Mary v Oxford University Press, East Africa Limited & another (Civil Appeal E083 of 2024) [2026] KEHC 4590 (KLR) (16 March 2026) (Judgment)

Neutral citation: [2026] KEHC 4590 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL APPEAL E083 OF 2024

GL NZIOKA, J

MARCH 16, 2026

BETWEEN

ADHIAMBO A MARY ..... APPELLANT

AND

OXFORD UNIVERSITY PRESS, EAST AFRICA LIMITED .... 1ST RESPONDENT

FIRST ASSURANCE COMPANY LIMITED ..... 2ND RESPONDENT

JUDGMENT

1. By a plaint dated 24th September 2019, the plaintiffs (herein "the respondents") sued the defendant (herein "the appellant") seeking for judgment against the appellant for:
   a. The sum of Kshs 327,592.
   b. Interest on (a) above at court rates from the date of filing the suit till payment in full.
   c. Costs of the suit.
   d. Interest on (c) above at court rates.
   e. Any other and/or further relief that the court may deem fit and just to grant.
2. The respondents' case is that on or about 29th September 2016, the first respondent's motor vehicle registration number KBP 750B was being lawfully driven by its authorized driver along Naivasha Nairobi Road. That when it reached at Ihindu area, the appellant's driver, agent, servant and/or employee so negligently drove, controlled and/or managed motor vehicle registration number KBZ925R and caused it to violently crash into the 1st respondent's aforesaid motor vehicle thereby damaging it extensively.

3. The respondents aver that the accident was wholly caused by the sole negligence of the appellant and/or her driver, agent, servant and/or employee. The particulars of negligence attributed to the appellant's driver are tabulated at paragraph 6 of the plaint as;

    a. driving carelessly, and/or recklessly without due attention to other road users,

    b. failing to have proper lookout or regard for other road users, particularly motor vehicle registration No, KBP750B,

    c. failing to brake, swerve and/or in any other way control motor vehicle registration number KBZ925R to avoid hitting motor vehicle registration number KBP750B,

    d. failing to keep reasonable distance between motor vehicles No(s)KBZ925R and KBP970B thereby violently ramming into the rear of motor vehicle registration number KBP750B,

    e. failing to stop or in any way bring motor vehicle registration number KBZ-925R to a halt to avoid the accident,

    f. driving at excessive speed in the circumstances of the case,

    g. failing to observe Traffic Rules and Regulations contrary to the *Traffic Act* and the Highway Code.

4. The respondents aver that the doctrine of Res Ipsa Loquitor applies in the circumstances surrounding the accident and would rely on the provisions of the Highway Code and the *Traffic Act*.

5. That as a result of said accident 1st respondent motor herein was extensively damaged occasioning the it substantial loss as per the particulars of special damages being;

    a. Repair costs---------- Kshs 261 580.

    b. Assessment fees---------- Kshs 5,800.

    c. Re-inspection fees---------- Kshs 1,740.

    d. Replacement car hire costs--------- Kshs 30,000 and

    e. Investigation fees----------Kshs 28,472

    Total cost----------Kshs 327,592.

6. That despite demand being made and notification of intention to sue the appellant adamantly failed refused and/or neglected to make good the claim or any part thereof as a result the respondents filed the suit herein.

7. However, the claim was opposed by the appellant through a statement of defence dated 5th November 2021. The appellant denied all the averments in the plaint and in particular that on or about 26th September 2016, an accident occurred in the manner described in the plaint and involved her motor vehicle registration number KBZ 925R. The particulars of negligence attributed to the appellant and/or her driver, or agent were denied.

8. The appellant further denied that the respondents are entitled to the special damages as pleaded and/or the doctrine of subrogation is applicable herein.

9. However, on a without prejudice basis, the appellant pleaded that if the accident occurred which was denied, then it was due to the negligence and/or contributory negligence of the 1st respondent's driver, servant or agent.

10. The particulars of negligence attributed to the 1st respondent's driver are stated as; failing to keep a proper lookout, driving at an excessive speed in the circumstances of the case, failing to slow down, stop, brake and swerve to avoid the accident, failing to have regard to other road users, failing to take effective control of the said motor vehicle to avoid the accident. The appellant urged the court to dismiss the suit with costs.

