Liberty Enterprise Ltd v Daro (Civil Appeal E003 of 2024)
[2025] KEHC 6698 (KLR) (15 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6698 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MARSABIT

CIVIL APPEAL E003 OF 2024

FR OLEL, J

MAY 15, 2025

BETWEEN

LIBERTY ENTERPRISE LTD ..... APPELLANT

AND

YASIN MOHAMED DARO ..... RESPONDENT

(Being An Appeal From The Judgment And Decree Of Hon M.s.kimani (principal Magistrate) Signed And Dated 15Th November 2023 But Delivered By Hon W.k Cheruiyot (pm) On 24Th November 2023 In Moyale Civil Case No. 4 Of 2020))

JUDGMENT

A. Introduction

1. This Appeal arises from the judgment/ decree of Hon M.s Kimani (PM) dated 24th November 2023 where he dismissed the Appellant's primary suit on the basis that they had not established liability as against the respondents driver, arising from a road traffic accident involving the Appellants Motor vehicle Registration No KCJ 932 S Mercedes Benz Actros (hereinafter referred to as the 1st suit motor vehicle) and Motor vehicle registration No KBL 068A Mitsubishi lorry (hereinafter referred to as the 2nd suit motor vehicle).

2. The Appellant, who was the plaintiff in the primary suit, had sued the respondent claiming special damage to the tune of Kshs.4,652,104/= arising from a road traffic accident which occurred on 20.06.2017 at around 4.40 am along Moyale – Marsabit Road, when the 1st suit motor vehicle rammed into the back of the 2nd suit motor vehicle, which had developed a mechanical problem and had stalled on the road.

3. The respondent, on the other hand, denied that his driver/agent was negligent and pleaded that his motor vehicle had stalled off the road and his driver/agent had taken all precaution to warn other road

users of its presence by placing the lifesaving triangle appropriately in front and behind the stalled motor vehicle. He blamed the Appellants' driver of not driving with due care and attention as he had crashed the life saver triangle and proceed to ram into the 2nd suit motor vehicle, yet he had ample opportunity to avoid the said accident given that the accident spot was along a straight road .

4. The Appellant called four witnesses to support their case, while in defence, the respondent called two witnesses. The trial Magistrate considered the evidence and written submissions presented and found that although the Appellant had adequately proved that the special damages pleaded, they had failed to prove that the respondent's agent was negligent and hence liable for the accident that occurred. On this basis, the learned trial Magistrate proceeded to dismiss the Appellant's suit.

B. The Appeal

5. The Appellant, being dissatisfied with the said judgment, filed their memorandum of Appeal dated 12th January 2024 and raised the following grounds of appeal, namely: -

    a. That the learned Principal Magistrate erred in law and fact by holding that the Appellants' driver was entirely to blame for the accident involving motor vehicles' registration KCJ 932S and KBL 068A, despite the overwhelming evidence on record to the contrary.

    b. That the learned Principal Magistrate erred in law and fact by holding that the Appellant failed to prove on a balance of probability that the respondent was to blame for the accident.

    c. That the learned Principal Magistrate failed to appreciate and/or consider the Appellants' submissions on the issue of whether the respondent was liable for the accident.

    d. That the learned Principal Magistrate erred in law and fact in failing to consider the issues of road visibility at night, the positioning on the road of Motor vehicle registration No KBL 068A, during the accident, and the proximity and placement of the warning signs on the road.

    e. That the learned Principal Magistrate erred in law and fact in raising the Appellant's burden of proof despite the documentary and oral evidence on record.

    f. That the learned Principal Magistrate erred in law and fact in failing to award the material damages claim of Kshs 4,653,104/= incurred by the Appellant as a result of the Respondent's negligence.

6. The appellant thus urged this court to allow this Appeal, set aside the decree made by the trial court, and proceed to allow the Appeal with costs

i. Evidence at Trial.

7. PW1 Margaret Muthoni Kalya, stated that she was the general manager of Sunrays General Insurance Investigators and had been assigned to investigate the whereabouts of the respondent by the Appellants' insurer, Sanlam Insurance Company Ltd. They carried out their investigations and handed over their report to the Appellants insurer. They charged the said insurer, a sum Kshs.25,000/=, for work done, which amount was settled. Upon cross examination, she confirmed that their investigations only concentrated in finding ownership details and financial status of the respondent. They did not investigate circumstances under which the accident occurred.

