



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wafula v Situma (Civil Appeal E016 of 2024)  
[2025] KEHC 762 (KLR) (29 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 762 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL E016 OF 2024  
REA OUGO, J  
JANUARY 29, 2025**

**BETWEEN**

**NICHOLAS NGOVILO WAFULA ..... APPELLANT**

**AND**

**COLLINS MUMANYI SITUMA ..... RESPONDENT**

*(Being an appeal from the judgment and decree of the Principal Magistrate's Court Webuye in Civil suit No. 270 of 2017 delivered on 19.1.2024 by Hon. P.Y Kulecho)*

**JUDGMENT**

1. On the 21.9. 2017 the appellant was travelling as a fare-paying passenger in vehicle registration number KBH 618V along Eldoret- Malaba Highway when the respondent's agent driver negligently drove vehicle registration no. KBH 618 V that it lost control and knocked a bridge guard thereby causing the plaintiff to sustain the following injuries; bilateral fracture of both tibia and fibula on both legs, external fixator on the left leg, surgical wounds on both legs measuring 2.5 x 2cm and 3 x 3.2cm and 2.5 x1.5cm. The appellant sought general damages and special damages of Kshs. 6710/-, plus the costs of the suit.
2. In a defence dated 30.1.2018, the defendant denied being the registered/ beneficial owner, possessor, and insured of motor vehicle reg. no. KBH 618V. The defendant denied the plaintiff's allegations in his complaint and alleged that the plaintiff was negligent. The defendant sought a dismissal of the appellant's suit.
3. In a judgment dated 19.1.2024 after a hearing the trial court dismissed the plaintiff's suit for failure to prove his case as per the required standard for want of liability. The appellant has 5 grounds of appeal as stated below:



- i. The learned trial magistrate erred in law and in fact by finding and holding that the appellant did not discharge his burden of proof as required by the law and the decision made was against the weight of evidence that was adduced thereby occasioning a miscarriage of justice.
  - ii. The learned trial magistrate erred in law and in fact absolving the respondent from blame which finding was against the evidence that was tendered thereby occasioning miscarriage of justice.
  - iii. The learned trial magistrate erred in law and in fact by dismissing the appellant's suit when the deceased was a passenger who never had control of either of the motor vehicles which were involved in the accident.
  - iv. The learned trial magistrate erred in law and in fact by dismissing the appellant's claim without making any finding on quantum.
  - v. The learned trial magistrate's decision albeit, a discretionary one was plainly wrong.
4. This court is under a duty to evaluate the evidence adduced by the parties in the subordinate court and to come up with its own independent decision ( see *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968]1EA 123).
  5. The appellant testified as follows; that he was involved in an accident on 21/9/2012 and sustained serious injuries, fracture of both legs, and cut wounds on both legs. He reported the accident at Webuye Police Station. From the police abstract, the suit motor vehicle is registration number No. KBH 618V is owned by Collins Mumanyi Situma. He blamed the driver for speeding at a bridge hence the accident. During cross-examination, he stated he was a passenger in the said vehicle and it was driving in speed. Pw2 was the doctor who examined the appellant he testified that the appellant suffered from STI , fractures of both bones on both legs, each leg has two bones, both of which were broken in each leg, psychological trauma as a result of the accident inability to walk in an accident related. On 28.2.2023 counsels for the parties consented to produce the police abstract as P Exhibit 3. On 11.7.2023 they recorded a consent the words both legs were deformed be struck off from the pleadings and that the notes from Lugulu Mission hospital be produced as P exhibit 1. The respondent did not adduce any evidence.
  6. The appeal was canvassed by way of written submissions. The appellant filed written submissions, but the respondent did not. The only issue raised in the appellant's submissions is whether the learned magistrate erred in fact by finding that the appellant did not establish ownership of the vehicle. Counsel submitted that this was contrary to the evidence that was tendered in court and submitted that from the court proceedings, it is clear that the police abstract was produced in evidence P exhibit no.3 and it referred Collins Mumanyi Situma as the owner of the vehicle. It was argued that the finding of the trial magistrate was against the evidence that was tendered and this occasioned a miscarriage of justice. Reliance was made in a Court of Appeal decision of *Joel Muga Opinja vs East African Sea food Limited* [2013] which was quoted in the case of *Ignatius Makau Mutisya vs Reuben Musyoki* where the court stated that, " we agree that the best way of proof ownership would be to produce to the court a document from the Registrar of Motor vehicle to show who the registered owner is, but when the abstract is not challenged and is produced in court without any objection the contents cannot later be denied". It was further submitted that in this case the police abstract was produced and no evidence was tendered by the respondent. The appellant argued that the respondent should be held 100% liable. On quantum, the appellant submitted the court should uphold the award of Kshs. 800000/- for general damages and special damages of Kshs 6700/- which were pleaded and proved.



