



REPUBLIC OF KENYA



KENYA LAW
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**Paul v Ndambuki (Civil Appeal E106 of 2024)
[2026] KEHC 2341 (KLR) (18 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 2341 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL E106 OF 2024
CJ KENDAGOR, J
FEBRUARY 18, 2026**

BETWEEN

PATRICIA MUTHOKI PAUL APPELLANT

AND

JUSTUS MULI NDAMBUKI RESPONDENT

(Being an Appeal from the judgment of Hon. Elizabeth Kemei, Senior Resident Magistrate delivered on 27th August, 2024 in Makueni CMCC No. E084 of 2022)

JUDGMENT

1. The appeal arises from the judgment of the Senior Resident Magistrate delivered on 27th August, 2024 in Makueni CMCC No. E084 of 2022. The suit before the trial Court concerned a road traffic accident which occurred on 5th April, 2022 along the Wote–Makindu road involving motor vehicle registration number KAQ 962C and motorcycle registration number KMFH 341P. The Plaintiff, who was a pillion passenger aboard the said motorcycle, sought general and special damages for injuries allegedly sustained in the accident, contending that the motor vehicle diverted into a feeder road without due care and collided with the motorcycle.
2. The Defendant entered appearance and filed a statement of defence denying liability and, in the alternative, pleaded negligence on the part of the rider of the motorcycle and the Plaintiff. The matter proceeded to hearing where the Plaintiff testified and called a police officer as a witness. The defence initially closed its case without calling evidence but subsequently moved the trial Court through an application dated 24th April, 2024 seeking to reopen the proceedings. The Court allowed the application, permitted further cross-examination of the Plaintiff's witnesses, and the Defendant thereafter testified in support of the defence case.
3. Upon considering the evidence and submissions by the parties, the trial Court found that the respective accounts of the accident were conflicting and that liability could not be placed wholly upon either side.



Guided by the authorities cited before it, the Court apportioned liability at the ratio of 50:50 between the parties and awarded general damages in the sum of Kshs.250,000/= less contribution together with special damages of Kshs.3,550/=.

4. Aggrieved by the finding on liability, the Appellant lodged the present appeal through a Memorandum of Appeal dated 12th September, 2024 on the grounds that:
 - a. The learned Magistrate erred in fact and in law in apportioning liability of 50% to the Plaintiff, who was a pillion passenger.
 - b. The learned Magistrate erred in law and in fact by apportioning liability between the Appellant and the Respondent when the Appellant was neither the owner nor the rider of motorcycle registration number KMFH 341P.
 - c. The learned Magistrate erred in law and in fact by apportioning liability between the parties despite the existence of overwhelming evidence allegedly demonstrating that the Respondent was wholly liable for the accident.
 - d. The learned Magistrate erred in fact and in law by failing to find the Defendant 100% liable notwithstanding the evidence on record.
 - e. The learned Magistrate erred in fact and in law in ignoring the Appellant's written submissions and authorities on liability.

Submissions:

5. The Appellant submits that the learned trial magistrate fell into error by apportioning liability against a pillion passenger who had no control over the manner in which the motorcycle was ridden. It is contended that the evidence tendered before the trial Court, particularly that of the investigating officer, demonstrated that the motor vehicle joined a feeder road without due care and was therefore wholly to blame for the occurrence of the accident. The Appellant further argues that the defence evidence departed from the pleadings and that the trial court improperly relied on unpleaded allegations to reach its conclusion. In addition, it is submitted that the rider of the motorcycle was never enjoined as a party and that liability could not lawfully be apportioned against a non-party.
6. In urging the Court to interfere with the finding on liability, the Appellant relies on several authorities on the duty of a first appellate Court and the impropriety of attributing negligence to a pillion passenger. Among the authorities cited are *Selle & Another v Associated Motor Boat Co. Ltd* [1968] EA 123, *Peters v Sunday Post Ltd* [1958] EA 424, *Khambi & Another v Mahithi & Another* [1968] EA 70, *Kivunanga v Omamoimbuye (Civil Appeal 31 of 2022)* [2024] KEHC 10813 (KLR), *Janet Kathambi v Charity Kanja Njiru* [2021] eKLR and *Secilina Gatavi Peter v Jasper Gitonga Mugambi* [2020] eKLR.
7. The Appellant also places reliance on authorities addressing the binding nature of pleadings and the evidentiary value of an investigating officer's testimony, including *Kibiwott Tanui v Lawrence Panyakoo* [2014] eKLR, *Madara & 2 Others v Chite & Another (Civil Appeal 111 of 2022)* [2023] KEHC 24270 (KLR), *Moses Muriithi Njagi v Joseph Njuguna Macharia & 2 Others* [2016] eKLR and *Matulai v Mwikya (Civil Appeal 12 of 2022)* [2024] KEHC 1909 (KLR).
8. Further reliance is placed on decisions such as *Kennedy Okongo Oganda & Another v Hamisi Misa Maloba* [2020] eKLR, *Joseph Kimeli A. Sitonik & 11 Others v Michael Muchiri Kibe & 2 Others* [2020] eKLR and *Kinyua v Murage (Civil Appeal E016 of 2023)* [2024] KEHC 7882 (KLR) to



support the contention that liability cannot be apportioned against a person who was not joined to the proceedings.

