

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
CIVIL APPEAL NO. E070 OF 2025
(CONSOLIDATED WITH CIVIL APPEAL NO. E069 &E071 OF
2025)

RAEL MBULWA NZULA.....
.....APPELLANT

VERSUS

RICHARD KANYOGE.....1ST
RESPONDENT

NICK DERRICK CHRIS.....2ND
RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. M. W. Kamau (RM/Adjudicator) delivered on 27th February 2025 in Thika Small Claims Court SCCC No. E764 of 2024 as consolidated with SCCC No. E765 of 2024 & E763 of 2024)

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Thika Resident Magistrate/Adjudicator in SCCC No. E764 of 2024 as consolidated with SCCC No. E765 & E763 of 2024, a suit

arising from a road traffic accident where the court found that the respondents were not to blame for the accident.

2. Dissatisfied with the court's decision, the appellants lodged this appeal citing 8 grounds summarized as follows:-

a) The learned adjudicator erred in law and in fact by failing to consider Order 1 Rule 9 on misjoinder and Order 1 Rule 10 on substitution and addition of parties.

b) The learned trial magistrate erred in law by failing to consider Order 1 Rule 15 on third party proceedings noting the respondent blamed a third party but did not enjoin them in the suit.

c) The learned adjudicator erred in law by failing to consider Section 107, 108 and 109 of the Evidence Act on arriving at apportioning contributory negligence.

d) The learned adjudicator erred on a point of law and fact by failing to take into account the 2nd respondent's submissions whereby the 2nd respondent conceded liability arising from the accident.

3. Parties disposed of the appeal by way of written submissions.

The Appellants' Submissions

4. The appellants submit that the respondents in the instant case mentioned that the accident was caused by another driver through their written submissions thereby introducing a claim of third party liability. However, the respondents failed to invoke the procedure

prescribed by Order 1 Rule 15 of the Civil Procedure Rules. They failed to apply for leave to issue a third party notice neither did they seek directions under Order 1 Rule 15. The appellant relies on the

case of **Anthony Francis Wareham t/a AF Wareham & 2 Others vs Kenya Post Office Savings Bank [2004] eKLR** and argues that submissions are not pleadings and cannot be used to introduce parties and to shift liability or even adduce evidence.

5. The appellants submit that once the issue of third party was raised, the trial court was enjoined under Order 1 Rules 9 and 10 of the Civil Procedure Rules to consider whether the alleged third party was a necessary party for the effective and complete adjudication of the dispute. However the trial court failed to interrogate the respondents noncompliance with the procedure and failed to give appropriate directions on joinder.

6. The appellants refer to **Sections 107, 108 and 109 of the Evidence Act** and the cases of **Mumbi M’Nabea vs David M. Wachira [2016] eKLR**; **Nandwa vs Kenya Kazi services Ltd [1988] KLR 488** and **Karugi &**

Another vs Kabiya & 3 Others [1987] KLR 347 and submits that he proved the occurrence of the accident but the respondents blamed another party but did not produce any evidence to support their allegations.

7. The appellants argue that the 2nd respondent expressly conceded liability in his submissions but the learned adjudicator failed to take the said concession into account. The appellants further argue that

while submissions per se don't constitute evidence, an admission made against the interest remains relevant, admissible and should not be ignored by the court. To support their arguments, the appellants rely on **Sections 17 and 20 of the Evidence Act** and the cases of **Trust Bank Ltd vs Paramount Universal Bank Ltd & 2 Others [2009] eKLR** and **Dorcas Wangithi Nderi vs Samuel Kiburu Mwaura & Another [2015] eKLR**.

8. The appellants refer to **Articles 50(1) and 159(2)(d) of the Constitution** and the cases of **Mbaki & Others vs Macharia [2005] 2 EA 206** and **David Sironga Ole Tukai vs Francis arap Muge [2014] eKLR** and argue that the trial court relied on issues not pleaded or supported by evidence thereby condemning them unheard.

