



**Magolo v Wachira & 2 others (Civil Appeal E003 of 2025)
[2025] KEHC 16260 (KLR) (3 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 16260 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E003 OF 2025
AN ONGERI, J
NOVEMBER 3, 2025**

BETWEEN

DAVID OTIENO MAGOLO APPELLANT

AND

ELIUD WACHIRA 1ST RESPONDENT

JEDY GENERAL CONTRACTORS LIMITED 2ND RESPONDENT

BANDA CHAKA 3RD RESPONDENT

*(Being an appeal from the Judgment of Hon. C. K. Kithinji (PM)
in Voi CMCC No. E095 of 2023 delivered on 18th December 2024)*

JUDGMENT

1. The Appellant David Otieno Magolo filed Voi CMCC No. E095 of 2023 seeking general damages for pain and suffering and special damages for injuries the Appellant sustained while travelling as pillion passenger on motor cycle registration number KMFP 690S from Kaloleni to Voi Town when it was hit by motor vehicle registration No. KAW 186V belonging to the 2nd Respondent which was being driven by the 1st Respondent.
2. The Appellant's evidence in brief was that the Appellant injured when the 3rd Party (the owner of motor cycle registration number KMFP 690S) was overtaking motor vehicle registration KAW 186V.
3. When the 3rd Party was about to finish overtaking motor vehicle registration KAW 186V, the motor vehicle suddenly turn right to enter a service lane and it hit the motor cycle at the rear and the Appellant fell down.
4. The Appellant sustained the following injuries:-
 - i. Bruises and abrasions of the right forearm.



- ii. Bruises and abrasions of the left hand.
 - iii. Bruises and abrasions of the right hip.
 - iv. Cuts/lacerations on both legs.
 - v. Blunt trauma to the right foot.
5. The Respondents filed a defence dated 25th May 2023 denying the Appellant's suit and in the alternative, they alleged that the accident was wholly caused by the negligence of the 3rd Party who is the rider of the motor cycle.
 6. The trial court found that it was the 3rd Party who was entirely to blame for the accident and assessed damages at Kshs. 202,100/=.
 7. Judgment was entered in favour of the Appellant against the 3rd Party in the sum of Kshs. 202,100/=.
 8. The Appellant has appealed against the said Judgment on the following grounds:-
 - i. The learned trial Magistrate erred in law and fact in dismissing the Appellant's suit against the 1st and 2nd Respondent on the issue of liability despite the overwhelming evidence on record which decision was unjust and unfair.
 - ii. The learned trial Magistrate erred in law and fact in failing to take into account of the relevant evidence tendered by the Appellant thereby dismissed the Appellant's case against the 1st and 2nd Respondents on the issue of liability which decision was unfair and unjust in the circumstances.
 - iii. The learned trial Magistrate erred in law and fact in misapprehending the evidence on record on the issue of liability thereby made a decision that was wrong, unfair and erroneous in the circumstances of this case.
 - iv. The learned trial Magistrate erred in law and fact and applied wrong principles thereby made a wrong and erroneous decision on the issue of liability.
 - v. The learned trial Magistrate erred in law and fact by failing to consider the submissions by Appellant thereby arrived at an unfair decision on liability.
 9. The parties filed written submissions as follows:-The Appellant, David Otieno Magolo, submitted that he has appealed against the judgment of the Principal Magistrate in Voi CMCC No. E095 of 2023, which dismissed his case against the 1st and 2nd Respondents and held the 3rd Respondent wholly liable for a road traffic accident.
 10. The Appellant seeks a reversal of the liability finding, arguing that the trial magistrate erred in her assessment of the evidence.
 11. The accident occurred on March 2, 2023, involving motor vehicle KAW 186V, owned by the 1st and 2nd Respondents, and motorcycle KMFP 690S, on which the Appellant was a pillion passenger.
 12. The evidence from the police sergeant (PW2) and the Appellant (PW3) consistently established that the motor vehicle, while ahead of the motorcycle, made an abrupt right turn without signaling, striking the rear of the motorcycle as it was overtaking.
 13. The driver of the motor vehicle (DW1) admitted under cross-examination that he had a duty to ensure the lane was clear before turning and that he did not see the motorcycle prior to the collision.



