



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. E093 OF 2025

SYLVANOS TUDI MALIA

APPELLANT

VERSUS

STEPHAN MUSIYA 1ST

RESPONDENT

WATU NOMINEES LIMITED 2ND

RESPONDENT

(Being an appeal against the judgment and decree of Hon. Antoinette Ogange in Kakamega SCCC No. E176 of 2024 delivered on 11th June 2025)

JUDGEMENT

1. In a judgment delivered on 11th June 2025, the small claims court found that the Appellant had not discharged his burden of proof on a balance of probabilities to establish that the Respondents were liable for the road traffic accident herein.
2. Aggrieved by the lower court's decision, the Appellant filed the present appeal anchored on the following grounds:
 - a) *The adjudicator erred in law and in fact by dismissing the Appellant's suit for want of written submissions.*

- b) The learned adjudicator erred in law by misapplying the legal principles governing the burden of proof.*
- c) The learned adjudicator erred in law by failing to find that the Appellant had established a prima facie case through unrebutted testimony.*
- d) The learned adjudicator failed to assess both general and special damages, despite it being prayed for and supported by evidence.*

Appellant's Case

3. The Appellant averred that on 4th April 2024, at approximately 3:00 pm he was a passenger in motor vehicle registration number KTWC 466V along the Kakamega-Kisumu road at the Shirere area when the 1st Respondent's driver, operating another three-wheeler motor vehicle registration number KTWC 694W, drove the said vehicle so negligently that it veered from its lane and collided with the vehicle in which the Appellant was riding in.
4. Consequently, the Appellant sustained grievous injuries, which included fractures to his 9th and 10th ribs, general body and chest pain and was rushed to the hospital, where he incurred treatment costs. The Appellant prayed for special damages, general damages and costs of the suit.
5. The Appellant relied on their written statement, a police abstract, motor vehicle search, demand letter, statutory notice and his treatment documents to establish liability on the Respondents' agent, driver or employee.

Respondents' Case

6. The 1st respondent denied the claim in its entirety, putting the Appellant to strict proof of negligence.
7. The 2nd Respondent denied liability and contended that it was a mere financier of the three-wheeler vehicle under an Asset Finance Agreement and exercised no possessory or operational control over the subject motor vehicle at the time of the accident.
8. Further, the 2nd Respondent attributed the accident to the 3rd party whom they named as Bruce Chevene and claimed that the 3rd party whom they averred was the owner and/or rider of the subject motor vehicle registration No. KTCW 694V and whom they claimed was negligent in his managing and central of the subject motor vehicle.
9. The 2nd Respondent averred that they merely financed the 3rd Party to purchase the subject motor vehicle and could not be held vicariously liable for his negligence as the 3rd Party had full possession and control of the subject motor vehicle at the time of the accident.
10. A 3rd party notice was issued at the instance of the 2nd Respondent against Bruce Chevene, identifying him as the owner of the subject motor vehicle at the material time.

Appellant's Submissions

11. The Appellant contends that the trial court erred in law in dismissing the suit without making any finding on liability notwithstanding the fact that pleadings had closed and oral evidence had been

tendered. He further submits that the trial court's dismissal based on a lack of written submissions was a violation of Article 159(2)(d) of the Constitution. He argues that since he was a passenger, no contributory negligence can be attributed to him. He relies on ***Daniel Toroitich Arap Moi v. Mwangi Stephen Muriithi & Another [2014] eKLR***.

12. He further submits that the trial court failed to properly evaluate uncontroverted evidence he adduced as the Respondent (sic) did not rebut or controvert his evidence and cites ***Trust Bank Limited v. Paramount Universal Bank Limited & 2 others [2009] eKLR*** and ***Charterhouse Bank Ltd (Under Statutory Management v. Frank N. Kamau [2016] eKLR*** where he submits the Court of Appeal held that a trial court must evaluate all evidence on record and failure to do so warrants appellate intervention.
13. On quantum, the Appellant seeks the award of general damages in the sum of Kshs. 300,000/= and special damages of Kshs. 31,455/= which he submits were pleaded and proved.

