



**Mwangi v Harj Construction Company Limited & another (Civil Appeal
35 of 2024) [2025] KEHC 12704 (KLR) (9 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12704 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 35 OF 2024
FN MUCHEMI, J
SEPTEMBER 9, 2025**

BETWEEN

PATRICK MURATHI MWANGI APPELLANT

AND

HARJ CONSTRUCTION COMPANY LIMITED 1ST RESPONDENT

PETER KAMAU KIMANI 2ND RESPONDENT

*(Being an Appeal from the judgment and decree of Hon. Joseph Were (SPM)
delivered on 29th February 2024 in Ruiru SPMCC No. E044 of 2022)*

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Ruiru Senior Principal Magistrate in SPMCC No. E044 of 2022 in a claim arising from a road traffic accident whereby the trial court apportioned liability at the ratio of 85:15 in favour of the appellant and awarded the appellant general damages of Kshs. 800,000/-, future medical expenses of Kshs. 200,000/- and special damages of Kshs. 203,588/- plus costs and interest.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 3 grounds summarized as follows:-

“The learned trial magistrate erred in law and in fact by failing to consider the appellant's uncontroverted evidence and hold the respondents entirely liable for the accident.”
3. Parties put in written submissions.



The Appellant's Submissions

4. The appellant submits that he called three witnesses in the lower court who testified in support of his case on the occurrence of the accident and on the injuries sustained. The respondents on the other hand did not call any witnesses and opted to close their case without any witness testifying. Further, the police officer who testified in support of his case confirmed that the motor vehicle owned by the respondents was wholly to blame for the accident. Furthermore, the appellant submits that he explained how the accident occurred and that he did not contribute in any way to its occurrence. Relying on the cases of *Ngugi v Karanja & Another Civil Appeal 161 of 2018 [2023] KEHC 2368 [KLR]*; *Wellington Nganga Muthiora v Akamba Public Road Services Ltd & Another [2010] eKLR* and *Regina Wangechi v Eldoret Express Co. Ltd [2008] eKLR*, the appellant submits that his evidence was never controverted and should have been relied wholly by the trial court.

The Respondents' Submissions

5. The respondent relies on the case of *Mursal & Another v Manese [Suing as the legal administrator of Dalphine Kanini Manesa] [2022] KEHC 282 [KLR]* and submits that the appellant had the legal burden to prove that they were wholly liable for the occurrence of the accident. The appellant testified that he was lawfully riding a motorcycle but he failed to avert the accident when he noted that the same was about to occur. The respondents refer to the case of *Michieka & Another [Suing as the legal representatives of the Estate of the late Samuel Mose Gioma Michieka] v Ainley [Civil Suit 119 of 2011] [2023] KEHC 473 [KLR] [Civ] [24 January 2023] [Judgment]* and submit that the appellant could have quickly swerved to avoid the accident and leading himself to the said accident made him negligent.
6. The respondents submit that the police constable who testified as the appellant's third witness, produced a police abstract confirming the occurrence of the said accident but on cross examination, it was established that she was not the investigating officer, there was no sketch plan of the scene of accident and as such the respondents were not criminally charged for the accident. To support their contentions the respondents rely on the cases of *Bwire v Wayo & Sailoki [2022] KEHC 7[KLR]* and *Abbay Abubakar Haji Patuma Ali Abdulla v Freight Agencies Limited [1984] eKLR* and submit that the evidence by the police constable was not of any probative value but more of hearsay evidence. The respondents argue that the appellant ought to have called another eye witness to testify on the occurrence of the accident.

Issue for determination

7. The main issue for determination is whether the liability apportioned by the trial court was against the weight of the evidence adduced.

The Law

8. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another v Associated Motor Boat Company Ltd & Others [1968] 1EA 123*:

“.....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. In particular,, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some



point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

9. In *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR the Court of Appeal stated that:-

“An appeal to this court from a trial by the High 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.

10. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-

- a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
- b. That 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 it; and
- c. That 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.

Whether the liability apportioned by the trial court was against the weight of the evidence adduced.

11. The appellant seeks to have the court review the trial court’s findings of 15% liability against him with 100% liability upon the respondents. The appellant asserts that the accident was substantially caused by the respondents and he did not contribute in any form to its occurrence.

12. The principles guiding the appellate court’s power to interfere with the trial court’s finding on liability are well settled. In *Khambi & Another v Mahithi & Another* [1968] EA 70 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 circumstances, 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.”

13. The record shows that the appellant and 2nd respondent are the only parties who witnessed the accident. According to the appellant, he was riding his three wheeler motorcycle [tuk tuk] registration number KTWB 506L on 20th February 2021 when the 2nd respondent, who was driving motor vehicle registration number KCV 839R negligently and carelessly drove the said motor vehicle at a very high speed that he lost control thus colliding into his motorcycle causing him serious injuries. On cross examination, the appellant testified that there was a tuk tuk ahead of him before the collision and it did not make a turn to the right but escaped into the ditch to avoid the accident. The appellant testified that he did not manage to escape the accident.

14. The appellant called a police officer who testified as PW3 to the effect that an accident occurred on 20th February 2021 between a tuk tuk registration number KTWB 606L driven by the appellant and motor vehicle registration number KCV 839R driven by the 2nd respondent. The witness testified that the 2nd respondent was to blame for the said accident. On cross examination, PW3 testified that she was not



the investigating officer thus she did not visit the scene or participate in the investigation of the case. She further testified that motor vehicle registration number KCV 839R was blamed for the accident, which conclusion was obtained from the initial report of the occurrence book.

15. The evidence by the appellant stood uncontroverted as the 2nd respondent did not testify as to how the accident occurred. However, he who alleges must prove and it is upon the appellant to prove his case on a balance of probabilities. The appellant testified that he was riding behind a tuk tuk which avoided being hit by motor vehicle registration number KCV 839R however he did not manage to avoid the said accident. It is thus clear that the appellant was in a position to have avoided the said accident as the tuk tuk in front of him escaped into the ditch to avoid the accident. Thus, the appellant ought to have presented to the court evidence of how the accident occurred and that he was not to blame or that he had lesser responsibility.
16. It is therefore my considered view that the trial court did not err in apportioning liability at the ratio of 85:15 for the appellant has failed to show that the 2nd respondent the driver of the 1st respondent vehicle wholly caused the accident.
17. It is my considered view that this appeal lacks merit and is hereby dismissed with costs to the respondents.
18. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 9TH DAY OF SEPTEMBER 2025.

F. MUCHEMI

JUDGE

