



**Kinuthia v Geothermal Development Company Limited (Civil Appeal
E001 of 2024) [2025] KEHC 5971 (KLR) (8 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 5971 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDAMA RAVINE
CIVIL APPEAL E001 OF 2024**

RB NGETICH, J

MAY 8, 2025

BETWEEN

HESBORN NJOROGE KINUTHIA APPELLANT

AND

GEOHERMAL DEVELOPMENT COMPANY LIMITED RESPONDENT

JUDGMENT

1. The Respondent filed suit in the lower court vide plaint dated 29th November 2021 on 2nd December, 2021 following personal injury claim arising from a road traffic accident which occurred on 7th July, 2021 along Marigat-Loruk road involving the Appellant's motor vehicle registration number KCE 895 Z and the Respondent's motor Vehicle registration number KBG 418 C. The Respondent sought general damages and special damages of Kshs 129,490.00 plus costs and interest.
2. By judgment delivered on 24th October 2023, the trial court apportioned liability at 50:50 and assessed General damages at Kshs 1,800,000, special damages at Kshs 129,490.00 and Future medical expenses at Kshs 200,000
3. The Appellant being aggrieved and dissatisfied with the trial court decision, challenged finding on liability on ground that the trial magistrate erred in disregarding the Appellant's evidence which demonstrated that the Respondent's driver veered off his lane onto the Appellant's rightful lane thus occasioning the accident. The appeal proceeded by way of written submissions.

Appellant's Submissions

4. The Appellant submits that the Police Investigating Officer blames the Respondent's deceased driver while DW1 blamed the Appellant but the Police Abstract indicate that charges would have been preferred against the Respondent's driver if he had survived the accident; that PW2 Sergeant Daniel Kathenya who was the investigating officer testified that the Respondent's driver was to blame for causing the accident by failing to keep to his lane and thereby collided with the Appellant's vehicle and



produced police abstract as Plaintiff's Exhibit 4. That his evidence which blamed the Respondent's driver was not challenged during cross examination hence it stands unrebutted.

5. Further that in re-examination, PW2 confirmed that the point of impact was on the rightful lane of the appellants motor-vehicle and during cross – examination, DW1 stated that he did not know where the vehicles stopped after the accident and he also confirmed that the Appellant's vehicle was hit on its right side and had the respondent's vehicle been driven at 45 km/h as alleged, it would have immediately stopped upon driver applying break.
6. They submit that the Appellant in his evidence in chief, stated that he took evasive measures by driving off the road to his nearside, to avoid the accident to give room to the defendant's driver.
7. The appellant submits that in her judgment, the trial magistrate rehearsed the plaintiff's evidence that he took evasive measures to avert a head-on collision but nonetheless proceeded to blame both parties on grounds that the Investigating Officer did not produce sketch maps of the accident scene and held that both versions of the party's testimonies were believable. The appellant submit that this finding is not based on facts on record.
8. Further that the record show that PW2 being an expert Police Investigator, testified that the Respondent's driver was to blame and DW1 stated that he did not know where the vehicles stopped after the accident.
9. The appellant submits that the evidence on record does not support the trial Magistrate's finding that both parties were to blame and apportioning liability as a result of failure by the Police to tender sketch maps of the accident scene is akin to placing a higher burden of proof in civil cases yet the standard is on a balance of probabilities; that the holding was therefore erroneous.
10. Further that, DW1 was a passenger in the accident vehicle but he conceded he did not know where the accident vehicles stopped after impact and was not therefore able to tell the point of impact whereas the Appellant testified that the point of impact was off the road on his near side (the respondent's far side), the respondent having crossed over onto his lane.
11. The Appellant submit that a Police Abstract is the final and conclusive product of Investigations and requiring the production of sketch maps and OB extracts would be akin to placing a burden of proof that is higher than a balance of probabilities; and should the Respondent have had doubts of the Abstract, they should have tendered evidence to displace the conclusion that the Respondent was to blame, by for instance taking out summons against the Investigating Officer and producing the sketch maps if at all the same would have demonstrated that their client's deceased driver was not blameworthy. The Appellant rely on the case of *Mbiti v Maingi & another* (Civil Appeal E77 of 2022) [2023] KEHC 20833 (KLR) (10 July 2023) (Judgment) and in the case of *Kenya Alliance Insurance Co. Ltd v Thomas Ochieng Apopa* (suing as Administrator of the Estate of Pamela Agola Apopa) deceased [2020] eKLR and conclude that the Police Abstract at paragraph 3 captures the fact that the deceased driver would have been charged by the Police investigating Officer for causing the accident if he survived the accident.
12. That the Learned Magistrate thus erred in apportioning liability at 50:50 and pray that the finding on liability be set aside and substituted with a holding that the Responded was wholly to blame for the accident. In the alternative, the appellant pray that the court holds the Respondent liable to a higher extend as compared to the Appellant; certainly not at 50:50 as the weight of the evidence on record tilts the scale, on a balance of probabilities, in favour of the Appellant.



