



REPUBLIC OF KENYA



**KENYA LAW**  
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**Tamar Agencies & another v Musyimi (Civil Appeal E209 of 2023)  
[2025] KEHC 6101 (KLR) (7 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6101 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL E209 OF 2023**

**AM MUTETI, J**

**MAY 7, 2025**

**BETWEEN**

**TAMAR AGENCIES ..... 1<sup>ST</sup> APPLICANT**

**JOHN GICHURU WACHIRA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**JOHN MWENDWA MUSYIMI ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The appeal challenges the decision of the learned Honorable magistrate on liability.
2. The appellant in his memorandum of appeal raises the following grounds:-
  - i. The learned Trial Magistrate erred in fact and law in failing to appreciate the evidence of the defendants thereby finding the defendants 100% liable, leading to miscarriage of justice
  - ii. The learned Magistrate greatly misdirected herself by ignoring and treating the submissions of the defendants on liability superficially thereby arriving at the wrong conclusion on liability.
  - iii. The honorable Magistrate's decision is plainly wrong and is against the weight of evidence.
3. The issues that arise are:-
  - a. Who was to blame for the accident
  - b. Who should bear the costs of the appeal.



## **Appellants Case**

4. The appellant submits that the only offence that made them to be held 100% liable was the fact that the motor vehicle had no sticker and that their driver was fined Kshs 2000.
5. The appellant has urged this court to find that the fact of them not testifying in defense of the suit should not have led the court into finding them 100% liable for the accident.
6. The appellant has cited Sections 107 and 108 of the Evidence Act to emphasize that he who alleges must prove and according to him the respondent did not discharge the burden of proof.
7. Further the appellant submitted that the Police Officer who testified as did not witness the accident thus his evidence could not be used as conclusive proof of occurrence of the accident.
8. The appellant at the tail end of his submissions stated:-

“..... However in an effort to balance or do justice to both parties, we propose that liability be apportioned between the parties.”
9. The appellants also prayed for the costs of the Appeal.

## **Respondent's Case.**

10. The respondent is opposed to the appeal.
11. The respondent submitted that in assessing liability in an action for negligence, it is trite law that the burden of proof is always on the plaintiff to prove the accident was caused by negligence of the defendant.
12. In Nadwa v Kenya Kazi Ltd (1988) eKLR the court of Appeal held:

“In an action for negligence the burden is always on the plaintiffs to prove that the accident was caused by the negligence of the defendant. However, if in the course of trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendant the issue will be decided in the plaintiffs' favour unless the defendant's evidence provides some answer adequate to displace that inference.
13. The respondent submitted that from the evidence the respondent's car was hit while it was stationary after the appellants motor vehicle veered/ swerved off the road rolled over and landed on to the Respondent's car which was at a car wash.
14. The respondent placed reliance on the evidence adduced by the police officer who visited the scene and investigated the accident.
15. The respondent further invited the court to look at the evidence of PW2 who also testified that James Mwendwa left his car registration No KCT 7X5E Toyota Fielder parked at a car wash for cleaning.
16. The vehicle was hit after PW2 had cleaned it by the trailer carrying sugar cane that had knocked the pavement and lost control on top of the fly over. The respondent did not in any way contribute to the occurrence of the accident thus it was incumbent upon the appellant to call evidence to rebut the presumption that the lorry fell on the respondent's vehicle out of solely the act of negligence on the part of the appellant's driver.



17. It is on the basis of the evidence of PW1, PW2 and PW3 that the respondent has urged the court to find that the appellant was solely responsible for the occurrence of the accident and dismiss the appeal.

### **Analysis and Determination**

18. The appellant's appeal is basically on liability. The appellant has argued that the respondent did not discharge the burden of proof to establish negligence on the part of the driver of motor vehicle KBR 8X8N- ZD 9XX5.
19. The court in considering the appeal has reevaluated the evidence presented by the respondent through PW1, PW2 and PW3.
20. The evidence on record and the totality of the circumstances surrounding the occurrence of the accident was unchallenged. The case was a one where the doctrine of *res ipsa loquitur* applied. The respondent having established that the accident occurred in circumstances in which an accident should not have occurred, thereby discharged in the absence of any other explanation by the appellant, the original burden of showing negligence on the part of the driver of the appellants. See *Embu Public Road Services Ltd v Riimi* [1968] E.A 22
21. The defense did not call any evidence to discount the evidence adduced by PW2 who was the person at the scene when the accident occurred.
22. The facts of the case as stated by the respondent and his witness remain unchallenged. The respondent's motor vehicle was lawfully parked at the yard of PW2. The appellants were better placed to lead evidence to show why negligence should not have been attributed to them.
23. The same was hit while at the yard thus the appellant cannot be heard to argue that the respondent should shoulder blame for the accident.
24. The evidence does clearly show that the offending motor vehicle was that of the appellants. It would only have been the driver of the appellant who would have explained to the court why he hit the vehicle of the respondent but from the evidence of PW3 he was said to have passed on thus could not be called to testify by the appellant.
25. The driver was charged for driving a motor vehicle without a sticker and fined Kshs 2000 but the witness PW3 blamed him for the accident.
26. The respondent discharged the burden of proof in this court's view through his witnesses. The evidence clearly shows that the respondent was at no fault that this court is persuaded that the evidence satisfied the requirements of Sections 108 and 109 of the [Evidence Act](#).
27. The appellants in this case if at all they desired to have the court give judgment apportioning liability between the parties, would by didn't of the provisions of Section 107 of the [Evidence Act](#) called evidence that would have demonstrated to what extent the respondent was to blame for the occurrence of the accident.
28. The appellant did not do so therefore this court does not find any justifiable cause to interfere with the decision of the learned Honorable magistrate on the issue of liability.
29. As a result, the appeal is dismissed with costs to the respondent.
30. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 7<sup>TH</sup> DAY OF MAY 2025.**



**A. M. MUTETI**

**JUDGE**

In the presence of:

Court Assistant: Kiptoo

Nyangano for the Appellant

Dan Ochieng for the Respondent

