

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
CIVIL APPEAL NO. E107 OF 2024

JONATHAN ABAYO ABAYO APPELLANT

- VERSUS -

KENNEDY ODIWUOR ONONG'NO RESPONDENT

(Being an appeal from the judgment and decree of **Hon. F. Rashid (PM)**)

delivered on **20/2/2024** in **Kisumu MCCC No. 153 of 2020**

J U D G M E N T

1. By a Complaint dated **22/4/2020** filed in Court on **23/4/2020**, the respondent sued the appellant for damages. The same was in respect of an accident that allegedly occurred on **4/2/2020** at about 11.30am whilst the respondent was a passenger in a Tuk Tuk registration No. KTWB 289R along Kisumu-Ahero road at Rabuor Shopping Centre.
2. It was alleged that the said Tuk Tuk was recklessly driven whereby it veered off the road and overturned. As a result, the respondent sustained injuries for which he sought compensation.
3. The appellant appeared and lodged a defence dated **8/9/2020** wherein it denied in *toto* the respondent's claim.
4. At the trial, the respondent called 2 witnesses while the appellant called none. By a judgment delivered on **20/2/2024**, the trial Court found in favour

of the respondent. It held the appellant 100% liable for the accident, awarded **Kshs.500,000/=** general damages and specials of **Kshs.10,962/-** plus costs and interest.

5. Aggrieved by that decision, the appellant appealed to this Court vide a Memorandum of Appeal dated **20/5/2024**. It set out 3 broad grounds of appeal as follows: -

a) That the trial court erred in fact and in law in failing to dismiss the suit and by apportioning 100% liability to the appellant (defendant) without considering the circumstances of the case.

b) That the trial court erred in law and in fact in finding in favour of the respondent (plaintiff) against the appellant (defendant) when there was totally no credible evidence or proof of negligence on the part of the appellant.

c) That the learned trial magistrate erred in law and in fact in failing to note the discrepancies on the date of the accident as pleaded in the plaint and as indicated on the police abstract.

6. This is a first appellate court. Its jurisdiction is well known as set out in the case of **Selles & Another vs Associated Motor Boat Company Ltd &**

Others (1968) EA 123 CA. It has to re-evaluate the evidence afresh and come to its own independent findings and conclusions.

7. The case before the trial court was that on **4/3/2020** at about 11.30am, the respondent (**Pw2**) was travelling as a passenger in Motor Vehicle Registration No. KTWB 289R along Kisumu-Ahero road when at Rabuor Shopping Centre the said vehicle was negligently or carelessly driven at a high speed as a result of which it veered off the road and overturned. As a result, the respondent sustained a head injury, injury on the neck, left hip joint, both thighs and a fracture of the left acetabular central floor.
8. He reported the matter to Kisumu Central Police Station and was issued with a P3 Form. He was examined by **Pw1** who filled the said P3 Form after examining him. He was issued with a Police Abstract which he produced at the trial. He blamed the driver and owner of the subject Motor Vehicle for the accident as he drove the same carelessly and at an overspeed.
9. **Pw1 Phillip Kiplimo**, a Clinical Officer at Kisumu County Hospital appeared at the trial. He testified that he examined the respondent and filled the P3 Form on **19/3/2020**. That the accident occurred on **4/3/2020** at about 1130hrs at Rabuor Market. He observed and certified the injuries sustained and as recorded in the P3 Form. He produced the P3 Form and Medical Report as **PExh 4 and 5**, respectively.

10. That was the evidence that was before the trial court as the appellant called no evidence. It is worth to note that the appellant was given three chances, **22/8/2023, 7/11/2022** and **5/12/2023** to call evidence but failed to do so. He chose to close his case.
11. It is on the foregoing that the trial court found against the appellant for which he has preferred the present appeal.
12. The parties filed their submissions which the Court has considered. It is apt to note that the appeal is only on liability. The three grounds of appeal can be summarized into one; viz, that the trial court erred in holding the appellant 100% liable while the respondent's case was never proved and failed to consider the discrepancy on the date of the accident pleaded.
13. The cardinal principal of the law of evidence is that; he who alleges must prove. That is the gist of *sections 107 and 108 of the Evidence Act*. They provide: -

“107(1). 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.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

14. The question in this appeal is whether the respondent did prove his case or not. As already observed, the evidence that was before the trial court was that of **Pw1** and **Pw2**. It was that the respondent was a passenger in the appellant’s motor vehicle on **4/3/2024**. That the appellant drove the same at a high speed, recklessly and carelessly as a result of which it overturned at Rabuor. As a result of that accident, the respondent sustained serious injuries. Pw1 appeared and confirmed the said injuries having examined the respondent.
15. The record shows that both the testimonies of **Pw1** and **Pw2** were not seriously challenged on sufficiently tested on **26/10/2022** when they testified. Their testimonies remained firm and un-displaced.
16. To that point, the evidentiary burden of proof shifted from the respondent to the appellant. It was the appellant to displace that burden by calling his evidence in defence. He failed to do so. Therefore, the respondent’s case remained proved as presented before the trial court.
17. Without there being any evidence to counter the respondent’s testimony that the vehicle was being driven carelessly, overspeed and recklessly, could the

trial court err in holding the appellant 100% liable? I don't think so. There was no evidence that was tendered to show how the respondent could have or did actually contribute to the accident.

18. Accordingly, the trial court's holding the appellant liable at 100% cannot be faulted. In the case of **Acceller Global Logistics vs Gladys Nasembu Waswa & Another (2020) KEHC 9074 (KLR)**, it was held that where there is no evidence called by the defence, the plaintiff's case remains uncontroverted.

19. In **Jamlik Muchangi Miano vs Attorney General (2017) KEHC 8422 (KLR)** Mativo J (as he then was) held: -

“Where a party fails to call evidence in support of his case, that party's pleading remains mere statements of fact since in so doing the party fails to substantiate his pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against the defence is uncontroverted and therefore challenged.”

20. The foregoing is the correct statement of the law where no evidence is called to support the denials in a defence. The defence cannot stand on the face of tested evidence of a plaintiff. Accordingly, the trial court was correct in holding the appellant 100% liable in circumstances.

21. As regards the discrepancy on the dates of the accident as pleaded in the plaint and the testimony, that is not a serious contention. It is correct that the plaint stated that the accident occurred on **4/2/2020** while all the documents produced at the trial and the testimony of the respondent was that the accident occurred on **4/3/2020**. The appellant had the opportunity of cross-examining the respondent at the trial and test the issue of the discrepancy. He did cross-examine respondent. That was the point of testing the respondent's evidence. He never raised the said discrepancy. The date in the plaint must have been a typographical error. It could have been rectified at the point of trial. It remains as such an error that does not go to the root of the case. That challenge is dismissed.
22. That being the case, I find the appeal to be without merit and dismiss the same with costs.

It is so decreed.

DATED and **DELIVERED** at Kisumu this **24th** day of **April, 2026**.

A. MABEYA, FCI Arb

JUDGE