



REPUBLIC OF KENYA



**KENYA LAW**  
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**Njoki v Kihara & another (Civil Appeal E188 of 2024)  
[2025] KEHC 11742 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11742 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL E188 OF 2024  
FN MUCHEMI, J  
JULY 31, 2025**

**BETWEEN**

**SAMUEL WAWERU NJOKI ..... APPELLANT**

**AND**

**JOSEPH KAMAU KIHARA ..... 1<sup>ST</sup> RESPONDENT**

**MARY NJOKI KIHIGO ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the Judgment and Decree of Hon. M. W. Kamau (RM/Adjudicator)  
delivered on 25th July 2024 in Thika Small Claims Court SCCC No. E930 of 2023)*

**JUDGMENT**

**Brief facts**

1. This appeal arises from the judgment of Thika Resident Magistrate/Adjudicator in SCCC No. E930 of 2023 arising from a road traffic accident whereby the magistrate dismissed the appellant's claim for lack of proof on a balance of probability.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 4 grounds of appeal summarized as follows:-
  - a. The learned adjudicator erred in law and in fact by failing to consider the evidence on liability adduced by the appellant together with his witnesses.
  - b. The learned adjudicator erred in law and in fact by failing to consider the gravity of the appellant's injuries.
  - c. The learned trial magistrate erred in law and in fact in dismissing the suit while relying on documents that were not produced as exhibits by the expert witnesses and hence arrived at the wrong conclusion.



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

### **The Appellant's Submissions**

4. The appellant relies on Article 50(1)(4) of *the Constitution* and submits that the learned adjudicator erred by relying on the OB extract which was filed after pleadings had closed and parties had closed their respective cases. The learned adjudicator in her judgment concluded that the appellant was playing with a conductor who pushed him on the road which evidence was given by the 1<sup>st</sup> respondent who testified that he heard people at the scene of the accident saying that the appellant was playing on the road but he never called the said people as witnesses in the primary suit.
5. The appellant argues submits that the right to fair trial includes the right to a full and fair opportunity to present one's case and respond to the other party's arguments. Allowing the late filing of documents undermines the said right. Relying on the case of Environment & Land Court at Nakuru, Cherotic Kiprono Ruto vs Reuben Kipnetich & 4 Others ELC Case No. 321 of 2015, the appellant submits that introducing a witness not previously disclosed and a document not previously exchanged during the pre-trial stage was in bad faith. The respondents were aware of the procedures laid down in the Civil Procedure Rules which ensure a fair trial. Further, the appellant submits that he did not have an opportunity to seek a contrary opinion after the OB was attached to the respondents' submissions. To support his contentions, the appellant relies on the case of Preview Property Agency & Another vs Terrie Wanjiku Miano, Milimani Civil Appeal No. 637 of 2019.
6. The appellant submits that he testified that he was knocked while off the road and the same was confirmed by his eye witness, CW3 who testified that he was not knocked on the road as alleged by the 1<sup>st</sup> respondent, who was the driver of the suit motor vehicle. The appellant further submits that RW1, the driver of motor vehicle registration number KCZ 122P, testified that the appellant was run over by the back wheel of the same motor vehicle and confirmed that he had a passenger in his motor vehicle whom he never called as a witness to corroborate his evidence. The witness further testified that he heard people say that the appellant was playing but he never called the said people as witnesses to corroborate his evidence. To support his contentions, the appellant relies on the case of Hussein Omar Farah vs Lento Agencies (2006) eKLR.
7. The appellant submits that medical reports by Patrick Mwangi and Dr. Wokabi reveal that he suffered open communitated fractures of the right tibia/fibula bones, segmental fractures of the left tibia bone, soft tissue injuries of the right leg and soft tissue injuries to the left leg. Relying on the case of Francis Ndungu Wambui & Others vs V. K. (minor) Embu Civil Appeal No. 62 of 2017, the appellant submits that an award of Kshs. 940,000/- as general damages and Kshs. 51,130/- for special damages would have been reasonable and adequate compensation for the injuries he sustained.

