REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ITEN
CIVIL APPEAL NO. E012 OF 2024

ANDREW CHEBULET……...1ST APPELLANT
FRANCIS KIPTOO…….2ND APPELLANT

VERSUS

MESHACK KIPLIMO KIPSOI ……..1ST RESPONDENT
KEWELL INVESTMENT LTD……..2ND RESPONDENT

JUDGMENT

(Appeal from the Judgment dated and delivered on 24/07/2024 in Iten SPMCC No. 045 of 2022 by Hon. C. Kutwa - SPM)

1. This Appeal arises from the Judgment delivered in the said Magistrate's Court suit in which the 1st Respondent (as the Plaintiff) filed a claim against the Appellants and the 2nd Respondent (as Defendants) seeking compensation for injuries allegedly suffered by him while riding a motor-cycle. The Appeal is clearly only against the trial Court's decision on liability.

2. The Judgment was against the Appellants and the 2nd Respondent (as Defendants) in the following terms:

i)	Liability	100%
ii)	General damages	Kshs 700,000/-
iii)	Special damages	Kshs 6,550/-
	Total	**Kshs 706,550/-**
iv)	Plus costs and interest	

3. The background of the matter is that the 1st Respondent, by the Plaint dated 11/05/2022 filed through **Messrs Morgan Omusundi Law Firm**, pleaded that the Appellants were the owners of the motor vehicle registration **KCL 882C**, while he was riding the motor cycle registration number **KMGA 436Z** on 24/03/2022 along the Kabarnet – Iten Road when the Appellants and/or their driver, negligently drove, or managed the said motor vehicle causing it to lose control, veer off the road and cause an accident which occasioned the 1st

Respondent injuries, for which he held the Appellants jointly and severally liable. The 1st Respondent listed several particulars of negligence in the Plaint.

4. The Appellants, in response, through **Messrs Kimondo Gachoka & Co. Advocates**, filed the Statement of Defence dated 31/05/2022 in which they generally denied the claims made in the Plaint, and in the alternative, blamed the 1st Respondent for causing the accident.

5. The matter then proceeded to full hearing in which both sides called 2 witnesses each.

6. At the trial, the 1st Respondent testified as **PW1** and adopted his Witness Statement, which is basically a replica of the Plaint. He also produced his supporting documents. In cross-examination, he stated that he was heading to Kabarnet while the motor vehicle was heading to Iten. He denied that he is the one who lost control of the motor-cycle, and reiterated that it is the motor vehicle that veered into his lane. He also contended that the accident occurred on the right lane facing Iten, and that he had flashed the motor-cycle's headlights. He agreed that the driver of the motor vehicle was not charged in Court. In re-examination, he stated that he was told that the accident occurred in his lane.

7. **PW2** was **Police Constable Thomas Kimeli** from Iten Police Traffic station. He testified that the accident occurred at around 6.30 pm, and that the driver of the motor vehicle veered off the road and hit the motor cycle ridden by the 1st Respondent, who was heading to Iten from Kabarnet. He further stated that the motor vehicle (matatu) was damaged on the right side, and he then produced the Police Abstract and P3 confirming the injuries suffered by the 1st Respondent. In cross-examination, he agreed that he was not the Investigating Officer and that he never visited the scene, but insisted that, the Investigating Officer blamed the driver of the motor vehicle because he did not keep to his lane. He however stated that he did not know whether the driver was charged in Court, and agreed that in the Police Abstract, the accident is indicated as pending under investigations, and also that he did not have any sketch maps.

8. For the defence, **DW1** was **Police Officer Eric Mullet** from Iten Police station. He stated that he was not the Investigating Officer in the case but stated that from the Police Occurrence Book, the motor vehicle was being driven from Kabarnet towards Iten and that it is the oncoming motor-cycle that lost control and crashed into the motor vehicle. He then produced an extract of the Occurrence Book. In cross-examination, he agreed that the Police Abstract does not indicate the person to blame. He also denied that the accident was a head-on collision and stated that he did not know where the motor-cyclist was headed. He then agreed that he could not confirm the person to blame for the accident, and also that he did

not also have the police file. In re-examination, he clarified that the motor-cycle and the motor vehicle were not heading towards the same direction.

9. **DW2** was **Francis Kiptoo Amdany**, the 2nd Appellant, who also adopted his Witness Statement. In cross-examination, he stated that he was the driver of the motor vehicle and was heading to Eldoret from Ravine, and the accident occurred near a corner. He denied that the point of impact was on the right-side facing Ravine. In re-examination, he stated that the accident occurred on the left side facing Ravine.