8. PW2, George Ndutire Karugo, testified that he works at Timing Auto Assessors as an insurance motor assessor, and recalled that on 28.06.2017, he received instructions from Sanlam insurance Company Ltd, to assess the 1st suit motor vehicle. The pre-accident value was Ksh.6,300,000/= and he assessed its repair cost would cost approximately Kshs.4,026,360/=. It was therefore uneconomical to repair the

said motor vehicle, and it was declared a write-off. Concurrently, he assessed and estimated the salvage value to be Ksh.2,000,000/=. He prepared his report and charged Sanlam Insurance Company Ltd Kshs.12,760/= for the services rendered and Kshs.5,800/= for court attendance. He also produced his Assessment report and receipts as exhibits before the court.

9. PW3 James Mandare stated that he was a claims officer at Sanlam General Insurance Company Ltd, which had insured the 1st suit motor vehicle. Under policy Number 023/087/1/251290/2016/11. He confirmed that the said motor vehicle had been involved in a road traffic accident and as a result had been declared a write off, hence they compensated the Appellant and disposed off the salvage to the highest bidder who paid a sum of Kshs.1,200,000/= for the said salvage.

10. Further, they had incurred other expenses, including storage fees, auctioneers' fees, motor vehicle assessment fee, and the total cost incurred after deducting the salvage cost was Kshs.4,651,604/= which they claimed under the principle of subrogation. PW3 produced all receipts to justify their claim.

11. PW4 Daniel Kinyanjui Kimani confirmed that he was an employee of the Appellant company and was the driver of the 1st suit motor vehicle. On the material day when the accident occurred, he was driving towards Moyale at about 4.40 am when he encountered the 2nd suit motor vehicle, which had stalled on the road and its driver had not put a life saver triangle to alert other road users of its presence on the road. Unfortunately, he could not overtake the 2nd suit motor vehicle as there was an oncoming vehicle, and ended up ramming into its back.

12. He further testified that he was an experienced lorry driver, having clocked 23 years of driving experience under his belt and had previously driven along the Marsabit -Moyale route. He was thus well conversant with the said route and reiterated that the 2nd suit motor vehicle had stalled in the middle of the road and not outside the road. Further, had they put the life saver sign, he would have managed to control his vehicle to avoid the accident as he was driving at a speed of about 50 – 60km/hr. He also confirmed that the accident occurred on a clear stretch, and luckily, nobody was injured. After the accident, PC Mwaki and his colleagues came to the scene, and later he was issued with a police abstract, which squarely laid blame for the occurrence of the accident on the respondent's driver.

13. Under cross-examination, PW4 confirmed that the accident occurred on a straight stretch of the Marsabit - Moyale road and reiterated that he was driving at a speed of about 50- 60 km/hr. He denied admitting to the police that he was fatigued and/or sleepy at the time of the accident and asserted that the police abstract he produced into evidence was genuine and not a forgery.

14. DW1 Toshe Humbe Gonde, relied on his witness statement dated 19.04.2020, wherein he confirmed that on the material day, he was driving the 2nd suit motor vehicle and it suffered a mechanical breakdown at “funanyatta”, which was about 20km south of Moyale town. He managed to park the said motor vehicle completely off the road, with its right-hand side wheels completely on the nearside road shoulder. He also averred that after disembarking, he fetched the lifesaver triangle signs and placed them on recommended spots on the road surface at a recommended distance of about 30m behind the 2nd suit motor vehicle.

15. As he was checking the 2nd suit motor vehicle engine, he heard a loud bang from the rear and on checking noticed that the 2nd suit motor vehicle had rammed into his motor vehicle from the rear. He was perturbed as to how the said accident occurred as he was off the road and noticed that the 1st suit motor vehicle had crushed the triangle lifesaver and veered off to its nearside, thus crushing into his stationary motor vehicle. DW1 further alleged that PW4 alighted from his cabin and lamented that he had not had enough rest since he embarked on his journey from Mombasa and it was quite evident that he had lost control while driving due to profound fatigue.

16. DW1 further testified that he called the traffic police, who came and interviewed both drivers, and PW4 had narrated them the exact story as to how the accident occurred. The said traffic police officers processed the accident scene and made arrangements for their vehicles to be towed to the police station. DW1 reiterated that he was not to blame for the accident that occurred, and it was also not true that he had parked the 2nd suit motor vehicle in the middle of the road. The accident had also occurred on a straight stretch of road, and PW4 ought to have been able to see his vehicle in good time to avoid ramming into its backside. He thus urged the court to dismiss the suit filed.

