



Atanga v Rojeh (Civil Appeal E195 of 2023) [2025] KEHC 6067 (KLR) (15 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6067 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E195 OF 2023
BM MUSYOKI, J
MAY 15, 2025**

BETWEEN

DANCAN ONYANCHA ATANGA APPELLANT

AND

GEORGE ROJEH RESPONDENT

(Being an appeal from judgment and decree of Senior Principal Magistrate's Courts Nyando (J.M. Wekesa SPM) civil case number 42 of 2020 dated 8-11-2023)

JUDGMENT

1. The respondent instituted suit against the appellant in the subordinate court claiming general and special damages suffered as a result of an accident which occurred on 15-11-2020 involving motor cycle registration number KMDZ 953M ridden by the respondent and the appellant's motor vehicle registration number KCT 730G. The Honourable Magistrate found each party 50% liable and awarded the respondent a sum of Kshs 400,000.00 before liability and costs of the suit.
2. It is against the above judgement that the appellant has raised the following grounds of appeal in his amended memorandum of appeal dated 5th January 2024;
 1. That the learned trial magistrate erred in law and fact in holding the appellant 50 % liable in negligence.
 2. That the learned trial magistrate erred in law and fact by failing to dismiss the respondent's suit in view of the evidence adduced.
 3. That the learned trial magistrate erred in law and fact in failing to consider respondent case despite the overwhelming evidence in court confirming that the Appellant was hit from the rear by the Respondent.



4. That the learned magistrate erred in law and facts in failing to consider the submissions by the Appellant on both issues of liability and quantum.
5. That the learned trial magistrate erred in law and fact in suing the wrong principles in the assessment of damages thereby arriving at an erroneous decision.
3. It is notable from the above grounds that the appellant has not appealed against the quantum. This is also evident from his submissions dated 24th September 2024. I will therefore confine myself to the issue of liability only. It is trite law that an appellate court should conduct a first appeal in the same manner as a hearing where it re-evaluates, re-considers and re-analyses the evidence produced before the trial court afresh and comes to its own independent conclusion. The appellate court should however be alive to the fact that it did not hear the witnesses or record the evidence first hand and also that it did not observe the demeanour of the witnesses and therefore give due allowance to that. It is on the basis of this principle that I reproduce the evidence of the parties as hereinbelow.
4. The respondent told the court that he was riding his motor cycle along Katito – Ahero road when he was knocked by the appellant’s motor vehicle. That is as much as he told the court on liability in his evidence in chief after which he went on to produce documents in proof of the occurrence of the accident and injuries he sustained. In cross examination, he stated that him and the motor vehicle were going towards the same direction. He also denied that he hit the motor vehicle from behind. He added that the motor vehicle was overtaking and came fast from behind before it knocked him down. He also admitted that he was not aware of the conclusion of the investigations.
5. The respondent called another witness Corporal Immaculate Okongo attached to Ahero police station performing traffic duties. She produced an abstract for the accident and confirmed that the respondent was the rider of the motor cycle. She said nothing on liability but on cross examination, she said that the respondent rammed the motor vehicle from behind. She also testified that the damage to the motor vehicle was on the rear left-hand side. In re-examination, the police officer stated that, that was not enough to show that the respondent was the cause of the accident. The third witness for the plaintiff was a clinical officer whose evidence has no contribution to the issue of liability.
6. The appellant’s first witness was one James Sabore, a police constable attached to Ahero Police station. He told the court that he visited the scene of the accident and his observations were that the motor cycle was moving from Katito towards Ahero direction and on reaching Ayweyo area, it rammed the motor vehicle from behind occasioning injuries to the rider and his pillion passengers and damage to the rear the bumper of the motor vehicle. He blamed the motor cycle rider for failing to keep distance. In cross examination, he maintained his stand and added that he was not the investigations officer but he accompanied the investigating officer to the scene.
7. The second witness for the defemce was Jared Otieno Juma who was the driver of the motor vehicle. He told the court that at the material time, he was driving the motor vehicle in question from Oyugis to Kisumu and on reaching Ayweyo, he was stopped as the road was being repaired upon which he switched on hazards signals of his motor vehicle to allow motor vehicles from Kisumu to Oyugis to pass. He added that before the vehicles were done with passing, he heard a bhang and upon checking, he found a motor cycle rider lying on the road behind his motor vehicle. The motor cycle was carrying two children at the front, a woman at the back and maize in the back and the rider. He maintained that, he was not moving and the motor cycle hit his motor vehicle from behind. On cross-examination, he stated that he was never charged in court and he was not aware that the rider was charged in court for a traffic offence.



