

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
THE CIVIL APPELLATE DIVISION
(Coram: A.C. Mrima, J.)
CIVIL APPEAL NO. E075 OF 2025

-between-

PAUL MWAURA KAMAU
APPELLANT

-versus-

MARY WAIRIMU MWAI
RESPONDENT

(Being an appeal from the judgment and decree of Hon. Caroline K. Ireri (RM/Adjudicator) in Milimani Small Claims Court Civil Claim No. 2422 of 2024, delivered on 27th December 2024)

JUDGMENT

Background:

1. This appeal traces its history from a road traffic accident that occurred on 19th December 2023 along Thika Road around the Pangani Area involving the collision of vehicles. *Mary Wairimu Mwai*, the Respondent herein, instituted *Milimani Small Claims Court Civil Claim No. 2422 of 2024* (hereinafter referred to as '**the suit**') claiming Kshs. 277,240/- in special damages. The Respondent's case was that the Appellant's motor vehicle registration number KDC 662U, suddenly changed lanes, forcing the Respondent's driver to brake, leading to a multi-vehicle collision.
2. The suit was heard where five witnesses appeared for the Respondent and two for the Appellant. In a judgment that followed thereafter, the Court found the Appellant wholly liable and allowed the sum prayed for and costs. It was that decision that prompted the instant appeal.

The Appeal:

3. In a Memorandum of Appeal dated 27th January 2025, the Appellant asserted the following grounds of appeal: -
 1. *The learned Magistrate erred in law in failing to find that the claim offended Section 10(2)(a) of the Insurance (Motor Vehicles Third Party Risks) Act for want of notice of institution of a suit to the Insurer.*
 2. *The learned Magistrate erred in law in disregarding Section 109 and 112 of the Evidence Act by finding that the Respondent had proved that an accident occurred on 19th December 2023.*
 3. *The learned Magistrate erred in law in disregarding Section 109 and 112 of the Evidence Act by finding that the Respondent had proved that the Appellant caused the accident that occurred on 19th December 2023.*

The Appellant's submissions:

4. In his written submissions dated 25th August 2025, the Appellant argued that the suit was fatally defective for non-compliance with Section 10(2)(a) of the *Insurance (Motor Vehicle Third Party Risks) Act, Cap 405*, which requires statutory notice to the insurer within 30 days of commencing proceedings.
5. The Appellant contended that notice was wrongly issued to *Fidelity Shield Insurance Co. Ltd* instead of MUA Insurance (Kenya) Ltd. Reliance was placed on *Mui -vs- First Assurance Company Limited* [2024] KEHC 13794 and *Kenya Orient Insurance Company Ltd v Mbelenzi* [2024] KEHC 11252 (KLR) to bolster its case. In the former it was observed thus;

.... Section 10(2)(a) is a substantive legal provision that serves to ensure that a third party who has suffered injury or loss due to the acts or omissions on the part of an insured motor vehicle is assured of compensation in the event that the owner or driver of the insured motor vehicle is unable to settle the claim.
6. Further to the foregoing, the Appellant submitted the trial Court misapplied Sections 109 and 112 of the Evidence Act regarding the burden of proof. He argued that the

Respondent failed to prove negligence beyond a mere police abstract. The Appellant emphasized that a matatu (KAV 907T) hit the Respondent from behind, invoking the principle that the rear-ender is *ipso facto* negligent, as per the authority in *Multiple Hauliers (E.A) Ltd -vs- Mutua Malundu & 2 Others* [2017] KEHC 4278 (KLR).

7. The Appellant prayed for the appeal to be allowed and the suit be dismissed with costs.

The Respondent's case:

8. The Respondent opposed the appeal through written submissions dated 16th September 2025. She asserted that it lacks any *bona fide* points of law, as required by Section 38(1) of the Small Claims Court Act. Regarding the statutory notice, the Respondent argued that Section 10(2)(a) of the *Insurance (Motor Vehicle Third Party Risks) Act* does not apply to subrogated recovery claims where the insurer seeks to recoup costs from a tortfeasor, but only to third-party claims seeking to enforce statutory liability against an insurer. The Respondent relied on the case of *Leli Chaka Ndoro -vs- Maree Ahmed & S.M. Lardhib* [2017] KEHC 7713 (KLR) where it was observed as follows: -

... By the principle of subrogation, the insurer is put in the position of the insured and is entitled to claim compensation from the 3rd party tortfeasor.

9. On liability, the Respondent maintained that her driver and the police officer (CW4) provided consistent testimony corroborated by police abstract and the sketch map. The Respondent argued that the Appellant's testimony was contradictory regarding ownership of the vehicle and insurance particulars. To that end, the Respondent drew support from various authorities among them, *Mmbando & another -vs- Kisaka* [2023] KEHC 4004 (KLR) regarding the shifting evidential burden and *William Kabogo Gitau -vs- George Thuo & 2 others* [2010] KEHC 4124 (KLR) on the civil standard of proof.

