

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT
MACHAKOS CIVIL APPEAL NO. 318 OF 023

JANE NDUKU alias JANE NDUKU MBENE.....
APPELLANT

-VERSUS-

T.A MOTORS COMPANY LTD.....1ST
RESPONDENT

JONATHAN MUTUA NZYUKO alias MUTUNGA
MUTUA.....2ND
RESPONDENT

JUDGEMENT

1. The Appellant then Plaintiff in the lower court, filed suit by way of Plaint dated 18/12/2018 claiming for:-
 - a) General damages for pain, suffering and loss of amenities.
 - b) Special damages in the sum of Kshs.6,650/=.
 - c) Costs and interests of all items pleaded.
 - d) Any other and/or further relief that the honourable court deems fit to grant.

2. The Appellant's case was that on or about the 18.07.2017, she was lawfully and carefully travelling as a fare paying passenger on board motor vehicle registration number KCJ 802Q along Machakos-Kitui Road when at a place known as Mukuyuni near Kithangathini area, the 2nd Respondent either by himself, his authorized driver, servant and/or agent so negligently and/or recklessly managed, controlled motor vehicle registration number KCJ 802Q that the same was permitted to run over a stationary object on the road and which caused the said motor vehicle to overturn occasioning serious injuries to the Appellant and the Appellant suffered loss, expenses and damages.

3. The Appellant sustained the following injuries:-

- i. Blunt injury to back
- ii. Blunt head injury
- iii. Blunt chest injury
- iv. Blunt injury to the left shoulder
- v. Cut wound left leg.

4. The Respondents filed an Amended Statement of Defence dated 26/11/2029 denying the claim and also pleaded fraud on the part of the Appellant, contending that the claim was fake.
5. The Appellant filed an Amended Reply to the Amended Statement of Defence dated 06/08/2021.
6. The suit proceeded for trial with the Appellant testifying as PW1 and told court that on 18.07.2017 she was on board motor vehicle registration number KCJ802Q make Nissan as a fare paying passenger while at Makuyuni area along Machakos-Kitui Road, the driver ran over an object on the road which caused the said vehicle to overturn. As a result, she was injured and rushed to Shalom Hospital for treatment. She blamed the driver for speeding, careless driving and failing to keep proper look out. That she went to Shalom Community Hospital on the said date, however the date indicated 19.10.2017 was erroneous. That she had not falsified the case. In support of her case, she produced PExt.2-P3 Form, PExt.3-Treatment notes, PExt.4 Receipts, PExt.5-Copy of Records and PExt.7-Demand notice.
7. On cross examination, she stated that she was involved in an accident on 18.07.2027 at about 8.00pm. That the vehicle left the road and hit a tree. That she had sat at the back of the matatu and had put on her seat belt. That she went to Machakos Level 5 Hospital and then to Shalom on the same date. That she visited the hospital three times to have the dates rectified but the same was never rectified.
8. On re-examination, she stated that she was first rushed to Machakos Level 5 hospital. She was taken to Shalom hospital

by her relatives. That she was treated on 18.07.2017. That the vehicle veered off the road and hit a tree.

9. The Police Abstract and the Medical Report were produced by consent.
10. The Respondents called DW1, Records Keeper from Machakos Level 5 Hospital for 12 years and whose duties entailed the capture of information details of patients who go to the facility for treatment. She received a letter to authenticate the treatment notes of the Appellant by Directline. That the Appellant did not appear in the In-Patient and Out-Patient records of the hospital on 18.07.2017. The Out-Patient number in the treatment notes being 744873/17 appeared on 16.11.2012 in their system. That the Appellant was seen four months after. The treatment card was fraudulently issued as the Out-Patient number would tally with the date. In support, she produced DExt.1-a letter dated 16.10.2019 confirming this position.
11. On cross examination, she stated that the treatment card had the stamp of the medical superintendent. That the card had the signature but not the name of the person who signed it. That any document originating from the facility had an Out-Patient number. That she had not brought a print out of 18.07.2017.
12. Upon considering the pleadings, evidence tendered and the submissions of parties' counsel, the trial court was not satisfied that the Appellant had proved her case on a balance of probabilities that she was involved in a road traffic accident on 18.07.2017 following her contradictory testimony as to how the accident occurred, the different dates in the medical notes, the different injuries in the treatment notes and out-patient number used was for 16.11.2027
13. As such the trial court dismissed the suit with costs to the Respondents.

