



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kengere v Aisha Motor Dealers Ltd & 2 others (Civil Appeal  
E007 of 2023) [2025] KEHC 4798 (KLR) (10 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4798 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
CIVIL APPEAL E007 OF 2023  
CM KARIUKI, J  
APRIL 10, 2025**

**BETWEEN**

**THOMAS ALEX KENGERE ..... APPELLANT**

**AND**

**AISHA MOTOR DEALERS LTD ..... 1<sup>ST</sup> RESPONDENT**

**NNUS SACCO LTD ..... 2<sup>ND</sup> RESPONDENT**

**SAMUEL HURE ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. A.N. Sisenda  
(S.R.M.) delivered on 03/04/2023 in Narok CMCC NO. 308 of 2018)*

**JUDGMENT**

1. This appeal challenges the judgment of the Chief Magistrate's Court at Narok in Civil Suit No. 308 of 2018, delivered on 03/04/2023, in which the trial court made awards as follows: -
  - a. Liability 80:20 in favour of the appellant.
  - b. General damages Kshs. 120,000/= less 20% contribution Kshs. 24,000/= 80% Kshs. 96,000/=
  - c. Special damages Kshs. 7,550/= Total Kshs. 103,550/=
2. The memorandum of appeal dated 20/04/2023 cited two grounds of appeal which relate to:
  - i) liability.



## **Background**

3. The suit arose from a road traffic accident, which occurred on 27/08/2018 along Bomet-Narok road involving motor vehicle registration number KCJ 369U. The appellant was a fare-paying passenger aboard the said motor vehicle. The appellant sustained serious bodily injuries.
4. The appellant testified and called one witness, whereas the respondents did not call any witnesses.

## **Directions of the court**

5. The appeal was canvassed by way of written submission.

## **The Appellant's Submissions**

6. The appellant submitted that the appellant proved negligence against the respondents on a balance of probability and in the absence of evidence to attribute contributory negligence to the appellant then the respondents must be held 100% liable for the accident. The appellant relied on *Ngingi Kuria & Another V Thomas Ondili Oduol & Another* [2019] eKLR, *Linus Nganga Kiongo & 3 Others Vs Town Council of Kikuyu* [2012] eKLR Cited In *D.T Dobie & Company(K) Ltd Vs Wanyonyi Wafula Chebukati*[2014] eKLR, *John Wainaina Kagwe V Hussein Dairy Limited* [2013] eKLR, and *Samuel Munyanzi Mugendo V Wycliffe Omboto* [2021] eKLR.

## **The 3<sup>rd</sup> respondent's submissions.**

7. The 3<sup>rd</sup> respondent submitted that the appellant failed to demonstrate that she had taken any precautions such as fastening her seat belt. The 3<sup>rd</sup> respondent relied on *Mwema Musyoka V Paulstone Shamwama Sheli* [2020] eKLR, and *Nance Vs British Colombia Electric Rly* [1951] AC 601.

## **Analysis and Determination.**

### **Duty of court**

8. The appellate court shall have the same powers and shall perform nearly the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted herein (Section 78(2) of the *Civil Procedure Act*).
9. The first Appellate Court should, therefore, evaluate the evidence afresh and make any of its conclusions, albeit it must bear in mind that it did not have the opportunity of seeing or hearing the witnesses firsthand. See the case of *Selle & Anor –vs. Associate Motor Boat Co. Ltd* 1968 EA 123.

### **Issues**

10. This appeal relates to liability only.

### **Liability**

11. Who is to blame for the accident, and by what proportion, if at all?
12. The trial court noted that the defendants now respondents had not adduced any evidence or called any witness to controvert the evidence of the appellant herein. The trial court however noted that the appellant did not testify as to whether he had taken precautionary measures to ensure his safety in the event of an accident such as fastening her safety belt. The trial court consequently found that the



appellant must shoulder some liability for the injuries sustained and awarded a liability in the ratio of 80:20 in favour of the appellant.

13. According to the evidence of PW1 and PW2, the driver of the suit motor vehicle was overspeeding and as a result, the motor vehicle lost control and rolled.

14. Section 107 (1) of the *Evidence Act* provides that:

Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.

15. This refers to the legal burden of proof. There is, however, an evidential burden of proof which is captured in Sections 109 and 112 of the *Evidence Act* as follows:

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.

16. The two provisions were dealt with in the decision of Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, in which this Court held as follows:

“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.”

17. It follows that the general rule is that the initial burden of proof lies on the plaintiff, and the appellant in this appeal, but the same may shift to the respondents depending on the circumstances of the case. In the persuasive High Court case of Evans Nyakwana –vs- Cleophas Bwana Ongaro [2015] eKLR it was held that:

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side.”

18. However, as held in Michael Hubert Kloss & Another vs. David Seroney & 5 Others [2009] eKLR:

“The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in Stapley vs. Gypsum Mines Ltd (2) (1953) A.C. 663 at p. 681 as follows:

“To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law, this question must be decided as a properly instructed and reasonable jury would decide it...The



question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history, several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally...”

19. The issue is however whether the appellant as passenger ought to have been found 20% liable or the respondents 100% liable. In this case, this Court is being called upon to interfere with the trial court’s finding on liability. In *Khambi and Another vs. Mahithi and Another* [1968] EA 70, it was held that:

“It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.”

20. It was not disputed that the appellant was a passenger in the suit motor vehicle. The appellant in his cross-examination was never asked if he had fastened his safety belt or not. The respondents, however, did not call any evidence to confirm this allegation as the appellant did not confirm either that he had no safety belt on.

21. I find that the respondents failed to prove that the appellant contributed to the occurrence of the accident. Therefore, the appeal on liability succeeds. Accordingly, this court finds the appeal is merited, and the same is hereby allowed with costs to the appellant. Thus, the court makes the following orders.

- i. Liability 100% in favour of the appellant.
- ii. General damages Kshs. 120,000/=
- iii. Special damages Kshs. 7,550/=
- Total.....127,550
- iv. Costs to the appellant

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 10<sup>TH</sup> DAY OF APRIL, 2025**

.....  
**CHARLES KARIUKI**  
**JUDGE**

