

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL APPEAL NO. E120 OF 2023

JOSEPH

MAKAUAPPELLANT

-VS-

**RUIRU FEEDS LIMITED
RESPONDENT**

(Being an appeal from the judgment delivered by Hon. Rose Gitau (SRM) on 9TH May 2023 in Mavoko CMCC No. 556 of 2021)

JUDGMENT

1. This appeal challenges both liability and quantum. In the trial court, the Appellant sued the Respondent seeking general damages for pain, suffering, and loss of amenities, as well as special damages of Kshs.7,350/= arising from a road traffic accident that occurred on 26th October 2021 along the Nairobi-Mombasa Road, at the Devki area. According to the Complaint, the Respondent was sued as the registered owner of motor vehicle registration number KCF 611N, a TATA lorry/truck. At the time of the accident, the Appellant was riding motorcycle registration number KMFP 322D.
2. It was alleged that the Respondent's motor vehicle was being driven negligently and carelessly, thereby causing an accident in which it knocked the Appellant's

motorcycle, resulting in serious bodily injuries and loss and damage.

3. The Respondent, in its defence, denied the claim, and the matter proceeded to full hearing. Upon conclusion, the trial court found the Appellant wholly (100 per cent) liable for the occurrence of the accident and dismissed the suit with costs.
4. Aggrieved by the Judgment of the trial court, the Appellant filed this appeal citing the grounds that the Learned trial Magistrate erred in law and fact in dismissing the suit even when liability had been proved against the Respondent; misdirected herself in totally disregarding the plausible evidence by the appellant in support of his case on the issue of negligence against the Respondent; dismissing the appellant's suit yet he had discharged his burden of proof against the Respondent; by considering only the evidence of the Respondent and his witness and disregarding the Plaintiff evidence and his witnesses; grossly erred in her evaluation of the evidence before her; erred in failing to find that the Respondent wholly or substantially contributed to the occurrence of the accident herein; the Learned Magistrate final orders have occasioned a miscarriage of justice and erred in law and fact in holding that it is the appellant who was to blame for the accident.

5. The Appellant therefore prayed that the trial court's judgment be set aside and or varied and this appeal be allowed with costs.
6. The Appeal was canvassed by way of written submissions. The Appellant's submissions are dated 2nd October 2025 and the Respondent's submissions is dated 16th May 2025.

Appellant's Submissions

7. The Appellant provided a brief background, stating that both parties blamed each other for the occurrence of the accident.
8. He urged that the only issue for determination was whether the trial court erred in its finding on liability. He submitted that PW1 testified that he was riding ahead of DW1, who veered off the road and hit him from the rear. The accident occurred at Devki junction, with both vehicles on the highway; PW1 was on the left lane, while DW1, who was allegedly over speeding, hit him from behind on the left side of the road.
9. The Appellant noted that DW1 testified that the accident occurred as PW1 was joining the highway. DW1 confirmed he was heading towards Mombasa direction and that PW1 was on his left. DW2 corroborated the occurrence of the accident. The Appellant emphasized that DW1 was charged with careless driving following police investigations.

10. The Appellant further argued that the police abstract confirmed the location of the accident and contradicted the Respondent's version that the accident occurred at Devki junction. He maintained that he was riding on DW1's left side facing the Mombasa direction, and could not have been joining the highway at the point of impact; if he was, he would have been riding on DW1's right side. The Appellant contended that DW1 admitted he only saw him after the impact, which according to the Appellant demonstrated DW1's failure to keep a proper lookout.
11. In conclusion, the Appellant submitted that he proved negligence against DW1 and that the trial court erred in its finding on liability.

Respondent's submissions

12. The Respondent began with a summary of the trial court proceedings and addressed both the issues of liability and quantum.
13. On liability, the Respondent relied on **Nairobi HCCA No. 152 of 2003, Statpack Industries Limited v James Mbithi, as cited in Nakuru HCCA No. 320 of 2004, Timsales Limited v Willy Nganga Wanjohi** and on Section 3(4) of the Evidence Act. It argued that the Appellant completely failed to discharge his burden of proof and, did not establish on a balance of probabilities that DW1 was negligent or liable for causing the accident.

14. The Respondent maintained that PW1 admitted DW1 had the right of way, and therefore the Appellant should have exercised caution and kept proper lookout for other road users, which he failed to do.
15. Contrary to the Appellant's claims, the Respondent submitted that DW1 was not charged, with any traffic offence. DW1 confirmed that he reported the matter and recorded a statement with the police. Citing the decision in **Peter Kanithi Kimunya v Aden Guyo Haro [2014] eKLR**, the Respondent argued that a police abstract is only prima facie evidence of an accident report and does not establish liability.. The Respondent urged the Court to dismiss the appeal with costs asserting that no liability should be apportioned upon it.
16. On quantum, the Respondent submitted that if the Court were to find in favour of the Appellant on liability, an award of Kshs.80,000/= would be reasonable compensation for the soft tissue injuries sustained, In support of this proposal, the Respondent referred to the medical report dated 19th February 2022 and relied on the authorities of **Murang'a High Court Civil Appeal No. 78 of 2013 (formerly Nyeri HCCA No. 90 of 2012), Socfinaf Company Limited (Ruera Estate) v Mary Njeri Kibe [2020] eKLR** and **Nyahururu HCCA No. 16 of 2017 (Consolidated with HCCA Nos. 17 and 18 of 2017), LNK (A Minor Suing Through CNK as Next**

Friend) & 2 Others v Simon Gatuni Njuria [2022] eKLR.

17. Regarding special damages, the Respondent argued that although the Appellant claimed Kshs.7,250/=, only those amounts specifically pleaded and strictly proved should be awarded.