9. The appellants submit that a pillion passenger is a passive road user who exercises no control over the manner in

which the motorcycle is ridden. Further liability is anchored on fault, and fault can only arise where a party had control, choice or influence over the act complained which the pillion passenger lacks. To support their contentions, the appellants rely on the cases of **Hussein Omar Farah vs Lento Agencies** (no citation given) and **Statpack Industries vs James Mbithi Munyao [2005] eKLR.**

10. The appellants further submit that the police abstract unequivocally blamed the driver of motor vehicle KCK 898Y for dangerous driving, which evidence was unchallenged. The appellants argue

that pillion passengers are passive road users and cannot be held responsible for the occurrence of an accident save where contributory negligence is pleaded, proved and supported by evidence.

The 1st Respondent's Submissions

11. The 1st respondent submits that the trial court was not required to invoke third party procedure under Order 1 Rule 15 because the respondents never sought to shift or apportion liability to a third party. What they did was to consistently maintain throughout the proceedings that they bore no liability whatsoever for the accident. The 1st respondent submits that his evidence was that he did not collide with the motor cycle and that it was motor vehicle KCU 007A which ran over the motorcycle. The 1st

respondent argues that, that was not an attempt to invoke third party procedure but was a straightforward denial of liability supported by factual evidence. The 1st respondent relies on the case of **Kenya Commercial Bank Ltd vs Wachira Kung'u & Another (Civil Appeal 46 of 2007) [2009] eKLR** and submits that it was the duty of the appellants to join all the parties to their case as the fact was disclosed in the response to the statement of claim.

12. The 1st respondent submits that regarding Order 1 Rule 9, the suit was not defeated but was properly determined on its merits based on the parties before the court. The non joinder of the owner of motor vehicle registration number KCU 007A did not defeat the

suit. Rather the appellants' suit was dismissed because they failed to prove liability against the respondents who were parties to the suit. The 1st respondent refers to the case of **Musa Ahmed Mohamed vs Osman Abdalla Mohamed & 2 Others (Civil Appeal 86 of 2008) [2010] eKLR** and submits that the court cannot be faulted for failing to join parties whom the plaintiff chose not to sue.

13. Relying on the case of **Nandwa vs Kenya Bus Services Ltd [1988] KLR 488**, the 1st respondent submits that the trial court correctly applied the principles of burden of proof and reached a finding entirely supported by the evidence on record. The appellants

failed to discharge the burden of proving that the accident was caused by the respondents' negligence. The 1st respondent argues that the evidence before the trial court established that he did not collide with the motorcycle and that it was motor vehicle KCU 007A that physically ran over the motorcycle.

14. The 1st respondent submits that the matter proceeded by way of documentation and submissions which all parties agreed to and they cannot now complain about the procedure to which they consented and in which he actively participated. Relying on the case of **Anthony Francis Wareharm t/a AP Wareharm & 2 Others vs Kenya Post Office Savings Bank [2004] eKLR**, the 1st respondent submits that his submissions merely highlighted evidence already on record being the pleadings, police abstract and the photographs. The trial court did not rely on facts introduced through submissions but it relied on properly pleaded and adduced evidence.

15. The 1st respondent further relies on the case of **Karugi & Another vs Kabiya & 3 Others [1987] KLR 347** and submits that the burden of proof was upon the appellants to prove the allegations against him which they failed to do. The 1st respondent further submits that the appellants' suit was not dismissed on the basis of any procedural technicality as the trial court determined the suit on its merits after considering the evidence before it.

16. Relying on the case of **Anthony Francis Wareharm t/a A.P Wareharm & 2 Others vs Kenya Post Office Savings Bank [2004] eKLR**, the 1st respondent argues that submissions are not evidence. The 1st respondent submits that the trial court was required to make its findings based on the evidence before it and not based on the statements made in submissions. The 1st respondent further submits that he and the 2nd respondent filed their own defences as he was the registered owner of motor vehicle registration number KCK 898Y while the 2nd respondent was the beneficial owner according to the insurance policy. Thus he cannot be prejudiced by any concession made by the 2nd respondent.

