

KENYA / JUDGMENT

Kibera v Kahura [2026] KEHC 13723 (KLR)

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COURT

High Court

CASE / FILE NUMBER

Civil Appeal E003 of 2025

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REPUBLIC OF KENYA IN THE HIGH COURT OF KENYA AT THIKA CIVIL APPEAL NO. E003 OF 2025 JAMES KINOTI KIBERA..... APPELLANT VERSUS JOSEPH MACHARIA KAHURA..... RESPONDENT (Being an appeal from the judgment of and decree of Hon. Hon. Tawai J Khalimesi delivered in Ruiru Small Claims Court Case No. E175 of 2024 on 27th May of 2024)

JUDGEMENT

1. This Appeal arises from the Judgement issued by Hon. Tawai J Khalimesi in Ruiru SCC NO. E175 of 2024 delivered on 27th May 2024. The Respondent had instituted the primary suit herein vide a statement of claim dated 27th March 2024 following a road traffic accident that occurred on or about 3rd about April 2021. In the claim, the Respondent averred that his driver was lawfully driving motor vehicle registration number KCX 185K along Nairobi-Naivasha Road at Kariko area when the Appellant so negligently drove and/or managed motor vehicle registration number KCX 101R causing the same to hit motor vehicle registration number KCX 185K hence causing extensive damage. 2. He further averred that his insurer, CIC General Insurance Limited repaired the vehicle at a cost of KES. 275,986 consequently filing the claim under the doctrine of subrogation against the appellant. THIKA HCCA NO. E003 OF 2025 1 | P a g e 3. The Appellant filed an undated response denying the averments by the respondent and sought for the claim to be dismissed with costs. 4. The matter proceeded to hearing during which the Respondent presented three witnesses while the Appellant called one. The first witness for the Respondent/Claimant, Josphat Kamau, a seasoned assessor with fifteen years' experience, testified that he had inspected motor vehicle KCX 185K Isuzu in Naivasha and prepared an assessment report estimating repair costs at Kshs. 240,182, together with a service fee of Kshs. 13,708. He produced the report and receipt as exhibits. On cross-examination, he admitted that he was unaware of the accident date and had assessed the vehicle a week after the incident, noting frontal damage consistent with impact from another vehicle travelling in the same direction. 5. The second witness, Police Constable Patrick Kibera of Lari Police Station, testified that the accident was non-injury and occurred at Kariko area along the Nairobi-Naivasha road. He stated that motor vehicle KCX 101R, a Mercedes Benz, cut across KCX 185K Isuzu lorry, thereby causing the accident, and produced a police abstract. On cross-examination, he

conceded that he was not the investigating officer, had no accident report or sketch maps, and could not determine the point of impact. He relied on the Occurrence Book entry which recorded that KCX 101R had cut across, though he acknowledged that KCX 185K was overtaking KCX 100R, a fact he could not independently verify. 6. The third witness, Martin Kariuki, Assistant Manager at CIC Insurance, adopted his statement and produced policy documents. He testified that the insurer relied on police and insured's information blaming the Respondent. On cross- THIKA HCCA NO. E003 OF 2025 2 | P a g e examination, he admitted that no proposal form or certificate of insurance had been produced, clarifying that only the proposal form is executed by the insured, while policy documents are ordinarily unsigned. 7. The Respondent's sole witness, James Kinoti Kirera, adopted his statement and produced documents. He testified that he was driving correctly in his lane when the lorry attempted to overtake, positioning itself in the middle of the road. He maintained that his vehicle was properly placed and that the parties had agreed to bear their own repair costs. On cross- examination, he denied overlapping, stated he was driving at about 50 km/h, and explained that police instructed him to move his vehicle to avoid obstruction. He asserted that the accident occurred when the lorry attempted to overtake, encountered an oncoming vehicle, and swerved back into his lane, colliding with him. On re-examination, he reiterated that the lorry overtook without noticing the oncoming vehicle, swerved back, and struck his car. 8. The Learned Magistrate relied on the case of Dorcas Wangithi Nderi v Samuel Kiburu Mwaura & Another

[2015] KLR where it was that held if a police abstract is produced without any objection, its contents cannot be denied and found the appellant 100% liable for the accident. He was of the view that the claimant had produced police abstract report without any objections and the said abstract blamed vehicle registration number KCX 101R for the accident. 9. Upon conclusion the hearing, the learned magistrate determined the matter in favor of the plaintiff having made a finding that the doctrine of subrogation was properly invoked. He was of the view that the claimant, through the insurance, THIKA HCCA NO. E003 OF 2025 3 | P a g e produced sufficient evidence that the insurer had compensated him to his satisfaction.

