

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CIVIL APPEAL NO. E103 OF 2024**

MOSES SAMWEL NYAPERA-----  
APPELLANT

VERSUS

JASPAL AND SONS CO.LTD-----  
RESPONDENT

***(Being an appeal from the judgment of Hon. Reuben S. Kipngeno delivered on 21.05.2024 in Butali PMCC E024 of 2024)***

**JUDGMENT**

**INTRODUCTION.**

1. The appellant herein had filed a claim at the chief magistrate's court seeking general and special damages for an accident that involved two motor vehicles belonging to him and the defendant.
2. According to the plaintiff/appellant, on 3<sup>rd</sup> October 2020, he was driving a motor vehicle registration no. KAL 699 B BMW along the Kakamega- Webuye road at Mband Bridge area, when the defendant's motor vehicle, KCY 785A/ZE 6417 M/BENZ AVOR, which was a lorry, was negligently driven at a high speed by the defendant driver and or agent, was squeezed and rammed by his motor vehicle, causing him severe bodily injuries. The car was greatly damaged, for which he held the defendants liable.
3. The plaintiff/appellant called three witnesses to build his case against the defendant. In its judgment dated 21<sup>st</sup> May 2024, the trial court, on the issue of liability dismissed the plaintiff's claim holding that the Plaintiff failed to prove the liability on a balance of probability.
4. On the assessment of quantum, the trial court did not assess for the plaintiff had failed to prove the liability. The plaintiff's case was dismissed with costs to the defendant.
5. The appellant/plaintiff is being aggrieved and dissatisfied with the decision and judgment of Ho. Reuben S. Kipngeno delivered on

21/05/2024 in Butali PMCC No. E024 of 2024 appealed against both the liability and quantum on the following grounds;

- i. The learned trial magistrate erred in law and fact in failing to consider and rely on the testimony of the plaintiff's witnesses, i.e., the police officer, assessor, and plaintiff, which evidence was not controverted.*
- ii. That the trial magistrate erred in failing to find that the evidence tendered by the plaintiff established/proved negligence on the part of the defendant to the required standard.*
- iii. The trial Magistrate erred in law and fact by subjecting the appellant's case to a standard of proof of beyond a reasonable doubt and dismissing the appellant's suit with costs on the basis that he had not proved liability against the respondent on a balance of probabilities.*
- iv. The learned trial magistrate erred in law and in fact in failing to appreciate the evidence that was placed before him and in taking into account extraneous issues, hence arrived at a decision that was erroneous against the evidence that was placed before him.*
- v. The learned trial magistrate erred in law and in fact in failing to take into account the principle in the doctrine of Res Ipsa Loquitor as pleaded by the appellant.*
- vi. The learned trial magistrate erred in law and in fact by disregarding the plaintiff's testimony when the same was not rebutted by failure on the part of the respondent to call an eye witness.*
- vii. The learned magistrate erred in law and in fact by relying on hearsay evidence by the defence, i.e., evidence by the investigator.*
- viii. The learned magistrate misdirected herself in the appraisal of the evidence by failing to consider that the authenticity of the police abstract had not been rebutted.*

- ix. *The learned trial magistrate erred in law and in fact by being biased against the appellant.*
- x. *The learned magistrate erred in law and in fact by exercising her discretion capriciously and not judiciously.*
- xi. *That the trial magistrate erred in fact and law by dismissing the appellant's case despite the appellant having proved her case to the required standard.*
- xii. *The learned magistrate misdirected herself in the appraisal of the evidence by failing to consider that the authenticity of the police abstract had not been rebutted.*
- xiii. *The learned trial Magistrate erred in law and in fact in failing to appreciate that it was not in dispute that the occurrence of the accident is not disputed, hence the liability of the blamed motor vehicle could be inferred.*
- xiv. *The learned trial magistrate erred in law in discarding the evidence of the plaintiff who witnessed the accident, resulting in up dismissal of the case.*
- xv. *That the learned trial magistrate's decision was arrived at in a cursory and perfunctory manner in consideration of the irrelevant factors while leaving out relevant ones, resulting in up dismissal of the plaintiff's case.*
- xvi. *That the learned trial magistrate erred in law and fact in failing to consider the appellant's submission and legal authorities relied upon in support thereof.*
- xvii. *That the learned trial magistrate erred in law and fact by overly relying on the respondents' submissions and legal authorities which were not relevant and without addressing his mind to the circumstances of the case.*
- xviii. *That the trial magistrate erred in fact and law by writing a judgment that is not only incompetent but also not based on proper evaluation and consideration of pleadings, evidence on record, submissions, and applicable law and principles.*