Respondent's Submissions

13. The Respondents submits that the issue for determination is whether the trial magistrate was correct in apportioning liability in the ratio of 50:50 between the Appellant and the Respondent; quantum has not been appealed against and argue that the onus is on the Plaintiff to prove a case of negligence upon the Defendant as provided for under Section 107(1) of the *Evidence Act*. That the principle of 'whoever asserts must prove' was defined in the case of Jennifer Nyambura Kamau vs Humphrey Mbaka Nandi [2013] eKLR.
14. The Respondent's submits that the trial court was right in apportioning liability at 50:50 between the Appellant and the Respondent and urge this court not interfere with this finding. He urged this court to reevaluate evidence of pw2 the Police Officer and pw1 the Plaintiff on Page 84-88 of the Record of Appeal.
15. The appellants submit that pw1 stated that on 7th July 2021, he was driving motor vehicle registration number KCE 875 Z TOYOTA PICK UP along Loruk Marigat Road when at Kijiji ya Forest Area the driver of motor vehicle registration number KBG 418 C Toyota Prado, moving from the opposite direction, failed to keep to his lawful lane leading to a collision and on cross examination, the plaintiff said he swerved off the road and his evidence was not controverted by PW 2.
16. That Pw2 PC Sergeant Daniel adduced evidence in support of his case. He confirmed that on 7th July 2021 motor vehicle registration number KCE 875 Z Toyota Pickup moving from Loruk - Marigat and motor vehicle registration number KBG 418 C Toyota Prado coming from Marigat - Loruk were involved in an accident and produced police abstract - PEX8. He testified that the accident happened when motor vehicle registration number KBG 418 C failed to keep to its lane and collided with KCE 875 Z. That on cross-examination, he stated that the road was under construction and the left side of the road had loose chippings: The Defendant's driver was on lawful lane. That on further cross examination he confirmed that he did not have the police file neither did he have the sketch plan but he confirmed on re-examination that the point of impact was on the side of the Defendant's vehicle.
17. The Respondent submits that he was travelling as a lawful passenger aboard motor vehicle registration number K8G 418 C and that while they approached Kampi ya Samaki Junction, they encountered a speeding vehicle from the opposite direction which had full headlights on. That the vehicle abruptly and without warning, encroached onto their lawful lane but unfortunately due to excessive speed of the Plaintiff's motor vehicle an accident occurred resulting in extensive damage to the front right-hand side of the defendant's motor vehicle. He submits that the defendant's driver swerved off road to his left side but a collision occurred.
18. Further that Plaintiffs evidence was contradictory in the sense that PW2 the Police officer on one hand claimed that it was the Defendant's deceased driver that left his lane and veered onto the Plaintiff's lane but then again in re-examination contradicts himself and states that in fact the accident occurred on the Defendant's driver lawful lane.
19. That secondly, although it is the Appellant's case that the Respondent's driver swerved to his lane and hit his motor vehicle, it is the Respondent's case that the Plaintiff's motor vehicle registration number KCE 875 Z TOYOTA PICK UP abruptly and without warning, encroached onto their lawful lane.
20. That in as much as both parties have contrasting versions on the circumstances of the subject accident. PW 2 in re-examination confirm DW1's evidence that it was indeed the Appellant that encroached onto the lawful lane of the Defendant's vehicle hence the accident occurred on the Defendant's vehicle lawful lane.