14. Being aggrieved by the trial court's judgement dismissing the suit, the Appellant lodged the instant appeal vide a Memorandum of Appeal dated 11.12.2023 raising 11 grounds as follows:-

1. THAT, the learned Magistrate erred in law and in fact in failing to appreciate that the Appellant's suit had merit and ought not to have been dismissed.
2. THAT, the learned Magistrate erred in law and fact in dismissing the Appellant's suit when evidence had been tendered why special damages in the sum of Kshs.6,650/= and general damages for pain, suffering and loss of amenities should be awarded for loss and damage and the serious injuries sustained by the Appellant, as a result of the road traffic accident that occurred on 18th July 2021.
3. THAT, the learned Magistrate erred in law and fact by failing to appreciate that the Appellant is entitled to compensation from the Respondents who were either responsible and/or vicariously liable for the said accident as bound by the Insurance (Third Party Risks) Act of the Laws of Kenya
4. THAT, the learned Magistrate erred in law and fact in dismissing the suit by subverting the main issue of the Appellant being a passenger onboard the Respondents' Motor Vehicle (Matatu) Registration Number KCJ 802Q at the time of the accident, and was injured as a result of the negligent and reckless acts of the Respondents
5. THAT, the learned Magistrate erred in law and fact in dismissing the suit for failure to appreciate the Appellant's sworn testimony that she was initially treated at the Machakos Level 5 Hospital after being taken there by the Police Officers, before being transferred to Shalom Hospital on the same day by her relatives, for further specialized treatment.
6. THAT, the learned Magistrate erred in law and fact for failure to appreciate that the particular of injuries espoused by the Appellant were actually similar; that injuries to the back and chest are symptomatic to chest pains; injuries to the head are symptomatic to a

headache; injuries to the left shoulder are symptomatic to a painful left arm.

7. THAT, the learned Magistrate erred in law and fact for failure to acknowledge that a printout of 18/07/2017 was never produced to confirm if the Appellant was ever treated at Machakos Level 5 Hospital.
8. THAT, the learned Magistrate erred in law and in fact for failure to appreciate that the Appellant was issued with a treatment card bearing her Out-Patient Number 744873/11 dated 18/07/2017.
9. THAT, the learned Magistrate erred in law and fact by subverting the Appellant's evidence by wholly relying on DWI's testimony which was never authenticated by production of any supporting documents to render the Appellant's treatment card as fraudulently being issued.
10. THAT, the learned Magistrate erred in law and fact for failure to appreciate that the subject matter in the suit is for compensation of severe bodily injuries sustained by the Appellant as a result of an accident involving the Respondent's Motor Vehicle (Matatu) Registration Number KCJ 802Q.
11. THAT, the learned Magistrate erred in law and fact in disregarding the grounds and submissions tendered by the Appellant's Counsel for the award of special damages and general damages for loss and damage as pleaded in the suit.

15. The Appellant prays that:-

- a. THAT the Judgement dated, signed and delivered on the 16th November 2022 be set aside.
- b. THAT this case be reviewed and determined based on its merits.

c. THAT the costs of this appeal be paid to the Appellant by the Respondent.

16. The appeal was canvassed through written submissions. The Appellant's submissions are dated 29.09.2025. The Respondents failed to file submissions despite them being granted leave on 02.10.2025 to do so.

Analysis and Determination

17. This being a first appeal, I am reminded of the primary role as a first appellate court namely, to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in ***Selle & another v Associated Motor Boat Co. Ltd. & others*** and in ***Peters v Sunday Post Limited (1968) E.A 123. (1958) E.A Page 424.***
18. In the case of ***Mursal & another v Manese (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) (6 April 2022)***, the court held that: -

A first appellate court has jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own

reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it.

19. A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section 78 of Civil Procedure Act, a court of first appeal can appreciate the entire evidence and come to a different conclusion
20. I have had the chance to critically assess and peruse the Record of Appeal and also considered the Appellant's submissions on the appeal.
21. I will therefore proceed to consider whether the trial court's judgement ought to be set aside.

Liability

22. A cursory perusal at the record on evidence tendered before the trial court on liability was that of the Appellant. She testified as PW1 and told court that on 18.07.2017 she was on board motor vehicle registration number KCJ 802Q make Nissan as a fare paying passenger while at Makuyuni area along Machakos-Kitui Road, **the driver ran over an object on the road which caused the said vehicle to overturn.** As a result, she **was injured and rushed to Shalom Hospital for treatment.** She blamed the driver for speeding, careless driving and failing to keep proper look out. That she went to Shalom Community Hospital on the said date, however the date indicated 19.10.2017 was erroneous. That she had not falsified the case.