18. In conclusion, the Respondent urged the Court to dismiss the appeal with costs, reiterating that the Appellant failed to prove his case on a balance of probabilities.

Analysis and Determination

19. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand. The foregoing duty was succinctly stated by the Court of Appeal in the case of **Selle v Associated Motor Boat Company Ltd (1968) EA 123 and Peters v Sunday Post Limited [1985] EA 424**).

20. Upon careful analysis of the record of appeal and the parties submissions the following issues arise for determination:

a. Whether the issue of liability was properly determined;

b. Whether the Trial Magistrate misdirected herself in assessment of damages.

Whether the issue of liability was properly determined

21. The Appellant's primary contention is that the learned trial magistrate failed to properly evaluate the evidence and erroneously found him wholly liable for the accident. The Appellant maintains that the Respondent's driver was negligent and that the trial court disregarded material evidence supporting this claim. Conversely, the Respondent argues that the Appellant failed to discharge the burden of proof and that the finding on liability was well-founded.

22. The burden of proof as per Section 107 (1), 109 and 112 of the Evidence Act, Cap 80 Laws of Kenya 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."

23. This appeal, essentially revolves around the question of who was responsible for the accident. The scope and extent of the fundamental legal principles on this subject 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 Courts on this issue 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 some answer adequate to displace that inference."

24. In examining the evidence presented before the trial magistrate, the Appellant testified that he was riding his motorcycle ahead of the Respondent's motor vehicle along Mombasa Road when the Respondent's driver, who was allegedly speeding, hit him from behind. He claimed to have been on the left lane, facing the Mombasa direction, and attributed the accident to the driver's failure to maintain a proper lookout. He also stated that the driver was charged with careless driving after police investigations.

25. However, during cross examination the Appellant conceded that the Respondent's lorry had the right of way and that he was joining the main highway from a junction. He further also admitted that he had no proof that the lorry actually hit him from behind, and that he only saw it after the collision. These admissions are significant and directly impact the question of liability.

26. On the other hand, the Respondent's driver (DW1) testified that the Appellant emerged from the Devki junction and joined the highway abruptly, without ensuring it was safe to do so. DW1 stated he was travelling from Nairobi toward Mombasa when the

Appellant entered his path from the left side, and fell beside the vehicle. DW1 denied being charged with any traffic offence, a position corroborated by the absence of any charge sheet in the record. DW2, an insurance investigator, testified regarding the damage to the lorry and produced the inspection report.

27. After evaluating the evidence of the parties, the trial court concluded that the Appellant was 100 per cent liable for the occurrence of the accident. The trial court in the judgment observed;

“From the above evidence and the concession by the Plaintiff that the Motor Vehicle had a right of way, it is uncontested that the Plaintiff had joined the road from a junction. The contention however, is whether the accident occurred at the junction itself or the Plaintiff had safely joined the road, covered some distance before the accident occurred.

Assuming the Plaintiff had safely joined the road and had proceeded for some distance, it was the Plaintiff's evidence that the driver's motor vehicle was trailing him at a high speed causing his to swerve off the road, but the Motor Vehicle followed him off the road and knocked him down from the rear. If that was the case, damages to the Motor vehicle ought to have been to front side or depending on the angle used while swerving to the left side. A perusal of the Motor Vehicle inspection report attached to Dex2 noted damaged to the front bumper and offside step panel.

The damage to the offside step panel corroborates the evidence by the defence to the effect that the accident occurred at the junction after the rider joined the road from the junction. As conceded by the Plaintiff, the motor vehicle had the right of way. Failing to give way is a clear indication that the rider abrogated his duty of care to other road users and in particular the Defendant. I thus find that the Plaintiff was 100% to blame for the occurrence of the accident”

28. It is undisputed that the accident occurred on 26th October 2021, and was reported, as evidenced by the police abstract.
29. The trial court reasonably inferred that the collision occurred at or near the junction when the Appellant joined the road without yielding. The Appellant’s own admission that the lorry had the right of way supports this conclusion. Under the Highway Code and general traffic rules, a person joining a main road has a higher duty to ensure that the way is clear and that it is safe to merge. Failure to do so constitutes negligence.
30. The Appellant’s reliance on the police abstract does not strengthen his case. It is settled law that a police abstract is only prima facie proof that an accident was reported, it does not establish liability. The Appellant also cites that the alleged traffic charge against DW1 as corroboration. However, no evidence was presented to confirm such charges. The foregoing notwithstanding,

even if there was evidence, the institution or withdrawal of traffic charges does not in itself prove civil liability.

31. Upon reviewing the entire record, this Court finds that the Appellant's testimony contained material inconsistencies. The Respondent version was more consistent with the physical evidence and probabilities of the case. The trial magistrate's finding that the Appellant was wholly liable was not based on any misapprehension of evidence or an error of law. This Court finds no justification to interfere with that finding.

Whether the Trial Magistrate misdirected herself in assessment of damages.

32. The finding on liability disposes off the appeal. From the foregoing analysis therefore, it is evident that the Appellant failed to discharge his burden of proof to establish negligence on the part of the Respondent on a balance of probabilities. The trial court correctly held that the Appellant was 100 per cent liable for the accident. There is no misdirection in law, fact, or principle to warrant this Court's interference with the trial court's findings.

33. Accordingly, this appeal is found to be without merit and is hereby dismissed. The judgment of the trial court is upheld in their entirety.

34. The Appellant shall bear the costs of this appeal assessed at kshs.35,000/-.

35.Orders accordingly.

Dated, signed and delivered at Machakos this 14th day of October, 2025.

RHODA RUTTO
JUDGE

In the presence of;

.....Appellant

.....Respondent

Selina Court Assistant