

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CORAM: R. MWONGO, J.
CIVIL APPEAL NO. E033 OF 2025

ZACHARY NJAGI NDWIGA.....APPELLANT

-VERSUS-

MOSES KARIUKI NJERU.....RESPONDENT

*(Appeal arising from the decision of Hon. J.A. Otieno in Embu MCCC No. E056 of 2024
delivered on 09th April 2025)*

J U D G M E N T

The Appeal

1. Through a memorandum of appeal dated 11th December 2025, the appellant is seeking the following orders:
 - 1) The appeal to be allowed and the judgment of the Learned Trial Magistrate be set aside as a whole;
 - 2) The court do award costs of this Appeal and the costs in the lower court to the Appellant; and
 - 3) Such further or other orders as this Honourable Court may deem fit.
2. The appeal is premised on the grounds that:
 - 1) The Learned Trial Magistrate erred in law and in fact in reaching a judgment which was not supported by the evidence on record and failing to consider the evidence adduced by the Appellant and his witness;
 - 2) The Learned Trial Magistrate erred in law and in fact in failing to appreciate that it was the Respondent who was to blame for the accident as he was the one who hit the Appellant's motor vehicle when it was indeed partly off the road and hence he hit it on the passenger's door;
 - 3) The Learned Trial Magistrate erred in law and in fact in failing to find that the Respondent was indeed riding on the pavement by overlapping the Lorry that had given way to the Appellant and that is why he could not see the Appellant's vehicle;
 - 4) The Learned Trial Magistrate erred in law and in fact in failing to find that the Respondent was not a credible witness because he could not be unconscious and at the same time see all that was happening at the scene after the accident;

- 5) The Learned Trial Magistrate erred in law in fact in finding that Appellant was making a U-turn when indeed no such evidence was tendered;
- 6) The Learned Trial Magistrate erred in law and in fact in apportioning damages yet it is the Respondent who was 100% to blame for this accident;
- 7) The Learned Trial Magistrate erred in law and in fact in relying on the Respondent's medical report yet the Doctor who was PWII admitted in his evidence that the Plaintiff failed to disclose initial treatment at Embu Level 5 hospital where the Respondent was first rushed to casualty allegedly bleeding and unconscious and there was no treatment notes or discharge summaries from the initial hospital visit produced, thereby undermining the reliability of the medical report used to support quantum; and
- 8) The Learned Trial Magistrate erred in law and in fact in awarding damages of Kshs.700,000/- and costs of the suit to the Respondent in view of the inconsistencies in the Respondent's evidence and failure to disclose material facts, which go to the credibility of both the Respondent and the medical report relied upon.

Background

3. The respondent filed a plaint dated 24th April 2024 seeking judgment against the appellant for general damages for pain and suffering and loss of amenities, special damages of Kshs.5,550/=, costs of the suit and interest.
4. He claimed that on or about 14th December 2023 along Embu-Meru road, Embu Level 5 Hospital area, the respondent was a lawful rider of motorcycle registration number KMFG 154P when the appellant's authorized driver drove motor vehicle registration number KBP 870D so recklessly and negligently that the motor vehicle lost control and hit the respondent and caused an accident thereby occasioning him serious injuries. The plaint contained details of the alleged negligence. The injuries suffered were indicated as cut wounds on the forehead (para-nasal, upper lip and chin); swollen, painful and tender knee; head concussion; fracture on the left temporal bone; and blunt injuries on the chest, left and anterior aspects.
5. The appellant filed a statement of defense denying the allegation in the plaint and blaming the respondent 100% for the accident due to negligence on his part. He stated that the respondent was so careless that as a result of the accident, his car was damaged.