11. The case proceeded to full hearing. The respondents' case was supported by the evidence of (PW1) Zaddock Mambo, a Principal Motor Vehicle Assessor who testified that he assessed the 1st respondent motor vehicle No. KBP 750 and prepared a report produced in court. That the report indicates the repairs would cost Kshs 212,860 and he allowed repairs on the bumper and the boot tail at a cost of Kshs 70,000 but later realized they can't be repaired so the cost went up at the time of purchase of the parts. That he prepared a supplementary estimate at Kshs 48,720 giving rise to a total cost for the vehicle came to Kshs 261,580. Further he charged Kshs 5,000 for the assessment and Kshs 1,700 for the assessment as proved by the documents produced.

12. The respondents' case was also supported by the evidence of (PW2) No. 96714 PC Makau Josepat attached to Naivasha Police Traffic Base. He produced a police abstract showing the accident involved three (3) vehicles registration No(s); KBZ 185M driven by Francis NJuguna, KBP 750B driven by Stephen Kamau and KBZ 925R driven by Sammy Wairegi. That all the three (3) vehicles were heading towards Nairobi from Naivasha wherein; motor vehicle KBZ 185M was ahead followed by KBP 750B then lastly KBZ 925R.

13. He stated that the vehicle KBZ 185M slowed down KBP 750 was hit from the rear by KBZ 925R and KBP 750B hit KBZ 185M. That the scene was visited by the investigating officer PC Mwai and motor vehicle registration number KBZ 925R was blamed for the accident.

14. In cross-examination he told the court that there is a difference between a Toyota Voxy and Allion but the police abstract indicates Toyota Allion. Further the police abstract does not indicate the make of motor vehicle KBZ 925R. Furthermore, the particulars of insurance of motor vehicles and drivers were taken and that certificate of insurance for KBZ 925R is indicated as C14351363 and policy number as 003-070-11-63375-2015.

15. The respondents called (PW3) Francis Njenga who employed as a Recovery Officer at Fast Assurance Company. He adopted his statement as evidence in chief and produced documents attached thereto and a supplementary list of documents dated 19th November 2025 as exhibits.

16. In cross-examination he told the court that the police abstract indicates motor vehicle KBZ 925R as Toyota Allion and that it was based on the statement of claim form, the police abstract, the statement by driver Kamau Joseph. That the driver of motor vehicle KBZ 185M did not record a statement. He conceded that he was not at the scene of the accident.

17. The appellant's case was supported by the appellant herself who adopted her statement dated 25th April 2022 as her evidence in chief and produced documents marked as exhibit 1 to 7 in support.

18. She testified the police abstract produced describes a different vehicle from hers and gives different dates of accidents. That her motor vehicle is Toyota Noah station wagon and that on 26th of September 2016 the vehicle was in the garage in Kisumu undergoing gear replacement and therefore she was not aware of the said accident. That as the motor vehicle which is the subject of the accident is different from hers the case be dismissed.

19. In cross-examination she said that she has no written agreement with the mechanic, nor photos of motor vehicle being at the garage, and that she contacted the mechanic who confirmed that her motor vehicle was at United Friends garage on the date of the accident.

20. The defence called Edwin Omondi Agutu a trained mechanic and a co-owner of United Friends garage motors since 2007. He relied on his statement dated 25th April 2022 and stated that he issued quotations and receipts for motor vehicle registration number KBZ 925R after repairing it. That the appellant contacted him on 17th September 2016 brought the vehicle to the garage on 18th of September 2016.

21. That he diagnosed the vehicle to have a gearbox problem and the appellant bought the parts on 25th September 2016 at Kshs 73,000 and the motor vehicle stayed in the garage from 19th to 29th September when the appellant picked it up.

22. At the close of hearing and parties to filing their respective submissions the trial court delivered a judgment dated 21st June 2024, and found the appellant 100% liable and assessed damages in the sum of Kshs 325,592 plus costs of the suit and interest from the date of filing of the suit.

23. However, the appellant is aggrieved by the decision of the trial court and has appealed against it on the following grounds of appeal.

    a. That the learned trial Magistrate erred in law and in fact in failing to critically analyze the evidence presented before it thereby arriving at a wrong finding.

    b. That the learned trial Magistrate erred in law and in fact in failing to note that the evidence presented by the appellant was inconsistent, contradictory, inefficient and or insufficient.

    c. That the learned trial Magistrate erred in law and in fact by overlooking the inconsistence of motor vehicle registration numbers, make and/or model as presented by the evidence of the police abstract.

    d. That the learned trial Magistrate erred in law and in fact in shifting the burden of proof from the plaintiff to the defendant and in so doing arrived at a wrong finding.

    e. That the learned trial Magistrate erred in law and in fact in treating the appellant's response superficially in arriving at the judgment and paying little and/or no regards whatsoever to the appellant's submissions and evidence.

    f. That the learned trial Magistrate erred in law and in fact by completely overlooking the provisions of the *Evidence Act*, (cap 80) Laws of Kenya, in respect to the case.

    g. That the learned trial Magistrate erred in law and in fact by relying on secondary evidence thereby reaching a wrong finding.

    h. In all circumstances of the case the findings of the learned Magistrate are unsupportable in law or on the basis of the evidence adduced.