10. The Respondent prayed that the appeal be dismissed with costs.

Analysis:

11. Having carefully considered the appeal alongside the rival submissions, the issues that emerge for determination are as follows: -

- i. Whether the appeal is properly before the Court under Section 38(1) of the Small Claims Court Act.*
- ii. Whether the Respondent's claim was defective for want of statutory notice under Section 10(2)(a) of Cap 405.*
- iii. Whether the trial Court erred in law in its application of Sections 109 and 112 of the Evidence Act regarding liability.*

12. The Court will now deal with the above issues in seriatim.

[a] Whether the appeal is properly before the Court under Section 38(1) of the Small Claims Court Act:

13. The High Court's jurisdiction on appeal is provided for by *Section 38(1) of the Small Claims Court Act*. It provides thus;

38. Appeals

- (1) A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.*
- (2) An appeal from any decision or order referred to in subsection (1) shall be final.*

14. In ***M'riungu and Others -vs- R*** [1982-88] 1 KAR 360 his Lordship, Chesoni AJA discussed matters of law in the following manner: -

*... We would agree with the views expressed in the English case of *Martin v Glyneed Distributors Ltd (t/a MBS Fastenings)**

[1983] 1 CR 511 that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decision of the trial of first appellate court unless it is apparent that; on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad law.

15. Later, in ***J N & 5 Others -vs- Board of Management, St. G School Nairobi & Another*** [2017] eKLR, the Court discussed points of law in the following fashion: -

... In law, a question of law, also known as a point of law, is a question that must be answered by applying relevant legal principles to interpretation of the law. Such a question is distinct from a question of fact, which must be answered by reference to facts and evidence as well as inferences arising from those facts. Such a question is distinct from a question of law, which must be answered by applying relevant legal principles. The answer to a question of fact (a "finding of fact") usually depends on particular circumstances or factual situations.

16. Deriving from the foregoing, this Court finds and hold that the grounds raised in the memorandum of appeal regarding statutory interpretation and the legal burden of proof are indeed matters of law. This Court, therefore, has the requisite jurisdiction to deal with this appeal.

[b] Whether the Respondent's claim was defective for want of statutory notice under Section 10(2)(a) of Cap 405:

17. Sections 10(1) and (2)(a) of the *Insurance (Motor Vehicle Third Party Risks) Act* [hereinafter referred to as '**the Act**'] provides as follows: -

10. Duty of insurer to satisfy judgments against persons insured:

- (1) *If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5*

(being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum

payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

(2) *No sum shall be payable by an insurer under the foregoing provisions of this section—*

(a) *in respect of any judgment, unless before or within fourteen days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings.*

18. From the reading of the above provision, it is apparent that the requirement of the statutory notice is designed to protect insurers in actions where a third party intends to satisfy a judgment against them directly and not otherwise. Therefore, the Appellant's contention that the suit should fail for lack of statutory notice to his insurer is legally misplaced since the suit was a subrogated recovery action against the tortfeasor, not a claim for statutory indemnity against an insurer. The lack of statutory notice to his insurer does not, hence, invalidate the claim because the insurer's statutory liability has not yet been triggered. Consequently, the notice requirement under Cap 405 does not apply. As such, this Court finds favour with the finding in ***Leli Chaka Ndoro -vs- Maree Ahmed & S.M. Lardhib*** case [*supra*] to the effect that the suit was not defective and, accordingly, the objection fails.

[c] Whether the trial Court erred in law in its application of Sections 109 and 112 of the Evidence Act regarding liability:

19. Sections 107, 109, and 112 of the Evidence Act govern the aspect of the burden of proof. For clarity, there are two limbs of the burden of proof being *the legal burden of proof* and the *evidential burden of proof*. Whereas the legal burden of proof is always static on the claimant, the evidential burden of proof initially rests on the claimant, but may shift to the other party depending on the weight of evidence adduced by the claimant. A detailed discussion on this aspect was undertaken by the Supreme Court in **Raila Amolo Odinga & another v IEBC & 2 others** {2017} eKLR.
20. In this case, the Respondent established a *prima facie* case through the testimony of her driver and the police officer, supported by a police abstract blaming vehicle KDC 662U. As a result, the evidential burden of proof shifted to the Appellant to disprove the Respondent's case. From the evidence, the trial Court correctly found that the Appellant failed to rebut evidence so as to shift the blame to the Respondent and as such, the Respondent proved her case on a balance of probabilities.
21. In essence, the Court, correctly so, found that liability attaches to the actor whose negligence sets the chain of events in motion. In this case, it was the Appellant's unsafe lane change that was the proximate cause of the Respondent's emergency braking. As such, the Appellant was wholly to blame as found in the suit.

Disposition

22. This Court, therefore, finds no error of law in the Adjudicator's decision. The Respondent proved her case on a balance of probabilities, and the legal contentions raised by the Appellant are without merit. Accordingly, the following final orders hereby issue: -

[a] The appeal is hereby dismissed in its entirety.

[b] The Judgment and Decree of the Small Claims Court dated 27th December 2024 is hereby affirmed.

[c] The Appellant shall bear the costs of this appeal.

Orders accordingly.

DELIVERED, DATED and SIGNED at NAIROBI this 30th day of April, 2026.

**A.C. MRIMA
JUDGE**

Judgment virtually delivered virtually in the presence of:

Mr. Kenneth Wilson, Learned Counsel for the Appellant.

Mr. Kimani, Learned Counsel for the Respondent.

Michael/Amina - Court Assistants.