Maina v Kenya Seed Company Limited & another (Civil Appeal E053 of 2024) [2025] KEHC 16117 (KLR) (7 November 2025) (Judgment)

Neutral citation: [2025] KEHC 16117 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CIVIL APPEAL E053 OF 2024

PJO OTIENO, J

NOVEMBER 7, 2025

BETWEEN

EMMANUEL KARIUKI MAINA ..... APPELLANT

AND

KENYA SEED COMPANY LIMITED ..... 1ST RESPONDENT

PHILEMON KIBICHI TOO ..... 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of Hon.S.N. Makila (PM) in Kitale CMCC No. E74 of 2021 delivered on 7th August, 2024)

JUDGMENT

Background of the Appeal

1. By an amended plaint dated 28th July 2021, the appellant prosecuted a suit against the respondents seeking general damages for pain and suffering, loss of amenities, future medical expenses, and loss of earnings at the rate of Kshs 300 per day and/or damages for diminished earning capacity. He also sought special damages amounting to Kshs 12,290, together with costs of the suit and interest thereon.

2. The appellant's case was that on or about 10th June 2020, at around 6:30 a.m., he was a lawful passenger aboard motor vehicle registration number KAM 315N, a Toyota Saloon, travelling from Maili Saba towards Kitale. Upon reaching the Kwa Mwaura area along the Kitale-Eldoret road, motor vehicle registration number KCD 166G, a Toyota Prado, owned and/or driven by the respondents or their agent, was allegedly being driven negligently. In an attempt to overtake a pedal cyclist, the said vehicle allegedly veered off its lane into the path of KAM 315N, resulting in a head-on collision. The appellant sustained serious bodily injuries as a result of the accident.

3. The appellant pleaded and sought to rely on the doctrine of res ipsa loquitur.

4. In their statement of defence dated 13th July 2021, the respondents denied ownership, possession, or control of motor vehicle registration number KCD 166G at the time of the accident, as well as all allegations of negligence. They further averred that if any accident did occur, it was caused or substantially contributed to by the negligence of the driver of motor vehicle KAM 315N. The respondents also challenged the appellant's reliance on the doctrine of res ipsa loquitur.

5. In a judgment delivered on 7th August 2024, the learned trial magistrate held that both motor vehicles KCD 166G and KAM 315N were equally to blame for the accident. Since only the driver of KCD 166G had been sued, the court found the 2nd respondent (driver) 50% liable for the accident, and the 1st respondent (owner) vicariously liable, thereby apportioning liability equally at the ratio of 50:50 against the respondents jointly and severally.

6. The court awarded damages as follows: -General damages: Kshs. 7,000,000/=; Special damages: Kshs. 12,290/= and Loss of earnings: Kshs. 2,000,000/= bringing the total award to Kshs. 9,012,290/=.

7. After deducting 50% for contributory negligence, the net award stood at Kshs. 4,506,145/=. The court further awarded half the costs of the suit, together with interest at court rates from the date of judgment until payment in full.

8. Aggrieved by the said decision, the appellants lodged the present appeal by a Memorandum of Appeal dated 5th August 2024, seeking to have the judgment and decree of the learned trial magistrate set aside and substituted with a proper finding on liability and costs. The appellants also seek costs of this appeal and costs of the suit in the lower court. The appeal is anchored on the following grounds: -

    a. The learned magistrate erred both in law and fact in entering judgment on liability at a ratio of 50:50 between the appellant and the respondents whereas the appellant had proved the respondent's liability on a balance of probabilities.

    b. The learned magistrate erred both in fact and law by failing to take into account all material and relevant facts as to the causation of the accident and as a result thereof, she reached a wrong decision by holding the appellant 50% liable for the accident.

    c. The learned magistrate erred both in fact and law by taking into account irrelevant factors and failing take into account relevant factors and thereby arrived at an erroneous finding on liability.

    d. The learned magistrate erred both in fact and law by proceeding to pronounce judgment in the ratio of 50:50 on liability in total disregard of the appellant's submissions; authorities cited by the appellant and the principle of stare decisis.

    e. The learned magistrate erred both in law and fact by apportioning liability in the ratio of 50:50 and failed to consider the evidence adduced in support of the claim.

    f. The learned magistrate erred both in fact and law by holding that the appellant had proved negligence as against the respondent on a balance of probabilities only to enter judgment on liability at a ratio of 50:50 without any legal basis.

    g. The learned magistrate erred both in fact and law by awarding half costs to the respondent without any legal basis.

    h. The judgment and decree of the learned magistrate is in the circumstances unfair, unjust and irregular and should not be allowed to stand.