Respondent's Submissions

14. The 2nd Respondent argues that the burden of proof lies solely on the Appellant. It submits that a police abstract is merely an administrative record of a report and is insufficient to prove negligence without corroborative oral testimony from the investigating officer.

15. The 2nd Respondent asserts that, as a financier holding a logbook for security, it lacks the 'possession and control' required to be held vicariously liable.

Analysis and Determination

16. This being an appeal against a decision made by the Small Claims Court, the appeal is strictly limited to matters of law. The court can only consider the appeal on the basis of factual errors under exceptional circumstances such as where crucial material evidence was ignored, where the court relied on evidence it should not have relied on, where the decision being appealed against is totally unreasonable, or where the court misapprehended the material facts thereby arriving at a wrong decision. The court will also consider the appeal where procedural irregularities are evident in the proceedings.
17. Having evaluated the submissions before this court, the following issues arise for determination:
- a) *Whether the trial court erred in dismissing the suit for lack of submissions.*
 - b) *Whether the Appellant established liability on a balance of probabilities.*
 - c) *Whether the trial court was right in assessing the quantum of damages.*
 - d) *Whether the Appellant should bear the costs.*

18. Regarding the first issue, I have reviewed the learned Adjudicator's Judgement. The Judgement clearly indicates in paragraph 7 that both the Claimant and the 2nd Respondent filed submissions and that they form part of the record. Further, when determining damages, the learned Adjudicator in paragraph 15 of the impugned Judgement noted that the special damages was only raised in the submissions and not in the claim and went ahead to state:-

“The same was only pleaded in submissions and still it is not pleaded as to how the figure of Kshs. 31,455/= was arrived at. It is trite that submissions are not pleadings...”

19. I have perused the Statement of Claim dated 14th May 2024 and confirmed that indeed, special damages were not pleaded. In the absence of an Amended Statement of Claim, it is my considered view that the learned Adjudicator was referring to the Appellant's written submissions as is demonstrated in the body of the Judgement where even in considering the quantum of damages, the trial court analysed Appellant's submissions that an award of Ksh. 500,000/= to Ksh. 800,000/= would be sufficient and arrived at the sum of Ksh. 300,000/=. The Appellant's appeal on that ground therefore fails although I hasten to add that written submissions can never take the place of evidence in any matter, and the court can arrive at a just and fair decision notwithstanding the absence of written submissions. See ***Daniel Toroitch Arap Moi v. Mwangi Stephen Muriithi & Another [2014] eKLR.***

20. Regarding the second issue, Section 107-109 of the Evidence Act places the burden of proof upon the Appellant. Section 107-109 provides:-

“107. Burden of proof.

(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. Incidence of burden.

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.

109. Proof of particular fact.

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.”

21. In **Eastern Produce (K) Ltd v. Christopher Atiado Osiro [2006] KEHC 3200 (KLR)**, the court held that:-

“It is trite that the onus of proof is on he who alleges and in matters where negligence is alleged the position was well laid down in the case of Kiema Mutuku v. Kenya Cargo Hauling Services Ltd. (1991) 2KAR 258, where it was held that “there is as yet no liability without fault in the legal system in Kenya,

and a plaintiff must prove some negligence against the defendant where the claim is based on negligence”.

22. The Appellant claimed that an accident occurred involving the Respondents’ motor vehicle and the motor vehicle he was travelling in and ascribing the entire blame to the driver of the Respondents’ motor vehicle. The onus was upon him to adduce sufficient evidence to persuade the court on a balance of probabilities, that the accident did occur in the manner claimed by him.

23. In support of his claim, the Appellant relied on his sole statement and the police abstract which indicates “PUI” which means the matter was pending under investigations. There was no conclusion in the police abstract that the driver of the subject motor vehicle was to blame for the accident. It is well settled that a police abstract is prima facie evidence that an accident occurred but not proof of who is to blame unless on the face of it, it is indicated that a particular driver has been convicted of the offence of careless driving. In ***ZOS v. CAO (suing as the legal representative in the estate of SAO (Deceased) v. Amollo Stephen [2019] KEHC 9268 (KLR), R. E. Aburili J*** held:-

“However, a police abstract is not and cannot be proof of occurrence of an accident but proof of the fact that following an accident, the occurrence thereof was reported to the police who took cognizance of that accident. It is therefore the police, having received information or a report of occurrence

of an accident, would investigate and establish circumstances under which such an accident occurred.”