## Analysis and Determination

7. The issue for determination in this appeal is whether the learned magistrate erred in finding that the appellant did not establish ownership of motor vehicle registration number KBH 681V. The trial magistrate expressed herself as follows on finding on liability ;

“The defence disputed ownership of the suit motor vehicle. Whereas the plaintiff maintained he was a passenger aboard the motor vehicle registration number KBH 618 he did not adduce the police abstract in evidence to prove ownership of the said motor vehicle nor the identity of the driver. By the close of the plaintiff’s case there was no proof as to the ownership or registration particulars of the motor vehicle that was involved in the accident , nor whether the plaintiff was indeed a passenger on board thereof. The fact that the defence did not lead evidence to confirm ownership of the suit motor vehicle means the plaintiff’s case is not proved”

8. The trial court acknowledged that the appellant was in the vehicle registration number KBH 681V but that he failed to adduce the police abstract. This is contrary to what the parties agreed. The police abstract was produced in court as exhibit no. 3 after the appellant’s counsel informed the court that they had consent to produce the police abstract as plaintiff exhibit. By stating that the appellant had not adduced evidence of a police abstract, the learned magistrate erred in her finding. The Court of Appeal decision in the case of *Joel Muga Opinja vs East African Sea Food Limited ( supra)* relied on by the appellant supports his argument that if the abstract is not challenged and is produced in court without any objection the contents cannot later be denied. I find that the learned magistrate erred in her find and I find that the appellant proved his case that the vehicle was owned by the respondent. On liability, the learned magistrate stated that had the appellant proved his case against the respondent then because he was a passenger he could not in any way contribute to the occurrence of the accident and liability would have been at 100%. From the evidence adduced the appellant was a passenger in the respondent vehicle. His evidence that the vehicle was driven in speed and that the accident occurred due to the driver’s negligence was not controverted. In the case of *Trust Bank Limited vs. paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001* the court held 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 that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged. In my view the respondent is 100% liable. I therefore set aside the order dismissing the appellant’s case and find that the appellant proved his case on a balance of probabilities and hold the respondents 100% liable.
9. On quantum the trial court indicated that had the appellant proved his case he would have awarded him Kshs 800000/- for general damages and Kshs 6700/- for special damages which were pleaded and proved. The appellant seeks that the said award be adopted as the finding of quantum. The plaintiff suffered the following injuries; bilateral fracture of both tibia and fibula on both legs, external fixator on the left leg and he had surgical and trauma wounds on both legs measuring 2.5cmx2cm on right leg and three wounds on the left leg measuring 3x2.5cm and 3.3.2cm and 2.5x1,5cm. In *Opeth & another v Musa (Civil Appeal E018 of 2022) [2024] KEHC 10530 (KLR) (3 September 2024) (Judgment)* the respondent sustained bilateral tibiofibular fractures of the legs, on the left being compound, as well as soft tissue injuries and was awarded Kshs 950,000/-. I find that a sum of Kshs 800,000/- is adequate for the injuries sustained by the respondent. On special damages, I find that the appellant has proved a sum of Kshs, 3500/- for the medical report and postage certificates to the insurer and owner totalling Kshs 3870/-.



10. In conclusion the trial court order dismissing the appellant's case is set aside. Judgment is entered for the appellant against the respondent as follows;
- i. Liability at 100%
  - ii. Damages for injuries sustained -Kshs. 800,000/-
  - iii. Special damages -Kshs 3870/-
  - iv. The appellant shall have costs of the appeal and those of the subordinate court.
  - v. It is so ordered.

**DATED, SIGNED, AND DELIVERED AT BUNGOMA ON THE 29<sup>TH</sup> OF JANUARY 2025.**

**R.OUGO**

**JUDGE**

In the presence of;

Mr. Alukwe h/b for Mr Mukisu - For the appellant

Respondent - Absent

Wilkister C/A