10. On quantum the learned magistrate held that the claimant had also produced enough evidence to support his claim for special damages of KES. 275,968.
11. The Appellant being dissatisfied with the judgment of the trial Court filed the Memorandum of Appeal dated 2nd December 2024 preferring ten (10) grounds of appeal namely:
 - a) That the Learned Magistrate erred in law by not adequately establishing and verifying the ownership of the motor vehicle with registration number KCX 101R.
 - b) That the Learned Magistrate erred in law by failing to determine whether sufficient evidence was presented to substantiate the claim for material loss, as mandated by the laws of evidence.

- c) That the Learned Magistrate erred in law by relying exclusively on the respondent's evidence concerning the material damage incurred, without giving due consideration to the evidence presented by the appellant, an approach that contravenes the principles of equality and natural justice.
 - d) That the Learned Magistrate erred in law by apportioning liability at 100% against the appellant, despite the presence of contradictory evidence regarding liability.
 - e) That the Learned Magistrate erred in law by awarding damages that were disproportionate to the material damage incurred, thereby failing to align the award with the principles of proportionality and fairness. THIKA HCCA NO. E003 OF 2025 4 | P a g e
 - f) That the Learned Magistrate erred in law by not finding sufficient evidence of material loss amounting to Kshs. 275,986 and incorrectly concluding that the invoice can serve as proof of payment, instead of recognizing that only a receipt can fulfill this evidentiary requirement.
 - g) That the learned magistrate erred in law by holding the appellant liable to settle the respondent an amount of Ksha. 275,986 plus costs and interests as against the weight of evidence and precedent decision of superior courts which establish that such damages require strict proof.
 - h) That the learned magistrate erred in law by failing to consider the weight of case law rendered by superior courts on the facts in issue, as submitted by the appellant's counsel. The decision in question failed to appreciate the doctrine of stare decisis, resulting in an erroneous outcome.
 - i) That the learned magistrate erred in law by awarding costs to the respondent.
- 12. The appellant sought to have the impugned judgement set aside and for the case to be heard on its merits and a stay of execution of the said judgement pending the hearing and determination of the appeal. Submissions;
 - 13. The matter was canvassed by way of written submissions by the rival parties through their respective learned counsel, Marienga for Appellant and Kimachia for the Respondent.
 - 14. The appellant, through Marienga Advocates LLP, argued that the appeal raised pure questions of law under Section 38 of THIKA HCCA NO. E003 OF 2025 5 | P a g e the Small Claims Court Act. They contended that the adjudicator failed to properly evaluate the evidence, ignored material facts, and misapplied the law, leading to an erroneous finding on liability.
 - 15. On ownership of motor vehicle KCX 101R, the appellant maintained that although the respondent pleaded ownership, no records from the Registrar of Motor Vehicles were produced despite ownership being denied in the defence. They submitted that police abstract alone was insufficient proof, especially since the police officer who testified was not the investigating officer and lacked supporting documents.

