



REPUBLIC OF KENYA



KENYA LAW
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**Okuko v Osir (Civil Appeal E060 of 2024)
[2025] KEHC 16610 (KLR) (14 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 16610 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL APPEAL E060 OF 2024**

**DK KEMEL, J
NOVEMBER 14, 2025**

BETWEEN

WILLIS OUGO OKUKO APPELLANT

AND

CAROLYNE AUMA OSIR RESPONDENT

*(An appeal from the judgment and decree of Hon. Eric Malesi (PM)
delivered 10th July 2024 in Madiany PMCC No. E005 of 2023)*

JUDGMENT

1. The Respondent had sued the Appellant in the lower court vide a plaint dated 10th March 2023 and sought several reliefs namely, general damages, costs of the suit and interest on the damages and costs arising from injuries sustained through a road traffic accident involving motor vehicle registration number KCS 194M wherein the Appellant was its beneficial owner and registered in the name of the 2nd Defendant who is not party in this appeal when the said vehicle was negligently driven along Uyoma-Kisumu road along Luanda Kotieno-Ndori road and which hit a stationary motorcycle registration number KMCN 217U and that the 1st Respondent herein who was a fare paying passenger suffered injuries. The Appellant filed his defense statement dated 21st March 2023, denying the said claim and urged the court to dismiss the Respondent's suit with costs.
2. Upon trial, a judgment was entered in favour of the 1st Respondent inter alia; 100% liability against the Appellant; general damages of Kshs 80,000 for pain and suffering; costs and interest.
3. Aggrieved, the Appellant filed his Memorandum of Appeal dated 29th September 2024 wherein he raised the following grounds of appeal:
 - i. That the learned trial magistrate erred in law and fact in holding the Appellant 100% liable for causing the accident.



- ii. That the learned trial magistrate erred in law and fact in holding that the Appellant did not institute 3rd party proceedings.
- iii. That the learned trial magistrate erred in law and fact in failing to consider the Appellant's submissions on liability that were guiding in assessment of liability that is appropriate and applicable in similar cases such as the one he was deciding.

The Appellant therefore prayed that the appeal be allowed and the decree by the trial court be set aside. Further, that this honorable court reassesses the evidence on record on liability and arrives at its own decision. He likewise prayed to be awarded costs for the appeal.

4. Being the first appellate court, its duty is well spelt out namely to re-evaluate the evidence tendered before the trial court and subject it to a fresh exhaustive scrutiny so as to arrive at its own findings and independent conclusion on whether or not to uphold the decision of the trial court. In carrying out this task, the court must bear in mind that it neither saw nor heard the witnesses as they testified and therefore to give due allowance for that. (See *Selle & Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123; *Peters v. Sunday Post Ltd* (1958) EA 424; *Mary Wanjiku Gachigi v Ruth Muthoni Kamau* (Civil Appeal No. 172 of 2000. (Tunoi, Bosire & Owuor JJA); *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* Civil Appeal No. 345 of G2000. (Okubasi, Githinji & Waki JJA).
5. Carolyne Auma Osir (PW1) adopted her witness statement dated 03 02 2022 as her evidence in chief. She testified that on the 21st April 2021 at about 11.00 A.m she was travelling from Uyoma to Kisumu as a fare paying passenger on board motor vehicle registration number KCS 194M Toyota van and that on reaching a place called Gagra area along Ndori-Luanda Kotieno road and while she was seated right behind the driver, she noticed motor cycle registration number KMCN 217U that was stationary on the opposite lane indicating the rider's intention to turn right. Then the suit motor vehicle registration number KCS 194 M which was being driven at a very high speed suddenly swerved on to the right lane as if the driver expected the rider of the motor cycle to turn and enter the left lane but the rider remained on his right lane near the yellow line (centre of the road) and that the suit motor vehicle knocked the motor cycle causing the motor vehicle to lose control and land into a culvert by the right side. As a result, her face was hit by the metal bar behind the driver's seat while the seat belt tightened her chest. As a result, she sustained a deep cut wound on the right cheek, pain on the right cheek and pain on the chest. That she was treated at Pap Ndege health centre and was issued with a treatment book. That the pain persisted and that she went to Ober Kamoth hospital for further treatment. That she later reported at Bondo police station issued with a P3 for that was later filled. She produced the following documents: treatment notes from Pap Dero health Centre-(P exhibit 1), patient attendance card from Ober Kamoth sub county hospital as P Exhibit 2, general outpatient card as Exhibit 3, P3 form as P exhibit 4, police abstract as P exhibit 5, certificate of insurance as p exhibit 6 and demand letter as p Exhibit 7.

On cross- examination, she stated inter alia; that she had a waiting card serial number 2542858832; that she had her seat belt on; that it tightened and hurt her chest; that she was also taken to Madiany hospital but that she didn't carry the documents.

6. No. 67194 CPL Philip Juma (PW2), testified that a police officer attached to Bondo police station performing traffic duties. He produced a police abstract as Exhibit 5.

On cross examination, he stated inter alia; that he was not the investigation officer; that he did not know the circumstances of the accident and that the driver is yet to be charged and that he has not produced the police file.