### **The Respondents' Submissions.**

8. The respondents refer to Section 38(1) of the *Small Claims Court Act* and submit that the appellant's memorandum of appeal is premised on alleged errors in fact and evidence evaluation. Additionally, the respondents refer to Rule 31 of the Small Claims Court Rules and submit that the court shall not be bound by the strict rules of procedure and evidence. Relying on the cases of Wachira vs Mwai (Civil Appeal E022 of 2023 [2024] KEHC 3173 (KLR) (15 March 2024) (Judgment) and Fidelity Insurance Company Ltd vs Korir (Civil Appeal 13 of 2023) [2024] KEHC 3365 (KLR) (Ruling, 22 March 2024), the respondents argue that the grounds of appeal are issues on liability and evidence which are matters of fact and not law.



9. The respondents argue that the appellant is seeking to overturn a legislated section of the law, Section 38 of the Act which is binding upon this court. To support their contentions, the respondents rely on the cases of *Matete vs Sasala Self Help Group* (Civil Appeal E104 of 2023) [2024] KEHC 2583 (KLR) (8 March 2024) (Judgment) and *Achayo vs Witness Protection Agency* (Civil Appeal E008 of 2024) [2024] KEHC 3877 (KLR) (19 April 2024) (Ruling).
10. The respondents submit that the consideration by the trial court of the OB extract was not prejudicial to the appellant as he was fully aware of its existence and had complete access to it being a police record. Despite that, the appellant chose not to present it or have his witness, PC Muthengi produce it, as doing so would be unfavourable to his case. Further, the respondents submit that procedural flexibility in the small claims court is a guiding principle and Order 11 of the Civil Procedure Rules does not apply as the small claims court governs its own procedures as was held by D.S. Majanja J. in *Uniglobe Northline Travel Limited vs Maverick Picture Works Limited* (Civil Appeal E045 of 2022) [2022] KEHC 13531 (KLR) (Commercial and Tax) (7 October 2022) (Judgment).
11. The respondents submit that during cross examination of PC Muthengi, where he was asked to read the contents of the OB, he stated that he did not have it and was therefore unable to verify the circumstances surrounding the accident. The inference was that the OB contained evidence detrimental to the appellant's case which explains the effort to keep it from the court record. Further, the appellant objected to PC Muthengi's testimony when he was recalled to read the OB and provide clarity on how the accident occurred as the officer had previously testified for the appellant. The court stood down the witness and upheld the appellant's objection to not having the witness testify again and proceeded to order them to file a certified extract of the OB. The appellant neither raised any objection nor did he address the same in his submissions. Consequently, the appellant cannot challenge the document being adduced at the appellate stage, having effectively waived his right to do so during trial. Relying on the case of *IMW vs Republic* (Criminal Appeal 60 of 2018) [2021] KEHC 8008 (KLR) (25 March 2021) (Judgment), the respondents submit that issues that were not raised or resolved at the trial level should not be raised for the first time on appeal.
12. The respondents submit that the trial court did not solely rely on the OB extract to dismiss the appellant's case but evaluated all the evidence adduced before it by both parties and reached a well-reasoned conclusion after a careful analysis.
13. The respondents refer to the case of *Midland Hotel vs Kioko* (Civil Appeal 183 of 2022) [2024] KEHC 9709 (KLR) (29 July 2024) (Judgment) and submit that the learned adjudicator has discretion to admit any evidence that appears credible and relevant and is not bound by the formality or procedural technicalities of the *Evidence Act* or the Civil Procedure Rules.
14. The respondents further rely on Sections 107, 108 and 109 of the *Evidence Act* and the cases of *Statpack Industries vs James Mbithi Munyao* [2005] eKLR and *Agot vs Munge* (Civil Appeal E128 of 2023) [2024] KEHC 11925 (KLR) (Civ) (23 September 2024) (Judgment) and submit that the appellant failed to discharge his burden of proving negligence against them on a balance of probabilities, thus the trial court dismissed his claim. Additionally, the respondents argue that the issue of liability is a discretion which the appellate court will only interfere when it is clearly wrong or based on no evidence or an application of wrong principles. To support their contentions, the respondents rely on the case of *Mburu & 6 Others vs Kirubi* (Civil Appeal E246 of 2021) [2023] KEHC 3599 (KLR) (20 April 2023) (Judgment).
15. The respondents argue that the issue of quantum does not arise where liability has not been established. However, if the court finds otherwise, the trial court's proposed award of Kshs. 700,000/- for general damages and Kshs. 51,130/- for special damages was reasonable and based on comparable precedent.