*xix. That the learned trial magistrate's decision, albeit a discretionary one, was plainly wrong.*

6. He prays that the court allow his appeal and set aside the judgment of the lower court.
7. The appeal was canvassed by way of written submissions as per the court's direction.

### **Summary of the Evidence at the Lower Court**

8. PW1 was Senior Sergeant Jarius Okere, who was attached to Kabras police station as a traffic police officer testified that on 3/10/2020 at 10.00 p.m. along Kakamega Webuye Road at Mbande bridge, an accident involving two motor vehicles: KCY 785A and Trailer ZE647 Mercedes-Benz, and motor vehicle registration KAL 699 B occurred.
9. He testified that the KCY 785A, was coming from the Webuye general direction, headed towards Kakamega, loaded with sugarcane, and that the KAL 699 B was coming from Kakamega heading to Webuye route.
10. The driver of motor KCY lost control of the motor vehicle, and veered to the right, hitting the motor vehicle KAL 699 B, causing it to overturn.
11. He stated that the driver of motor vehicle KAL sustained injuries and that the motor vehicle was damaged.
12. He produced the motor vehicle inspection report PEXN-1, the police abstract-PEXN-2, and Photos-PEXN-3.
13. During cross-examination, he stated that he visited the crime scene saw that the bridge was narrow but wide enough for the trailer and motor vehicle to cross simultaneously.
14. He testified that the accident occurred at 10 p.m., 200 metres from the bridge, and the road was not marked.
15. On re-examination, he said that the accident occurred at night and just before the vehicles reached the bridge.
16. PW2 was the motor vehicle assessor at Mecca Automotive Works. He testified that on 17/11/2020, he received a call from the

plaintiff to assess his motor vehicle registration no. KAL 699B, a BMW, he observed that the motor vehicle was hit on the front left side and approximated the repair costs at Kshs. 503,000. He declared a total loss with the pre-Accident value at Kshs. 785,000/= salvage value of Kshs. 75,000/=.

17. He produced the photos taken and a report No. 17111120 marked PEXH-3.
18. PW3 was the plaintiff. He adopted his evidence in chief and produced the following documents: a logbook-PEXH-5; Demand notice/certificate of postage- PEXH-6 (a)(b); Statutory notice/Certificate of postage-PEXH-7(a)(b), and receipts of 6000-PEXH-8.
19. During cross-examination by the defence advocate, he testified that he had used the road 5 times a year. Bridge was narrow and there was no any signage making his motor vehicle overturn on impact. He stated that the accident occurred at 9 p.m. and that he was driving at 45-50 km/h when the truck, which was driving at a high speed, hit him, overtaking the motor on impact. He spent Kshs. 60,000 and produced the M-Pesa statement to prove that.
20. On re-examination, he stated that he had slowed down as he had approached the bridge and denied any blame for causing the accident.
21. Dw1 was the insurance claims investigator who had prepared the investigation report, which he produced in court marked DEXH-1. He testified that the accident involved 2 motor vehicles along the Mbande Bridge area at 10.00 p.m., moving to opposite directions when they collided.
22. He testified that the road was undergoing a major rehabilitation since it was narrow and there were no road signs near the bridge. He testified that the saloon car was hit at the edge of the concrete on its left side.

