



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nthenge v Watu Nominees Company Limited & another (Civil Appeal E227 of 2023) [2025] KEHC 9515 (KLR) (26 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9515 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E227 OF 2023**

**EN MAINA, J**

**JUNE 26, 2025**

**BETWEEN**

**SAMUEL MUTISO NTHENGE ..... APPELLANT**

**AND**

**WATU NOMINEES COMPANY LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**JOHN MUSILI ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment of the Resident Magistrate/  
Adjudicator Hon. M. Thibaru delivered on the 24th August 2023 in  
the Small Claims Court at Machakos in SCC Case No. E272 of 2023)*

**JUDGMENT**

1. By Statement of Claim dated 25<sup>th</sup> April, 2023 the Appellant herein sued the Respondent for General Damages for pain and suffering, Special damages of Kshs. 9,950, costs and interest. The Appellant prayed for compensation for injuries sustained during an accident which occurred on or about 28<sup>th</sup> of January 2023 at Kaseve area along Machakos -Kitui road. He was onboard motor vehicle registration number KTWC 349Q as a lawful fare passenger which was negligently driven and or managed that it fell down. The injuries sustained were particularized as Blunt head injuries; blunt injuries to the anterior chest wall, the abdomen and back; degloving wound to the left arm and palm; multiple cut wounds to the lower limbs, tenderness on the back and abdomen; multiple scars on the left upper limb and both lower limbs.
2. In its Response to the Statement of Claim dated 28<sup>th</sup> May, 2023 the Respondent denied the accident claim and stated that if at all the accident occurred it was occasioned by the negligence of the Appellant. The court was urged to dismiss the suit with costs.



3. At the hearing, the Appellant called two witnesses and the Respondent did not call any witness. After evaluating the evidence adduced by the parties, the learned magistrate found in favour of the Respondent and dismissed the suit with costs to the Respondent.
4. Being aggrieved, the Appellant preferred this appeal. The appeal is premised on the following grounds:-
  - i. That the learned Adjudicator erred in law and in fact in dismissing the Appellant's suit against the evidence placed before the Honourable adjudicator;
  - ii. That the learned Adjudicator erred in law and fact by holding that the appellant had failed to discharge burden of proof against the evidence and submissions presented in court;
  - iii. That the learned Adjudicator erred in law and in fact by reaching at a conclusion that is contrary to the evidence before him, the relevant facts of the case and the appellant's submissions;
  - iv. In all the circumstances of the case, the findings of the learned Trial Magistrate were characterized by misapplication of law, misapprehension of facts of the case, consideration of irrelevant matters and wrong exercise of discretion;
  - v. That the learned Adjudicator/RM erred in law by failing to award costs to the appellant."
5. The Counsel for the parties consented to canvassing the appeal by way of written submissions.

### **Submissions**

6. In submissions dated 19<sup>th</sup> February August 2025, the Appellant stated that he attributed the accident to the tuk tuk being driven at high speed causing the driver to lose control thus causing the accident and not that it was hit from behind. That the accident was self-involving as per the evidence of the police officer and only motor vehicle KTWC 349Q was to blame for the accident; there was no evidence to attribute any contribution on the part of the Appellant was merely a passenger and did not have any control. The court was urged to find that the doctrine of Res Ipsa Loquitur was applicable and the Respondent be found 100% liable for the accident. Reliance was placed on the case of Brian Muchiri Waihenya vs Jubilee Hauliers Limited & 2 Others [2017] eKLR, Kenya Power & Lighting Company Limited vs Rassul Nzembe Mwadzaya [2020] e KLR, Cosmas M Mutisya vs Jap Quality Motors & Another [2018] eKLR, Grace Nzula Mutunga vs Joyce Wanza Musila [2017]eKLR and Sicilia K. Thomas vs Eldoret Express and another [2017] eKLR.
7. As regards quantum, it was submitted that Kshs 200,000 would be adequate recompense for the Appellant's injuries and he prayed that he be awarded.
8. The Respondent filed submissions dated 3<sup>rd</sup> February 2025 and asked the court to uphold the decision of the Trial court and to dismiss the appeal with costs to the Respondent. It was submitted that the Appellant did not establish any fault on the part of the Respondent and as such liability could not ensue. Further, that the police abstract indicated that the matter was pending under investigation; that a party cannot be blamed for occurrence of the accident or be guilty of negligence solely on account of failure to implead a third party. He placed reliance on the cases of Evans Mogire Omwansa vs Benard Otieno Omolo & Another (2016) eKLR, Evans Nyakwana vs Cleophas Bwana Ongaro [2015]eKLR, Palace investment Limited vs Geoffrey Kariuki Mwenda & Another [2015] e KLR, LWK



(A minor suing through father and next friend SKD) VS Kirigu Stanley & Another [2019], Sammy Ngigi Mwaura vs John Mbugua Kagai & Another [2006] eKLR, Lucy Muthoni Munene vs Kenneth Muchange & Kenya Bus Services Limited Nairobi HCCC no 858 of 1998 and Gabriel Owe Okello vs Ujenzi Quarries Limited [2017]eKLR to support its submissions.

## Determination

9. The duty of this Court as an appellate court exercising jurisdiction under the Small Claims Court squarely falls under Section 38 of the [Small Claims Court Act](#) which section provides as follows;

“ 38. Appeals

- (1) 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.
- (2) An appeal from any decision or order referred to in subsection (1) shall be final.”