7. Medical documents were produced by consent of the parties and that marked the close of the 1st Respondent's case.

8. Sebastian Maloba (DW1) testified that he was an inspector of police and the base commander at Bondo police station. He stated that the accident occurred while he worked at Bondo. That the investigating officer was PC Kanyi. That it was the rider of the motorcycle that was to blame because he made an abrupt U-turn and who was hit on the right side. That a sketch map was drawn.

On cross examination, he stated that the rider was not charged.

9. Jared Sirango Ochonge (DW2) adopted his witness statement as his evidence in chief. That he has been a driver for 12 years. He produced his driving license as D Exhibit 2.

On cross examination, he stated that he was the driver in the suit motor vehicle where passengers were injured. That the motor cycle rider was in the same direction as him and that he made a sudden U-turn and that the point of impact was on the left side of the road. He stated that he was not charged for the accident.

9. That marked the close of the Appellant's case.

10. The appeal was canvassed by way of written submissions. The Appellant submitted that all the witnesses testified that the rider took an abrupt u- turn and caused the accident. It was the Appellant's submission that the trial magistrate erred in apportioning liability 100% against him. The Appellant further submitted that the trial court was in error to hold that the Appellant should have filed 3rd party proceedings and maintained that he actually filed third party proceedings and that the 2nd Respondent being the rider filed a defence on the same. The Appellant finally urged this court to allow the appeal as prayed.

11. The 1st Respondent on her part submitted that apportionment of blame represents an exercise a discretion with which the appellate court which will interfere only when it is based on no evidence or on the application of a wrong principle. (see *Khambi and Another vs Mahithi and Another* (1968) EA 70. It was the submission of the 1st Respondent that PW1 testified that she was a fare paying passenger on board m v reg. No. KCS 194 M and that on the fateful day as she traveled from Uyoma to Kisumu on reaching Gagra shopping centre, DW2 who was the driver of the suit motor vehicle suddenly swerved to the right lane as if expecting the rider who was stationery to cross to the left lane but that the rider remained on hid lane near the yellow line, then DW2 hit the rider causing him to loss control of the vehicle which landed in a culvert on the right side of the road.

He went further to submit that DW1 testified in MADIANY PMCC NO. E003 OF 2023 and his testimony was adopted herein. That DW1 did not adduce evidence against the 1st Respondent but only confirmed that the 1st Respondent was a passenger aboard the Appellant's motor vehicle registration number KCS 194M. That DW1 stated that the driver of the Appellant namely Jared Sirango Ochonge (DW2) blamed a third party for the accident according to the occurrence book. That none of the Appellant's witnesses blamed the 1st Respondent for the accident.

That DW1 confirmed that the accident occurred involving the Appellant and the Respondent. That it was the testimony of DW1 that police were called to the scene and sketch maps drawn and investigations commenced by PC Kanyi-the investigation officer. DW1 referred to the OB excerpt which indicated that DW2 who was the Appellant's driver of the suit motor vehicle reported that a rider who was never enjoined as third party herein was travelling in the same direction being Luanda Kotieno towards Ndori when he made a sudden u- turn to the right lane as one faces Ndori direction from Luanda Kotieno. That DW2 indicated that he collided with the rider who made a u turn.



That it was DW2's testimony that he was released on police cash bail of ksh 5000 =and given a Notice of Intended prosecution but failed to return to Bondo police station on the appointed date. The import of issuance of notice of intended prosecution and release of DW2 on police cash bail meant that there was reasonable suspicion and intention to charge him for the accident herein.

Lastly, the Respondent submitted that no evidence was tendered by the Appellant's witnesses to show that the 1st Respondent was negligent in any way and that she contributed to the accident. The Appellant's witnesses instead chose to blame a rider for contributory negligence yet the said rider was never enjoined as a third party. That the evidence of the 1st Respondent remained unchallenged even on cross examination and as such the 1st Respondent proved on a balance of probability that the Appellant's driver was 100% liable for the accident.

