



REPUBLIC OF KENYA



**Mugambi v Mwangi (Civil Appeal E001 of 2022)
[2025] KEHC 7687 (KLR) (5 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 7687 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL E001 OF 2022
JK NG'ARNG'AR, J
JUNE 5, 2025**

BETWEEN

STEPHEN MAINA MUGAMBI APPELLANT

AND

ZIPORAH WANJIKU MWANGI RESPONDENT

(Being an appeal against the judgment and decree of the Hon. Abdulqadir Lorot (C.M) in Wang'uru Chief Magistrate's Court Civil Case No. 78 of 2019 delivered on 23/12/2021)

JUDGMENT

1. Vide plaint dated 10/7/2019, the respondent filed the suit before the lower court on grounds that on 28/4/2018, she got into an accident at Kimbimbi area along Mwea-Embu road while she was a lawful pillion passenger on motorcycle registration number KMCP 255Y when the appellant negligently drove motor vehicle KBZ 54BN and it hit the motorcycle causing the respondent severe injuries. That the appellant was the registered owner of the motor vehicle and was also the driver on the material day of the accident.
2. The appellant filed a statement of defence dated 4/2//2020 denying liability and blamed the rider of the motor cycle for the accident and sought orders that the suit be dismissed with costs.
3. The matter proceeded for hearing wherein the respondent called three witnesses whereas the appellant called two witness.
4. Vide judgment delivered on 23/12/2021, the trial court found the appellant to be 100% liable for the accident and awarded the respondent Kshs. 400,000/= as compensation and a further Kshs. 3,750/= for special damages plus costs and interests from the day of judgment.
5. The appellants were dissatisfied with that judgment and filed the memorandum of appeal dated 6/1/2022.



The Appeal

6. The appellant filed the memorandum of appeal on six grounds being that; the trial court erred in apportioning liability to the appellant against the weight of the evidence tendered, the trial court relied on uncorroborated evidence in determining the matter, the trial court failed to consider the evidence of the appellant's witness, the trial court failed to consider the merits of the appellant's defense, the trial court erred by failing to acknowledge the appellant's submissions occasioning a miscarriage of justice, and that the trial court erred in applying wrong principles of law and in particular discretion thereby arriving at a wrong decision.
7. The parties were directed to file written submissions and the appellant complied by filing his dated 15/6/2024 whereas the respondent's were dated 25/6/2024. I have seen and considered those submissions and I note that both parties only submitted on the issue of liability. Even in the grounds of appeal, the appellant did not take issue on quantum, consequently, I do find that the appeal related to the issue of liability.

Analysis and Determination

8. It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions see Court of Appeal for East Africa in *Peters –vs- Sunday Post Limited* [1958] EA 424.
9. In an appeal against assessment of damages an appellate court must be careful not to interfere with the trial court's discretion unless certain conditions are met. These conditions were outlined in the case of *Kemfro Africa Limited t/a “Meru Express Services (1976)” & Another v Lubia & Another (No 2)* Civil Appeal No 21 of 1984 [1985] eKLR where the court held that: -

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

Whether the issue of liability was properly determined

10. As already held, the appeal was related to only one issue; the apportionment of liability.
11. The burden of proof as per Section 107 (1), 109 and 112 of the *Evidence Act*, Cap 80 Laws of Kenya is outlines as: -

“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.”
12. The scope and extent of the fundamental legal principles on who is to blame for negligence are settled. In the cases of *Nandwa v Kenya Kazi Ltd* [1988] KLR 488 and *Regina Wangechi v Eldoret Express Co. Ltd* [2008] eKLR the Court held that: -

“In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. However, if in the course of the trial there is proved a set of facts which raises a prima facie case inference that the accident was caused



by negligence on the part of the defendant, the issue will be decided in the plaintiff's favour unless the defendant provides same answer adequate to displace that inference."

13. From the record, it is undisputed that on 28/4/2018 an accident occurred between the Respondent and the Appellant's Motor Vehicle Registration KBZ 548N being driven by the Appellant.
14. The Respondent called three witnesses to support her case, the Appellant also called two witnesses.
15. In *Evans Nyakwana vs. Cleophas Bwana Ongaro* (2015) eKLR the court in setting out the legal burden of proof in civil cases stated: -

"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."