10. The jurisdiction of the High Court based on the above section is limited to matters of law only. Having perused the Memorandum of Appeal and the grounds set out there under, I note that the Appellant raises issues of both law and fact. Most of the grounds of appeal are premised on the allegations that the learned adjudicator erred in both the law and fact. The main issue before this court is whether the Respondent was liable for the accident.

11. It is not disputed that the Respondent did not call any witness to prove its case and thus the Appellants case was uncontested. Nonetheless, the Appellant who was the claimant in the Trial court still had the burden of proving case on a balance of probabilities. Section 107 of the [Evidence Act](#), Section 109 and Section 112 of the [Evidence Act](#) were dealt with in the case of Anne Wambui Ndiritu -vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, wherein 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”

12. I am persuaded by the observation of the court in the case of Bedrock Holdings Limited v Rallytec Motors Limited [2019] eKLR where the court stated that;

“ 27. A Plaintiff may adduce uncontroverted evidence, but if such evidence is not sufficient to prove the facts required to find the Defendant liable, the court would still be entitled to dismiss the claim.

.....

29. Secondly, the failure by the Defendant to call any witnesses meant that the evidence tendered by the Plaintiff was not controverted.”

13. From the record, PW2’s testimony points to the fact that the tuk tuk driver was overspeeding and as a result it fall causing him to sustain the injuries elucidated herein. From the police abstract dated 03/03/2023, there was no other motor vehicle involved in the accident. It further indicates that the



case is pending under investigation and no eye witness was called to corroborate the evidence of the Appellant. Contrary to this, upon cross examination, the Appellant told the court that;

“a car hit the tuk tuk from behind and it disappeared.... It the tuk tuk was not hit from behind, the accident would not have happened.”

14. Upon reexamination, he indicated that he did not see the car that hit them and he just heard a bang after the tuk tuk was hit. The allegation that the Trial Court misapprehended facts of the case and arrived at the wrong conclusion is thus not true. It is the finding of the court that the Appellant gave two conflicting accounts of the accident as the question that begs is, Was the accident self-involving or was the tuk tuk hit from behind?

15. Faced with a similar situation where there was conflicting evidence, the court in the case of Siema v Shivanda [2024] KEHC 16385 (KLR) held as follows;

“After analyzing the Trial record and all the evidence tendered in the case, and having had no advantage of seeing and hearing the witnesses and in absence of independent evidence for there were no eye witnesses, this coupled with the fact that the police investigations were said to be incomplete at the time of filing the suit, no sketch plans, legend and measurements taken of the scene were produced for the trial court to have a feel of the scene of the accident, no inspection reports of the motor vehicle and the motor cycle showing the parts that were damaged were produced which would have enabled the trial court on a degree of probability to assign the blame thus it becomes a challenge to make a determination on liability in this appeal.”

16. In this case, the conflicting evidence is coming from a plaintiff who alleges to have been a passenger in the vehicle. either the accident was self - involving in which case the driver of the vehicle was to blame or the vehicle was hit causing it to overturn in which someone else was to blame. In the case of Kiema Mutuku v Kenya Cargo Hauling Services Ltd [1991] eKLR cited in the case of Eunice Wayua Munyao v Mutilu Beatrice & 3 others [2017] eKLR the court stated-

“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.”

17. The Appellant submits that doctrine of res ipsa loquitor was applicable in this case. The Court of Appeal, in the case of Margaret Waithera Maina v Michael K Kimaru [2015] eKLR) the court held as follows on res ipsa loquitor:

“Firstly, it is doubtful whether it is a doctrine, a maxim or a principle of law. Its literal meaning is that “the thing speaks for itself”. It is said to be a mechanism whereby the claimant can be relieved of the burden of proving the negligence, and the court can infer negligence in those situations where the factual circumstances of the case would make proving it almost impossible. In the text book Charlesworth & Percy on Negligence, 12th edition, appears this passage:

Although use of the maxim is periodically discouraged, it is so well entrenched that it may take some time to dislodge entirely. However, it has never been correct to describe it in terms of doctrine:

I think that it is no more than an exotic although convenient; phrase to describe what is in essence no more than a common-sense approach, not limited by technical rules, to



the assessment of the effect of evidence in certain circumstances. The question whether to apply the maxim has usually arisen where the claimant is able to prove the happening of an accident but little else. He might well be unable to prove the precise act or omission of the defendant which caused an accident to occur, but if on the evidence it is more likely than not that its effective cause was some act or omission of the defendant, which would constitute a failure to take reasonable care for his safety, then in the absence of some plausible explanation consistent with an absence of negligence, the claim would succeed.”

18. In this case the credibility of the Plaintiff is called into question could it be that he was not in the vehicle when the accident occurred? Why would he give two completely contradictory scenarios? As there was no eye witness to shed light on the cause of the accident occurred, which is what determines who is to blame for the accident and the police abstract having showed that the accident was still under investigation which was confirmed by CWI Gideon Kipruto, this court is not able to attribute liability to the driver of the Motor vehicle. In the premises this court upholds with the judgment of the Adjudicator and this appeal is dismissed with costs to the Respondent.

Orders accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 26<sup>TH</sup> DAY OF JUNE, 2025.**

**E. N. MAINA**

**JUDGE**

In the presence of:

Ms Masila for the Appellant

Mr.Mwanzia for Karanja for the Respondent

Geoffrey – Court Assistant