23. On cross-examination, he testified that he got confirmation from the traffic investigator and the trailers driver. He blamed the trailer and KENHA for the accident.
24. On re-examination, he said he made an independent analysis and blamed KENHA for the road accident.

### **Appellants submissions**

25. The appellant filed his appeal dated 23<sup>rd</sup> June 2025 and raised two issues of determination, the first being whether the appellant proved his case on a balance of probabilities and whether the learned trial magistrate erred in dismissing the appellant's suit.
26. On the first issue of whether the learned trial magistrate erred in dismissing the appellant's suit, he avers that he called three witnesses in support of his case he claimed that the respondent was the main cause of the accident for the driver lost control of his vehicle and hit the plaintiff's motor vehicle, causing it to overturn. He produced the police abstract that blamed the respondent's vehicle for the accident. He cited the case of **William Kabogo Gitau vs. George Thuo & 2 others (2010)** in support of his case and submitted that he had proved his case to the required standards, that is prove on balance of probability.
27. He submitted that the respondent's driver was to blame for he was driving a lethal machine, he had a duty of care to other road users which he failed to exercise responsibly thus should he held 100% liable for causing the accident if not he should equally share the blame if the court was not able to determine who was to wholly blame. He further referred the court to the case of **Isaac Onyango Okumu v James Ayere & another [2019] KEHC 4170 (KLR)**, where the court held that: where there is no concrete evidence to determine who is to blame between two drivers, both should be held equally liable.
28. The second issue for determination was whether the trial court ought to considered unpleaded facts an opinion that was not

pleaded by either of the parties to the suit. He quoted the judgment by the trial court, which claimed that the respondent's motor vehicle swerved to the left-hand side, which was never stated by either party.

29. The Appellant faulted the trial court for relying on unpleaded facts thus making it to arrive to erroneous decision on liability, he referred the court to the case of **Mwangi v Thiriku (Civil Appeal E010 of 2025) [2025] KEHC 8201 (KLR)**, where it was held a court is bound by the pleadings of the parties. which stated that the court was bound by the pleadings of the parties.

30. The Appellant further faulted the trial court for its decision on liability for the court speculated on what might have happened.

#### **Respondent's submissions**

31. In their submission dated 22<sup>nd</sup> July 2025, the respondent prays that the court uphold the decision of the lower court, submitting that the Appellant failed to discharge the burden of proof as required by section 107 of the Evidence Act.

32. The Respondent referred the court to the appellant's witness statement, where he stated that he swerved to the extreme left to avoid colliding with the respondent's vehicle but in vain. He held that this demonstrated that the appellant was solely to blame for the accident due to his negligence, which the respondent had nothing to do with.

33. He further referred the court to the findings of the investigating officer which stated that the accident occurred when the BMW's (the Appellant's motor vehicle KAL 699B) LHS (Left Hand Side) front tire violently hit a concrete edge of the bridge, rupturing the tire and deviating the car diagonally straight onto the trailer ZE6417's RHS (Right Hand Side) first axle's front tire/wheel thus the appellant was to blame for the accident.

34. The appellant's motor vehicle was damaged on the left-hand side, the appellant failed to explain how the vehicle was hit on the left-hand side.

35. He holds that if the accident had occurred and the vehicles were moving in the opposite direction, then the point of contact was to be on the right-hand side of both motor vehicles, not on the right side.
36. He dismissed the appellant's reliance on the police abstract, for it was not proof of negligence but a confirmation that there was an accident.
37. The investigating officer never produced any sketch maps of the scene of the accident. He referred the court to the case of **Equator distributors vs. Joel Muiru & 3 others [2018] eKLR** and **Benter Atieno Obonyo v Anne Nganga & another [2021] KEHC 7520 (KKLR)**.