24. As a result, the appellant prays that this appeal be allowed and judgment in favor of the respondent be set aside and the appellant be awarded the costs of the appeal.

25. The appeal was canvassed through filing of submissions. The appeal was disposed of vide filing written submissions. The appellant in submissions dated 16th January 2025, submitted that a police abstract in itself cannot prove either ownership or liability as it is not proof of negligence but rather evidence of occurrence an accident as held by the High Court in the cases of Peter Kanithi Kimunya v Aden Guyo Haro [2014] eKLR and Florence Mutheu Musembi and Geoffrey Mutunga Kimiti v Francis Karenge

[2021] eKLR. That in addition, the police abstract does not show that the appellant was responsible for the accident.

26. That in the present case, the police file, sketch map, the investigation diary, covering report and correspondence sheet which entails all the aspects of a police investigation was not produced. That police relied on the sketch plan of the private insurance investigator who was not at the scene.

27. The appellant relied on the case of Kennedy Nyangoya v Bash Hauliers [2016] eKLR where the Court held that even if the police abstract held the defendant was to blame for causing the accident, the fact that he was not charged and that the investigating officer did not visit the scene of the accident, then the abstract is not conclusive proof of liability.

28. The appellant also relied on the case of Mega Industries Limited v Jane Jerotich [2020] eKLR and Wellington Ng'ang'a Muthiora v Akamba Public Road Services and Another CA Kisumu [2010] eKLR where it was held that when a police abstract is produced and there is no evidence to rebut it and it is not challenged in cross examination it is prima facie evidence that can be relied on as proof of ownership of a motor vehicle.

29. However, where it is challenged by evidence or in cross examination the plaintiff must produce a certificate from the registrar of motor vehicles or any other proof such as a sale agreement to be conclusive evidence. The appellant faulted the trial Magistrate for holding that the validity of the police abstract was not challenged.

30. That she challenged the identification of the motor vehicle recorded in the police abstract which indicated that the car was a Toyota Allion while her vehicle was a Toyota Noah. That the difference between the two models is capable of causing confusion. Furthermore, any reasonable person knows that the make of the vehicle, is more visible than the registration of the vehicle.

31. The appellant further challenged the insurance policy number and the insurer indicated in the police abstract in that it differed from those by the assessor. That having showed variance between the police abstract and the assessor's report, the trial court should have construed it be challenging the validity of the police abstract.

32. The appellant argued that the respondents did not call any eyewitnesses nor any of the three (3) drivers of the vehicles involved in the accident whose evidence would have proved and/or disproved her liability. Additionally, the investigating officer on the case did not testify. That the reason for failing to call him that he was off duty is not valid as the respondents could have requested for summons. That his evidence could dealt with discrepancies in the matter herein.

33. The appellant submitted that the burden of proof in civil cases lies on the person who alleges as laid out in section 107 of 109 of the *Evidence Act*. Further, the burden does not shift nor does it change even in the absence of the evidence by the defendant as held in the case of Hon. Daniel Torotich Arap Moi -vs- Mwangi Stephen Muriithi [2014] eKLR.

34. The appellant further faulted the trial Magistrate for failing to find merit in the defence evidence that her vehicle was under repair in the garage and did not consider the receipts produced in support despite the fact that the respondents never controverted the receipts and therefore it is more probable than not that the vehicle was in the garage when the accident occurred.

35. That the trial court shifting the burden to the appellant to prove the vehicle was at the garage and further subjecting defence case on proof beyond reasonable doubt standard. That, the respondents were not subjected to the same burden of proof as they were not required to show actual photographs of the vehicle at the scene of the accident.

36. However, the respondents in submissions dated 12th March 2025 stated that the central argument by the appellant is that her motor vehicle is a Toyota Noah while the police abstract indicated that it was a Toyota Allion.

37. That it its trite law that a police abstract is filled based on the information in the occurrence book and the police file. That in the instant case, the police officer who testified explained that the make of motor vehicle KBZ 925R belonging to the appellant was not recorded in the occurrence book. That it was therefore obvious that the officer who issued the police abstract mistook the appellant's car to be a Toyota Allion while in reality the Toyota Allion was the car that was ahead of the other being motor vehicle registration No. KBZ 185M.