Summary of the Evidence in the trial Court

6. PW1 was Cpl. Silvy Chelangat based at Embu Police Station. She produced the police abstract for the accident and stated that on the material day, she was attending to her duties along Embu-Meru road when they found a mob attempting to burn down the appellants motor vehicle registration number KBP 870D. By the time they arrived, the scene had been secured by administration police who were there and registration numbers had been removed. She established, from studying the scene, that the motor vehicle was turning to enter the hospital but without giving way to oncoming vehicles.
7. The respondent had been taken to the hospital but when they went to see him, they did not find him there or at Tenri Hospital. The wreckages of the motor vehicle and motor cycle were taken to the police station. The respondent was found at Liberty Hospital and was advised to present his motor cycle number plate and ownership documents before a P3 form could be issued. He recorded a statement and the appellant was issued with a police abstract and he was not charged with a traffic offence. she blamed the driver of the motor vehicle for the accident.
8. On cross-examination, she stated that the accident occurred on the lane entering Embu from Meru direction and the respondent was pushed outside the road completely. That the appellant's vehicle was hit on its side but it remained on the road. That the respondent did not say that he was riding on a feeder road. No other witnesses recorded their statements.
9. PW2 was Dr. G.K. Mwaura who examined the respondent. He produced the medical examination report which indicated the injuries suffered by the respondent as stated in the plaint. On cross-examination, he stated that the respondent was treated at Liberty Hospital and he wrote the medical report based on the treatment notes from the said hospital. That the respondent did not tell him that he had been treated at Embu Level 5 Hospital.
10. PW3 was the respondent who produced documentary evidence in support of his case. In his statement, he stated that on the day of the accident, he was riding his motor cycle along Embu-Meru road being fully clad in his safety gear. He said he was crossing a feeder road near Embu Level 5 Blood Transfusion Center when he saw the appellant's motor vehicle being driven at high speed attempting to enter the said feeder road.
11. In the process, the vehicle hit him and he sustained injuries as a result of being thrown off the motor cycle 3 meters away. Good Samaritans gathered and helped him to Embu Level 5 Hospital while some called the police. He received first aid at

the said hospital and some scans were done before he was transferred to Liberty Hospital where he was treated and discharged the same day. He stated that since the accident occurred, he has never been able to do his daily activities normally because of the accident.

12. On cross-examination, he stated that he was riding his motor cycle behind a lorry and so he could not see how the appellant's motor vehicle was being driven. After the accident, the lorry did not stop. He said he saw a white vehicle making a turn and hit him. He did not tell PW2 that he received medical intervention at Embu Level 5 Hospital.
13. DW1 was the appellant who stated that he was going to attend to his ailing father at Embu Level 5 Hospital when he was required to go to the Hospital's Gate D, the blood transfusion center for some specimens. He was driving from the Embu town direction to Gate D and he indicated intending to make a right turn to enter the said Gate D. That is when the respondent, who was riding his motor cycle from the Meru direction, abruptly emerged and without caring that the appellant had indicated and was turning, proceeded on his way, dangerously so.
14. He said that the respondent was riding behind a lorry which had stopped to give him way to enter the hospital's Gate D but this act did not prompt the respondent to stop. The respondent hit the side of his vehicle and caused damage to it. His wife, who was in the car at the time, helped to take the respondent to Embu Level 5 Hospital. The police arrived at the scene and processed it then recorded his statement at the police station where he was also issued with a police abstract showing the registration numbers of his car and the respondent's motor cycle together with insurance details for both.
15. He stated that the accident did not occur at a feeder road as alleged by the respondent and that the accident occurred because of the respondent's carelessness. That at the time of the accident, the respondent was not wearing any protective gear. He stated that his car was damaged on the side and that explains that it was the respondent who hit him and he should, therefore, be held 100% liable for the accident. He produced a motor vehicle assessment report for his vehicle as evidence.
16. DW2 was Paulina Wanjeri Njagi, DW1's wife who was in the motor vehicle with him that day. In her statement which was adopted as evidence in chief, she stated in the same terms as DW1 and also blamed the respondent for the accident. On cross-examination, she stated that she was not aware that the police abstract did not mention the presence of a passenger in the appellant's motor vehicle.

Findings of the trial court

17. The trial court assessed liability at 70%:30% against the appellant and quantum as follows:

- 1) General damages- Kshs.700,000/=
- 2) Special damages- 5,550/=
- 3) Costs and interest to the respondent.

Parties' Submissions

18. The appeal was canvassed by way of written submissions.

19. In his submissions, the appellant stated that the trial court's judgment did not meet the requirements set out under Order 21 Rule 4 of the Civil Procedure Rules. He urged the court to re-examine the evidence and reach its own conclusions as was stated in the case of **Selle & Another v Associated Motor Boat Co. Ltd. & Others [1968] EA 123 at 126**. He stated that the accident occurred along the main road at the hospital's Gate D and there was no feeder road in sight. That the respondent hit his car on the side while he had turned to enter the hospital and that he lied in his evidence adduced before the trial court. He urged the court to allow the appeal and find the respondent 100% for the accident

20. The respondent also relied on the case of **Selle & Another v Associated Motor Boat Co. Ltd. & Others (supra)** and urged the court to re-examine the evidence adduced before the trial court. He argued that the appellant did not call any witness to rebut the respondent's testimony. That under section 107 of the Evidence Act, onus was on him to displace the evidence adduced by the respondent but he failed to do so. He relied on the cases of **William Kabogo Gitau v George Thuo & 2 Others [2010] KEHC 4124 (KLR)**, **Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] KECA 432 (KLR)** and **Bourhill v Young [1943] AC 92**. He urged the court to find the appellant 100% liable for the accident and increase the award of damages to Kshs.1,500,000/=.