#### **Analysis and determination**

38. This being a first appeal, the duty of this court is well settled. As held in **Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123**, the first appellate court is mandated to re-evaluate, reassess, and reanalyze the evidence on record and arrive at its own independent conclusion, bearing in mind that it neither saw nor heard the witnesses testify. The court must therefore determine whether the trial magistrate properly analyzed the evidence and applied the correct principles of law.
39. The appellant's case before the trial court was that on 3rd October 2020, he was driving his motor vehicle, registration number KAL 699B, when the respondent's motor vehicle, KCY 785A/ZE 6417, driven negligently and at high speed, veered from its lane and rammed into his car, causing serious damage and injuries. He called three witnesses in support of his claim, being (PW1) a police officer, (PW3) a motor vehicle assessor, and himself as (PW2), and produced documentary exhibits, including a police abstract, a vehicle assessment report, a certificate of examination and test of vehicle photographs, and a logbook.

40. The respondent denied liability and contended through its investigator that the accident occurred due to the appellant's negligence, alleging that he lost control and hit the concrete edge of the bridge before colliding with the respondent's lorry.
41. The trial court dismissed the appellant's case, holding that he failed to prove negligence to the required standard. The key question for this court is whether, upon re-evaluation of the record, was the trial court wrong in arriving at its conclusion, or it was right.
42. Under Sections 107 and 108 of the Evidence Act, he who alleges must prove. The burden of proof in civil cases rests upon the party who would fail if no evidence at all were given by either side. However, once a plaintiff establishes a prima facie case of negligence, the evidential burden shifts to the defendant to rebut the same.
43. The trial court, in dismissing the appellant's claim, found that he had failed to prove the respondent's negligence on a balance of probabilities. The required standard in civil cases is that the appellant must show it is more likely than not that the defendant's act caused the harm.
44. From the testimony of PW1, who is the police officer, it was clear that the accident occurred at night, on a narrow bridge along the Kakamega-Webuye road, involving the appellant's BMW and the respondent's sugarcane trailer. He testified that the trailer was being driven at a high speed and veered to the wrong side of the road, ramming into the appellant's vehicle. The police abstract confirmed that both vehicles were involved in the accident, although it did not expressly apportion blame to either of the parties.
45. PW2, who was the motor vehicle assessor, produced the assessment report showing that the appellant's vehicle was damaged on the front left side, which was an indication that the point of impact was largely frontal.
46. The appellant (PW3) testified that he was driving at a moderate speed of about 45-50 km/h and that the respondent's

trailer, which was being driven at a high speed, veered into his lane, which caused the accident. He denied any negligence on his part.

47. The respondent, on the other hand, relied solely on the evidence of an insurance investigator (DW1), although he was not an eyewitness. He testified that he relied on statements and photographs obtained after the accident. His conclusion that the appellant's tire struck the concrete barrier was therefore an opinion rather than a factual observation.

48. It is trite law that if one party adduces direct evidence of how an accident occurred, and the other relies on hearsay or speculation, the court must attach greater weight to the direct testimony

49. In **Stat Pack Industries Ltd v James Mbithi Munyao [2005] eKLR**, the Court of Appeal held that the burden of proof does not shift simply because the defendant has not called evidence; the plaintiff must still discharge his legal burden. However, once prima facie negligence is established, failure to rebut may result in liability.

50. Applying those principles, this court finds that both vehicles were using the narrow bridge at night, which was still under construction and hence lacked proper signage, and with poor lighting. From the evidence presented at the lower court, the accident occurred when both vehicles were on the move. PW3's swerving left and DW1's report of the BMW hitting the bridge's edge suggest possible contributory negligence, though not pleaded. Here, the respondent's lorry, admittedly heavy, wide, and moving fast a factor demanding a higher duty of care. The appellant's swerve and possible contact with the bridge contributed to the outcome.

51. The Court of Appeal in **Khambi & Another v Mahithi & Another [1968] EA 70** held that where it is not possible to apportion blame with mathematical precision, the court should do its best on the evidence available and apportion liability equally. Similarly, **in Stapley v Gypsum Mines Ltd (1953) AC 663**, Lord

Reid stated that the apportionment of blame is a matter of judgment based on the degree of fault and causation.