17. Under cross-examination, DW1 stated that he had 8 years of driving experience and was conversant with the road stretch from Marsabit to Moyale. He reiterated that upon stalling, he did place the triangle life saver sign about 50 meters on the back and front of the 2nd suit motor vehicle, giving ample warning of the danger that lay ahead, and this fact, could also be confirmed by the traffic officers who visited the scene of the accident. He insisted that it was PW4 who was negligent as he had crashed the said life saver sign and rammed into the 2nd suit lorry. This was because he was fatigued, having driven from Mombasa.

18. DW2 PC Thomas Mwaki stated that he was attached to Moyale Police Station and was on duty on 20.06.2017, when the traffic base commander was contacted and informed about the accident involving the two suit motor vehicles along Marsabit—Moyale Road. He, alongside PC Opiyo, PC Maina, and PC Cholyo, proceeded to the accident scene and confirmed that the 1st suit motor vehicle had rammed into the back of the 2nd suit motor vehicle, leaving it with extensive damage.

19. They processed the scene as usual and organized for both motor vehicles to be towed to the police station. DW2 further confirmed that, at the scene of the accident, they did not meet either of the drivers as they had been taken to hospital, but they later came to the police station and recorded their statements, with the Appellants driver admitting that he was fatigued and sleepy thus did not see the stalled lorry in good time. The parties agreed to settle the matter, and the Appellant's director did pay the respondent a sum of Kshs 80,000/= to cover for the material damage caused to the 2nd suit motor vehicle.

20. DW2 was referred to the police abstract (Exhibit P1), and he confirmed that he did not issue the said abstract, and referred to his abstract, which tallied with the entries he had made in the OB. Under cross-examination, DW2 stated that he could not recall when the accident occurred, but believed that it occurred in the evening or early morning. He confirmed having visited the accident scene and noticed that the 1st suit motor vehicle had overrun the lifesaver triangle that had been placed behind the 2nd suit motor vehicle. He also confirmed that he did not take photographs or draw a sketch plan of the accident scene.

21. As regards the two police abstracts, he reiterated that the entries which he made in the OB captured the correct information regarding the accident scene and reaffirmed that he did not issue the police Abstract (Exhibit P1) produced by the appellant and did not agree with its contents, which suggested that the 2nd suit motor vehicle was to blame for this accident. Finally, he also confirmed that he did not have any evidence in court to prove that the appellant paid the respondent a sum of Kshs 80,000/= to compensate him for the material damage occasioned to the 2nd suit motor vehicle.

C. Submissions

i. The Appellants submissions

22. The appellant submitted that the trial magistrate erred in his analysis of the evidence presented and therefore failed to consider pertinent issues surrounding road visibility at night, the positioning of

the 2nd suit motor vehicle, placement of warning signs on the road and the fact that the agent of the respondent had left an unlit motor vehicle parked on the road. These facts had been adequately brought forth by the evidence of PW4 and corroborated by the evidence of DW2. It was therefore a misdirection/ error for the trial court to fail to consider the same and find that liability as against the respondent had not been adequately proved. Reliance was placed on the case of Vyas Industries Vrs Diocese of Meru (1976) KECA 18 (KLR), LWK (A minor suing through the father and next friend SKD) Vrs Stanley & Another (2019) KEHC (1946), (KLR) & Welch vrs Standard Bank Limited (1970) EA 115.

23. Secondly, the Appellant submitted that the trial Magistrate erred in law by raising the burden of proof to a higher standard and subsequently proceeded to wrongly dismiss their case without properly assessing the evidence adduced. The oral evidence of PW4 had been supported by the police abstract produced, which clearly stated that the 2nd suit motor vehicle had parked on the road due to a Mechanical breakdown. DW2 also did not produce the accident scene photograph's and/or the accident sketch plan to show the distance between where the lifesaver triangle was placed and the point of impact. DW2 had also confirmed that investigations were never carried out and no police file was opened. The learned trial magistrate had therefore erred in raising the standard of proof, while ignoring the ample evidence presented to prove that it was the respondents agent who was negligent and not their driver.

24. Finally, the trial Magistrate had also disregarded the evidence of PW4, who testified there was an oncoming motor vehicle from the opposite side of the road and therefore he could not avoid ramming into the back of the 2nd suit motor vehicle. The aforementioned evidence was never disapproved by the respondents witnesses and had the same been considered, the trial court would have arrived at a different conclusion. The trial courts finding on liability was therefore made using the wrong parameters and the appellant urged this court to reconsider the same. Reliance was placed on Anne Wambui Ndiritu (Suing as Administrator of the Estate of George Ndiritu Kariamburi-Deceased) Vrs Joseph Kiprono Ropkoi & four by four safaris company Ltd (2004) KECA 65 (KLR), and Kamau Vrs Kimani & Another (2023) KECA 187(KLR), all of which delved into how liability has to be determined.