17. The 1st respondent argues that the trial court did not hold liable the driver of motor vehicle registration number KCU 007A nor did it make any determination of liability as between the appellant and the driver of KCU 007A. The trial court found based on the photographic evidence that it was motor vehicle registration number KCU 007A that ran over the motorcycle which was a factual

finding necessary to determine whether the respondents were liable in the suit.

18. The 1st respondent submits that the appellants were afforded a full, fair and public hearing before the trial court. The appellants filed their pleadings and submissions upon directions by the lower court that the matter proceed

by way of submissions. The 1st respondent relies on the case of **Mbaki & Others vs Macharia [2005] 2 EA 806** and submits that a fair hearing does not guarantee a favourable outcome, it guarantees a fair process.

The 2nd Respondent's Submissions

19. The 2nd respondent submits that the learned magistrate did not dismiss the claims on the ground of misjoinder or non joinder, rather the dismissal was grounded on the appellants failure to discharge the burden of proving negligence against the respondents on a balance of probabilities. The 2nd respondent further submits that at no stage did the appellants seek joinder of any additional party under Order 1 Rule 10 of the Civil Procedure Rules nor did they demonstrate that such joinder was necessary for the determination of their claims. The 2nd respondent relies on the case of **Civicon Limited vs Kivuwatt Limited & 2 Others [2015] eKLR** and submits that learned adjudicator fully aligned with the principle that misjoinder and non joinder of parties is not fatal to a suit and courts should focus on substantive justice rather than technical objections.

20. The 2nd respondent relies on **Sections 107, 108 and 109 of the Evidence Act** and the cases of **Kirugi & Another vs Kabiya & 3 Others [1987] KLR 347** and **Miller vs Minister of Pensions [1947] 2 All ER 372** and submits that the appellants bore the burden of proving negligence and

causation against the respondents. Upon the learned adjudicator evaluating the material placed before the court, she found that the burden had not been discharged. The 2nd respondent argues that the matter proceeded by consent and direction of the court through documentary evidence and written submissions which did not lessen the evidentiary burden placed upon the claimants. The 2nd respondent further states that the appellants relied heavily on the police abstract and medical documents however it is trite law that a police abstract is not conclusive proof of liability. To prove his contentions, the 2nd respondent relies on the case of **Z. O. S vs C. A. O (Suing as the legal representatives in the Estate of S. A .O (Deceased) vs Amollo Stephen [2019] eKLR.**

21. The 2nd respondent submits that he did not admit liability in his submissions however he submitted that without prejudice and only in the event that the court were inclined to find liability, the same could be apportioned at 50:50. The 2nd respondent further submits that he was not the driver of the motor vehicle involved in the accident and was not present at the scene at the material time and he expressly denied liability. Further, the 2nd respondent argues that statements made without prejudice cannot in law amount to admissions capable of founding liability. Relying on the case of

Kenya Institute of Management vs Wakhanu (Appeal E066 of 2024) [2025] KEELRC 133 (KLR) (29 January 2025) (Judgment), the

2nd respondent submits that without prejudice statements allow parties to advance alternative positions without comprising their primary case.

22. The 2nd respondent refers to the case of **Moi vs Muriithi & Another [2014] KECA 642 (KLR)** and submits that submissions are not evidence. Further relying on the case of **Charterhouse Bank Limited vs Frank N. Kamau [2016] eKLR**, the 2nd respondent argues that liability cannot be imposed by consent, implication or concession where none has been established by evidence.

23. Relying on the case of **Independent Electoral and Boundaries Commission & Another vs Mule & 3 Others [2014] KECA 890 (KLR)**, the 2nd respondent submits that a finding that a party has failed to prove its pleaded allegations does not amount to reliance on unpleaded matters. The 2nd respondent submits that from the judgment, the learned magistrate did not introduce extraneous issues but rather interrogated whether the appellants had proved the pleaded particulars of negligence. Further the appellants relied primarily on documentary evidence without tendering evidence explaining the manner of the accident or demonstrating negligence on the part of the respondents. Thus, the learned magistrate's findings that liability had not been proved was a logical and lawful consequence of the evidence on record, not the product of reliance on unpleaded or speculative matters.

