

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MAKUENI**

**HCCA NO. E107 OF 2024**

**PATRICK MBATHA NZILANI .....**

**APPELLANT**

**-VERSUS-**

**JUSTUS MULI NDAMBUKI .....**

**RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. Jepkosgei Elizabeth Kemei, Senior Resident Magistrate, delivered on 27<sup>th</sup> August, 2024 in Makueni Chief Magistrate's Court Civil Case No. E111 of 2022)*

**JUDGMENT**

1. This appeal arises from the judgment of the Chief Magistrate's Court at Makueni in **Civil Case No. E111 of 2022**, delivered on 27<sup>th</sup> August, 2024, wherein the trial court apportioned liability at the ratio of 50:50 between the Plaintiff and the Defendant following a road traffic accident that occurred on 5<sup>th</sup> April, 2022 along the Wote-Makindu Road.

2. The Appellant's claim before the trial court was founded on a case that, while lawfully riding a motorcycle registration number KMFH 341P, the Respondent, while driving a motor vehicle registration number KAQ 962C, negligently diverted from the main road into a feeder road without due care or indication, thereby colliding with the said motorcycle and occasioning the Appellant injuries. The Appellant pleaded and led evidence attributing the occurrence of the accident wholly to the Respondent's negligence.
3. The Respondent denied liability and pleaded contributory negligence on the part of the Appellant. At trial, both parties testified, and the investigating officer from Makueni Police Station Traffic Department gave evidence indicating that the Respondent failed to give way before joining the feeder road, which resulted in the collision.
4. Following the close of the hearing and consideration of the evidence and submissions on record, the learned trial magistrate found that although an accident had occurred, liability could not be conclusively attributed to either party and consequently apportioned liability equally at 50:50 in favour of the Appellant against the Respondent.

5. Aggrieved by the said finding on liability, the Appellant lodged the present appeal, challenging the apportionment of liability by which he contends that the evidence on record established negligence wholly on the part of the Respondent.

**Submissions:**

6. The Appellant submitted that the learned trial magistrate erred in law and fact in apportioning liability at the ratio of 50:50 despite evidence demonstrating that the Respondent was wholly to blame for the accident. It was argued that the Appellant was lawfully riding motorcycle registration number KMFH 341P when the Respondent diverted from the main Wote-Makindu Road into a feeder road without due care or indication, thereby causing the collision.

7. The Appellant contended that his evidence was consistent and was corroborated by the investigating officer, who attributed blame to the Respondent for failing to give way. Relying on *Muritu Kinyanjui v Jane Muthoni Njiru & 2 Others [2020] eKLR*, the Appellant submitted that a

driver who fails to ensure that the road is clear before diverting bears full liability for the resulting accident.

8. The Appellant further submitted that the trial Court erred by relying on the Respondent's oral testimony, which departed from and contradicted his pleadings. It was argued that, while the Respondent pleaded that the Appellant was overtaking or failing to keep a safe distance, the Appellant testified that the motorcycle rammed into the rear of his vehicle while already on the feeder road, an account neither pleaded nor consistent. The Appellant maintained that parties are bound by their pleadings and that unpleaded evidence ought not to be relied upon, citing *Kibiwott Tanui v Lawrence Panyakoo [2014] eKLR and Pentecostal Assemblies of God v Peter Gathungu & Others*.
9. It was also submitted that the trial court failed to properly evaluate the evidence of the investigating officer. The Appellant argued that such evidence could not be dismissed as hearsay merely because it was based on investigations and scene assessment, relying on *Moses Muriithi Njagi v Joseph Njuguna Macharia & 2 Others [2016] eKLR*.

10. Further, the Appellant contended that issues raised regarding lack of a riding licence, insurance, or alleged intoxication were either unpleaded or irrelevant to causation, submitting that such matters constitute traffic offences and do not, without proof of causation, amount to contributory negligence, as held in *Kennedy Okongo Oganda v Hamisi Misa Maloba [2020] eKLR* and *Secilina Gatavi Peter v Jasper Gitonga Mugambi [2020] eKLR*.