52. The appellant equally pleaded the doctrine of *res ipsa loquitur*, that the occurrence of the accident itself raises an inference of negligence. This doctrine was discussed in **Embu Public Road Services Ltd v Riimi [1968] EA 22**, where the thing that caused the accident was under the control of the defendant, and the accident would not have happened without negligence.
53. In the instant case, both drivers were in control of their respective vehicles, and the road condition also contributed substantially to the accident happening. The respondent's driver veering into the appellant's lane suggested negligence on his part; however, the appellant's swerving also had a sole attribution. **In Muthuku v Kenya Cargo Handling Services Ltd [1991] KLR 464 (High Court at Nairobi, Civil Case No. 1234 of 1989)**, *res ipsa loquitur* was applied where a vehicle's loss of control was unexplained. Here, the respondent failed to rebut the presumption of negligence, but the appellant's contribution reduces its effect. The doctrine, therefore, cannot wholly fix blame on one side.
54. On whether the trial court erred in dismissing the appellant's case, it is my view that the trial court imposed a higher standard of proof on the appellant as opposed to a balance of probability. The court of appeal in **Miller v Minister for Pensions [1947] 2 All ER 372**, stated that proof on a balance of probabilities simply means that the version which seems more likely than not should prevail. The learned magistrate also failed to give due weight to the uncontroverted evidence of the police officer and the motor vehicle assessor.
55. The trial court's dismissal of the entire claim was, therefore, a misdirection both on the law and on the facts. While the appellant did not prove that the respondent was wholly to blame, he proved that both parties contributed to the accident.

56. Guided by the principles in **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5**, I find that the fairest apportionment in this case Liability is apportioned 50% to the respondent and 50% to the appellant, the road was not marked and also no sketch of the scene of accident was produced for the court to properly be guided on what happened.

57. On the quantum, the motor vehicle assessor assessed the pre-accident value of the appellant's BMW at Kshs. 785,000/= declared it a total loss, and placed the salvage value at Kshs. 75,000/= giving a net value of Kshs. 710,000/= The towing charges of Kshs. 6,000 were supported by receipts.

58. Considering comparable awards and guided by **Zacharia Waweru Thumbi v Samuel Njoroge Thuku [2006] eKLR**, the special damages, which were pleaded and proved at Kshs 66,000, being towing: Kshs 60,000; assessor's fee: Kshs 6,000, PExh-8 is allowed, while the value of the vehicle is assessed at PW2's uncontroverted report (PExh-3), assessed a net loss of Kshs 710,000 (pre-accident value Kshs 785,000 less salvage Kshs 75,000).

59. Applying the 50% contributory liability, the appellant is entitled to Kshs. 391,000/= plus costs at 50% of the total costs both in lower court and this court.

### **Conclusion**

60. Upon re-evaluation of the entire evidence and the law, this court finds that the trial magistrate erred in wholly dismissing the appellant's suit and finds that both parties were negligent and contributed to the accident.

61. Accordingly, the appeal succeeds partially and the court makes the following orders;

- (i) The judgment of the Principal Magistrate's Court at Butali dated 21st May 2024 in PMCC No. E024 of 2024 is set aside.
- (ii) Liability is apportioned 50% to the respondent and 50% to the appellant.

- (iii) The appellant shall have the costs of this appeal and the lower court case in the same proportion.
- (iv) The sum of Ksh.391,000/= shall accrue Interest at court rates from the date of the lower court's judgment until payment in full.
- (v) Orders accordingly.
- (vi) Right of Appeal 30 days.
- (vii) File closed.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA  
THIS 15<sup>TH</sup> DAY OF OCTOBER, 2025.**

**S.MBUNGI**

**JUDGE**

**In the presence of:-**

CA: Amgomg'a

Ms Osewe for the Respondent, present online.

Ms Muiruri for the Appellant present online.