24. The 2nd respondent argues that the principle that pillion passengers are passive road users and that they owe no duty in the manner of driving or control of a motor vehicle and cannot ordinarily be found contributory negligent, addresses contributory negligence and not primary liability. To support his contentions, the 2nd respondent relies on the cases of **Mwangi vs Wambugu [1984] KLR 453** and **Hassan vs Nathan Mwangi Kamau Transporters & 4 Others [1986] KLR 457**. The 2nd respondent further argues that the fact that a claimant is a passive passenger does not relieve them of the burden of proving negligence against the party sued. In the instant case the appellants pleaded negligence against the respondents but failed to adduce evidence demonstrating how the accident occurred or how either respondent was negligent. Further, the learned adjudicator did not attribute blame to the appellants on account of their status as pillion passengers rather the court found that the appellants failed to prove negligence against them. To support his contentions, the 2nd respondent relies on the case of **Statpack Industries vs James Mbithi Munyao [2005] eKLR**.

25. The 2nd respondent submits that the learned adjudicator did not ignore any material evidence as she summarised the parties' respective cases, considered the pleadings, witness statements and documents produced and addressed herself to the applicable principles before arriving at her conclusion. The finding that liability had not been proved was not speculative nor was it based on

extraneous considerations but it was the legal consequence of evidentiary gaps in the appellants' case, the absence of proof on the

manner of the accident and the consistent denial of liability by the respondents.

Issues for determination

26. The main issues for determination are:-

a) Whether the appeal is properly before the court.

b) Whether the appellants proved their case as against the respondents.

The Law

27. The Court of Appeal while referring to a second appeal, which is essentially on points of law and thus similar to the duty of this court under **Section 38 of the Small Claims Court Act**, set out the duty of the second appellate court in the case of **Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited [2020] eKLR** as follows:-

I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below considered matters that they should have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

28. In distinguishing between matters of law and fact the Court of Appeal stated in **Kenya Breweries Ltd vs Godfrey Odoyo [2010] eKLR** as follows:-

I have anxiously considered the pleadings, the evidence on record, the judgment of the learned Senior Resident Magistrate and the judgment of the superior court, the grounds of appeal, the submissions of the learned counsel as well as the authorities to which we were referred. First, this is a second appeal. In a first appeal the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyse it, evaluate it and come to its own independent conclusion. In other words, a first appeal is by way of retrial and facts must be revisited and analysed a fresh. See **Selle and Another vs Associated Motor Boat Company Limited and Others (1968) EA 123. In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.**

29. **Section 38 of the Act** provides:-

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.

30. I have perused the grounds in the memorandum of appeal and noted that the grounds relate primarily to questions of law. The appellants are aggrieved that the learned adjudicator failed to consider Order 1 Rule 9, 10 and 15 of the Civil Procedure Rules on

the issue of joinder of parties and proceed to dismiss their claim without relying on Sections 107, 108 and 109 of the Evidence Act on the burden of proof.

31. The procedure of the Small Claims Court is outlined in **Section 17 of the Small Claims Court Act** which provides that:-

Subject to this Act and rules, the Court shall have control of its own procedure in determination of claims before it and, in exercise of that control, the Court shall have regard to the principles of natural justice.

32. **Section 30 of the Act** provides for proceedings by documentation. It provides:-

Subject to agreement of all parties to the proceedings, the Court may determine any claim and give such orders as it considers fit and just on the basis of documents and written submissions,

statements or other submissions presented to the Court.

33. Pursuant to Section 30 of the Act, the learned adjudicator on 14th January 2025 directed that the matter do proceed by way of documentation and parties were directed to file submissions. According to the appellants, the learned adjudicator failed to consider Order 1 Rule 9, 10 and 15 of the Civil Procedure Rules on the issue of joinder and dismissed their claim without relying on

Sections 107, 108 and 109 of the Evidence Act on the burden of proof. The record is clear that the appellants sued the respondents for negligence and causation of the accident. Whereas the appellants stated that the accident was caused by the respondents as they were alighting the motor cycle registration number KMFL 063Y, they never gave an account of how the accident occurred. The respondents on the other hand gave evidence that the driver of motor vehicle KCU 007A who was behind the 1st respondent's vehicle swerved and rolled over the said motor cycle. In support of his testimony, the 1st respondent attached photographs showing that it was motor vehicle registration number KCU 007A that ran over the motorcycle that the appellants were travelling in.

