REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. E171 OF 2025

DOUGLAS KHOYA …..... 1ST APPELLANT

PELTON TRANSPORTERS LTD ……...…..… 2ND APPELLANT

- VERSUS -

GEOFFREY WAFULA WALIULA …….……..….. RESPONDENT

(Being an appeal from the judgment and decree of **Hon. Denis Ogal SPM** delivered on **30/6/2025** in **Winam SPMCC No. 165 of 2017**

R U L I N G

1. The suit before the trial court was tried vide an amended plaint amended on **18/11/2019**. In that pleading, **Geoffrey Wafula Walialu** 'the respondent' pleaded that he was employed by the appellants ('applicants') as a turn-boy since December, 2014.

2. He alleged that on **30/3/2017**, he was instructed to accompany one **Juma Wepukhulu** who was a driver to transport goods from Eldoret to Kisumu using the applicants motor vehicle Registration **No. KBV 509H Mitsubishi FH Lorry**. He further alleged that the said vehicle was involved in an accident at Coptic Church along Kisumu-Kakamega road. That as a result of the said accident, he sustained injuries in respect of which he lodged the said suit for compensation.

3. The applicants appeared and defended the suit vide an amended defence dated **24/6/2019**. In that defence, they denied the respondent's claim in total. They also denied that the respondents injuries were as a result of the alleged accident. In particular, they pleaded in paragraph 8 thereof that: -

> ***"8. The 1st and 2nd defendant denies that the plaintiff's alleged injuries, loss and damage were as a result of the alleged accident or at all…"***

4. Initially, exparte judgment was entered against the appellants but by a consent of the parties, it was set aside on **13/9/2018**. It is then that the aforesaid pleadings were amended accordingly.

5. The trial of the suit began on **8/8/2019**. The respondent's case was concluded on **15/8/2024**. The appellants opened their defence on **3/10/2024** and concluded on **27/3/2025**. Thereafter, the parties filed their respective submissions whereupon the trial court rendered its judgment on **30/6/2025**. In its judgment, the trial court found in favour of the respondent and awarded him damages of **Kshs.347,980/-.**

6. The appellants were aggrieved by the said judgment and lodged the present appeal vide their Memorandum of Appeal dated **25/7/2025** in which they raised 11 grounds of appeal.

7. Against that background, on **12/2/2026**, the applicants took out a Motion on Notice under ***section 78 of the Civil Procedure Act*** and ***Order 42 Rule 27 of the Civil Procedure Rules***. They sought leave to be permitted to adduce additional evidence in the form of medical report dated **9/9/2025** from St. Elizabeth Mission Hospital, Mukumu.

8. The grounds for the application were that a decree for **Kshs.347,980/-** had been issued against them. That at the trial, the respondent had relied on a discharge summary from St. Elizabeth Mission Hospital Mukumu dated **28/4/2017** where it was alleged that he had received comprehensive treatment for injuries he had allegedly sustained from the said accident.

9. The applicants contended that they had now obtained a medical report from the said institution dated **9/9/2025** which showed that the respondent had attended the said hospital on **17/4/2017** with abdominal pains. That no one from that institution testified at the trial. That the Medical Report was availed upon request by the appellant's advocate's letter dated **25/8/2025.** Finally, that the evidence sought to be adduced would have a significant influence in the outcome of the case.

10. The Motion was opposed vide the replying affidavit of **Kennedy Owuor** sworn on **11/3/2026**. He swore that the application was an afterthought.

That the evidence sought to be introduced was not new but had always been available. That there was no evidence that any effort had been made to obtain the said evidence before now.

11. That the contents in the report dated **9/9/2025** was contained in the discharge summary dated **20/4/2017**. That there was lack of due diligence and the evidence was meant to fill the gaps of the appellants' case. Finally, that it will cause prejudice to the respondent as the evidence, if produces, will not be tested in evidence.

12. The parties filed their respective submissions which were ably highlighted by Learned Counsel. **Mr. Ombiro** led **Mr. Mutunga** for the applicants. They cited the Supreme Court decision in **Mohamed Abdi Mahamud vs Ahmed Abdullahi Mohamad & 3 Others (2018) eKLR** on the guiding principles for adduction of fresh evidence on appeal. That the evidence could not have been obtained with reasonable diligence for use at the trial, that it must be such that it will have significant influence on the result of the case and that it must be credible.