9. At the time of writing this decision, only the appellant's submissions had been filed. The same may be summarized as follows:

Appellant's Submissions

10. The appellants identify the sole issue for determination as whether the learned trial magistrate erred in apportioning liability at 50:50 between the appellant and the respondents, and if so, what the proper finding on liability should have been. The appellant concurs with the trial court's finding that he had no role in the management or control of the motor vehicle and was therefore not liable for contributory negligence. However, he faults the learned magistrate for holding that the deceased driver and/or owner of motor vehicle registration number KAM 315M was also responsible for the accident, despite not being a party to the suit. He contends that a person who is not a party to a suit cannot be blamed, and that no adverse orders can properly be made against them. In support of this proposition, he cites the case of James Gikonyo Mwangi v D M (Minor suing through his mother and next friend, I M O) [2016] eKLR and Raphael Muthiani Maithya v Simon Nzioki Mwanzia [2008] eKLR.

11. The appellant further submits that the proper course of action for the respondents, if they believed the driver or owner of motor vehicle registration number KAM 315M was to blame, would have been to join them as a third party to the proceedings in accordance with Order 1 Rule 15 of the Civil Procedure Rules. In support, counsel refers to Stella Nasimiyu Wangila & Another v Raphael Oduro Wanyama [2016] eKLR and Mwanahamisi Omar Mzee alias Fatuma Mohammed Ali Omar v Chengo Kahindi Birya & Another [2018] eKLR.

12. The appellant adds that where a defendant fails to issue a third-party notice to bring such a person into the proceedings, that omission is "his own funeral." For this proposition, reliance is placed on Boniface Waiti & Another v Michael Kariuki Kamau [2007] eKLR.

13. The appellant also faults the learned trial magistrate for treating the 2nd respondent as an eyewitness, arguing that he was a party to the proceedings and therefore could not, in law or fact, be treated as an independent eyewitness.

14. It is his contention that the only independent witness was PW3, a passenger aboard motor vehicle registration number KAM 315M, whose testimony the court found credible but did not expressly discredit or explain why it was not believed. The appellant therefore faults the trial magistrate for failing to properly evaluate and balance the evidence of PW3 against that of the 2nd respondent.

15. The appellant further argues that the 2nd respondent failed to keep a proper lookout, which would have enabled him to take reasonable action to avoid the collision. He maintains that it is the duty of every driver to guard against foreseeable danger and to take precautions against reasonably expected risks. In that regard, he relies on Jesse Muriithi v John Gichunge Baituru & Another [1992] eKLR, which cited Mondo v Jessa [1969] E.A.R. 156 for that principle.

16. In conclusion, the appellant urges this court to find the respondents 100% liable for the accident.

Issue, Analysis and Determination

17. Having carefully considered the record of appeal, the judgment of the lower court, and the submissions filed by the appellant, the sole issue that arises for determination in this appeal is whether the learned trial magistrate erred in apportioning liability at 50:50 between the respondents and the driver or owner of motor vehicle registration number KAM 315M.

Analysis

18. The appellant called a total of six witnesses before the trial court. PW1, a traffic police officer, produced the police abstract but confirmed that it did not disclose who was to blame for the accident. She further testified that she was not the investigating officer and did not produce any sketch maps of the scene. PW2 to PW4 were medical practitioners who testified on the nature and extent of the appellant's injuries, while PW5, the appellant's wife, testified about his condition and occupation prior to the accident.

19. The only witness who gave an account of how the accident occurred was PW6. He testified that he was seated in the front passenger seat of motor vehicle registration number KAM 315M, driven by the deceased driver, while the appellant was seated directly behind him.

20. The appellant himself was unable to testify owing to memory impairment arising from the injuries sustained in the accident.

21. PW6 narrated that the driver of motor vehicle registration number KCD 166G attempted to overtake a pedal cyclist and, in the process, veered off his lane and collided head-on with motor vehicle registration number KAM 315M. He attributed full blame for the accident to the driver of motor vehicle KCD 166G.