14. The Appellant contends that the trial magistrate misapprehended this evidence by incorrectly assuming the motorcycle rammed in to the motor vehicle.
15. The point of impact—the rear of the motorcycle and the front bumper of the motor vehicle—contradicts this assumption and instead supports the Appellant's version that the turn was made suddenly while the motorcycle was lawfully overtaking. The fundamental duty of a driver to signal and ensure a clear path before turning was breached by DW1, making the 1st and 2nd Respondents liable.
16. The Appellant, as a pillion passenger, bore no contributory negligence. The appeal therefore requests that the 1st and 2nd Respondents be held jointly and severally 100% liable for the accident, while the award of damages by the lower court is not contested. Costs of the appeal are also sought.
17. The 1st and 2nd Respondents on their part submitted that the trial court's judgment, which absolved them of liability for the accident, was sound and should be upheld.
18. That the appeal invites this Honourable Court to re-evaluate the finding on liability, a task governed by the established principle that an appellate court will not interfere with a trial court's findings of fact unless they are based on no evidence, a misapprehension of the evidence, or demonstrably wrong principles.
19. Further, that the core issue is whether the trial court correctly applied the legal principles in dismissing the case against the 1st and 2nd Respondents.
20. That the Appellant bore the burden of proof under Section 107 of the *Evidence Act* to establish the facts supporting his claim of negligence. The trial court, after a thorough analysis of the evidence and the witnesses' demeanour, rightly concluded that this burden was not discharged.
21. That the evidence presented by the Appellant, particularly from the investigating officer Sgt. Jacob Nyambu, was critically deficient.
22. Despite testifying, the officer failed to produce any substantive evidence from the police file, such as a sketch plan or investigation report, that could have objectively established the point of impact or culpability.
23. His testimony, which sought to assign blame to the lorry driver, was uncorroborated and inconsistent, and he provided no proof that the driver was ever charged with a traffic offence.
24. In contrast, the evidence from the 1st and 2nd Respondents demonstrated that the lorry driver was acting lawfully, having signalled and been given way before commencing his turn.
25. The proximate cause of the accident was the negligence of the 3rd Respondent, the motorcycle rider, who recklessly attempted to overtake a turning vehicle, thereby breaching his duty of care to the Appellant, his pillion passenger.
26. The trial court's finding that the 3rd Respondent was solely liable was a proper inference drawn from the evidence on a balance of probabilities.
27. Consequently, as the Appellant failed to substantiate his pleadings with credible evidence against the 1st and 2nd Respondents, this appeal lacks merit and should be dismissed with costs.
28. This being the first appellate court, the duty of the first appellate court is to re-evaluate the evidence adduced before the trial court and to arrive at its own conclusion whether to support the findings of the trial court.
29. The issues for determination to this appeal are as follows:-.



- i. Whether the trial court was right in holding that the first and second Respondents were not liable for the accident.
 - ii. Whether the Appellant proved his case to the required standard.
30. It is not in dispute that the motor vehicle registration KAW 186V and the 3rd Party motor cycle KMFP 690S were going the same direction when the accident occurred.
31. Having carefully re-evaluated the evidence adduced before the trial court, this court finds that the learned trial Magistrate erred in her appraisal of the evidence on the issue of liability.
32. The duty of a first appellate court, as set out in the case of *Selle v Associated Motor Boat Co. Ltd* [1968] EA 123, is to re-evaluate the evidence afresh and draw its own conclusions, while making allowance for the fact that it did not see or hear the witnesses testify.
33. The central question is whether the Appellant discharged the burden of proving, on a balance of probabilities, that the accident was caused by the negligence of the 1st Respondent, the driver of motor vehicle KAW 186V.
34. The evidence of the Appellant (PW3) and the investigating officer, Sergeant Jacob Nyambu (PW2), which was consistent and uncontroverted on the material points, established that the accident occurred when the 1st Respondent's motor vehicle, which was ahead of the motorcycle, suddenly turned right to enter a service lane without warning.
35. The point of impact—the rear of the motorcycle and the front bumper of the motor vehicle—corroborates the Appellant's version that the motorcycle was in the process of overtaking when the motor vehicle executed its turn.
36. This evidence was critically analyzed against the testimony of the 1st Respondent (DW1), who admitted under cross-examination that he had a duty to ensure the lane was clear before turning and that he did not see the motorcycle prior to the collision.
37. This admission is fatal to the Respondents' case. A driver intending to turn must signal his intention and ensure it is safe to do so. By failing to see the overtaking motorcycle and turning without ensuring the path was clear, the 1st Respondent breached this fundamental duty of care.
38. The trial magistrate's finding that the 3rd Party (the rider of the motorcycle) was entirely to blame was based on a misapprehension of the evidence, specifically an incorrect assumption that the motorcycle "rammed into" the motor vehicle.
39. This conclusion is irreconcilable with the established point of impact. A vehicle turning across the path of an overtaking vehicle is a classic scenario of negligence on the part of the turning driver.
40. An appellate court is justified in interfering with a trial judge's findings of fact if they are based on no evidence, or on a misapprehension of the evidence.
41. The trial court's finding on liability falls into this category, as it disregarded the consistent and logical evidence pointing to the negligence of the 1st Respondent.
42. Concerning the burden of proof, while it is true under Section 107 of the *Evidence Act* that the Appellant bore the initial burden, this burden was discharged by the coherent and consistent testimony of PW2 and PW3.
43. The failure to produce a sketch plan, while regrettable, was not fatal to the Appellant's case, as the oral evidence on record was sufficient to establish the sequence of events on a balance of probabilities.



- 44. The Respondents' argument that the motorcycle rider was reckless for attempting to overtake a turning vehicle is untenable, as the evidence shows the turn was made suddenly and without signaling, leaving the rider with no opportunity to avoid a collision.
- 45. As a pillion passenger, the Appellant bore no contributory negligence, and his claim against the driver and owner of the motor vehicle that caused the accident is well-founded.
- 46. In the result, the appeal on liability succeeds. The judgment of the trial court is set aside to the extent that it dismissed the Appellant's suit against the 1st and 2nd Respondents.
- 47. Judgment is hereby entered for the Appellant against the 1st and 2nd Respondents jointly and severally on liability at 100%.
- 48. The award of damages in the sum of Kshs. 202,100/= made by the trial court, which was not contested in this appeal, is hereby affirmed.
- 49. On quantum of damages therefore, Judgment is also entered for the Appellant against the 1st and 2nd Respondents, jointly and severally, in the sum of Kshs. 202,100/- together with costs of the suit in the lower court and costs of this appeal.
- 50. Orders to issue accordingly.

DATED, SIGNED AND DELIVERED THIS 3RD DAY OF NOVEMBER 2025 IN OPEN COURT AT VOI HIGH COURT.

ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistant: Millicent/Mabishi

.....for the Appellant

.....for the Respondent