38. That on the issue that the police abstract was not produced by the investigating officer, the respondents argued that the appellant had an opportunity to cross-examine the (PW2) PC Makau and it was clear that the Investigating Officer PC Mwai was not at the station when the matter came up for hearing. Further, that the contents of the occurrence book were read out in court.

39. On whether the appellant's vehicle was to blame for causing the accident, the respondents argued that the evidence adduced showed that the appellant's motor vehicle rammed the respondents' vehicle from the rear causing it to ram into the rear of vehicle registration KBZ 185M. That, traffic officers from Naivasha Police Station visited the scene and after investigations blamed the appellant's vehicle for causing the accident.

40. That the argument by the appellant that she does not know the driver by the name Francis Mwangi Njuguna is not in issue as the police officer testified that the appellant's driver name was Sammy Wairegi. That the appellant did not produce any evidence to demonstrate that the said driver was not her employee or that she had not authorized him to driver her vehicle.

41. The respondents relied on the case of Kenya Bus Services Ltd v Dina Kawira Humphrey [2003] eKLR where the Court of Appeal cited with approval the case of; Karisa v Solanki [1969] EA 318 where it was held that if it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible.

42. The respondent argued that the appellant's claim that her vehicle was undergoing repairs for the gearbox at the time the accident occurred was not substantially proved. That the invoices and receipts produced did not create a nexus with the appellant's vehicle as the registration number of the vehicle was not indicated therein.

43. Further, there was no evidence to show the period that the car was in the garage and that it did not leave the garage between the 19th to 28th September 2016. Furthermore, the appellant did not provide a booking form, photos or delivery notes to demonstrate that the vehicle was in the garage thus the trial court correctly dismissed the appellant's evidence. That in circumstances, the documents relied on were fictitious, crafted and manufactured to create an impression that the vehicle was not at the scene of the accident.

44. The respondents further argued that the documents relied on by the appellant were not the original documents and did not therefore meet the burden of admissibility. That it is trite law that, documents may be proved by either primary or secondary evidence where primary evidence is the document itself while secondary evidence includes copies. That while documents must be proved by primary evidence, section 67 of the *Evidence Act* provides special circumstances where secondary evidence may be used.

45. The respondents cited the case of; Atlantic Limited v Echken Agencies Limited [2023] eKLR the court relied quoted the case of Sofie Feis Caroline Lwangu vs Benson Wafula Ndote [2021] eKLR where the Court held that section 67 of the *Evidence Act* is worded in a manner that makes it mandatory for documentary evidence to be produced in primary form unless secondary evidence fell in the exceptions provided for in the *Evidence Act*

46. That the appellant having failed to produce the original documents, her evidence amounted to hearsay evidence which did not aid her case, and therefore the trial court cannot be faulted for arriving at the logical conclusion that the receipts were an afterthought to give an illusion that the vehicle was undergoing repairs.

47. At the conclusion of arguments on appeal, I take note of the role of the first appellant as stated in the case of Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123 as to evaluate the evidence afresh and arrive at its own decision.

48. The court stated as follows: -

> "I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. 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 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 allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

49. Furthermore, it is noteworthy that the burden of proof rests on the party who asserts a fact, generally the plaintiff, who must prove their case on a balance of probabilities, meaning their claim is more likely than not to be true, section 107 & 108 of the *Evidence Act* (Cap 80) Laws of Kenya, and while the legal burden remains on the plaintiff, the evidentiary burden can shift to the defendant to disprove specific facts.

50. The appellant has denied her vehicle was involved in the accident. To start with the respondents pleaded that the appellant is the registered owner of motor vehicle registration No. KBZ 925R. Further the respondents pleaded that the appellant the driver or agent caused the subject accident as a result of driving the motor vehicle KBZ 925R negligently.

51. To support the afore, the respondent relied on the evidence of (PW1) Zaddock Mambo, who is a motor vehicle Assess and therefore could not prove whether the appellant is the registered owner of the subject vehicle herein nor whether her driver or agent drove the vehicle negligently.

52. (PW2) PC Makau who produced the police abstract conceded that he did not witness the accident that, he did not visit the scene, and that it was visited by PC Mwai who investigated the matter. He confirmed that, the police abstract produced indicates that motor vehicle KBZ 925R is a Toyota Allion, and that there is a difference between a Toyota Premio and Allion, a Toyota Noah and Voxy and that the latter do not resemble an Allion vehicle.