24. In ***Margaret Wambui Thidigwa v. Eliud Sidigu Otiato [2021] KEHC 8765 (KLR)***, H. Chemitei J. stated that:-

“16. ...The police abstract was obviously issued after the incident and way after the OB had been filled... As a matter of fact, the police abstract is an abridged version of the OB.”

25. The Appellant’s Statement of claim is a generic statement which states as follows:-

“That on or about 4th April 2024, I was a passenger aboard motor vehicle registration number KTWC 466V at Shirere area along Kisumu-Kakamega Road when the vehicle registration number KWTC 694W, driven by the respondent’s agent, driver and or employee in a reckless manner, veered into the lane of motor vehicle registration number KTWC 466V which I was on board, in high speed, causing an accident that occasioned me serious injuries.”

26. It is clear from the Appellant’s witness statement that his claim was that the subject vehicle veered off its lane although he did not expressly state that he saw the subject motor vehicle being driven at a high speed. Apart from the Appellant’s statement, there was no evidence adduced to corroborate his claim. The Appellant

needed to adduce evidence demonstrating the negligence of the subject vehicle since the accident involved two motor vehicles.

27. I am alive to the fact that Section 32 of the Small Claims Court Act provides for less stringent evidential measures than those provided in the law of Evidence Act. Section 30 of the Small Claims Court Act allows parties to proceed by way of pleadings, witness statements and documentary evidence. However, it does not displace the requirement for evidence. It only simplifies the mode of production.
28. The duty of a Claimant to discharge the burden of proof was amplified in ***Karugi & Another v. Kabiya & 3 others [1987] KLR 347*** when the Court of Appeal held that:-

“The burden of proof on a balance of probabilities remains with the Plaintiff and is not lessened even where the case is heard ex parte. The Plaintiff must adduce evidence which, on a preponderance, convinces the court that the allegations are true.”
29. Once the Respondents denied liability and pleaded negligence on the part of the drivers of the motor vehicle in which the Appellant was a passenger, it was incumbent on him to adduce evidence to prove that the driver of the subject motor vehicle was the one to blame. However, the Appellant did not call an independent witness, nor the driver of motor vehicle registration number KTWC 466V. The failure to file a witness statement of the said driver begs more questions and leads to the inference that his evidence would likely

have been adverse to the Appellant's case. See ***Bukenya & others v. Uganda [1972] EA 549*** and ***Treadsetters Tyres Ltd v. John Wekesa Wepukhulu [2010] eKLR*** where the court stated that where a party fails to produce the best available evidence, the court may draw an adverse inference.

30. The Appellant could also have furnished photographs of the scene, sketch map, or written statement of the investigating officer in support of his case and to prove that indeed, the Respondent's motor vehicle was being driven at a high speed and veered off its lane. In absence of any other witness statement or documentary evidence, the learned Adjudicator did not err in making the finding that the Appellant had failed to prove liability. There was nothing unreasonable in the finding and I cannot fault her as she properly applied the principles governing the burden of proof.
31. Regarding the claim that the learned Adjudicator contradicted herself in making a pronouncement on general damages, it is trite that where a court dismisses a claim for general damages on the ground that liability has not been proven, it must make a finding on the amount of general damages it would have awarded were the claim successful.
32. On the issue of costs, I have considered the 2nd Respondent's submissions and perused the proceedings. The Respondents filed a defence and List of documents. The matter proceeded summarily pursuant to Section 30 of the Small Claims Court Act. I am mindful

of the objectives of the Small Claims Court Act while not discounting the Respondents' right to costs. However, given the nature of this claim, I find that this is a matter where it would be inappropriate to award the Respondent costs.

33. For the reasons stated above, I make the following orders:-

(a)The appeal is dismissed and the Judgement of the trial court upheld.

(b)Each party shall bear their own costs of the appeal.

Dated, signed and delivered at Kakamega this 7th day of May 2026.

**A. C. BETT
JUDGE**

In the presence of:

..... for the Applicant

.....for the Respondent

Court Assistant: Polycap