11. The Appellant also faulted the trial Court for failing to engage with his written submissions and authorities on liability, arguing that such omission amounted to a misdirection warranting appellate interference, as discussed in *Rufus & Another v African Banking Corporation Ltd [2024] KECA 935 (KLR)*.

12. On his part, the Respondent submitted that the trial Court properly evaluated the evidence and correctly exercised its discretion in apportioning liability equally. It was argued that the evidence before the trial court consisted of two conflicting versions of how the accident occurred, with each party blaming the other, and that the police abstract did not attribute blame to either party. The Respondent maintained that where a Court is unable

to conclusively determine who is to blame, the appropriate course is to apportion liability equally, relying on *Farah v Lento Agencies Ltd [2006] 1 KLR 123*.

13. The Respondent further submitted that the trial magistrate considered the testimonies of the witnesses, the documentary evidence, and the parties' submissions before concluding that both accounts were doubtful. It was argued that this Court, as a first appellate court, ought to be slow to interfere with findings of fact and the exercise of discretion by the trial Court unless it is shown that the decision was perverse or based on a misapprehension of the evidence, relying on *Peters v Sunday Post Ltd [1958] EA 424* and *Selle & Another v Associated Motor Boat Company Ltd [1968] EA 123*.

**Analysis & Determination:**

14. This is a first appeal. It is settled law that the duty of the first appellate Court is to re-evaluate the evidence which was adduced in the subordinate Court both on points of law and fact and come up with its own findings and conclusions.

15. In **Selle and Another -vs- Associated Motor Boat Company Ltd & Others [1968] 1. E.A 123** it was stated as follows:-

*“... this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind [the fact] that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”*

16. The only issue that arises for determination in this appeal is whether the learned trial magistrate properly evaluated the evidence on record in apportioning liability between the parties at the ratio of 50:50.

17. The Appellant’s only complaint is that the apportionment of liability was not supported by the evidence on record and was instead influenced by unproven and legally

irrelevant considerations, including allegations of intoxication, lack of insurance, and lack of a riding licence. The Respondent, on the other hand, maintains that the evidence before the trial court was conflicting and that the trial Court properly exercised its discretion in apportioning liability equally.

18. I have re-evaluated the entire record, including the pleadings, the oral evidence, and the submissions filed before the trial Court. The Plaintiff's evidence was that he was riding motorcycle registration number KMFH 341P along the Wote-Makindu Road when the Defendant diverted from the main road into a feeder road without ensuring that it was safe to do so, thereby colliding with the motorcycle. That evidence was consistent with the pleadings and was not dislodged in cross-examination.

19. The Plaintiff's account was supported by the evidence of **PW2**, the investigating officer, who testified that the Defendant failed to give way before joining the feeder road and that the collision occurred as a result of that manoeuvre. **PW2** did not attribute any negligence to the Plaintiff.

20. Before addressing the substance of the defence case, it is necessary to clarify the position arising from the record. The record shows that although the Defendant was granted leave by the ruling delivered on 19<sup>th</sup> September, 2023 to reopen the matter, the leave was limited to purposes of cross-examination, and the Defendant's witness statement filed on 24<sup>th</sup> March, 2023 was deemed duly filed and served. The Defendant, however, did not testify on oath and did not adopt that statement.

21. It is now settled that a witness statement does not constitute evidence unless it is adopted by the maker on oath. In the case of **Trust Bank Ltd Vs Paramount Universal Bank Ltd & 2 others Nairobi [2009] KEHC 4030 (KLR)**, the court addressed itself on this issue when it held:

***“It is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is***

***uncontroverted and therefore unchallenged.”***

22. It follows that the only sworn evidence before the trial Court on the manner in which the accident occurred was that of the Plaintiff and **PW2**, the investigating officer. In those circumstances, the trial Court could not properly treat the assertions contained in the Defendant's unadopted statement as constituting a competing version of evidence. There were no two sworn accounts of equal weight before the Court.

23. The Defendant further alleged that the Plaintiff was drunk and raised issues relating to lack of insurance and licensing. These matters were neither pleaded as particulars of negligence nor supported by any sworn testimony or documentary evidence. They remained unproven allegations.