13. That the Medical Report sought to be produced was only obtained after judgment. That it will show that the injuries the respondent relied on were not as a result of the accident the subject of the suit. That the records are

from a private hospital and not easily available. That the evidence will ultimately help the court to determine for what the respondent was treated. The cases of **Attorney General vs Marshall (1954) 1 WLR 1489** and **Kavikavi vs Wiafe (1981) DLCA 2146** were cited in support of those submissions.

14. **Mr. Owuor**, Learned Counsel for the respondent submitted that the applicants had not satisfied the requirements for adduction of fresh evidence at the trial. That they should have produced it at the trial. That it will prejudice the respondent as he would have no opportunity to look at them on appeal.

15. Before I determine the application, there is a point of law that was raised by **Mr. Mutunga**. He objected to the replying affidavit of **Mr. Kennedy Owuor** as being in breach of ***Rule 8 of the Advocated Rules***. The case of **Barack Ofulo Otieno vs Instarect Ltd (2015) eKLR** was cited in support of that submission.

16. **Mr. Oduor** reiterated that the affidavit was not on any contentious matter but only on formality. It was not the substance of the documents sought to be produced.

17. I agree with **Mr. Mutunga** that an advocate cannot swear an affidavit on behalf of his client. He is not allowed to swear on matters that are contentious. He can only swear affidavits that are of a formal nature and not where he may be called as a witness.

18. In the present case, the application before Court is on a matter based on law only; ***section 78 of the Civil Procedure Act***. The question is whether or not the applicants have satisfied the legal principles for the adduction of fresh evidence on appeal. There is nothing contentious about that. If it were the veracity of the evidence contained therein, then it will be contentious and the affidavit would have been a subject for striking out. However, it was not and the same is left to stand.

19. Now moving to the Motion itself, this is an application for leave to produce fresh evidence on appeal. ***Section 78 of the Civil Procedure Act*** provides: -

> ***"78. (1) Subject to such condition and limitations as may be prescribed, an appellate court shall have power –***
>
> ***(a) to determine a case finally;***
>
> ***(b) to remand a case;***
>
> ***(c) to frame issues and refer them for trial;***

(d) <u>to take additional evidence or to require the evidence to be taken</u>."

20. The enabling procedural provision is ***Order 42 Rule 27 of the Civil Procedure Rules*** which provide" –

> *"**(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred; but if –***
>
> ***(a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or***
>
> ***(b) the court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the court to which the appeal is preferred may allow such evidence or document to be produced or witness to be examined.***
>
> ***(2) Wherever additional evidence is allowed to be produced by the court to which the appeal is preferred the court shall record the reasons for its admission."***

21. Both the Supreme Court of Kenya and the Court of Appeal have expressed themselves on the principles applicable in such applications. In **Mohamed Abdi Mahamud vs Ahmed Abdullahi Mohamad & 3 Others** (supra), the Supreme Court of Kenya set out the relevant guidelines an appellate court should consider before granting orders for admission of new and fresh evidence as follows: -

> ***"a) the additional evidence must be directly relevant to the matter before the court and be in the interest of justice;***
>
> ***b) it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;***
>
> ***c) it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;***
>
> ***d) where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;***

e) ***the evidence must be credible in the sense that it is capable of belief;***

f) ***the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;***

g) ***whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;***

h) ***where the additional evidence discloses a strong prima facie case of willful deception of the Court;***

i) ***the Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful;***

j) ***a party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case;***

k) ***the court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional***

evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other."

22. In compliance to the aforesaid decision of the Apex Court, the Court of Appeal stated as follows in the case of **Safe Cargo Limited vs Embakasi Properties Limited & 2 Others (2019) eKLR**: -

> ***"Following the guidelines as given by the Supreme Court, it is our duty to consider and determine if the instant application fulfils the principles as laid out in the case above. Of significance is whether the additional evidence sought to be introduced by the applicant is directly relevant to the appeal before this Court and if given, it would influence or impact upon the result of the verdict, and whether it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of trial by the applicant."***

23. While applying these principles, there is one very important aspect which a Court must guard itself from as expressed by the Supreme Court but very

well elucidated by **Chesoni Ag. JA** (as he then was) in **Mzee Wanje & 93 Others vs A. K. Siakwa (1982-88) 1 KAR 462** wherein he observed thus: -

