

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. E037 OF 2025

SIMON GITHIGA

MAINA.....APPELLANT

VERSUS

JAMES MUGAMBI

LAARU.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. Manuela W. Kinyanjui, Adjudicator, delivered on 30th April 2025 in Milimani Small Claims Court Civil Case No. SCCC E1387 of 2024)

JUDGMENT

- 1.** The Respondent filed a claim before the Small Claims Court seeking special damages of Kshs. 221,398 for repair costs and related expenses following a road traffic accident that is alleged to have occurred on 8 March 2021 along the Chuka-Embu Road at Kiracha area.
- 2.** The Respondent alleged that the accident occurred when the driver of motor vehicle KCE 200T, allegedly belonging to the Appellant, negligently rammed into the rear of the Respondent's motor vehicle KCM 095C.
- 3.** After being indemnified by his insurer under the doctrine of subrogation the Respondent instituted the claim in the Small Claims Court seeking recovery of special damages.
- 4.** The Appellant denied liability and denied ownership of the said motor vehicle at the time of the accident.
- 5.** After hearing the matter and considering written submissions, the trial court found that the Appellant was

liable for the accident and awarded damages to the Respondent thereby triggering the filing of this appeal in which the Appellant raised several grounds, including that the trial adjudicator:

- a) ***Erred in law and fact in finding that the Respondent had proved negligence.***
- b) ***Failed to consider the pleadings and evidence on record.***
- c) ***Failed to consider the Appellant's submissions and legal authorities.***
- d) ***Imported facts into the judgment which were not supported by evidence.***
- e) ***Failed to properly appreciate the doctrine of subrogation.***
- f) ***Arrived at a decision against the weight of evidence.***

6. The appeal was canvassed by way of written submissions which I have considered.

Appellant's Submissions

7. The Appellant submitted that the trial court erred in law and fact by relying on evidence that was not on record.

8. The Appellant argued that the trial adjudicator wrongly concluded that the Appellant had given his driver the vehicle at the time of the accident. According to the Appellant, this conclusion contradicted the testimony given in court.

9. The Appellant also submitted that the Respondent failed to prove negligence. Reliance was placed on Section 109 of the Evidence Act, which provides that:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence.”

10. The Appellant argued that no evidence was presented to establish ownership of motor vehicle KCE 200T at the time of the accident as the police abstract did not indicate ownership or liability. The Appellant noted that no police officer testified and no independent accident investigation report was produced.

11. The Appellant further submitted that the Respondent’s witnesses actually exonerated him.

12. The Appellant relied on the decision in ***Techar Steam & Power Ltd vs. Mutio Muli & Mutua Ngao*** [2019] eKLR, where the court held:

“A police abstract is not proof of occurrence of an accident but of the fact that following an accident, the occurrence thereof was reported at a particular police station.”

13. The Appellant also argued that the doctrine of subrogation could not apply where negligence was not proved.

Respondent’s Submissions

14. The Respondent submitted that the trial court correctly evaluated the evidence and reached the proper conclusion that the Respondent had proved ownership of the vehicle through a **motor vehicle search** produced during trial.

15. The Respondent relied on **Sections 107 and 109 of the Evidence Act**, which provide that:

“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.”

16. The Respondent also relied on the Court of Appeal decision in ***Mbuthia Macharia vs. Annah Mutua Ndwiga & another* [2017] KECA 290 (KLR)** where the court stated:

“The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal... the evidential burden may shift in the course of trial depending on the evidence adduced.”

17. The Respondent submitted that once evidence of ownership was produced, the burden shifted to the Appellant to disprove the same, which he failed to do.

- 18.** The Respondent further submitted that the Appellant admitted in testimony that he had given the vehicle to his driver, which justified the finding of vicarious liability.

Issues for Determination

- a) I have carefully considered the Memorandum of Appeal, the Record of Appeal, and the submissions by both parties, I find that the issues arising for determination relate primarily to the scope of appellate jurisdiction under the Small Claims Court Act, the evaluation of evidence relating to negligence, and the application of the doctrine of subrogation.

Jurisdiction

- 19.** The law is settled that under Section 38 of the Small Claims Court Act, appeals from the Small Claims Court lie to the High Court only on matters of law. The Section provides that:

“A person aggrieved by the decision or order of the Court may appeal against that decision or order to the High Court on matters of law.”

- 20.** In *Kenya Breweries Ltd vs. Godfrey Odoyo* [2010] eKLR the Court of Appeal explained the distinction between matters of law and matters of fact and stated:

“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 a second appeal however... this Court confines itself to matters of law 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.”

21. Similarly, in ***Fidelity Insurance Company Ltd vs. Koirir [2024] KEHC 3365 (KLR)*** the Court stated:

“Under Section 38 of the Small Claims Court Act, the High Court, while handling an appeal from the Small Claims Court is not permitted to substitute that Court’s decision with its own conclusions based on its own analysis and appreciation of the facts unless the findings are so perverse that no reasonable tribunal would have arrived at them.”