10. After the hearing, the trial Court delivered its Judgment on 24/07/2024 in favour of the Respondent as aforesaid.

11. Dissatisfied with the Judgment, the Appellants filed this appeal by way of the Memorandum of Appeal dated 2/08/2024, premised on the following 4 grounds:

i) **That the learned trial magistrate erred in law and in fact by failing to consider the Appellant's written submissions and legal authorities and/or precedents on liability thereby arriving at a determination which is wholly erroneous in law.**

ii) **That the learned trial magistrate erred in law and in fact by holding the Appellants 100% liable for causing the accident contrary to the evidence on record and/or adduced during trial.**

iii) **That the learned trial magistrate erred in law and in fact by failing to elaborate on a balance of probability, how the 1st Respondent proved negligence and/ or adduce reasons for holding the Appellant liable to the degree of 100%.**

iv) **That the learned trial magistrate misdirected himself by failing to take into account the written statement, oral evidence of the appellant, as well as the Occurrence book excerpt that was produced in court together with evidence of the police officer DW1 and thus arriving at an unjust determination.**

12. The Appeal was then canvassed by way of written Submissions. The Appellants' Submissions is dated 28/07/2025, while for the Respondent, I have not come across any either in the physical file or in the Judiciary Case Tracking System (CTS) online platform.

<u>Appellants' Submissions</u>

13. Counsel for the Appellants, after restating the principles applicable in determining Appeals challenging assessment of quantum, pointed out that the two Police Officers (**PW3** and **DW1**) were not the Investigating Officers and as such, their testimonies amounted to

hearsay. He however averred that **DW1** produced an extract from the Occurrence Book which contained remarks made by the Investigating Officer, as opposed to **PW3** who only referred to the Police Abstract, which did not attribute blame. He asserted that there being no independent eye-witness, the testimony of the Police Officers should not be relied upon. He then cited an unnecessarily lengthy list of cases on the known principles applicable on the issue of standard of proof in civil cases, and submitted that the 1st Respondent failed to prove his case. He also restated the principle that a party who wishes the Court to rule in his favour must prove his claims, and cited **Sections 107**, **108** and **109** of the **Evidence Act**, and also further authorities.

Determination

14. As reiterated in a plethora of cases, this being a first appellate Court, it has the duty to evaluate, re-assess and re-analyze the evidence before the trial Court, and draw its own conclusion (see for instance, the case of **Kenya Ports Authority vs Kuston (Kenya) Ltd [2009] 2 EA 212**.

15. As aforesaid, the issue in this Appeal is "**whether the trial Court erred in attributing liability at 100% against the Appellants"**.

16. The extent of the mandate of an Appellate Court when called upon to review a finding of fact by a trial Court is well-settled. It is that an appellate Court will only interfere with the conclusions and findings of a trial Court if the same was not supported by evidence or was premised on wrong principles of law. In re-affirming this principle, the Court of Appeal, in the case of **Mwangi V. Wambugu (1984) KLR 453**, held as follows:

> **"A court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding and an appellate court is not bound to accept the trial Judge's finding of fact if it appears either that he has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."**

17. In this case, the only eye-witnesses who testified were the 1st Respondent, as the Plaintiff (**PW1**), who was also the rider of the motor-cycle, and the 2nd Appellant (**DW2**) who was the driver of the Appellant's (Defendants') motor-vehicle. While the 1st Respondent (as Plaintiff), as the rider of the motor-cycle, blamed the Appellants' motor vehicle for veering

off its lane and crashing into his motor-cycle, the Appellants, on their part, claim that it is in fact the 1st Respondent who lost control of the motor-cycle and veered into the motor-vehicle's lane.

18. The Investigating Officer who, I believe, visited the scene after the accident, documented it, drew sketch maps, and interviewed witnesses, did not testify. It is, instead, two other Police Officers, **PW2** called by the Prosecution and **DW1**, called by the Defence, but neither of whom was the Investigating Officer, who testified. No reasons were however tendered on why the Investigating Officer was himself not called to testify, and why it is these other two Officers who were sent to testify. It is possible that he has since left the Station, either by transfer or by any other eventuality but such was not disclosed. What I find interesting is that the two Officers, **PW2** and **DW1**, both from the same Police Station and allegedly relying on the same documentation on record at the Station, gave conflicting evidence on who was blamed. According to **PW2**, it is the driver of the Appellant's motor-vehicle who was blamed as it was alleged that it is him who veered off his lane and caused the collision. He did not however produce any record, entry or document, to support this contention. He also agreed that the Police Abstract did not attribute blame and simply indicates that the case is pending under investigation. According to **DW1** however, it is the 1st Respondent who was blamed because it is him who lost control of his motor-cycle, veered into the opposite lane and crashed into the Appellant's motor-vehicle. At least on his part, he produced an extract of the Occurrence Book which indeed indicated that it is the rider (1st Respondent-Plaintiff) who was blamed.