16. Further in *William Kabogo Gitau vs. George Thuo & 2 Others* [2010] 1 KLR 526 Kimaru J (as he then was) stated that: -

"In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

17. In this instance, the respondent (PW3) maintained that she was a pillion passenger aboard the motorcycle and that the motor cycle was hit by the respondent's vehicle from behind. She testified that the motor cycle was on the edge of the road on the left side facing Embu direction. On cross-examination, she testified that the accident occurred around 5:45am and it was a bit dark and drizzly.
18. PW1, a police officer from Wang'uru Police Station testified that both the motorcycle and the subject vehicle were heading towards Embu when the respondent rammed into the motorcycle by failing to keep safe distance. She testified that after investigations, the respondent was blamed for the accident having failed to keep a safe distance. On cross-examination, she testified that it was probable that the rider did not have insurance and she could not recall whether he had worn reflective gear.
19. The respondent on the other hand testified that as he was driving to Meru at around 5:40am, a cyclist entered the road from the left at close range. That he had no lights on and had not worn reflective material thus he was to blame for the accident.
20. DW2 was a passenger in the subject motor vehicle. He similarly testified that a motor cycle entered the road and he lacked rear lights and had not also worn a reflector jacket. That the passenger had also not worn a reflective material. He blamed the rider for the accident.
21. In its judgment, the trial court found that the appellant was 100% liable as he had a higher duty of care as he was driving behind and had to ensure that he could see the front clearly. That the road was



notorious for donkey carts and ox-drawn carts and noting that there was a visibility challenge he ought to have driven within a manageable limit and brake as soon as it was necessary.

22. In his submissions before this court, the appellant maintained that PW1 was not the investigating officer and did not disclose whether any sketch maps were taken at the scene of the accident or whether the subject vehicle was inspected. It was thus submitted that the appellant had established that the rider attempted to branch into the road at a tight angle therefore causing the accident.
23. The respondent on the hand submitted that the appellant and PW1 both testified that the subject vehicle hit the motorcycle from behind thus causing the accident. That it was not possible that the motorcycle did not have lights yet the accident occurred at 5:40am when it was still dark. That the accident could have been avoided if the appellant kept a safe distance.
24. It has already been established that the respondent had a duty to prove that the appellant negligently caused the accident, and upon such proof, the appellant is called to offer an explanation. I have considered both versions and this court is called upon to decide, on a balance of probabilities, which version is correct.
25. Though the trial court found that the appellant was 100% liable for the accident, I do note that both the appellant and the rider had a duty of care to themselves and to other road users. The respondent testified that the accident occurred at 5:45am when it was still dark and drizzling. There was uncontroverted evidence that neither the rider nor the respondent were wearing reflective jackets/material. There was also evidence that the motorcycle did not have rear lights. Under such difficult circumstances, the rider ought to have taken precaution by riding a motorcycle that had hind lights, and also wear a reflector. Further, PW1, the police officer, testified that it was possible that the rider did not have insurance. I do find that to that end, the rider contributed to the negligence.
26. Noting that the respondent had a duty to prove her allegations, I find that the respondent did not prove that the appellant was a 100% liable for the accident. The claimant did not call the rider of the motorcycle to testify on the circumstances of the accident. Though PW1 testified that the rider gave his statement at the station at a later day after the accident occurred, the statement was not part of the claimant's bundle. The appellant was adamant that the rider joined the road from the left side negligently hence the accident. The rider too ought to have given his version, more so noting that the appellant's testimony was consistent with the statement he made with his insurer, including the sketch map.
27. That said, the appellant could also not escape liability entirely. Noting that the investigations done by the police concluded that he did not keep a safe distance, I find that the appellant ought to have driven at a reasonable distance and speed to be able to control the car. Moreover, the appellant was not consistent with his narration. In his claim, he stated that the rider was taking a U-turn and was joining the road when the accident occurred, whereas he testified that the rider was overtaking from the left.
28. In the end, this Court finds there is justification in disturbing the trial court's finding on liability. The driver of the motor cycle was similarly to blame for the accident.
29. I therefore enter liability at the ration of 80:20 in favor of the respondent as against the appellant.
30. Noting that the appellant did not take issue with the award on quantum and special damages, I see no reason to disturb the trial court's finding on the same.
31. In the end, I enter judgment in favor of the claimant as against the respondent as follows: -
Liability.....80%



Special Damages.....Kshs. 3,750.00/=

General Damages.....Kshs. 400,000/=

Less 20% liability.....Kshs. 80,000/=

Total.....Kshs. 323,750/=

32. The respondent is also awarded costs of the appeal assessed at Kshs. 35,000/= to be deducted from the total amount awarded to the claimant.

33. 30 days stay granted

**JUDGEMENT DATED, SIGNED AND DELIVERED VIRTUALLY THIS 5TH DAY OF JUNE 2025
IN THE PRESENCE OF;**

Njoroge for the Appellants

Mbugua for the Respondents

Siele /Mark (Court Assistants)

.....

J. NG'ARNG'AR

JUDGE