25. The Appellant thus urged this court to find that their Appeal had merit, proceed to set-aside the trial court judgment and substitute it with and order entering judgment in their favour as prayed for in the plaint. The also prayed for costs of the Appeal.

ii. The Respondents Submissions

26. The respondent on the other hand, strenuously opposed this Appeal and submitted that the Appellant had failed to discharge the burden of proof, by failing to show that indeed it was their driver, who was negligent and his action/omission and/or commission had caused and/or contributed to the accident which occurred. A review of the evidence would show that PW4 evidence was amply disapproved by the evidence DW1 and DW2, both of whom confirmed that the life saver triangle was appropriately placed on the road and it was the Appellant's driver who had overrun it and proceeded to ram onto the 2nd suit lorry from behind. The police abstract produced by the respondents also supported/ corroborated this fact.

27. Further, the trial court was right not to place reliance of both police abstracts as they gave contradictory information. The case law relied on LWK (Supra) too was inapplicable as in that case, there was no evidence advanced, the basis upon which the court could apportion liability, while in the present case they had demonstrated that the Appellants driver had sufficient time, and opportunity to avoid

ramming onto the 2nd suit motor vehicle, given that he was driving on a straight road with clear markings, but inexplicably still went ahead and rammed into the 2nd suit motor vehicle.

28. It was clear that the trial court rightly appricated the facts and evidence presented and correctly concluded that it was the Appellants driver who was to blame for the said accident. The respondent thus urged the court to dismiss this Appeal with costs.

C. Analysis & Determination

29. I have considered this appeal, submissions, and the impugned judgment. I have also considered the decisions relied on and perused the trial court's record. This being a first appeal, it is by way of a retrial and this court, as the first appellate court, must re-evaluate, re-analyze, and re-consider the evidence afresh and draw its conclusions on it. The court should however bear in mind that it did not see the witnesses as they testified and give due allowance for that. (see Selle v Associated Motor Boat Co Ltd & Others [1968] EA 123).

30. A first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the *civil procedure Act* a court of first appeal can appreciate the entire evidence and come to a different conclusion. See Kurian Chacko Vs Varkey Ouseph AIR 1969 Kerala 316

31. The only issue that arises for determination in this Appeal is whether the trial court correctly apportioned liability amongst the parties herein.

32. The issue of apportionment of liability was discussed in Khambi and another Vs Mahithi and another (1968) E.A 70, where 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." Similar decisions have been reached in Mahendra M Malde Vs George M Angira Civil Appeal No 12 of 1981.

33. Similarly, in Lakhamshi Vs Attorney General(1971) EA 118 it was held that:

> " A judge is under a duty when confronted with conflicting evidence to reach a decision on it and in most traffic accidents, it is possible on a balance of probability to conclude that one or other party was guilty, or both parties were guilty, of negligence. In many cases, as for example, where vehicles collide near the middle of a wide straight road, in conditions of good visibility, with no obstruction or other traffic affecting their courses, there is in the absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the Centre of the road, the other must be negligent in failing to take evasive action. It is usually possible, although extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence but where it is not possible, it is proper to divide the blame equally between them.

34. For the Appellant to prove that the respondent was liable for this accident, he needed to have presented evidence, which when considered on a balance of probability would place blame/ causation of this accident on the respondent's doorstep. In other words, the appellant ought to have proved that the

respondent's negligence lead to the occurrence of the accident. The four key elements of negligence, include duty of care, a breach of that duty, causation, and damages. A defendant must own a "duty of care" to the person bring the claim, in the sense that the claimant fell within a class of interests which the law considers should be protected. There must be a breach of that duty involving a failure to take reasonable care. Causation must be proved, and the type of damages alleged must be protected by law.

35. These principles were discussed in Christine Kalama Vrs Jane Wanja Njeru & Ano (2021) eklr wherein the high court had this to say

> " It is a basic element of a cause of action in negligence that the claimant can allege the he or she has suffered loss and damage falling within the scope of duty of care owed to her or him by the defendant. For that matter, it was the duty of the Appellant to show that she was owed a duty of care on the material day of the accident. It is a nexus between the harm and negligence on the part of the respondents. How is the scope of negligence and duty of care determined?

