

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

HIGH COURT CIVIL APPEAL CASE NO. E045 OF 2024

JENNIFFER WANGARI NYAMU

APPELLANT

VERSUS

PETER KABINGU MAINA.....1ST

RESPONDENT

KAROMBU TRAVELLERS SACCO LTD.....2ND

RESPONDENT

JUDGEMENT

1. Before this court is the Memorandum of Appeal dated **30th July 2024** by which the Appellant **JENNIFFER WANGARI NYAMU** seeks the following orders;-

1. THAT the judgment and Decree of the learned magistrate dated 8/7/2024 be set aside.

2. Costs of this Appeal and Lower Court.

2. The Respondents **PETER KABINGU MAINA and KAROMBU TRAVELLERS SACCO LTD** opposed the application. The

matter was canvassed by way of written submissions. The Appellants filed the written submissions dated **15th October 2025** whilst the Respondents despite being given an opportunity to do so did not file any submissions.

BACKGROUND

3. This matter emanates from a road traffic accident which occurred on

14th November 2021 at about 4.30 pm along the **Karatina-Kerugoya** Road. It was alleged that on the material day the Appellant was a fare paying passenger in a motor vehicle Registration **KCL 2402** Toyota Hiace Matatu being driven by the 1st Respondent. The Appellant claimed that the owner of the matatu drove at a high speed, negligently and recklessly thereby causing an accident to occur. That as a result of said accident the Appellant sustained the following injuries;-

- (i) Fracture of left clavicle bone.**
- (ii) Head concussion.**
- (iii) Blunt trauma to the forearm.**
- (iv) Blunt trauma on the lower back.**

4. The Appellant then filed a Civil Suit being **Karatina PMCC No. 70 of 2022** and vide the Plaint dated **23rd August 2022** prayed for

“(a) Special Damages of Kshs. 89,870/=

(b) General damages for pain and suffering and loss of amenities and loss of future earning capacity.

5. The suit was heard in the lower court and on **8th July 2024**, **HON. KANYIRI Principal Magistrate** delivered her judgment in which she dismissed the suit in its entirety. Being aggrieved by the decision of the Lower Court, the Appellant filed this Memorandum of Appeal which appeal is based on the following grounds:-

ANALYSIS AND DETERMINATION

6. I have considered the appeal before this court, the record of proceedings in the lower court as well as the submissions filed by the Appellant.

7. This is a first appeal and in this regard I take cognizance of the holding in **Imanyara & 2 others v Attorney General**

[2016] KECA 557 (KLR) in which the **Court of Appeal** stated as follows:-

This being a first appeal it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal is are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect. See Sell and Another v Associated Motor Boat Company Limited and others [1968] EA 123 and Williamson Diamonds Ltd v Brown [1970] E.A.L

As we discharge our mandate of evaluating the evidence placed before the High Court, we keep in mind what the predecessor of this Court said in Peters -vs- Sunday Post Ltd [1958] EA 424. In its own words:-

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution, if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide.....”

8. The Appellant has challenged the finding by the trial court that liability was not proved as against the Respondent. The Appellants had pleaded that the accident in which she sustained injuries was caused by the driver of the matatu who it is alleged was driving the vehicle negligently and recklessly.
9. It is trite law that he who alleges must prove. It is a general proposition of the law that the legal burden of proof lies upon the party who invokes the aid of the law. **Section 107(1) of the Evidence Act Chapter 80 Laws of Kenya** provides:

“107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of fact which he asserts must prove that those facts exist.”

10. **Sections 109 and 112** of the same Act provides as follows:-

“109. 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.

“112. In Civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him”.

11. The two provisions were considered in the case of **Anne Wambui Ndiritu -vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334**, in which the Court held as follows:-

“As a general proposition under Section 107(1) of the Evidence Act, Cap 80, the legal burden of

proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Section 109 and 12 of the Act.”

