



**Rading v Waomba (Civil Appeal E167 of 2024)
[2025] KEHC 10886 (KLR) (1 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10886 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E167 OF 2024**

**JM OMIDO, J
JULY 1, 2025**

BETWEEN

JOHN RADING APPELLANT

AND

KEVIN NYONGESA WAOMBA RESPONDENT

(Being an Appeal from the Judgement and Decree of Hon. G.C. Serem, Resident Magistrate/Adjudicator delivered on 25th July, 2024 in Kisumu SCCC No. E088 of 2024)

JUDGMENT

1. This appeal emanates from the judgement and decree of Hon. G.C. Serem, Adjudicator/Resident Magistrate delivered on 25th July, 2024 in Kisumu SCCC No. E088 of 2024.
2. The grounds of appeal presented by the Appellant vide the Memorandum of Appeal dated 12th August, 2024 upon which he seeks to upset the judgement and decree of the lower court are as follows:
 - i. The learned trial Magistrate erred in fact and in law in failing to dismiss the suit and by apportioning 80% liability to the Appellant without considering the circumstances of the case.
 - ii. The learned trial Magistrate erred in fact and in law in finding in favour of the Respondent against the Appellant when there was totally no credible evidence or proof of negligence on the part of the Applicant.
 - iii. The learned trial Magistrate erred in fact and in law in failing to consider the Appellant's submissions on liability by completely disregarding the submissions and authorities of the Appellant and as a result arrived in an unjustified decision on liability.
3. The Appellant proposes that the appeal be allowed and that this court reassesses liability and proceeds to order for the dismissal of the suit before the trial court.



4. This being the first appellate court, I am required under Section 78 of the *Civil Procedure Act* and as was espoused in the case of *Selle v Associated Motor Boat Co. Ltd* [1969] E.A. 123 to reassess, reanalyze and reevaluate the evidence adduced in the trial court and draw my conclusions while bearing in mind that I did not see or hear the witnesses when they testified.
5. In *Sielle*, Sir Clement De Lestang observed that:

“This Court must consider the evidence, evaluate it itself and draw its own conclusions, though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.

However, this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
6. The duty of the first appellate court was also discussed by the Court of Appeal for East Africa in the case of *Peters v Sunday Post Limited* [1958] EA 424 in which it was held that the appropriate standard of review established in cases of appeal can be stated in three complementary principles:
 - i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
 - iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.”
7. The matter before the trial court, based on tortious liability (a personal/bodily injury claim), was commenced by the Respondent by way of a statement of claim dated 4th March, 2024.
8. The Respondent pleaded that she was involved in a road traffic accident on 16th December, 2023 at along the Kisumu – Busia Road and sustained injuries. The accident involved a collision between motor vehicle registration numbers KCY 716B that belonged to the Appellant and was being driven and/or controlled by the Appellant’s driver, agent and/or employee and the Respondent’s motor cycle registration number KMFY 739R, which the Respondent was at the time riding.
9. The Respondent pleaded that the Appellant’s motor vehicle was carelessly and or negligently driven and/or controlled and joined the main road without giving way to the Respondent’s motor cycle, as a result of which it knocked down the Respondent. The Respondent listed in his pleading the particulars of negligence that he attributed to the Appellant as follows:
 - a. Failing to keep any or proper lookout.
 - b. Driving at a speed that was excessive in the circumstances.
 - c. Failing to stop in time or at all so to avoid the said accident.
 - d. Permitting to drive a defective motor vehicle.
 - e. Driving the said motor vehicle KCY 716B without any attention or care at all.