11. I have considered the record of appeal, rival submissions and all the relevant authorities relied on by the parties. I find the issue for determination is whether the appeal has merit.
12. By and large, the Appellant's contention is on liability only.
13. From the record, PW1 testified that on the 21st April 2021 at about 11.00 A.m she was travelling from Uyoma to Kisumu as a fare paying passenger aboard motor vehicle registration number KCS 194M Toyota van and that when they reached a place called Gagra area along Ndori-Luanda Kotieno road, while she was sitting right behind the driver, she noticed motor cycle registration number KMCN 217U that was stationary on the opposite lane and in which the rider indicated his intention to turn right. That the suit motor vehicle registration number KCS 194 M which was being driven at a very high speed suddenly swerved on to the right lane as if the driver expected the rider of the motor cycle to turn and enter the left lane but the rider remained on his right lane near the yellow line (center of the road) and that the suit motor vehicle knocked the motor cycle causing the motor vehicle to lose control and land into a culvert by the right side. As a result, she hit her face on the metal bar behind the driver's seat and that the seat belt tightened her chest. That as a result, she sustained a deep cut wound on the right cheek, pain on the right cheek and pain on the chest.
14. DW1 confirmed that the accident occurred involving the Appellant's vehicle and the 1st Respondent. It was the testimony of DW1 that police were called to the scene and sketch maps drawn and that investigations were commenced by Pc Kanyi-the investigation officer. DW1 referred to the OB excerpt which indicated that DW2 was the Appellant's driver of the suit motor vehicle who reported that a rider who was never enjoined as third party herein was travelling in the same direction being Luanda-Kotieno towards Ndori when he made a sudden U-turn to the right lane as one faces Ndori direction from Luanda-Kotieno. It was DW2's testimony that he collided with the rider who made a U-turn. DW2 further stated that he was released on police cash bail of ksh 5000 =and issued with a Notice of Intended prosecution but failed to return to Bondo police station on the appointed date. Hence, the import of issuance of notice of intended prosecution and release of DW2 on police cash bail meant that there was reasonable suspicion and intention to charge him for the accident herein.
15. It is noted that there is no evidence that was tendered by the Appellant's witnesses to show that the 1st Respondent was negligent in any way and that she contributed to the accident. The Appellant's witnesses instead chose to blame a rider for contributory negligence yet the said rider was never enjoined as a third party. Since the 1st Respondent was a passenger in the Appellant's vehicle, then she had no control at all in the manner in which the vehicle was driven, controlled or managed. Indeed, the 1st Respondent confirmed that she had fastened her seat belt and which pressed her chest on impact while her face was hit by the metal bar separating the driver's cabin. The Appellant has tried to claim that he had filed an application to enjoin a third party and that the said third party entered appearance and filed a defence. However, a perusal of the court record reveals no such evidence. The only hint about



it is by the evidence of DW1 who stated that he had testified in Madiany PMCC No. E003 of 2023 and that his evidence was adopted in PMCC E005 of 2023. It would then appear that the alleged third party proceedings might have been conducted in Madiany PMCC No.E003 of 2023. That being the position, it was incumbent upon the Appellant to have sought for third party proceedings in the lower court file herein so as to try and shift blame upon the alleged motor cycle rider. In the absence of such evidence, the Appellant must shoulder full liability for the accident. The Appellant and or his driver, agent or servant owed a duty of care to the 1st Respondent as their passenger and ensure that she was driven safely to her destination as she was a fare paying passenger. Hence, the finding on liability by the learned trial magistrate was quite sound and must be upheld.

16. In *Oduor vAchieng* (Civil Appeal No. E026 of 2023) KEHC 27162 KLR Aburili J held that: “ In this case the respondent was only a passenger in the appellants motor vehicle. A passenger cannot be held liable when a vehicle he she is travelling in is involved in an accident unless it is demonstrated on how negligent she was such as jumping out of the motor vehicle or hanging on the said motor vehicle while it is on motion. See *Rosemary Wanjiku Kungu vs Francis Mutua Mbuvi & Another* (2014) Eklr. Further to this, the respondent testified and this was not controverted by the appellant even on cross examination, that she had fastened her seat belt and that the suit motor vehicle was being driven in a speeding manner so as to cause it to zigzag on the road.”
17. Similarly, in *Kilet vs E- Coach company Limited and 2 others* (Civil Appeal No. E007 OF 2020) [2023] KEHC 17950 (KLR) where the Judge overturned a trial courts finding of apportioning liability to a passenger and stated: “...It was a misdirection for a trial court to apportion 40% liability of blame to the appellant. There was no basis of that finding because the appellant was a passenger and had no role at all in the occurrence of the accident. He only happened to be a passenger and got injured when the subject motor vehicle got involved in an accident. Those are indisputable facts.....”
18. Delving on the issue of third-party notice, Order 1 rule 15 of the Civil Procedure Rules provides as follows:
 - (1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)—
 - (a) that he is entitled to contribution or indemnity; or
 - (b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or
 - (c) that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third-party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.
19. I do not find any third-party notice in the trial court’s record as claimed by the Appellant. The Appellant was under a duty to enjoin the third party whom he blamed for the accident as the court cannot apportion blame to a third party who is not party to the suit. As noted in the preceding paragraphs that the alleged third party application and proceedings were in Madiany PMCC No. E003 of 2023 and which is a different matter altogether from PMCC No. E005 of 2023.



20. There being no blame ascribed to the 1st Respondent, Dw2 the driver of the suit motor vehicle has to bear the responsibility for the accident. The Appellant herein being the owner of the suit motor vehicle was held vicariously liable for the torts of his driver or servant.
21. As the appeal is only on liability, the issues on quantum will not be canvassed.
22. In the result, it is my finding that the Appellant's appeal is devoid of any merit. The same is dismissed with costs to the 1st Respondent.

It is so ordered.

DATED AND DELIVERED AT SIAYA THIS 14TH DAY OF NOVEMBER 2025.

D. KEMEI

JUDGE

In the presence of:

N A M s Bii for M s Turgut.....for Appellant

N A M s Mukhongofor 1st Respondent

N A.....for 2nd Respondent

Maureen.....Court Assistant