> ***"This Rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful at the trial to patch up the weak points in his case and fill up omissions in the Court of Appeal. The Rule does not authorize the admission of additional evidence for the purpose of removing lacunae and filling in gaps in evidence. The appellate court must find the evidence needful. Additional evidence should not be admitted to enable a plaintiff to make out a fresh case in appeal. There would be no end to litigation if the Rule were used for the purpose of allowing parties to make out a fresh case or to improve their case by calling further evidence. It follows that the power given by the Rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence."***

24. From the foregoing, it is very critical to note that the jurisdiction to admit fresh evidence on appeal is discretionary, the same has to be exercised judiciously. The principal consideration seem to be: -

a) ***that it must be shown that the evidence is 'new' and could not have been obtained or procured during trial in the lower court even with reasonable diligence during the trial;***

b) ***that if that evidence would have been available and given at trial, it would probably have had positive influence on the result of the case;***

c) ***the evidence should be so credible that it could have been believed.***

25. In the present case, it was clear that the evidence sought to be produced was obtained on **9/9/2025**, 3 months after the judgment. Does it fit in the three considerations set out above? Firstly, the evidence is so compelling. It is very relevant to the case. If it is or was produced at the trial, it would have had an impact on the outcome of the case. This is so because, the evidence could easily displace the respondent's contention that he was injured in the subject accident. Further, since the evidence emanates from the institution that is alleged to have attended to the respondent at the time of post-accident, the same is credible.

26. The foregoing satisfies two of the principles set out by Lord Denning in the case of the **Attorney General vs Marshall** (supra) viz, that the evidence is credible and would have influenced the result of the case.

27. How about the third principle, that the evidence could not have been obtained with reasonable diligence for use at the trial? The evidence on record is clear. The suit was about injuries allegedly sustained in an accident that occurred on **30/3/2017** along Busia-Kakamega road. The allegations were raised in 2017. The applicants responded to them in 2018 by their amended defence denying the same. They had between the said 2018 and the time of the trial to counter check, review, and even investigate the respondent's claim.

28. The applicants proceeded to the trial and conducted the same on the basis of the material on record. It is only after the judgment was rendered on **30/6/2025** that in **August, 2025**, their advocates wrote to St. Elizabeth Mission Hospital to inquire about the subject evidence. The response was immediate. This means that the evidence was at all times available and could be reached if and when sought.

29. In this regard, there is no evidence to show that the alleged new evidence could not have been accessed or obtained with reasonable diligence before

the trial. Indeed, there was no evidence to show that the same had been sought before August, 2025. The same having been availed on **9/9/2025** about one month after it was sought, it cannot be said that it could not be to obtained before trial even with due diligence? I do not think so. The applicants should have shown that they had sought for the same before, during and immediately after the trial and the same could not be obtained. That is what diligence means. What we have on record is a one letter request made 2 months after judgment and the evidence is availed within two weeks of demand. That shows that had there been diligence in seeking to obtain the same, the alleged fresh evidence would have been found to be readily available and could have been availed at the trial.

30. The totality of the foregoing means that, had been there been diligence, the evidence could have been obtained before or during the trial. It is clear from the history of the case that, the applicants knew the case they were facing. They put up a denial which they were expected to prove at the trial. That included procuring evidence to show that the alleged injuries were not sustained as a result of the subject accident. The applicants did not procure that evidence. They seek to produce it at the appeal level.

31. One of the cardinal principles applicable in applications for leave for adduction of fresh evidence on appeal is that, the adduction of evidence should not be used to build up or to patch up a rather weak case of the party. To my mind, that is what the applicants are seeking to do. There is nothing to show that they had sought that evidence before or during the trial and they were unable to find it.

32. In this regard, the Court is in agreement with the respondent that he will be prejudiced if the adduction of new evidence is allowed. There are no good reasons that have been proffered to explain why the same was not availed at the trial for it to have been subjected to cross-examination. The appellants are looking for an opportunity to build up that case which they failed to do at the trial.

33. The upshot is that the Court finds the application dated **12/2/2026** to be without merit and dismisses the same with costs.

It is so ordered.

DATED and **DELIVERED** at Kisumu this **30th** day of **April**, **2026**.

A. MABEYA, FCI Arb

JUDGE