16. Counsel placed reliance on authorities such as *Adelcus Agencies (K) Ltd v Kokoi* (Civil Appeal 166 of 2023(2024) KEHC 8282KLR and *Joel Joel Muga Opija v East African Sea food limited* (2013) eKLR to support this position.
17. The appellant further argued that liability was not proved because the insured, James Kinoti Kirera, neither testified nor recorded a statement. He added that none of the respondent's witnesses had witnessed the accident; For instance, the assessor admitted he could not explain the circumstances, and the police officer lacked sketch maps, inspection reports, or a police file. The appellant also highlighted contradictions about the identity of the driver and urged the court to draw an adverse inference against the respondent for failing to call essential witnesses.
18. On subrogation, the appellant submitted that the respondent insurer lacked authority to institute the suit, as there was no evidence of authorization by the insured, whose non-participation rendered the claim incompetent. Reliance was placed on *Securicor Guards (K) Ltd v Dr. Mohammed Saleem Malik & Another* [2019] eKLR. THIKA HCCA NO. E003 OF 2025
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19. The appellant challenged the trial court's reliance on the police abstract, arguing that it was treated as conclusive proof of liability without supporting evidence, contrary to authorities such as *Patrick Muhia Giathi v Joseph Kingiri Mwangi & Another* [2020] eKLR. They also faulted reliance on *Dorcas Wangithi Nderi v Samuel Kiburu Mwaura & Another*, saying its principles were misapplied.
20. Regarding special damages, the appellant argued that although repair documents were produced, there was no proof that the claimed costs were actually incurred or paid, contrary to the requirement that special damages must be specifically pleaded and strictly proved.
21. In conclusion, the appellant submitted that the trial court failed to properly analyze the evidence, ignored inconsistencies, gave undue weight to an unsupported police abstract, and overlooked deficiencies in ownership, liability, and subrogation. They urged the appellate court to set aside the judgment and allow the appeal with costs.
22. The respondent on the other hand urged for the dismissal of the appeal with costs, maintaining that the adjudicator properly evaluated the evidence and correctly found the appellant wholly liable. On ownership of motor vehicle KCX 101R, they argued it was proved through CW3's evidence and documentary records from the Registrar of Motor Vehicles.
23. On special damages, the respondent submitted that the sum of KES. 275,986, covering repair costs, assessment fees, tracing fees and re-inspection fees, was specifically pleaded and strictly proved by documents, justifying the award. They emphasized that a qualified assessor (CW1) produced an assessment report and confirmed the charges, which went unchallenged by any expert evidence from the appellant. THIKA HCCA NO. E003 OF 2025
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24. As to liability, the respondent argued that they discharged the burden of proof under section 107 of the Evidence Act. They relied on the police abstract, produced without objection, produced documentary evidence including the Motor Claim Form and driver's statement, which attributed blame to the appellant. They stressed that under section 32 of the Small Claims Court Act, the court was not bound by strict evidentiary rules and could rely on documentary evidence even without oral testimony from the driver. They further contended that the appellant's challenge improperly invited the appellate court to re-evaluate factual findings, contrary to section 38 of the Act which limits appeals to matters of law.
25. On subrogation, the respondent pointed out that the issue was not pleaded in the Memorandum of Appeal and should not be entertained. In any event, they argued that CW3's evidence established that the vehicle was comprehensively insured and indemnified, entitling the insurer to sue under subrogation. Reliance was placed on *Akamba Public Road Services v Abdikadir Adan Galgalo* [2016] eKLR.
26. In conclusion, the respondent submitted that the appellant failed to show any misdirection in law or principle by the adjudicator, and therefore the appeal should be dismissed with costs.
27. This being a first appeal, this court has a duty to re- consider and re-evaluate the entire evidence before the trial court afresh, and to come to its own independent conclusion on whether or not the findings of the trial court should stand; while bearing in mind that unlike the trial court, this court did not have the advantage of seeing or hearing the witnesses, and to make due allowance in that respect. THIKA HCCA NO. E003 OF 2025 8 | P a g e
28. This principle was reiterated in the court of appeal case of *Selle –vs- Associated Motor Boat Co.* [1968] EA 123; as follows: "The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect, in particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."
29. Guided by the principle in the afore stated authority, I have carefully considered the grounds of appeal, the rival written submissions by the parties and the authorities cited therein; having done so, I find that the main issues for determination in

30. Having carefully considered the Record of Appeal, the judgment of the learned Magistrate, the Memorandum of Appeal, the rival submissions, and the applicable law, I am of the view that the main issue for determination is whether this appeal is merited. In particular, the following sub-issues arise for determination: THIKA HCCA NO. E003 OF 2025 9 | P a g e
- a) Whether the ownership of motor vehicle registration number KCX 101R was sufficiently proved
 - b) Whether the learned Magistrate properly found the Appellant wholly liable for the accident; and
 - c) Whether the learned Magistrate properly found that the Respondent had proved its claim under the doctrine of subrogation and was entitled to the special damages awarded Whether ownership of motor vehicle registration number KCX 101R was proved.
31. The appellant contended that the respondent failed to prove ownership of motor vehicle registration number KCX 101R since no official search from the Registrar of Motor Vehicles had been produced.
32. I have perused the record. CW3 produced the Respondent's List of Documents as exhibits 4–18. Included therein, a tracing report prepared by Invetech Loss Assessors containing a copy of records from the Registrar of Motor Vehicles identifying the appellant as the registered owner of motor vehicle registration number KCX 101R.
33. In *Charles Nyambuto Mageto v Peter Njuguna Njathi*
- [2013] eKLR the court stated that: - “From the interpretation of Section 8 of the Traffic Act as elucidated above, a person claiming or asserting ownership need not necessarily produce a log book or a certificate of registration. The courts recognize that there are forms of ownership, that is to say, actual, possessionary and beneficial, all of which may be proved in other ways, including by oral or documentary evidence such as the Police THIKA HCCA NO. E003 OF 2025 10 | P a g e Abstract Report even, as held in the *Thuranira and Mageto* cases (supra) that the Police Abstract Report is not, on its own, proof ownership of a motor vehicle. If, however there is other evidence to corroborate the contents of the Police Abstract as to the ownership, then, the evidence in totality may lead the court to conclude on the balance of probability that ownership. In this case, the trial magistrate found that the Police Abstract showed that the Respondent was the owner of the motor vehicle. The evidence of the Respondent on ownership of the motor vehicle was corroborated by PW2, the Loss Assessor who testified that he had been instructed by the Respondent to prepare a Loss Assessment Report of the damage to the Respondent's motor vehicle, registration No. KAG 650H. Although the Respondent did not prove by complete documentary evidence (such as the logbook), that he was the owner of the motor vehicle as pleaded, he did on the balance of probability prove that he had ownership of the vehicle.”