To support their contentions, they rely on the cases of Tirus Mburu Chege & Another vs J.K.N (Minor suing through the next friend and mother D.W.N & Another [2018] eKLR where the respondent suffered fractures on the tibia and fibula on both legs, blunt injury on the forehead, broken upper right second front tooth, nose bleeding and consistent loss of consciousness. The court lowered the award for general damages from Kshs. 800,000/- to Kshs. 500,000/-. In Akamba Public Road Services vs Abdikadir Adan Galgalo [2016] eKLR where the award of Kshs. 800,000/- was substituted with an award of Kshs. 500,000/- on appeal for injuries particularized as fracture of the right tibia leg bone malleolus, right fibular bone and blunt injury to the right ankle. Further in Florence Njoki Mwangi vs Peter Chege Mbiitiru [2014] eKLR the court upheld an award of Kshs. 700,000/- where the appellant suffered a fracture of the right mid shaft femur, fracture of the left mid shaft femur, degloving wound on the right fibia fibula necessitating skin grafting, amputation of the right foot behind the ankle joint and multiple cuts on the forehead. Further, the appellant's reliance on the case of Francis Ndungu Wambui & 2 Others vs VK (A minor suing through next friend and mother MCWK) [2019] KEHC 2307 (KLR) is misplaced as the injuries were far more severe.

### Issues for determination

16. The main issues for determination are:-
  - a. Whether the appeal is properly before the court
  - b. If so, whether the appeal has merit.

### The Law

17. 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.

18. 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.



## Whether the appeal is properly before the court

19. 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.

20. I have perused the grounds in the memorandum of appeal and noted that the grounds involve the determination of liability and quantum which are primarily questions of fact. The grounds as raised by the appellant are matters of fact which will require this court to scrutinize and re-evaluate the evidence once more. Section 38 of the *Small Claims Court Act* limits appeals to this court from case decided by the Small Claims Court to only matters of law.

21. The appellant argues that the learned adjudicator dismissed his case for lack of proof on a balance of probability. From the record, it is evident that the adjudicator took into account evidence of both the appellant and the respondents and reached her conclusion. On further perusal of record, the appellant did not have the issue of the O.B in his memorandum of appeal as a ground of appeal. It is further noted that even if the O.B was an issue on appeal, it is a matter of evidence not law.

22. Section 32 of the *Small Claims Court Act* provides for exclusion of the strict rules on evidence. It provides:-

1. The Court shall not be bound wholly by the Rules of evidence.
2. Without prejudice to the generality of sub section (1), the Court may admit as evidence in any proceedings before it, any oral or written testimony, record or other material that the Court considers credible or trustworthy even though the testimony, record or other material is not admissible as evidence in any other Court under the law of evidence.
3. Evidence tendered to the Court by or on behalf of a party to any proceedings may not be given on oath but that court may, at any stage of the proceedings, require that such evidence or any part thereof be given on oath whether orally or in writing.
4. The court may, on its own initiative seek and receive such other evidence and make such other investigations and inquiries as it may require.
5. All evidence and information received and ascertained by the Court under subsection (3) shall be disclosed to every party.
6. For purposes of subsection (2), an adjudicator is empowered to administer an oath.

23. It is important to note that the appellant has not shown that the adjudicator contravened the provisions of Section 32 of the Act in handling the evidence related to the O.B and its admission as material evidence.

24. If it therefore my finding that this appeal is not properly before the court in that it is based on matters of fact contrary to Section 38 of the Small Claims Act.

25. Consequently, this appeal is incompetent and I hereby strike it out with costs to the respondent.

26. It is hereby so ordered.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 31<sup>ST</sup> DAY OF JULY 2025.**



**F. MUCHEMI**  
**JUDGE**