22. The 2nd respondent, who was the only defense witness, testified that at the time of the accident, his motor vehicle (KCD 166G) was travelling from Eldoret to Kitale, while motor vehicle registration number KAM 315M was heading in the opposite direction. He denied causing the accident and asserted that the point of impact was on the right side of his lane, facing Eldoret.

23. Upon considering the evidence, the learned trial magistrate held as follows:

> " In this case, it is my considered view that both drivers of the two vehicles equally contributed to the occurrence of the accident in light of the testimonies of PW6 and DW1. On his part, the plaintiff was a passive passenger who had no role to play in the matter... Since only the driver of motor vehicle registration number KCD 166G was sued, I will hold that the 2nd defendant driver is 50% liable for the accident and the 1st defendant (owner) is vicariously liable. Liability is apportioned at 50% against the defendants jointly and severally."

24. The gravamen of this appeal is the finding that the driver of motor vehicle registration number KAM 315M, who was not a party to the suit, was partly to blame for the accident. The question that arises, therefore, is whether a court can impose liability on a person who was not a party to the proceedings.

25. The right to be heard is a fundamental tenet of natural justice. It follows that no court of law can make a finding adverse to a person who has not been accorded an opportunity to be heard.

26. A court cannot issue a judgment or make any determination against an individual who was never made a party to the suit, as doing so would offend the audi alteram partem rule.

27. For a person to be held liable in law, they must have been properly joined as a party, served with the necessary pleadings, and given an opportunity to respond. A court cannot apportion liability to a non-party, regardless of the evidence suggesting their possible contribution to the accident. The principle that "no person shall be condemned unheard" has been reaffirmed by the Supreme Court in John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 2 others; Petition No. 17 of 2015 [2021] eKLR.

28. On the issue of liability against non-parties, I am persuaded by the decision in Pauline Wangare Mburu v Benedict Raymond Kutondo & another [2005] KEHC 2370 (KLR), where the court stated:

> " The defendant did not deem it necessary to issue a third-party notice to enjoin the owner of motor vehicle registration number KAH 129V to this suit. In the circumstances, it would be moot for this court to apportion liability to a person who is not a party to this suit. The defendants shall therefore bear 100% liability."

29. In the present case, the respondents, in their joint statement of defense, attributed blame to the "deceased." From the trial record, however, the appellant was alive, suggesting that the respondents either failed to properly identify the person they intended to blame or carelessly prepared their defense. It appears that their reference was to the deceased driver of motor vehicle registration number KAM 315M.

30. On the liability of the appellant, it is not in dispute that he was a lawful passenger aboard motor vehicle registration number KAM 315M. It is settled law that a passenger cannot be held liable for an accident, as they have no control over the management or operation of the vehicle.

31. Given that only the driver and owner of motor vehicle registration number KCD 166G were sued, it follows that they were the only parties before the court who could properly be held liable. The learned magistrate therefore erred in law and in fact by apportioning part of the blame to the driver or owner of motor vehicle registration number KAM 315M, who was not a party to the suit. The court in Raphael Muthiani Maithya v Simon Nzioki Mwanzia [2008] KEHC 2413 (KLR) underscored this principle, holding that a court cannot impose liability on non-parties.

32. The principles governing when an appellate court may interfere with a trial court's apportionment of liability were laid down in Khambi and Another v Mahithi and Another [1968] EA 70, where 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 cases, as where there is some error in principle or the apportionment is manifestly erroneous."

33. Upon re-evaluating the evidence and the law, I am persuaded that the learned trial magistrate erred both in law and in fact in apportioning liability at 50:50 between the two vehicles when only the respondents were parties to the suit. The appellant, being a lawful passenger, could not in any way be held contributorily negligent. The respondents, through their driver, bore the full responsibility for the accident.

34. Accordingly, I find and hold that the learned trial magistrate erred in apportioning liability equally. Liability is hereby reassessed at 100% against the respondents jointly and severally.

35. Consequently, the respondents shall bear the full costs of the suit in the lower court and the costs of this appeal, which are hereby awarded to the appellant.

DATED, SIGNED AND DELIVERED, VIRTUALLY, AT LODWAR, THIS 7TH DAY OF NOVEMBER 2025

PATRICK J O OTIENO

JUDGE