34. Accordingly, I find that no error of law on the part of the learned Magistrate in concluding that ownership of motor vehicle registration number KCX 101R had been proved. Whether the learned Magistrate properly found the Appellant wholly liable for the accident.
35. This is the central issue in the appeal. The learned Magistrate principally relied on the police abstract in finding the appellant wholly liable for the accident. The record, however, THIKA HCCA NO. E003 OF 2025 11 | P a g e reveals that CW2 expressly admitted during cross- examination that he was not the investigating officer, had not produced the police investigation file, could not produce the sketch maps, could not determine the point of impact, could not ascertain the resting positions of the motor vehicles after the collision and could not independently verify the material entries contained in the Occurrence Book.
36. The evidential value of a police abstract has been considered in several decisions of the High Court. In Patrick Muhia Giathi v Joseph Kingiri Mwangi & Another [2020] eKLR, the Court held that: “The question then is whether the contents of a police abstract constitute proof of negligence. As the name suggests, a police abstract is an abstract or summary of information contained in the police record. It contains factual matter like the parties involved in an accident, the date and time of accident, whether a party has been charged, person injured and such information. A statement contained therein that a party is to blame is a statement of opinion as it is based on the writer’s perception of a certain set of facts. It is therefore inadmissible unless it is admitted under section 48 of the Evidence Act.
37. Similarly, in PAS v George Onyango Orodí
- [2020] KEHC 5546 (KLR) the Court stated as follows: - “The evidence of the said officer that it is the cyclist who was to blame for the accident was based on an entry into the Occurrence Book which book was not produced in court. The police officer who made the report in the OB did not testify in the case. The evidence of the THIKA HCCA NO. E003 OF 2025 12 | P a g e police officer to that end therefore amounted to hearsay. The evidence was therefore not admissible. It could not be relied on to reach a finding that the cyclist was the one to blame for the accident. I agree that it was important for the appellant to have called the investigating officer to indicate to the court how the accident may have occurred. The question is whether in the absence of such evidence there was evidence to prove the case on the usual standard of proof of balance of probabilities...”
38. In the present case, the evidence of CW2 did not establish the factual basis upon which blame was attributed to the appellant. The witness readily conceded that he lacked the investigation file and was unable to explain the circumstances under which the investigating officer reached the conclusion reflected in the police abstract. Consequently, the abstract could not, standing on its own, conclusively establish negligence.