53. Consequently, this witness could not confirm the particular vehicles involved in the accident, and in particular the appellant's vehicle and neither could he testify as to how the accident occurred, who was to blame and why, since he is not the investigating officer.

54. The investigating officer was not called to testify and therefore the evidence of (PW2) evidence remains, hearsay and of little probative value.

55. The respondent further availed the evidence of (PW3) Godfrey Njenga an employee of the 2nd appellant who simply testified to what action was taken upon receipt of a report of the accident from the insured. The witness could not testify with certainty or at all on how the accident occurred which vehicles were involved and the party to blame.

56. The question that arises is, did the evidence of the three (3) witnesses afore prove the respondents case in particular as to whether the appellant's vehicle was involved in the accident on the balance of probability?

57. In this matter, the only persons who would have testified as to how the accident occurred were the three (3) alleged drivers who were driving the three vehicles involved and in particular the driver of motor vehicle registration No. KBP 750P and/or KBZ 185M identified as Stephen Kamau and Francis Njuguna respectively.

58. The question is why didn't they testify to support the allegations in the plaint that the appellant's vehicle was involved in the accident being driven by her driver or agent (if at all).

59. Notably the police abstract produced indicates the results of investigation as "matter referred to insurance". No indication that, the driver of KBZ 925R was held to blame. Consequently, the evidence of (PW2) PC Makau to that effect is unsubstantiated.

60. The respondent argues that, they are relying on the doctrine of subrogation but the question is does the doctrine of subrogation arise where there is no liability against the party sued for indemnity.

61. The respondent on her part denied in particular denied her vehicle was at the scene of the accident, and was involved in the accident. Furthermore, she argued that although she has a vehicle by registration No. KBZ 925R but the vehicle is Toyota station wagon, specifically a Noah Van and yet the police abstract refers to a motor vehicle registration No. KBZ 925R Toyota Allion.

62. I note from the judgment of the trial court the court analysed the appellant's case and concluded that the receipt dated 26th September 2016, did not indicate the details of the motor vehicle neither the time of purchase of the items. That the receipts failed to prove how long the vehicle was grounded at the garage.

63. That there is no evidence that the vehicle never left garage between the dates of 19th to 28th September 2016 and particularly on 26th September 2016. Further there was no evidence in terms of photos or otherwise to prove presence of the appellant's vehicle at the garage on the said date.

64. Furthermore, there was no delivery note to the garage for repair and acknowledgement of receipts of the repaired motor vehicle by the appellant to confirm the testimony of the appellant.

65. The trial court further held that the appellant failed to enjoin the alleged owner and/or driver of the vehicle that caused the accident. Further, the validity of the police abstract had not been challenged and neither was there evidence of a forgery raised.

66. The trial court then concluded "on the balance of probability, the appellant had proved that the accident occurred on the date material to the suit and that the defendant was 100% for the damage sustained as a result"

67. Pursuant to the aforesaid finding of the trial court the following salient issues arise: -

a. Did the trial court analyze the respondents' evidence at all, to establish whether the appellant's vehicle was involved in the accident? The record reveals that it was not done, yet it was the plaintiffs/respondents to prove their case to the required standard. On that ground alone the judgment lacks objectivity.

b. Notably, the trial court shifted the liability of proving the case on the appellant and erred in principle of fact and law. Assuming the appellant kept quiet in her defence, where is the evidence she is the registered owner of the vehicle KBZ 925R, or it belongs to her, in the absence of a record of registration from the Registrar of Motor Vehicles. The police abstract produced is not prima facie evidence of registration of a vehicle.

c. Again although the trial analysed the defendant's case in total in particular the receipts produced which were critically analysed however the evidence of DW2 was not considered at all. Yet he clearly stated the vehicle was at the garage to 28th which evidence was not challenged by the respondents.

d. In the same vein, whereas the trial court found that, the appellant did not bring photos to show her vehicle was in the garage, on the other part, the respondents did not produce a sketch plan or photos or even the police file to support the abstract to support their case and yet the trial court exonerated them from blame.

68. Pursuant to the aforesaid I find the trial court erred in facts and law in finding the appellant 100% liable. I set aside the subject judgment with a finding that, the appeal has merit and direct that each party meet its own costs.

DATED, DELIVERED AND SIGNED THIS 16TH DAY OF MARCH 2026.

GRACE L. NZIOKA

JUDGE

In the presence of:

Ms Okal for the appellant

N/A for the respondent

Ms Hannah: Court assistant