1. First that the respondents owed duty of care to the Appellant.
2. Second, that the respondents breached that duty of care in the manner of their driving.
3. That the breach caused the Appellant to suffer personal injuries attracting recoverable damages at law.
4. That the injuries suffered by the Appellant was as a result of the breach and negligence, which was reasonably foreseeable.

36. Also in Caparo Industries PLC Vs Dickman (1990) 1 ALL 586 and Chun Pui Vrs Lee Chuen Tal (1988) RTR 298 both courts highlighted the determinants of negligence as follows;

> " The requirements of the tort of negligence are, as Mr Batts submitted, fourfold, that is; the existence of a duty of care, a breach of the duty, a causal connection between the breach and the damages and foreseeability of the particular type of damage caused."

37. PW4 blamed the respondent's driver for parking the stalled 1st suit motor vehicle on the road and not placing the warning triangle to alert other road users of the present danger. He also produced their police abstract that squarely laid blame on the respondents agent for causing this accident. DW1, on the other hand, filed and adopted his witness statement where he deponed that he had parked the stalled 2nd suit motor vehicle off the road, with its right wheels being off the road shoulder, thus leaving enough room for other road users to pass by. He then placed the life saver triangle about 50m away and some branches/leaves on the road to forewarn other road users about the present danger.

38. It was his further evidence that, where the 2nd suit motor vehicle had stalled, was along a straight stretch of the Marsabit – Moyale road and the Appellants' driver had ample time and room to notice the danger signage placed to avoid ramming into his motor vehicle. To his surprise, the Appellants' driver had crashed into the danger signage and proceeded to ram into the back of the 2nd suit lorry. Luckily, nobody was injured, and at the scene he had engaged in a conversation with the Appellants' driver, who confessed that he was fatigued/ sleepy and had lost concentration while driving.DW1 insisted that his version of events was correct, and the police who visited the accident scene could bear him witness.

39. DW2 confirmed that he visited the accident scene and confirmed that indeed, the 1st suit motor vehicle had rammed into the rear of the 2nd suit motor vehicle. The vehicles were towed to the police station, and the respective drivers later came and recorded their statements. It was his further evidence that

the Appellant's driver had admitted that he was fatigued and sleepy and thus did not see the 1st suit motor vehicle in good time. The parties negotiated and settled the matter amicably, and he released both motor vehicles to their respective owners.

40. DW2 under cross-examination confirmed that he went to the accident scene and noticed that the 1st suit motor vehicle had overrun the life saver triangle before ramming into the 2nd suit motor vehicle, and this fact was mentioned in his OB. He also admitted that he did not take photographs of the accident scene, nor did he draw he accident sketch plan, but noted that investigations were stopped prematurely because the parties opted to amicably settled the matter. As regards the conflicting abstracts issued by Moyale traffic base, he insisted that it was the respondent's police abstract that bore the correct details and tallied with the OB as recorded.

41. This court is faced with two sets of circumstances and is duty-bound to make a determination thereon, however difficult the circumstances may be. This was appreciated by Madan, J (as he was then) in Welch Vs Standard Bank Limited (1970) EA 115, where he expressed himself as hereunder;

> " When there is no material to generate actual persuasion in the court's mind, still the court cannot unconcernedly refuse to perform its allotted task of reaching a determination. The collision is a fact. Any one of the alternatives mentioned may provide the right answer as to how it happened. The court's sense of impartiality prevents the choosing of the alternatives of individual blame against either driver. It would be just to say, and it is as likely the explanation that both drivers were to blame equally as that only one of them was wholly to blame. Accidents do not happen but they are caused. It is an explanation which offers a solution of impartial practicability.
>
> Every day, proof of collision is held to be sufficient to call on the two defendants to answer. Never do they both escape liability. One or the other is held to blame. They would not escape simply because the court has nothing by which to draw and distinction between them. So, also, if they are both dead and cannot give evidence enabling the court to draw a distinction between them, they must both be held to blame, and equally to blame.....justice must not be denied because the proceedings before the court failed to conform to conventional rules provided, in it judgment, the court is able to discern that which is right owing to it being fair and just in the circumstances, without jeopardizing the vital task of doing justice. Provided there is no transgression of this sacred duty, the court will act justly in coming to a decision even if there is no evidence capable of procreating actual persuasion.....There being nothing to enable the court to draw a distinction between the two drivers, it is consonant with probabilities, and it is not repugnant aesthetically to a logical judicial mind, to hold that both were to blame, and equally to blame. The court does so in this case.