12. This being a civil case the Appellants were required to prove on a balance of probability that it was the driver of the vehicle who caused the accident in which the Appellant sustained injuries.
13. The Appellant called two witnesses to testify in support of their case. **PW1 CORPORAL ELIZABETH SUMUKWO** produced the Police Abstract relating to the accident which occurred on **14th November 2021**.
14. **PW2** was the Appellant **Jennifer Nyambu** who testified that she was a passenger in the matatu Registration **KCL 240L** and was in the seat behind the driver.
15. The mere fact that an accident occurred is not in itself proof that the driver was negligent or that he caused the accident.

Accidents occur for a variety of reasons and in many cases the cause of an accident cannot be attributed to the driver of the vehicle. In order to prove liability the Appellants were required to tender evidence to show what was reckless or negligent in the drivers manner of driving i.e how mode of driving did the drivers fail below the required standard of care.

16. The appellants sought to rely on the police abstract as proof that the accident was caused by the negligence of the matatu driver. The said police abstract was produced in evidence by consent of both parties. **PW1** who produced the police abstract told the court that the driver of the matatu was to blame for the accident. However **PW1** did not visit the scene and could not explain why she blamed the matatu driver. Under cross-examination **PW1** admitted that she did not visit the scene and that no sketch map was drawn showing the scene. She further admitted that nobody was charged for causing the accident.

17. In effect therefore the evidence of **PW1** was of no assistance to the Court and certainly did not prove liability against the matatu driver.

No evidence was called from the police officer who visited the scene. No sketch map was produced as an exhibit. In short no evidence was called to prove the contents of that abstract.

18. A police abstract does not provide proof of how the accident occurred and cannot be deemed to be proof of liability. A police abstract is merely proof that a report was made to a particular police station. In the case of **PETER KANITHI KIMUYU -VS- ADEN GUYO [2014] eKLR** it was held that

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

19. Therefore the production of the police abstract did not absolve the appellants of their legal obligation to prove liability as against the respondent. In the absence of

evidence from an officer who visited the scene and/or sketch map the police abstract is of little value to the court.

20. In the case of **ZOS and CAO -vs- AMOLLO STEPHEN [2019] eKLR, Hon. Lady Justice Aburili** observed as follows

“The police abstract form of the material accident was also produced as an exhibit. However, a police abstract is not and cannot be proof of occurrence of the accident but poof of the fact that following an accident the occurrence thereof was reported to the police who took cognizance of that accident. It is the police, having received information of a report of occurrence of an accident [who] would investigate and establish the circumstances under which such an accident occurred.....”

[Own emphasis]

21. In the same case the Court went on to state that:-

“.....it was incumbent upon the appellant

at the time of hearing to either call an eye witness who saw the accident take place to prove the listed particulars of negligence attributed to the Respondent or to call the police from Bondo Police station who investigated the accident to shed light on the result of the investigations and as to who was to blame for the subject accident wherein the Deceased lost his life.”

22. Failure to call the officer who investigated the accident was a fatal omission. The matatu driver was not charged as a result of the accident.
23. The Appellant who was a passenger in the matatu could be said to have been an eyewitness to the accident. However the Appellant in her evidence stated that the accident occurred at a bend in the road and she did see exactly how the accident occurred.
24. The Appellant testified that the matatu driver was speeding but she stated that she was unable to see the speedometer and thus would not tell how fast the vehicle was being driven. The Appellant states that she **‘felt’** that the vehicle

was being driven fast. Speed is very subjective - one person may feel a vehicle is being driven fast but another may be of the view that the same vehicle is moving slowly. Without concrete evidence of how fast the vehicle was being driven the court cannot make a finding of speed.

25. Based on the above I do agree with the learned trial magistrate that the Appellant failed to prove liability against the Respondent on a balance of probability as required by law. In the absence of proof of liability no damages can be awarded. In the circumstances the trial court was correct to dismiss the suit in its entirety. I do uphold the decision of the trial court. This appeal is found to lack merit. The same is dismissed in its entirety. Costs will be met by the Appellant.

Dated in Nyeri this 19th day of March 2026.

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**MAUREEN A. ODERO
JUDGE**

ORIGINAL