



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CIVIL APPEAL NO. E101 OF 2024**

**JOSEPH GITILE NAITULI.....APPELLANT**

**VERSUS**

**ELIZABETH KANINI WAITA .....1<sup>ST</sup> RESPONDENT**

**PAUL WAITA KINYANJUI.....2<sup>ND</sup> RESPONDENT**

**DAVID KAMAU.....3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the Judgment of the Honorable D.M Macharia, Resident Magistrate/ Adjudicator, delivered on 3<sup>rd</sup> April, 2024 in the Small Claims Court at Nakuru, SCCC No. E591 OF 2023)*

**JUDGEMENT**

1. This appeal emanates from a judgement of the Small Claims Court. The Appellant vide Statement of Claim filed on 23<sup>rd</sup> October, 2023 sued the Respondents seeking compensation for material damage under the doctrine of subrogation, arising from a road traffic accident that occurred on 13<sup>th</sup> October 2020.
2. It was his case that while lawfully driving motor vehicle registration number KCS 110U, the Respondents' driver negligently drove motor vehicle registration number KCN 174U thereby causing it to collide with the Appellant's vehicle.

3. The Respondents vide the Response to statement of Claim dated 14<sup>th</sup> November, 2023 denied all the allegations of negligence and averred that the accident was not caused by the negligence of the Respondents but was caused by the Appellant.
4. **CW1, PC Wilson Yegon**, he stated that it was recorded that there was a non-injury accident involving motor vehicle **KCS110U** Range Rover and motor vehicle **KCN 174U** matatu. Both vehicles were headed towards Nairobi general directions. On heading the location of the accident motor vehicle KCN174U swerved towards the left to avoid collision with oncoming lorry when it brushed the motor vehicle KCS 110U on the left side mirror, bumper and left side wing. The police visited the scene. The police abstract dated 14 October, 2020 indicates motor vehicle KCN 174U was blamed for causing the accident. That motor vehicle KCN 174U hit the other vehicle when it swerved on the lane.
5. He was not the investigating officer, never visited the scene of the accident and could not confirm whether the photographs were taken. The police abstract indicated the matter was referred to the insurance.
6. **CW2 Joy Mutheka** a legal officer with Old Mutual Insurance adopted the statement dated and the list of documents both dated 3<sup>rd</sup> October, 2023 as well as the supplementary list of documents dated 7<sup>th</sup> December, 2023 C. Exhibit 1-23.
7. **CW3 Joseph Kitile Naituli** adopted his statement dated 3<sup>rd</sup> October, 2023 and stated that he was driving towards Nairobi. The driver of the matatu was overlapping on the left side of his vehicle while he was on the left lane of the road. His vehicle was damaged on the left mirror, the bumper and

the left door. He stood aside, called the police who came to the scene. They assessed the situation and they recorded statement. His insurance fixed his car. He could not tell the amount the insurance incurred but was not informed.

8. By the judgement was delivered on 3<sup>rd</sup> April, 2024 the Trial Court dismissed the claim claiming the claim against the Respondents had not been proved to the required standards.
9. Aggrieved by the said decision, the Appellant preferred the instant appeal through the Memorandum of Appeal dated 2<sup>nd</sup> May, 2024 on the following grounds: -
  - i) **That the Honourable Learned Magistrate erred in law and in fact in dismissing the Claimants case without proper basis.**
  - ii) **That the Honourable Learned adjudicator erred in law in applying the wrong principles of law on standard of proof in civil cases.**
  - iii) **That the Honorable Learned adjudicator erred in law in failing to consider lawful evidence before her contrary to the Evidence Act.**
  - iv) **That the Honorable Learned adjudicator erred in law in failing to consider and apply some weight on the evidence tendered by the claimant's evidence.**
  - v) **That the Honorable Learned adjudicator erred in law and in fact in dismissing the claimant's evidence and the suit with undue regard to the circumstances of the case before the small claims Court and the weight of precedents in similar circumstances.**

- vi) **That the learned adjudicator misdirected herself by failing to consider the evidence and the submissions by the Appellant while arriving at the judgement.**
- vii) **That the learned adjudicator erred in law and in fact in awarding costs of the suit to the Claimant.**

10. The Appellant thus prays that the Appeal be allowed and the Judgment in **Nakuru SCCC NO. E591 OF 2023** be either set aside or varied, the finding on liability be varied and that the costs of this appeal and Trial Court be borne by the Respondent and any other relief that the Court may consider just to award.
11. The Appeal was heard by way of written submissions. The Respondents have not filed their submissions despite service.

### **Appellant's Submissions**

12. In ***Mercantile Life & General Assurance Company Limited & another v Dilip M Shah & 3 others [2015] eKLR*** to submit that the claim was properly before Court under the doctrine of subrogation.
13. The Appellant submits that the evidence was credible, consistent, and unshaken and that the Respondents did not call any witnesses to rebut or challenge the Appellant's evidence. As regards the failure to call witnesses, he relied on ***Mary Njeri Murigi vs. Peter Macharia & Another [2016] eKLR*** to submit that the trial Court erred in disregarding the unchallenged and corroborated evidence adduced by the Appellant.
14. The Appellant submits that the documentary evidence produced met the legal threshold required to prove special damages, having been

specifically pleaded and strictly proved as was held in ***Jackson K. Kipmoo ss. Attorney-General [2009] eKLR*** through credible and admissible evidence. That the Court erred despite having acknowledged in the judgment that the Appellant had sufficiently proved the amount pleaded under special damages.