Issues for Determination

21. The issues for determination are:

- 1) Whether the trial court's assessment of liability is sound and fair;
- 2) Whether the trial court's award of damages should be reviewed.

Analysis and Determination

22. As a first appellate court, it is the duty of this court to examine the evidence adduced before the trial court afresh. This was held in the case of **Coghlan v. Cumberland (1898) 1 Ch. 704**, where the Court of Appeal (of England) stated as follows:

"Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong...When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen."

23. Liability is a matter of fact; hence, this court must re-look the circumstances under which the accident in question occurred. Matters of fact are determined from evidence and the burden of proof lies on the party alleging the facts to prove them. Section 107 (1) of the Evidence Act provides that:

"Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist."

24. The evidential burden is further established under sections 109 and 112 of the Evidence Act. In the case of **Evans Otieno Nyakwana v Cleophas Bwana Ongaro [2015] KEHC 8440 (KLR)** the evidential burden was discussed and the court stated that:

"As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore, the evidential burden...is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular

person...The appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side.”

25. PW3, the respondent, stated that he was riding his motor cycle at a feeder road when the appellant drove his motor vehicle and knocked him down while turning to enter the feeder road. On cross-examination he stated that he was riding behind a lorry and he could not see how the appellant’s vehicle was being driven. The lorry did not stop after the accident.
26. The appellant, DW1, stated that he had put on his indicator with the intention of entering Embu Level 5 Hospital Gate D as he was driving facing the Meru general direction. A lorry on the oncoming lane had stopped to give way to him to enter the hospital Gate D and the respondent was riding his motor cycle behind that lorry. As he was entering that gate and getting off the road, the respondent hit the side of his motor vehicle and causing damage to it.
27. From this evidence, it is settled that the respondent was driving behind a lorry. That lorry gave way to the appellant to make a right turn to enter the Hospital gate D. It is trite that liability must be proved on a balance of probabilities from assessment of the facts emerging from evidence. The Court of Appeal in **Michael Hubert Kloss & another v David Seroney & 5 others [2009] KECA 146 (KLR)** held that:

“The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in Stapley vs. Gypsum Mines Ltd (2) (1953) A.C. 663 at p. 681 as follows:

‘To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it...The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two

or more as having jointly caused the accident. I doubt whether any test can be applied generally...”

28. Given the narrated circumstances of how the accident occurred, it is clear to me that there is a greater likelihood that the respondent was negligent. He said he was riding behind the lorry when he left his place behind the lorry essentially overtaking it on its left side. The evidence is that the lorry had given way to the appellant who tried to turn into the hospital gate to the right. In the process, the motorbike hit the appellant's vehicle on its left side. The appellant produced photographs of his damaged vehicle as evidence. The photograph shows the damage on the left side of the vehicle. The respondent asserted he was behind the lorry. It had stopped to let the appellant turn to his right. The respondent's motorbike ought not to have been on the left of the lorry.
29. In my view, the accident was caused wholly as a result of the respondent's negligence and not the appellant's. Therefore, the respondent ought to have been held 100% liable for the accident and the finding of the trial court on liability should be set aside.
30. Given that the respondent was to blame 100% for the accident, it is not prudent for the court to delve into assessment of quantum. Moreover, the trial court's assessment of damages must be set aside entirely. The appellant produced an assessment of the material damages caused on his vehicle but he did not claim the same through a counterclaim before the trial court. Therefore, no award will be made in favour of the appellant regarding damage to his car.

Disposition

31. In light of the foregoing, the appeal hereby succeeds. The trial court's findings in its judgment delivered on 09th April 2025 are hereby set aside in their entirety and substituted with a finding that the respondent was 100% liable for the accident. Costs of the appeal are awarded to the appellant.
32. Orders accordingly.

Delivered, dated and signed at Embu High Court this 18th day of February, 2026.

**R. MWONGO
JUDGE**

Delivered in the presence of:

1. Fatuma for Appellant
2. Mugane for Respondent
3. Francis Munyao - Court Assistant