21. That going with the testimony of DW 1, they find it to be more believable as the Defendant's motor vehicle was hit on the driver's right side and having been hit on the right side and that the accident occurred on the Defendant's rightful lane, it is evident that the Plaintiff's motor vehicle was on a high speed and veered onto the Respondent's lawful lane thus causing the accident and equally contributed to the occurrence of the accident. That it was also said by DW 1 that the Appellant had his head lights on full lights thus blinding the Respondent's driver, a factor that contributed to the accident.
22. They submit that a person driving a motor vehicle on the road is under a duty of care to other road users. They rely in the case of *Teresia Sebastian Massawe* {suing as the legal Administratrix of the estate of the late *Silvia Sebastian Massawe -Vs- Solidarity Islamic (Kenya Office) & Another* (2018) eKLR, where *Nyakundi J.* cited the English case of *M. Jones -Vs- Livior Quarries Ltd* (1992) 2QB 608 on what constitutes contributory negligence.
23. In the premises, they submit that the Appellant ought to have exercised due care and attention while driving on the said road. That it is evident from the testimony of DW 1 that the Appellant's motor vehicle was being driven at a high speed and with full flashlights which impaired the road sight of the Defendant's driver who unfortunately died in the accident and being that the accident occurred on the Respondent's vehicle rightful path, then it may be inferred that it was the appellant that veered onto the Respondent's lane. That as such that the Appellant ought to bear contributory negligence since had he been driving at a reasonable speed and with due care to other road users the accident would have been averted. They argue that the accident occurred at around 7:30 pm and it is therefore further believable that the Appellant might have had his headlights on and on full lights blinding the Respondent's driver. They place reliance in the case of *David Ogol Alwar v Mary Atieno Adwera & another* (2021) eKLR.
24. The Respondent submits that the plaintiffs on a balance of probability, failed to prove that the Respondent was the sole cause of the accident on a balance of probabilities. That the scope and extent of the fundamental legal principles on who is to blame for negligence are settled, they place reliance in the cases of *Nandwa vs Kenya Kazi Ltd* [1988] KLR 488 and *Regina Wangechi v Eldoret Express Co. Ltd* [2008] eKLR.
25. It is the Respondents submissions that the court was right in finding both the Appellant and Respondent owed each other a duty of care and both equally contributed to the accident as was held all together and they invite this honorable court to hold as such.

Analysis And Determination

26. This being the first appellate court, I am obligated to re-evaluate the evidence of the trial court and come up with my own conclusion. I am however minded of the fact that unlike the trial court, I did not have the opportunity to hear witnesses and observe their demeanor, for this I give due allowance. This position was held in the case of *Selle & Another Vs. Associated Motor Board Company Ltd.* [1968] EA 123, where the court held as follows: -

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this 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...”



27. In view of the above, I have perused and considered evidence adduced before the trial and submissions filed by the parties herein. What is in issue is whether the trial court erred in apportioning liability at the ratio of 50:50. The appellants urge this court to find that the respondent is wholly to blame for the accident and places reliance on the police abstract which blamed the Respondents.
28. In the case of *Kanyungu Njogu Vs Daniel Kimani Maingi* [2000] eKLR the court when faced with two probabilities, held that, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other.
29. Further, in *Stanley –v- Gypsum Mines Limited (2)* (1953) A.C 663 at P. 681 Lord Reid reasoned that:
- “To determine what cause 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 fact of each particular case. In the circumstances, the trial court noted that the plaintiff contributed to the accident and on a balance of probability both parties were to be held responsible in equal portions.
30. Record show that the plaintiff testified and availed Pw2 the police officer who was the investigating officer in the traffic case. Pw2 said the accident occurred in a corner and the respondent’s vehicle was moving towards Loruk while the appellant’s vehicle was moving from opposite direction towards Marigat. He testified that the road was under repair and there were loose chippings on the lane of respondent’s vehicle registration number KBG 418C He said the point of impact was on the lane of appellant vehicle registration number KCE 895L.
31. Even though respondent’s witness Dw1 who was a passenger in respondent’s vehicle registration number KBG 418C said that it’s the appellant’s vehicle which collided with their vehicle, it is not disputed that the appellant’s vehicle registration number KCE 895L was hit on the driver’s side. This clearly confirm that the respondent’s vehicle registration number KBG 418C was not on its lane but had moved to lane of motor vehicle number KCE 895L.
32. The nature of damage to respondent’s vehicle corroborates pw2’s evidence that the deceased driver of motor vehicle registration number KBG 418C would have been charged for causing the accident if he survived the accident. In my view, the respondent’s vehicle registration KBG 418C should have shouldered higher blame in the accident.
33. However, both drivers have responsibility of being on the look out for other road users and take steps to avoid the accident. The scene being in a corner as stated by Pw2, both vehicles ought to have reduced speed to negotiate the corner and have clear view of the road. Having found that the driver of KBG 418C blame outweigh blame on part pf the appellant, I hereby apportion liability at 30:70 against the Respondent. Respondent to shoulder 70% liability and Appellant 30% liability.
34. Final Orders:-
1. Finding on liability by trial court is hereby set aside.
 2. Liability is apportioned at 30:70; the Appellant /plaintiff to shoulder 30%liability and the Respondent/Defendant to shoulder 70% liability.
 3. Costs of appeal to the Appellant.



JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 8TH DAY OF MAY 2025.

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RACHEL NGETICH

JUDGE

In the presence of:

Ms. Kioko holding brief for Terer for Appellant.

Mr. Ngeno holding brief for Respondent.

Elvis/Momanyi – Court Assistants.