- f. Failing to exercise sufficient care, skill or prudence at all in driving motor vehicle KCY 716B.
 - g. Failing to slow down, stop, swerve, brake or in any other way maneuver the said motor vehicle under control so as to avoid the said accident.
 - h. Failing to have regard to road users.
 - i. Failing to adhere to the provisions of the Highway Code (Chapter 403 of the Laws of Kenya).
10. The Respondent pleaded that he sustained the following injuries in the accident:
- a. Tenderness on the right shoulder.
 - b. Fracture of the right mid shaft femur bone.
 - c. Fracture of the wrist joint (ulna bone).
 - d. Swollen knee.
 - e. Tenderness on the right side of the chest.
11. The Respondent sought the following reliefs before the trial court:
- a. Judgement in the sum of Ksh.1,000,000/-.
 - b. Costs of the claim.
 - c. Interest at court rates until payment in full.
12. The Appellant resisted the claim by filing a response to the statement of claim dated 19th March, 2024, denying the Respondent's claim in its entirety. The Appellant denied that motor vehicle registration number KCY 716B belonged to the Appellant and that the same was being driven by the Appellant's driver, agent and/or servant. The Appellant further denied the allegations of the occurrence of the accident and that the Respondent sustained the injuries pleaded. The Appellant denied that he was liable for the occurrence of the accident, if at all the same occurred.
13. The Appellant, in the alternative pleaded that if indeed the alleged accident occurred, the same was solely caused by and/or substantially contributed to by the Respondent and pleaded the following particulars of negligence as attributable to the Respondent in riding and/or controlling motor cycle registration number KMFY 739R:
- a. Losing control of motor cycle registration number KMFY 739R and hitting/knocking motor vehicle registration number KCY 716B.
 - b. Being an incompetent and unqualified rider.
 - c. Carrying excess passengers.
 - d. Failing to keep any or any proper lookout for other vehicles that might reasonably have been on the said road especially motor vehicle registration number KCY 716B.
 - e. Failing to take any or any adequate precaution for his own safety and that of his pillion passenger.
 - f. Failing to wear any or any adequate protective apparel as designed by law.
 - g. Riding without due regard to other road users.
 - h. Riding at an excessive speed in the circumstances.



- i. Failing to properly steer and control his motor cycle.
 - j. Riding in a dangerous and careless manner.
 - k. Encroaching into the path of motor vehicle registration number KCY 716B.
 - l. Failing to wear reflective jackets.
 - m. Riding in a zig-zag manner.
 - n. Failing to move to avoid the accident.
 - o. Causing the accident.
 - p. Volenti non fit injuria.
14. The Appellant pleaded further that the Respondent's suit was a fraudulent attempt to obtain compensation from the Appellant through false means as the alleged accident never occurred. He listed the particulars of fraud as being attributable to the Respondent as follows:
- a. Purporting to have been involved in the said accident when indeed he was never involved in the alleged accident at all.
 - b. Uttering fake documents to wit police abstract without being involved in the accident.
 - c. Giving false information to the police officer pertaining the accident so as to obtain the police abstract.
 - d. Filing in court fake police abstract that was obtained irregularly to advance his fraudulent claim.
 - e. Filing a fake claim in court on the basis of fake documents.
 - f. Swearing a false affidavit.
15. The Appellant sought that the Respondent's suit be dismissed in its entirety, with costs.
16. The Respondent testified before the trial court and adopted the contents of his statement dated 4th March, 2024. The Respondent stated in his statement that on 16th December, 2023, he was riding his aforesaid motor cycle along the Kisumu – Busia Road when the Appellant's motor vehicle registration number KCY 716B was so carelessly and/or negligently driven and/or managed such that the same abruptly joined the main road from a petrol station as a result of which it knocked down the Respondent, who was on the main road, as a result of which he sustained the injuries listed above. He was rushed to hospital and received treatment. The accident was reported to the police.
17. The Respondent thus blamed the Appellant, as owner the motor vehicle, for causing the accident.
18. The Respondent produced the following documents in favour of his case:
- * A copy of the Respondent's national identity card.
 - * Police abstract.
 - * P3 form.
 - * Treatment notes and receipts from Jaramogi Oginga Odinga Training & Referral Hospital.
 - * Medical report.
 - * Demand letter.



19. On being cross examined, the Respondent told the trial court that he had a right of way and that the Appellant's vehicle ought to have given way before joining the road from the petrol station. He stated that he made an attempt at braking but it late as the accident was abrupt.
20. The Appellant called Joel Inanga Andanje as his witness. The adopted the contents of his witness statement recorded on 8th April, 2024. He stated in his statement that on 16th December, 2023, he was driving motor vehicle registration number KCY 716B. He stated that as he was driving the said vehicle out of a petrol station to join the main road, a saloon car on the main road indicated to ingress the petrol station and another vehicle behind it gave way and the Respondent's motorcycle hit his vehicle on the right tyre as he joined the road.
21. Upon being cross examined, the witness admitted that the rider of the motor cycle had a right of way as he was on the main road.
22. The trial court went on to render its judgement on 25th July, 2024 in favour of the Respondent as follows:
 - a. Liability – at 80%:20% in favour of the Claimant.
 - b. General damages – Ksh.600,000/-.
Less 20% contribution (Ksh.120,000/-) = Ksh.480,000/-.
 - c. Claimant is granted costs of the suit and interest from the date of judgement.
 - d. Respondent has 30 days stay of execution.
23. Now to the present appeal, the Appellant challenges the trial court's finding on liability. The finding of the trial court on quantum is not challenged. So then, the issues I am tasked to determine are as follows:
 - a. Whether the learned trial Magistrate reached the proper finding that the Appellant was 80% liable for the occurrence of the accident.
 - b. The court's determination as to costs.
24. In respect of the first issue for determination, which is whether the learned trial Magistrate reached the proper finding that the Appellant was 80% liable for the occurrence of the accident, the trial court, in its judgement, in determining liability, rendered thus:

“6. The court relies on the case of *Njeru & another v Nyakundi* (Civil Appeal E021 of 2021) [2022] KEHC 13963 (KLR) (11 October 2022) (Judgement) which held that:

“He avers that all road users owe a duty of care to other road users and they ought to move with due care and observe the Highway Code. According to him, the fact that the motor cycle hit the vehicle on the rear right door connotes negligence on the part of the Respondent. In this regard, the court has taken note of the authorities relied on by the Appellants being that of *Hussein Omar Farah & Welch v Standard Bank Limited* (supra). However, it is clear that the Respondent was driving on the highway while the 1st Appellant was joining the highway from a feeder road. The Respondent had a right of way. This is not to say that he did not



owe the 1st Appellant a duty of care but the 1st Appellant owed the Respondent a higher duty of care.”

7. The Claimant/rider here had the right of way and the vehicle should have allowed the Respondent (sic) to pass. However, the rider herein had the duty of care to drive with due care and attention and he should have been able to stop. However, being that he was on the rightful way, he will bear less liability and I refer to the case above.
8. In the circumstances of this case, I find that the Respondent was more to blame and I hereby apportion liability at 80%:20% in favour of the Claimant because he also ought to have been driving his motor cycle with due care and attention”.
25. The evidence of the Respondent was that he was riding on the main road when the driver of the motor vehicle joined the road from a petrol station, without giving way and/or first ensuring that it was safe to do so.
26. In his testimony, the Appellant’s driver stated that he drove the vehicle from the petrol station and joined the main road. He admitted that the accident occurred when his vehicle joined the main road from a petrol station when the Respondent’s motor cycle was already on the said road. The witness further admitted that the Respondent had a right of way. That notwithstanding, he still blamed the Respondent for the accident, stating that he ought to have given him way, just like another vehicle thereat did.
27. No doubt, all road users owe a duty of care to other road users. Road users are supposed to abide by the Highway Code and traffic laws and rules. The Appellant admitted that the Respondent had a right of way. That being the case, he ought to have given way to the Respondent and should only have joined the main road after ensuring that it was safe to do so. He was therefore at fault for not giving way to the Respondent’s motor cycle, which was on the main road and had a right of way.
28. But then, in my opinion, the Respondent’s actions to avert the accident were not sufficient. He owed other road users a duty of care and ought to have done more than just attempting to evade the accident by merely braking, as he admitted that he saw the Appellant’s vehicle being driven onto the road from the petrol station. In the circumstances, I agree with the trial court that the Respondent was partially to blame, albeit at a much lesser degree. In my view thus, the court properly apportioned liability at 80%:20% in favour of the Respondent.
29. The appeal then fails for the reasons above and is hereby dismissed.
30. With regard to costs, Section 27 of the *Civil Procedure Act* dictates that the same shall follow the event. To that end, the Appellant shall bear the Respondent’s costs of this appeal, which I assess at Ksh.40,000/-.
31. This file is hereby closed.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 1ST DAY OF JULY, 2025.

JOE M. OMIDO.

JUDGE

For Appellant: No appearance.

For Respondent: Mr. Rakewa.

Court Assistants: Mr. Ngoge & Mr. Juma.



Mr. Rakewa: I seek an order that the security that was deposited in a joint interest earning account in the names of the Advocates on record be released to the Respondent.

Court: The security that was deposited in a joint interest earning account in the names of the Advocates to be released to the Respondent.

JOE M. OMIDO

JUDGE

1ST JULY, 2025.