22. Authorities cited by the Appellant emphasize that an appellate court should generally refrain from interfering with factual findings of a trial court unless it is demonstrated that the court acted on no evidence,

misapprehended the evidence, or arrived at a decision that no reasonable tribunal could reach.

23. In this appeal, I find that the question whether ownership of the motor vehicle alleged to belong to the Appellant was proved is a point of law that properly falls within the jurisdiction of this Court. Accordingly, this court may interfere where the trial court's findings are unsupported by evidence or based on an error of law.

24. The respondent's claim against the Appellant was premised on the allegation that the Appellant was the owner of motor vehicle KCE 200T.

25. Ownership of a motor vehicle is a fundamental element in establishing liability, particularly where liability is alleged through the doctrine of vicarious liability. Section 8 of the Traffic Act provides:

“The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.”

26. In *Thuranira Karauri vs. Agnes Ncheche* [1997] eKLR the Court of Appeal held that:

“The plaintiff did not prove that the defendant was the owner of the vehicle. The only evidence on ownership was a police abstract which is not proof of ownership.”

27. Similarly, in ***Osapil vs. Kaddy [2000] 1 EA 187***, the court held that ownership must be proved by credible documentary evidence.
28. In the present case, the respondent produced a motor vehicle search in an attempt to establish that the Appellant was the registered owner of motor vehicle KCE 200T.
29. However, the said search reflects ownership details as at 9th September 2022.
30. The accident forming the basis of the claim is alleged to have occurred on 8th March 2021, which is approximately one year and six months earlier than the date reflected in the search.
31. A motor vehicle search showing ownership status as at 9th September 2022 cannot, without more, be taken as proof that the same person owned the vehicle on 8th March 2021, which is the material date of the accident.
32. The respondent also relied on a police abstract to link the vehicle to the Appellant.
33. However, as stated in ***Techar Steam & Power Ltd vs. Mutio Muli & Mutua Ngao [2019] eKLR***:

“A police abstract is not proof of occurrence of an accident but of the fact that following an accident, the occurrence thereof was reported at a particular police station.”

34. In the absence of credible evidence demonstrating that the Appellant was the registered or beneficial owner of motor vehicle KCE 200T as at 8 March 2021, the respondent failed to establish a legal basis for attaching liability to the Appellant.

Negligence

35. The burden of proving negligence rests upon the claimant. Section 107 of the Evidence Act provides:

“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.”

36. Section 109 of the Evidence Act further provides:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence.”

37. In *Eastern Produce (K) Ltd vs. Christopher Atiado Osoro* [2006] eKLR, the Court of Appeal stated:

“Where a claim is based on negligence, the onus lay on the plaintiff to prove some form of negligence against the defendant.”

38. Similarly, in ***Kiema Mutuku vs. Kenya Cargo Hauling Services Ltd*** [1991] 2 KAR 258, the Court 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.”

39. My finding is that in the absence of proof linking the Appellant to ownership or control of the offending vehicle, the Respondent failed to establish negligence against the Appellant.

Doctrine of Subrogation

40. The Respondent’s claim was premised on the doctrine of subrogation.

41. The doctrine was explained in ***Securicor Guards (K) Ltd vs. Mohamed Saleem Malik & another*** [2019] eKLR, where the court stated:

“The doctrine applies where there is a contract of insurance and following crystallization of the risk insured, the insurer had compensated its insured for financial loss occasioned thereby... the insurer is entitled to step into the shoes of the insured and enjoy all the rights, privileges and remedies accruing to the insured including the right to seek indemnity from a third party.”

- 42.** Subrogation therefore depends on whether the insured had a valid claim against the third party. However, the doctrine does not relieve the claimant of the obligation to prove liability against the alleged tortfeasor.
- 43.** I find that since liability against the Appellant was not established, the doctrine of subrogation could not sustain the respondent's claim.
- 44.** Having carefully considered the record of appeal, the judgment of the trial court and the submissions of the parties, this Court finds that the Respondent failed to prove that the Appellant owned motor vehicle KCE 200T as at the date of the accident.
- 45.** Consequently, the trial court attributed liability to the Appellant without a proper evidentiary foundation. To my mind, this constituted an error of law warranting intervention by this Court under Section 38 of the Small Claims Court Act.

Disposition

- 46.** In the end, I find that the appeal is meritorious and accordingly, I make the following orders:
- a) *The appeal is allowed.***
 - b) *The judgment of the Small Claims Court delivered on 30 April 2025 in SCCC No. E1387 of 2024 is set aside.***
 - c) *The respondent's claim before the Small Claims Court is dismissed.***

***d) The Appellant shall have costs of the appeal
and of the proceedings before the trial court.***

Orders accordingly.

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

HON. W. A. OKWANY

JUDGE

12/03/2026

FOR APPELLANT Ms Ajiambo for Njeru

FOR THE RESPONDENT Ms Muthiani

COURT ASSISTANT Abdirizak