24. The learned trial magistrate nevertheless treated the parties' accounts as "equally doubtful" and proceeded to apportion liability at the ratio of 50:50. That conclusion is irreconcilable with the record. The Plaintiff's evidence stood uncontroverted.

25. Even if the allegations had been mounted in evidence and found to be true, they still could not or ought not to

influence the trial court to apportion liability in the manner that it did. In ***Kennedy Okongo Oganda & Another v Hamisi Misa Maloba (suing as the personal representative and administrator of the estate of Hassan Luka Hamisi Hamisi [deceased]) [2020] eKLR***, the Court rejected a similar attempt to found contributory negligence on matters unrelated to causation and stated:

***“I reject the defence that the cyclist left his lane and hit the motor vehicle. That the motorcyclist was not insured or that he had an excess passenger does not relate in any way to the cause of the accident. Though failing to have insurance is a traffic offence, it had nothing to do with the happening of the accident. No evidence was put before court to demonstrate that the rider did anything to contribute to the accident. The question of apportionment of liability does not arise. I find for the plaintiff at 100% on liability.”***

26. That reasoning applies with equal force in the present appeal. The trial Court justified the apportionment of

liability on the basis that the parties' accounts were "equally doubtful". However, the record shows that the Plaintiff's evidence was consistent with his pleadings and corroborated by the investigating officer.

27. The Respondent appeared to support the trial Court's approach in this appeal by submitting that where evidence is conflicting and the court is unable to determine who is to blame, liability may properly be apportioned equally. In that regard, reliance was placed on *Farah v Lento Agencies Ltd* [2006] 1 KLR 123, where the Court of Appeal held:

***"In our view, it was not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who was to blame for the accident. In this state of affairs, the question arises whether both drivers should be held to blame... if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame."***

28. That principle presupposes the existence of two competing bodies of evidence placed before the Court. As

I have already stated, no defence evidence was tendered. The only sworn testimony before the trial Court was that of the Plaintiff and **PW2**. The factual foundation necessary to invoke the principle in *Farah v Lento Agencies Ltd* [2006] 1 KLR 123, was therefore absent.

29. In light of the foregoing analysis, the learned trial magistrate's finding that the parties were equally to blame is unsupported by the record and cannot stand.

30. Finally, regarding quantum, although the memorandum of appeal did not challenge the assessment on quantum, the Respondent in submissions invited this Court to consider the assessment of damages. It is therefore appropriate to briefly address the issue.

31. An appellate Court will not ordinarily interfere with an award of damages unless it is shown that the trial Court applied a wrong principle, took into account irrelevant factors, failed to consider relevant ones, or that the award is so inordinately high or low as to represent an entirely erroneous estimate.

32. The trial Court awarded Kshs.250,000/= as general damages for soft tissue injuries and Kshs.3,550/= as special damages as having been specifically proven.

Having considered the nature of the injuries as set out in the medical evidence, and the comparable authorities cited before the trial Court, I am not persuaded that the award was inordinately high or based on any misdirection in principle.

33. In the premises, there is no basis upon which this Court can interfere with the trial Court's assessment of quantum.

**Disposition:**

34. In the result, the appeal succeeds in the following terms:

- a) The finding of the learned trial magistrate apportioning liability at the ratio of 50:50 between the parties is hereby set aside and substituted with a finding that the Respondent was 100% liable for the accident.*
- b) The awards made by the trial court, namely Kshs.250,000/= in general damages and Kshs.3,550/= in special damages, are upheld.*
- c) Judgment is therefore entered in favour of the Appellant against the Respondent in the*

*total sum of Kshs.253,550/=, together with interest at court rates from the date of judgment of the lower court until payment in full.*

*d)The Appellant shall have the costs of this appeal and the costs of the suit in the lower court.*

35.Orders accordingly.

**DATED, DELIVERED and SIGNED at NAIROBI through the Microsoft Teams Online Platform on this 18<sup>TH</sup> day of FEBRUARY, 2026.**

.....

**HON C. KENDAGOR**

**JUDGE**

**In the presence of:**

Court Assistant: Beryl

Ms. Muthoni Ndwiga, Advocate for Respondent

No appearance for Appellant

ORIGINAL COPY