

REPUBLIC OF KENYA

IN THE HIGH COURT AT MARALAL

CIVIL APPEAL NO. E002 OF 2025

MOSES

LETUYA.....

.....**APPELLANT**

VERSUS

SHEILAH NEMAYAN AND WILSON LEKORPITA (*Suing as the legal Representative of the Estate of the late **PETER YUSUF DECEASED***).....

RESPONDENTS

(Appeal from the judgment and decree of the Hon. TAMBA A.SITATI (SPM) Delivered on 24th April, 2025 in Maralal MCCC E020 of 2023)

JUDGMENT

1. Aggrieved by the Judgment and Decree of the Honourable Temba A. Sitati, Senior Principal Magistrate delivered on

24th April 2025 in **Maralal MCCC E020 OF 2023**, Moses Letuya (the Appellant), lodged this appeal on liability based on the following grounds:

- a. THAT the Honourable Trial Court erred in fact and law by finding that the failure of PC (W) Regina, PW I, to observe any tyre screech marks suggested that the lorry did not take any evasive manoeuvres to avoid the accident and, by so finding, the trial court arrived at a wrong conclusion on liability.
- b. THAT the Honourable Trial Court erred in fact and law by failing to consider the evidence of DWI, John Ljalisa Lemeleny, that reason he flashed the full headlights was to warn the rider to return to his lane, and by so failing, the trial court arrived at a wrong conclusion on liability.
- c. THAT the Honourable Trial Court erred in fact and law by failing to give due weight to the evidence of

the said DWI on manner in which the accident occurred.

2. The appeal was canvassed by way of written submissions.
3. The Appellant challenges the finding on liability, contending that the trial court erred in law and fact by failing to hold the rider of the motorcycle wholly liable for veering into the Appellant's lane. For the Respondent, it is maintained that the lorry driver shone his headlights on the rider who lost control hence the collision.
4. The evidence of DWI was that he was he was lawfully driving his lorry on his correct lane when the motorcycle suddenly entered his lane, resulting in a collision. He added that he flashed his lights to warn the rider but to no avail. He denied any negligence on his part.
5. The Respondent, who was a pillion passenger, testified that the motorcycle was being ridden on its proper lane when the lorry approached from the opposite direction and shone full lights, momentarily blinding the rider, who then lost control, leading to the accident.

6. PW2 produced a police abstract in respect of the accident.
7. As a first appellate court, this Court is obligated to re-evaluate the evidence afresh and draw its own conclusions, while bearing in mind that it did not have the advantage of seeing or hearing the witnesses testify, as stated in **Selle & Another v Associated Motor Boat Co. Ltd [1968] EA 123**.
8. I have considered the grounds of appeal, the learned submissions by respective counsel, case law cited and the applicable law. As obligated of this court by law, I have re-evaluated the evidence at trial afresh to enable the court arrive at its independent findings.
9. Of determination is whether the trial court erred in apportioning liability at 100% against the Appellant.
10. It is not disputed that the accident involved oncoming vehicles and occurred at night. The Appellant asserts that the motorcycle entered his lane. The Respondent, through the pillion passenger's testimony,

attributes the loss of control to the Appellant's act of flashing full lights, thereby blinding the rider.

11. The law is settled that shining full lights at oncoming traffic, if it causes glare and impairs visibility, may amount to negligence. Equally, a rider who fails to maintain control of a motorcycle, even when faced with sudden glare, may be found contributorily negligent.

12. Crucially, there was no independent evidence to conclusively establish: the exact point of impact, which vehicle was on the wrong lane, or whether evasive action was taken by either party. PW2, said in her evidence that the matter was pending investigation. She, however, produced a police abstract which indicates that the file was closed due to insufficient evidence.

13. I am in conformity with recent jurisprudence variously established by the High Court in a plethora of decisions that have consistently held that a police abstract alone does not prove negligence, and that where the court is left with competing versions of events without corroboration, liability must be apportioned on the basis

of probabilities. In **Ngure v Maina (Civil Appeal E166 of 2024) [2025] KEHC**, the High Court reaffirmed that absence of an investigating officer or sketch map leaves the court with no firm basis to assign full blame to one party.

14. Similarly, in **Nzioka v Mwangangi & Another (Civil Appeal No. 283 of 2021) [2022] KEHC**, the court held that where both drivers blame each other and the evidence does not permit a clear finding as to who was more at fault, equal apportionment is appropriate.

15. The Court of Appeal's decision in **Lakhamshi v Attorney General (1971) EA 118** remains good law and was recently reaffirmed in several High Court decisions, to the effect that where it is impossible to determine who is more blameworthy, the court should apportion liability equally.

16. The Appellant, as the driver of a heavy commercial vehicle, owed a duty to exercise extra caution, particularly at night and when approaching oncoming traffic.

- 17.** The rider of the motorcycle equally owed a duty to maintain control of the motorcycle and to ride in a manner commensurate with night driving conditions.
- 18.** The evidence discloses mutual fault, but does not justify placing a greater share of blame on either party.
- 19.** Upon re-evaluation of the record, I find that based on the available evidence, the trial court's finding on liability must be faulted. The same was not a sound determination in light of the evidence. The facts pointed to a 50:50 apportionment of liability.
- 20.** With the result, that the appeal succeeds to the extent as hereunder stated.
- 21.** The judgement of the court on liability is hereby set aside and substituted thereof with a judgement apportioning liability at 50:50 as between the Appellant and the Respondent.
- 22.** Each party is to bear its own costs of the appeal.

**Dated signed and delivered virtually this 30th day of
January
2026**



A.K. NDUNG’U

JUDGE