23. On cross examination, she stated that she was involved in an accident on 18.07.2027 at about 8.00pm. **That the vehicle left the road and hit a tree.** That she had sat at the back of the matatu and had put on her seat belt. **That she went to Machakos Level 5 Hospital and then to Shalom on the same date.** That she visited the hospital three times to have the dates rectified but the same was never rectified.
24. On re-examination, she stated that **she was first rushed to Machakos Level 5 hospital.** She was taken to Shalom hospital by her relatives. That she was treated on 18.07.2017. **That the vehicle veered off the road and hit a tree.**
25. From the Appellant's evidence on liability, just like the trial court, I observe that she gave contradicting versions of how the accident occurred. Where as in examination in chief she stated that, **the driver ran over an object on the road which caused the said vehicle to overturn,** she on cross examination stated that **the vehicle left the road and hit a tree.** One is left to wonder which is which of the two versions.
26. No police officer was called to testify as the Police Abstract was produced by consent. The Police Abstract could be proof that an accident may have occurred but does not prove how the same occurred especially when no police officer or investigating officer is called as a witness to testify on the same and shade some light on how the accident occurred.
27. In **Warutumo v Kinyua & Another (Civil Appeal E058 of 2022) KEHC 16257 (KLR) (20th December 2024) (Judgment),** it was held that:
- "A police abstract, really does not show who is to blame. It is the police officer's preliminary view on the cause of the accident. A sketch plan gives a more succinct view of the accident"*
28. In **Ndiritu (Suing as Administrator for the Estate of George Ndiritu Kariamburi - Deceased) v Ropkoi & another (Civil Appeal 345 of 2000)**

[2004] KECA 65 (KLR) (10 December 2004) (Judgment)

the Court of Appeal stated that:-

“We think both parties did themselves a disservice by failing to call traffic police evidence which no one said was impossible to obtain”.

29. In **Albert Odawa v Gichimu Gichenji** **[2007] KEHC 1358 (KLR)** it was held that:

“Secondly, no evidence was called from an investigating officer which could have assisted the court to assess the point of impact so as to assist the court establish liability”

30. Based on the above cited decisions, it is my considered view that it was incumbent upon the Appellant to adduce concrete evidence to prove that she actually was involved in the accident in question and that the Respondents either directly or indirectly through their agents negligently caused the accident in the manner in which they controlled the vehicle in the accident. An investigating officer could have assisted the court to assess the point of impact and cleared the contradictions in the Appellant’s testimony so as to assist the court establish liability.
31. On the foregoing, I hold that in order to have proven her case to the required standard, the Appellant needed to avail either the investigating officer or an independent witness who witnessed the accident to collaborate her claim that she had been involved in the accident subject of this matter and sustained injuries pleaded in the plaint.
32. Further, I have noted from the Appellant’s evidence that after the accident she **went to Machakos Level 5 Hospital and then to Shalom on the same date.** That she visited the hospital three times to have the dates rectified but the same was never rectified.
33. On re-examination, she stated that **she was first rushed to Machakos Level 5 hospital.** She was taken to Shalom

hospital by her relatives. None of these relatives was called as a witness by the Appellant.

34. On the other hand, DW1 testified that the Appellant did not appear in the In-Patient and Out-Patient records of Machakos Level 5 hospital on 18.07.2017. The Out-Patient number in the treatment notes being 744873/17 appeared on 16.11.2012 in their system. That the Appellant was seen four months after. The treatment card was fraudulently issued as the Out-Patient number would tally with the date. In support, she produced DExt.1-a letter dated 16.10.2019 confirming this position.
35. On cross examination, she stated that the treatment card had the stamp of the medical superintendent. That the card had the signature but **not the name of the person who signed** it. That any document originating from the facility had an Out-Patient number. That she had not brought a print out of 18.07.2017.
36. The Appellant explained that the date and different injuries on the treatment notes from Shalom Community Hospital was erroneous and that she had requested for rectification of the same about three times but nothing was done.
37. The court observes that the Appellant did not provide any proof on the same.
38. Accordingly, I am unable to fault the trial magistrate's finding that the Appellant failed to prove her case on a balance of probabilities that she was involved in a road traffic accident on 18.07.2017, this follows her contradictory testimony as to how the accident occurred and her failure to avail either the investigating officer or an independent witness who witnessed the accident to collaborate her claim that she had been involved in the accident, the different dates in the medical notes, the different injuries in the treatment notes and out-patient number used which was for 16.11.2017 and not 18.07.2017.

39. I therefore uphold the trial magistrate's finding on liability.
40. Having found as above on liability, I see no need to belabour on quantum. It is trite law that an appellate court should be slow to reverse a lower court on the question of the amount of damages unless it is satisfied that the judge acted on a wrong principle of law or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. The question is not what the appellate court would award but whether the lower judge acted on the wrong principles (See **Maraga V Musila (1984) 1 KLR 251**).
41. Had I overruled the trial magistrate on the issue of liability, I would have affirmed the awards on quantum
42. The upshot is that the appeal is dismissed with no order as to costs.

Orders accordingly, file closed.

JUDGMENT WRITTEN, DATED & SIGNED AT MACHAKOS THIS 24TH
FEBRUARY 2026

NOEL I. ADAGI
JUDGE

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS 24TH
FEBRUARY 2026