39. Further, CW1, the motor vehicle assessor, candidly admitted that he neither witnessed the accident nor knew how it occurred. His evidence merely established the nature and extent of the damage sustained by the respondent's motor vehicle and did not assist the court in determining how the collision occurred.
40. The respondent equally did not call either the insured or the driver of the insured motor vehicle, both of whom were material witnesses capable of giving a first-hand account of the occurrence of the accident. Although witness statements formed part of the documentary evidence, those statements were not adopted in evidence and were never subjected to cross-examination. Consequently, they could not substitute THIKA HCCA NO. E003 OF 2025 13 | Page oral testimony on the contested issue of liability. In *Kenneth Nyaga Mwige v Austin Kiguta and 2 others* [2015] eKLR the court of appeal held that: - “Once a document has been marked for identification it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once the foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit; it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an authenticated account.”
41. Conversely, the appellant testified as the only eyewitness who gave viva voce evidence regarding the occurrence of the accident. His account was that the respondent's lorry, while overtaking another vehicle, encountered an oncoming vehicle and swerved back into its proper lane, colliding with his motor vehicle.
42. The learned Magistrate was entitled to reject that evidence if satisfied that it was not credible. However, the court was equally obliged to evaluate it alongside the respondent's evidence and give reasons for preferring one version over the other. Upon considering the impugned judgment, this court is not able to discern such an evaluation. Instead, the learned Magistrate appears to have treated the police abstract as conclusive proof of negligence notwithstanding the significant evidential deficiencies exposed during cross-examination. THIKA HCCA NO. E003 OF 2025 14 | Page
43. There is, however, no dispute that the accident occurred. What remains in dispute is the manner in which it occurred and which driver was to blame. The evidence tendered by both parties does not satisfactorily resolve that question. The respondent failed to adduce direct evidence from the investigating officer or the driver of the lorry to substantiate the allegation that the appellant caused the accident, while the appellant's account equally remained uncorroborated by any independent evidence. In the absence of credible evidence establishing the precise point of impact or demonstrating which driver was solely responsible, it is not possible to attribute full liability to either party.

44. Where the evidence leaves the court in a position that it cannot determine, on a balance of probabilities, whose version is more probable, and each driver blames the other for the occurrence of the accident, the proper course is to apportion liability equally. As was observed by the Court of Appeal in *Hussein Omar Farah v Lento Agencies*
- [2006] KECA 388 (KLR) where the court held that: “In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs, the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.”
45. Accordingly, I find that the learned Magistrate misdirected herself in holding the appellant 100% liable. The evidence on record does not support a finding of exclusive negligence against THIKA HCCA NO. E003 OF 2025 15 | Page either party. In the circumstances of this case, and doing the best the Court can on the available evidence, liability ought to be apportioned equally between the parties.
46. The appellant further challenged the respondent's right to institute the suit under the doctrine of subrogation. In determining whether the doctrine of subrogation was properly invoked, this court takes into account that the right of subrogation arises as the legal basis upon which an insurer is entitled to step into the shoes of the insured.
47. In *Kenya Power & Lighting Company Limited v Julius Wambale & Another* (2019) eKLR, where the Court rendered as follows: - “The parameters within which the principle of subrogation applies are now well settled. The doctrine applies where there is a contract of insurance and following crystallization of the risk insured, the insurer had compensated its insured for financial loss occasioned thereby usually by a third party. Under this doctrine, the insurer is in law entitled to step into the shoes of the insured and enjoy all the rights, privileges and remedies accruing to the insured including the right to seek indemnity from a third party. The action must however be instituted in the name of the insured with his consent and must relate to the subject of the contract of insurance...It is not disputed that the insurance company has not yet settled the decretal amount on behalf of the applicant who is its insured. It therefore follows that its right under the doctrine.”
48. Further in *Opiss v Lion of Kenya Insurance Company* Civil Appeal No. 185 of 1991, the Court stated as follows: - THIKA HCCA NO. E003 OF 2025 16 | Page “... The right to subrogate does not create a privity of contract between the insurance company and the third party; it only gives the insurance company the right to take over the rights and privileges of the insured and therefore must be brought in the name of the insured. (emphasis added)”
49. The record demonstrates that CW3 produced documentary evidence showing that CIC General Insurance Company had indemnified its insured and thereafter instituted the present proceedings in the insured's name.

50. Likewise, the respondent produced documentary evidence in support of the repair costs, assessment fees, tracing charges and re-inspection fees proving their case on a balance of probabilities. Therefore, liability having been established, I find no reason to interfere with the award of special damages.
51. Based on the above, I also find no basis for interfering with the learned Magistrate's finding that the doctrine of subrogation had been properly invoked.
52. The upshot of the matter is that the appeal succeeds in part and hereby issue the following orders: i. The finding of liability by the trial magistrate of 100% against the appellant is substituted with a finding of shared liability at 50:50 between the appellant and respondent. ii. Each party to bear their costs of this appeal. Dated, Signed and Delivered Virtually on 17th September 2026. THIKA HCCA NO. E003 OF 2025 17 | P a g e T. W. OUYA (OGW) JUDGE In the presence of; Ms. Waithaka for Respondent Nyabanje holding brief for Mutegi for Applicant Nyabuto – Court Assistant THIKA HCCA NO. E003 OF 2025 18 | P a g e

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