereby arriving at an erroneous conclusion.

### **Issues, Analysis and Determination**

21. The central issue arising in this appeal is whether, within the confines of an appeal on points of law under section 38 of the Small Claims Court Act, the Appellant has demonstrated any error of law in the trial court's finding that the Respondents proved their subrogation claim to the requisite standard.

22. Being an appeal from the Small Claims Court it is circumscribed by section 38 of the Small Claims Court Act to lie only on matters of law only. Being so restricted to points of law only, the Memorandum of appeal faulting the trial court for mistakes of fact must thus not be given any consideration. To pass the test as appropriately brought, the court must establish that the parameters of such jurisdiction as succinctly set out in **Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR**, do exist. In the matter the Court observed:

**“This is a second appeal. 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 they should not have considered or failed to consider matters they should have considered or, looking at the entire decision, it is perverse.”**

23. What constitutes a matter of law was pronounced in **Twaher Abdulkarim Mohamed v Independent Electoral and**

**Boundaries Commission (IEBC) & 2 others, (2014) eKLR**

where the Court held that a decision is erroneous in law if it is one to which no reasonable tribunal, properly directing itself, could have arrived. This simply means that the decision must disclose an erroneous exposition of the law including the duty to properly analyse the evidence led.

24. It is against this legal framework that the present appeal must be examined. The examination must then first focus on whether there is a point of law disclosed to ground the appeal. A keen perusal of the Memorandum of Appeal challenges the evidence led as hearsay, that the disclosed plaintiff never gave evidence and that the evidence was perfunctorily considered. The court sees three points which however, coalesce into one; whether the case was proved to the requisite standards. That position satisfies the stricture of points of law only and thus the court is convinced that the appeal properly lies.

25. On the merits, it is common ground that the suit before the Small Claims Court was founded on the doctrine of subrogation. The principle applies where an insurer, having compensated its insured for loss or damage under a contract of indemnity, steps into the shoes of the insured and pursues recovery against the third party responsible for the loss. Although the action is instituted in the name of the insured, the real party in the litigation is the insurer.

26. In **Fredrick Odowa Abungu v Collins Ondigo & Another (2021) eKLR**, the Court explained that once the insured risk materializes and the insurer settles the claim, the insurer is entitled to seek reimbursement from the tortfeasor, but only to the extent of the indemnity paid.
27. Similarly, in **Egypt Air Corporation v Suffish International Food Processors (U) Ltd and Another [1999] 1 EA 69**, the Court emphasized that subrogation derives its operative force from a valid contract of indemnity and actual payment made pursuant thereto. It is not as such a case demanding proof of negligence but rather a proof of a valid contract for indemnity and the payment of such indemnity.
28. It follows that for a subrogation claim to succeed, the claimant must establish the existence of a valid contract of insurance, payment of indemnity by the insurer; and legal liability of the third party for the loss.
29. Emanating from the above position, the resolution of the first requirement must come from the evidence led before the trial court. That evidence showed that the accident occurred on 22<sup>nd</sup> September 2021. The police abstract dated 23<sup>rd</sup> September 2021 indicated that motor vehicle registration number KCX 309Z was insured by First Assurance Company Limited under a policy issued to Yegon Kibet (Policy Number 20/11/KSM/000921/02), valid until

11<sup>th</sup> February 2022. The accident therefore occurred during the subsistence of the insurance policy.

30. In those circumstances, the existence of a valid contract of insurance was established.

31. The investigating officer (CW2) testified that upon visiting the scene, he formed the opinion that the driver of motor vehicle registration number KAW 450V caused the accident by overtaking carelessly and colliding with motor vehicle registration number KCX 309Z.

32. The Appellant contended that she was not the owner of motor vehicle registration number KAW 450V and that the wrong party had been sued. However, the motor vehicle search certificate from the National Transport and Safety Authority identifies her, Rosemary Wambui Mwangi, holder of National Identity Card Number 21918646, as the registered owner of the said motor vehicle. The finding that the appellant was the registered owner was wholly congruent with the evidence on record and is thus beyond fault. That holding when taken together absence of objective and credible challenge to the occurrence of the accident, affirms the conclusion on liability. The court finds no justification at interference and upholds the findings on liability as sufficiently established.

### **Proof of Indemnity**

33. The remaining question is whether the insurer, First Assurance Company Limited, proved payment of indemnity to the insured. The evidence showed that motor vehicle KCX 309Z was repaired by Jeet Motors at a cost of Kshs. 535,020/=. A receipt was produced in proof of payment. There was also evidence of payment of Kshs. 6,920/= to Diplomatic Accident Assessors for re-inspection fees.
34. Further, several final payment vouchers issued by First Assurance Company Limited were produced in evidence. These included payments of Kshs. 525,793.55 to Jeet Motors; Kshs. 1,635/= and Kshs. 4,350/= to Diplomatic Accident Assessors; Kshs. 20,350/= to Windscope Loss Assessors Limited; and Kshs. 9,650/= to Bright Loss Assessors (K).
35. The evidentiary value of payment vouchers was addressed in **Abdi Ali Dere v Firoz Hussein Tundal & 2 Others (2013) eKLR**, where the Court held that a payment voucher may constitute confirmation of payment and is not fundamentally different from a receipt.
36. The amounts claimed in the Statement of Claim; repair costs of Kshs. 525,794/=: assessment fees of Kshs. 9,640/=: re-inspection fees of Kshs. 4,350/=: and tracing fees of Kshs. 20,350/=: were supported by documentary evidence and the corresponding payment vouchers produced before the trial court. The vouchers set out above therefore demonstrates the respondents' assertion that

the insurer duly indemnified the insured in respect of the repair costs and ancillary assessment expenses arising from the accident.

37. It is noteworthy that under section 32 of the Small Claims Court Act, strict rules of evidence do not apply. The Court operates as a tribunal under an inquisitorial framework, and may, on its own initiative, receive such evidence as it deems necessary. In that context, the trial court cannot be faulted in law for admitting and relying upon documentary evidence that was not objected to at trial.

#### **Rendition and final Orders**

38. Upon consideration of the record, this Court finds no misdirection in law, no consideration of irrelevant matters, nor omission of relevant considerations by the trial court. The Respondents established the existence of a valid insurance contract, proof of third-party liability, and payment of indemnity thereby satisfying the legal requirements of a subrogation claim. The Appellant has not demonstrated any error of law to warrant appellate interference within the meaning of section 38 of the Small Claims Court Act. In the premises, this Court agrees with the findings of the trial court that the Respondents proved their claim to the required standard. The appeal is therefore dismissed with costs to the Respondents.

Dated, signed and delivered at Lodwar this 27<sup>th</sup> day of February 2026

Patrick J O Otieno

Judge

Original