8. The trial court after analysing the evidence observed that both parties claimed that the other was to blame for the accident. According to the magistrate, none of the parties availed an eye witness to corroborate their side of the story and it was not clear who was to blame for the accident since the investigations officer was not availed. She also stated that there was no sketch plan to prove the state of the scene of the accident. These are the reasons she apportioned at liability 50%.
9. This court is alive to the legal position that it should not interfere with the decision of the trial court for reasons that it would have reached a different opinion. However, the court is under an obligation in the appeal to re-evaluate the evidence and come to its own independent conclusion. It is true that where there is a collision between two or more vehicles and the court finds itself in a middle ground where it cannot tell on a balance of probabilities which of the vehicles was to blame, it is reasonable and acceptable to apportion liability equally. The question this court must answer here is whether in the circumstances and on the basis of the evidence produced before the court, there was no clear evidence on who between the appellant's driver and the respondent was to blame for the accident. The test to be applied in this case is that of balance of probabilities. If I find one of the versions of the evidence more probable than the other, I must apportion liability on the less probable party.
10. The respondent in this matter stated that the motor cycle and himself were moving towards the same direction when the appellant's motor vehicle hit him from behind. He alleges that the motor vehicle was overtaking fast. If indeed the motor vehicle was overtaking when it hit the respondent, the damage on the motor cycle would have been at the rear. The police officer who testified on behalf of the respondent admitted that the motor cycle rammed the motor vehicle from behind a position supported by the two defence witnesses one of them a police officer.
11. In my view, an eye witness testimony is not the only corroborative evidence in a court of law. Any other material and relevant source of evidence can corroborate a particular version of facts. I find the fact that the motor vehicle was damaged on the rear bumper to be corroborative of the testimony that the appellant's motor vehicle was hit from behind. The respondent admitted that if indeed he had been hit from behind, his motor cycle would have been damaged on the rear side. A person who is control of a motor vehicle and proceeds to hit another vehicle from behind, creates a burden for himself to prove that he was not negligent. In my view, the fact that he hit the other vehicle from behind creates a prima facie case of negligence against him because in normal circumstances, drivers are expected to concentrate on what is ahead of them and unless there are exceptional causes for such an accident, the driver from behind must be blamed. In *Orioki v Kevian Kenya Limited (2025) KECA 780 (KLR)*, the Court of Appeal held as follows;

Under common law, a driver who hits another vehicle from behind is generally presumed to be at fault, unless there is sufficient evidence to rebut this presumption. (See: *Njuguna v Chogo [1985] KLR 452*). In this case, the appellant admitted that he collided with the respondent's vehicle from behind. This fact alone placed on the burden on the appellant to prove that the collision was not due to his negligence'
12. The plaintiff had the burden of proof in the matter and I find that he failed to discharge the same. The respondent failed to prove negligence on the part of the appellant's driver on a balance of probabilities. I find the magistrate's finding on liability at 50% erroneous and I therefore set it aside.
13. In conclusion, this appeal succeeds and the suit in the lower court is hereby dismissed with costs. I will not make any orders of costs in the appeal..

DATED SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF MAY 2025.



B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in absence of the parties.