42. Both drivers, who were present at the scene of the accident, gave different versions as to how the accident occurred, and the court has to further consider the evidence of DW2 and other documentary evidence adduced to determine who shoulder's the greatest liability for the said accident. Ironically, both police abstracts produced before the court by the parties contained contradictory evidence, and as rightly pointed out by the trial Magistrate, the same could not be used as the sole basis for imputing liability as against either party. See Peter Kanithi Kimunya Vrs Aden Guyo Haro (2014) Eklr, and Stephen Kanjabi Wariari Vrs Dennis Mutwiri Muriuki & Another (2022) Eklr.

43. Be that as it may, DW2 did visit the accident scene, and confirmed that the 1st suit motor vehicle had crashed the warning triangle placed on the road before ramming into the 2nd suit motor vehicle, but he unfortunately did not take photographs of the scene nor did he draw the accident sketch plan, to

show the exact position of impact. The original OB abstract, NO 10/20/6/2017, recorded at 08.45 hrs, did state as follows;

> "It happened that the driver of M/vehicle KBL O68A, Mr Gerbe Toshe Hube, of No 319208 (4kq 072) was driving The said motor vehicle from Nairobi towards Moyale And upon reaching funanyatta area about 20km south of the station, the vehicle developed a Mechanical problem and stopped on the road since the vehicle was loaded with goods. He clearly put the triangle life saver on the road. Another M/Vehicle Reg No KCJ 932S driven
>
> by Daniel Kimani Kinyanjui C of C 037903 (19P062) came from behind and hit the lorry, and damaged it on the rear side....."

44. This evidence confirms that the 2nd suit motor vehicle stalled on the road and not on the side as alleged by DW1, but he did put the warning triangle to alert other road users of its presence. Secondly, it is worth noting that both parties admitted that where the accident occurred was on a straight stretch of the Marsabit – Moyale road. PW4 confirmed this fact under cross-examination and stated that he had clear visibility of the road that morning and was driving at a speed of about 50 - 60 km/hr. It is my finding that if indeed he was driving at the said pace/speed, he should have been able to slow down in time and/or seen the danger signage placed on the road to be able to stop on time, thus avoiding the said accident.

45. PW4 further testified that there was an oncoming car and thus he did not have room to maneuver to avoid ramming into the 2nd suit motor vehicle. Even if that were true, given the clear and unhindered visibility, plus a warning sign placed thereon (on a road that has very light traffic both during the day and night), PW4 should still have been able to anticipate the distance between his vehicle, and the oncoming vehicle to appropriately slow down on time, to avoid ramming into the stalled 2nd suit motor vehicle.

46. The court of Appeal when dealing with similar circumstances in; Vyas Industries Vrs Diocese of Meru (1976) KECA 18(KLR) relied on the case of Patel Vrs Yafesi (1972) EA 28, where it was stated that the greater blame attaches to a driver who runs into an unlit lorry on a straight road;

> "I agree with Mr Sharma's submissions on this point. I would hold that the plaintiff's driver was 75% to blame for the accident and the defendant's driver 25% to blame. I would therefore award the plaintiff 25% of the agreed damages of Kshs 17,000....."

47. In the above Patel case (Supra), higher liability was apportioned to the plaintiff driver. Similarly, given the peculiar facts and circumstances under which this accident occurred, it is difficult to apportion any liability on the respondent's diver, as he took all necessary precautions to warn other road users of his presence on the road, but the Appellants' driver still went ahead and rammed into his lorry.

D. Disposition

48. I do therefore find and hold that the respondent had a duty of care to other road users, including the Appellant and took reasonably foreseeable care by placing warning signs of the impending danger. Given the straight stretch of road where the accident occurred, and the speed at which the respondent's driver alleged that he was driving, I do find that he had ample opportunity to slow down and/or break to avoid the said accident, but failed to do so.

49. In other words, his explanation as to how the accident occurred was not convincing, and thus find that the trial Magistrate was right to hold that the respondent had failed to discharge the burden of

proof placed on their shoulder under section 107 & 108 of the *Evidence Act*, Cap 80 laws of Kenya and correctly dismissed their claim.

50. That being so, I do find that this Appeal is not merited and proceed to dismiss the same with costs to the Respondent.

51. It is so Ordered

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT MARSABIT THIS 15TH DAY OF MAY, 2025.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Team this 15th day of MAY, 2025.

In the presence of: -

Mr. Kabu - Appellant

Mr. Behailu - Respondent

Mr. Jarso - Court Assistant