34. It is trite law that he who alleges must prove. **Section 107 (1) of the Evidence Act**, Cap 80 Laws of Kenya, provides that:-

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.

35. In **Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another [2005] 1 EA 334**, the Court of Appeal held that:-

As a general proposition under Section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon

any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.

36. Upon the respondents arguing that it was not them who hit the appellants but motor vehicle registration number KCU 007A, the burden of proof shifted to the appellants to show that indeed it was the respondents who

hit them. It is evident that the appellants did not discharge their burden of proof by showing that the respondents were negligent and that they caused the accident. The evidence is clear that the appellants never gave an account of how the accident occurred. The respondents stated that motor vehicle registration number KCU 007A is the one that hit the claimants but the appellants never rebutted the respondents' testimony. The appellants argue that the learned adjudicator dismissed their suit for non-joinder and further no third party proceedings were undertaken. It is trite law that no suit should be defeated by reason of misjoinder or non joinder of parties, the lower court suit was dismissed because the appellants failed to show that the respondents caused the said accident. The appellants failed to demonstrate a causation link between the accident and the negligence by the respondents. The claim was never dismissed because of an issue of joinder.

37. Additionally, this was not a case of third party proceedings since no third party was joined as required by the law. The respondents were clear that they never caused the accident and did not depart from

the said position. Order 1 Rule 15 of the Civil Procedure Rules is clear that it is only a defendant who can seek for the issuance of a third party notice to enjoin a third party. In the instant case, the issue of third party did not arise nor did the learned adjudicator insinuate so in her judgment. The respondents denied any form of liability for the subject accident. The appellants having failed to join

the driver and registered owner of motor vehicle registration number KCU 007A and having failed to prove negligence on the part of the respondents the learned adjudicator had no choice but to dismiss the appellants' case.

38. The appellants have further argued that the 2nd respondent conceded to the accident in his submissions and thus that should be taken as an admission. It is trite law that submissions are not evidence. The Court of Appeal in **Daniel Toroitich arap Moi vs Mwangi Stephen Muriithi & Another [2014] eKLR** in finding that submissions cannot take the place of evidence held:-

Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language" each side endeavoring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on the evidence presented.

39. It is important to point out that the matter was decided upon the learned adjudicator analysing the

evidence of the parties and not submissions as alleged by the appellants. The documentary evidence produced by the 1st respondent showed that motor vehicle registration number KCU 007A caused the subject accident. The submissions tendered by the parties only supported the evidence presented and should not be taken as evidence in the matter.

40. The appellants further argue that the trial court erred by attributing responsibility on them without evidence. On perusal of the judgment, it is noted that the learned adjudicator did not attribute responsibility on the appellants as they allege. The court below was categorical that the appellants did not prove their case against the respondents. It is correct as argued by the respondents that a pillion passenger is incapable of controlling the manner in which a motorcycle is navigated on the road. The said control is on the rider who bears the responsibility of any careless navigation. As such, no fault could have been attributed to the pillion passengers in the said suit. Contributory negligence did not arise in the proceedings since no such evidence was adduced. The appellants failed to discharge the burden of proof against the respondents which led to their suit being dismissed. It is my considered view that upon careful analysis of the evidence on record, the magistrate/adjudicator analysed the evidence and reached the right conclusion that the respondents were not to blame for the accident. In other words the appellants failed to discharge the burden of proof against the respondents as required by the law.

41. Accordingly, it is my considered view that the appeal lacks merit and is hereby dismissed with costs to the respondents.

42. It is hereby so ordered.

***JUDGMENT DELIVERED VIRTUALLY, DATED AND
SIGNED AT THIKA THIS 7TH DAY OF MAY 2026.***

**F. MUCHEMI
JUDGE**