### **Analysis and Determination**

15. I have considered the record of appeal, the submissions of counsel and the authorities relied upon. A first Appellate Court is required to re-evaluate the evidence on record and draw its own conclusions while bearing in mind that it did not have the advantage of seeing and hearing the witnesses. This principle was firmly established in ***Selle v. Associated Motor Boat Co. [1968] EA 123***.
16. In ***Peters v. Sunday Post Ltd. [1958] EA 424***, the Court emphasized that while an Appellate Court has jurisdiction to review the evidence, it should not interfere with findings of fact unless they are based on no evidence, on a misapprehension of the evidence, or the Trial Court demonstrably acted on wrong principles.
17. This being an Appeal from the Small Claims Court **Section 38** of the **Small Claims Court Act**, the jurisdiction of this Court is on matters of law only. This statutory framework limits the scope of appellate intervention ensuring that factual findings of the Small Claims Court remain largely undisturbed unless they disclose a misdirection in law.
18. Ultimately, the guiding consideration is whether the finding on liability of the Trial Court amounted to a misdirection of law and occasioned a miscarriage of justice

19. On liability, it is trite that he who alleges must prove and uncontroverted evidence is not automatic evidence as the law places on the Claimant the obligation of proving his case.
20. In ***Miller v. Minister of Pensions [1947] 2 All ER 372***, it was held that the evidentiary burden of proof on civil cases is on a balance of probabilities which simply means that the Court must be satisfied that the occurrence of the fact is more probable than not.
21. The Trial Court failed to note that the Respondents despite being party to the trial only filed a Statement of Defence but did not submit a witness statement nor a witness or any supporting documents.
22. In the case of ***Trust Bank Limited vs Paramount Universal Bank Limited and 2 others [2001] KEHC (KLR)*** the learned judge stated:

***“It is trite law that where a party fails to call evidence in support of its case, the party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged. In AUTAR SINGH BAHRA AND ANOTHER VS RAJU GOVINDJI HCCC NO. 548 of 1998(UR) Mbaluto J. held:***

***“Although the Defendant has denied liability in an amended Defence and counter-claim, no witness was called to give evidence on his behalf. That means that not only does the Defence rendered by the 1<sup>st</sup> Plaintiff in support of the Plaintiff’s case stand unchallenged but also that the claims***

***made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counterclaim must fail.”***

23. The tort of negligence one must prove duty of care, the breach of duty being act in commission or omission that is the direct cause of injury, damage or loss to the Plaintiff.
24. In **Juma Rabote (suing as the legal representatives of the estate of Leonard Taabu Rabote (deceased) (Civil Appeal E044 of 2022) [2023] KEHC 2909 (KLR) (22 March 2023)** the Court observed that;

***“a reasonable person driving a motor vehicle on a highway with due care and attention does not hit every stationary object on his way merely because the object is wrongly there. He takes reasonable steps to avoid hitting or colliding with the object”.***
25. The Trial Court was tasked to decide the case based solely on the material provided. Since no evidence was produced to support the Defence, it remained nothing more than an unsubstantiated allegation. This is the position in law and the Trial Court’s failure to give weight to uncontroverted evidence was a misdirection in law.
26. In the same breadth, the Trial Court held that the evidence of CW1 contradicted that of CW3 and as such was not cogent to support the Appellant’s claim. I disagree, the Court failed to factor in that CW1 was a police officer who produced the Abstract and was not the investigation officer nor did he visit the scene. His testimony was limited and could be treated as secondary evidence.

27. **CW3**, on the other hand, was the driver directly involved in the accident and gave a firsthand account. The Trial Court's reliance on perceived contradictions without appreciating the limited scope of CW1's testimony was an appreciation of wrong principles.
28. Further, Police Abstract blamed the driver of motor vehicle **KCN 174U** for the accident. While it is not conclusive evidence of liability, it carries probative value and should have been given due weight.
29. The Trial Court appears to have required a higher threshold of burden of proof. I am convinced that the Appellant proved his case on a balance of probabilities and the Respondents are liable for the damage 100%.
30. On special damages, the principle is that they must be specifically pleaded and strictly proved. The Appellant produced documentary evidence of the insurance repairs, assessment and investigation reports, invoices and receipts of payment; **Kshs. 111,570.00** repair costs, **Kshs. 2,850** for re-inspection, **Kshs. 6,270** as assessment costs and **Kshs. 26,140** as tracing fees.
31. It was also pleaded in paragraph 5(e) and (g) that the claim was brought under the doctrine of subrogation by the Appellant's insured Old Mutual Insurance.
32. **CW2** the legal Officer of Old Mutual Insurance Company produced the documents in support of the claim. I am convinced the claim of Kshs. 146,830 was strictly pleaded and proven.
33. In the end, this appeal succeeds. I hereby set aside the trial Court's judgment and order that:

- i) The Respondents are liable to the Appellant in damages at 100%.**
- ii) The Appellant is awarded Kshs. 146,830 as pleaded and proved special damages.**
- iii) The Appellant is awarded the costs of the suit in this appeal and the Trial Court.**
- iv) Interest shall accrue from this judgment date**

It is so Ordered

**Signed, Delivered Virtually on Teams platform**

**On this 5<sup>th</sup> day of May, 2026**

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**Mohochi S.M**

**JUDGE**