19. As aforesaid, although the extract of the Occurrence Book produced on behalf of the Appellants indicated that it is the 1st Respondent as the rider of the motor-cycle who was blamed for causing the accident, the Investigating Officer who actually investigated the case and made entries in the Station's records not having been called to testify, the testimony given by the Police Officers was therefore technically hearsay. All they could have done in Court was to simply produce the records contained in the Police entries, nothing more. It is also not in dispute that no independent witness testified, and no sketch maps were produced, and that the Police Abstract on record did not attribute blame on anyone and simply indicated that the case was pending under investigations, and also that no one was charged in Court. Under these circumstances, I am reluctant to accept the extract from the Occurrence Book as conclusively confirming that it is the 1st Respondent as the rider of the motor-cycle, who was to blame.

20. It is therefore evident that the evidence on record on who was to blame for the accident is scanty and unreliable. The evidence was clearly not sufficient to attribute blame as the positions asserted by either party were clearly not conclusively established to be true. Under the above circumstances, I find no support for the trial Magistrate's finding that it is the Appellant's driver who was to blame. That finding was, in my view, not borne out of the evidence on record.

21. While it would therefore be easy to dismiss the 1st Respondent's suit on the ground that, as the Plaintiff, it is he who bore the duty to prove his case on a balance of probabilities, which duty he failed to discharge, the legal position in cases of this nature is not that automatic. I say so because it is now generally agreed that where the evidence on record is not sufficient to attribute liability, both parties are to bear equal liability. I cite, for instance, the Court of Appeal case of **Hussein Omar Farah v Lento Agencies [2006] eKLR**, in which it was held as follows:

> **"In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs, the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame."**

22. There is also the Court of Appeal case of **Anne Wambui Ndiritu (Suing as Administrator of the Estate of George Ndiritu Kariamburi -Deceased) v Joseph Kiprono Ropkoi & Four by Four Safaris Company Ltd [2004] KECA 65 (KLR)**, in which the Court held that:

> **"We have looked at the pleadings on the both sides in this matter. The plaintiff asserted that the accident was solely caused by the negligence of the defendant's driver and gave particulars of such negligence which the defendants denied. The defendant also asserted that the accident was solely caused by the negligence of the motorcyclist and gave particulars of contributory negligence. Issues were subsequently joined on such pleadings. In the event each party was under a duty to prove their own assertions but they did not do a good job for it.**
>
> **We have considered the submissions of both counsel, the authorities cited before us and we are persuaded by Mr. Mwangi learned counsel for the appellant that we must interfere with the judgment of the superior court. There is no doubt that an**

accident occurred between the two vehicles on the Nyeri - Mweiga road at the time stated by the two witnesses. In our assessment of the scanty evidence on record however both the lorry driver and the motorcyclist failed to exercise the degree of care and skill reasonably to be expected of a person driving a vehicle on a public highway. They were in our view equally to blame. We therefore apportion liability for the accident at 50/50."

23. For the above reasons, my finding is that the determination made by Learned trial Magistrate attributing liability at 100% against the Appellants and the 2nd Respondent (as Defendants) was not supported by the evidence on record, and was premised on wrong principles of law. The finding cannot therefore be upheld. There being no dispute that there was a collision between the motor-cycle and the motor vehicle, with either party blaming the other for causing the collision, but there being no cogent and/or conclusive evidence on who was to blame for causing the collision, the trial Magistrate ought to have found both the rider of the motor-cyclist, and driver of the motor-vehicle equally to blame for causing the accident at 50:50.

Final Orders

24. The upshot of my findings above is that the Appeal against liability partially succeeds, and I order as follows:

i) Liability entered by the trial Court at 100% against the Appellants and the 2nd Respondent, is hereby set aside and substituted with apportionment of liability equally at 50:50 as against the 1st Respondent, on one part, and the Appellants and the 2nd Respondent on the second part, respectively.

ii) Assessment and award of damages by the trial Court is not interfered with.

iii) Each party shall bear his own costs.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 27TH DAY OF FEBRUARY 2026

……..……..
WANANDA JOHN R. ANURO
JUDGE

Delivered in the presence of:

Ms. Kirigo for the Appellant

N/A for the Respondents

Court Assistant: Brian Kimathi