



REPUBLIC OF KENYA



**Odipo v Otema (Civil Appeal E023 of 2024)
[2025] KEHC 5014 (KLR) (28 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5014 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL APPEAL E023 OF 2024
WM MUSYOKA, J
APRIL 28, 2025**

BETWEEN

PETER MUKUDI ODIPO APPELLANT

AND

JACKSON OTEMA RESPONDENT

*(An appeal arising from the judgment of Hon. EC Serem, Resident Magistrate,
RM, delivered on 3rd June 2024, in Busia CMCCC No. E242 of 2022)*

JUDGMENT

1. The suit, at the primary court, was initiated by the appellant, against the respondent, for compensation, arising from a motor vehicle accident, which allegedly happened on 30th April 2022, along the road from Bumala to Port Victoria, at the Kangara area, involving motor vehicle registration mark and number KCV 952L, which was allegedly owned or controlled by the respondent at the material time. The appellant was a passenger in the said motor vehicle, KCV 952L, at the time of the accident. It was averred that the said vehicle was allegedly so negligently driven, that it caused an accident, wherein the appellant sustained injury.
2. The respondent filed a defence, in which he denied everything pleaded in the plaint. In the alternative, he attributed negligence on the appellant.
3. A trial was conducted. The appellant testified, and called 1 witness, a police officer. Judgement was delivered on 3rd June 2024. The suit was dismissed, with costs, for failure by the appellant to prove his case on a balance of probability. On quantum, it was held that the court would have awarded Kshs. 130,000.00 as general damages, and Kshs. 6,000.00 special damages.
4. The appellant was aggrieved, hence the instant appeal. The grounds, in the memorandum of appeal, dated 6th June 2024, are around the suit being dismissed against the weight of the evidence; the trial



- court not finding that the appellant had discharged the legal burden of proof, and the respondent the evidential burden, and treating the evidence on liability casually.
5. Directions, on the disposal of the appeal, were given on 16th February 2025, for canvassing of the appeal by way of written submissions. Both sides have filed written submissions.
 6. The appellant has argued that he had established his case to the required standard. The decisions, in *Ena Investment Limited v Onyaguti* (suing as a legal representative of the Estate of Jared Ocharo Nyagwaya) [2024] KEHC 2842 (KLR) (Odera, J), *David Kajogi M’Mugaa v Francis Muthomi* [2012] eKLR (JA Makau, J) and *Bwire v Wayo & Sailoki* [2022] KEHC 7 (Mativo, J), *Bernard Philip Mutiso v Tabitha Mutiso* [2022] eKLR [2022] KEHC 13688 (KLR)(Odunga, J), *West Kenya Sugar Company Limited v Lilian Auma Saya* [2020] eKLR (Njagi, J), *Joseph Suri Nyateng & another v HP Mashru Limited* [1999] KEHC 85 (KLR) (Waweru, J), *Kimatu Mbuvi v Benson Nguli* [2010] eKLR (Lenaola, J) and *Benson Charles & another v Patricia Atieno* [2013] eKLR (Kimaru, J). are cited in support.
 7. The respondent supports the award by the trial court, arguing that the case was not proved on a balance of probability, and cites *Black’s Law Dictionary Revised Edition 4th edition*, *Sammy Traders Ltd v Odhiambo & 2 others* [2023] KEHC 1881 (Odera, J), *Grace Kanini Muthini v Kenya Bus Service Ltd and another* HCCA No. 4708 of 1989 (Ringera, J)(unreported), *Michael Kariuki Muhi v Charles Wachira Kariuki & another* [2015] eKLR [2015] KEHC 2569 (KLR) (Aburili, J) and *JFA Ogol v Murithi* [1985] KLR 359 [1985] EA 458 (Hancox, Nyarangi JJA, & Gachuhi Ag JA).
 8. The appeal turns only on liability.
 9. It is not in dispute that the appellant was a passenger in the accident vehicle. The dispute is around whether the respondent was to blame for the accident. In the pleadings, it was pleaded that the vehicle was negligently and carelessly driven, causing an accident in the process. In his witness statement, which the appellant adopted at trial, it was averred he heard a loud bang, upon which the driver lost control of the vehicle, and it landed on its side. At the trial, he did not talk at all about how the accident happened, besides merely relying on his witness statement. His witness, the police officer who investigated the accident, testified that the accident involved the accident vehicle and an unknown motorcycle. The motorcycle swerved into the road abruptly, according to him, and caused the accident vehicle to swerve, losing control in the process.
 10. What do I make of this? The appellant testified and called a witness at the trial, but the respondent did not testify. The appellant stated that he only heard a loud bang, after which the vehicle lost control and fell. He did not attribute negligence on the respondent. He did not explain the loud bang. He did not see what happened, to cause the vehicle to fall, which could form or provide basis for attribution of liability on the respondent.
 11. His witness talked of a collision between the accident vehicle and an unknown motorcycle. The motorcyclist was blamed for the accident, for abruptly swerving into the road, ostensibly into the path of the accident vehicle, causing the accident vehicle to fall on the road. The witness did not attribute any liability on the respondent.
 12. The sum of the evidence presented by the appellant made only one point, that an accident happened. As to negligence, the appellant did not attempt to adduce any evidence in that direction. His witness absolved the respondent of any negligence. It is not enough to merely allege negligence in pleadings, evidence ought to be adduced to establish the alleged negligence, however tenuous or fleeting. The occurrence of an accident is not, ipso facto, proof of negligence. Even where the doctrine of *res ipsa loquitur* is pleaded, some evidence must be led, to bring the incident within the application of that principle.



13. The legal burden of proof was on the appellant, to prove negligence on the respondent, on a balance of probability. The evidential burden was also on him, to discharge the legal burden. He adduced evidence on the accident. The evidence marshalled established that there was an accident. He did not suggest negligence on the respondent, for he only heard a loud bang, before the vehicle fell. The police officer who testified also established that the accident happened, but added a new dimension, not pleaded by the parties, that was that it involved another vehicle, and that that other vehicle was to blame. The burden on the appellant, to establish negligence on the part of the respondent, was not discharged, for the evidence adduced did not reach the threshold. As the case did not reach the threshold, the evidential burden did not shift to the respondent, and the omission by the respondent, to call rebuttal evidence, or present a witness was not fatal.
14. I agree with the trial court. The case was not proved to the required standard, of balance of probability. Consequently, I find no merit in the appeal herein, and I hereby disallow and dismiss it. Each party to bear their own costs. Orders accordingly.

DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 28TH DAY OF APRIL 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. F. Omondi, instructed by Omondi & Company, Advocates for the appellant.

Ms. T. Wesonga, instructed by Kimondo Gachoka & Company, Advocates for the respondent.