9. The Respondent, on the other hand, supports the judgment of the trial Court and submits that the learned magistrate properly analysed the evidence and applicable law before apportioning liability equally. It is argued that the trial Court was confronted with two irreconcilable versions of how the accident occurred and, in such circumstances, the law permits equal apportionment of blame. The Respondent further maintains that the trial Court considered all the material evidence, including the submissions and authorities filed by the parties, and that no basis has been laid to warrant interference by this Court.
10. In support of these propositions, the Respondent relies on authorities outlining the limited scope of appellate interference with findings of fact, including *Thomas Nyawade v Richard Sule Odongo & 4 Others* [2015] eKLR, *James Ithale Akothe v Abdiwele Ali Abdi & Another* [2020] eKLR and *Peters v Sunday Post Ltd* [1958] EA 424. On the issue of apportionment where evidence is conflicting, reliance is placed on *Hussein Omar Farah v Lento Agencies* [2006] 1 KLR 123, *Eliud Papoi Papa v Jigneshkumar Rameshbai Patel & Another* [2017] eKLR and *Isaac Onyango Okumu v James Ayere & Another* [2019] eKLR. The Respondent also cites *Omar Athumani Mohammed t/a Paint Work and General Maintenance v Jumwa Kaingu* [2021] eKLR in support of the proposition that an appellate Court should exercise caution before disturbing findings made by a trial court that had the advantage of seeing and hearing witnesses.

Analysis & Determination:

11. Having considered the Memorandum of Appeal, the judgment of the trial Court, and the rival submissions by the parties, the issue that arises for determination is;
 - a. Whether liability could properly be attributed against the Appellant who was a pillion passenger.
12. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial Court, unlike the appellate Court, had the advantage of observing the demeanour of the witnesses and hearing their evidence firsthand.
13. In the case of *Peters v Sunday Post Limited* [1958] EA 424, Court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”
14. The undisputed position in this appeal is that the Appellant was a pillion passenger aboard the motorcycle at the material time. The trial Court acknowledged that there were two competing versions of how the accident occurred and, being uncertain which driver was to blame, apportioned liability equally.



15. It is now settled law that a pillion passenger, by virtue of not being in control of the motorcycle, bears no responsibility for the manner in which the vehicle is ridden. In *Janet Kathambi v Charity Kanja Njiru* [2021] eKLR, the court stated as follows:

“It is not in dispute that the deceased was a pillion passenger. Authorities have held time and again that there is nothing a pillion passenger could do to prevent an accident from occurring since he does not have control over the motor cycle.”

16. Similarly, in *Kivunanga v Omamoimbuye (Civil Appeal 31 of 2022)* [2024] KEHC 10813 (KLR), the Court was emphatic of the limited role of a pillion passenger and observed that:

“I hasten to add however that the above decision ... would have been the appropriate finding if the suit was between the Rider and the driver in this case. However, the Appellant was a pillion passenger. There was no role he played in the causation of the accident.”

17. Indeed, liability cannot ordinarily be visited upon a passenger unless there is evidence demonstrating some form of contributory conduct on their part. The record before the trial court does not disclose any evidence suggesting that the Appellant interfered with the riding of the motorcycle, encouraged negligent riding, or otherwise contributed to the occurrence of the accident.

18. The Respondent’s case before the trial Court largely rested on attributing blame to the rider of the motorcycle, contending that the motorcycle struck the motor vehicle from the rear after the Respondent had diverted onto a feeder road. Even assuming, for argument’s sake, that negligence could be attributed to the rider, it is notable that the rider was not joined as a party to the proceedings.

19. Courts have repeatedly cautioned against apportioning liability to persons who are not parties to a suit. In *Joseph Kimeli A. Sitonik & 11 Others v Michael Muchiri Kibe & 2 Others* [2020] eKLR, the court observed:

“Liability cannot be apportioned to a party who has not been enjoined in the suit.”

20. In the case of *Kinyua v Murage (Civil Appeal E016 of 2023)* [2024] KEHC 7882 (KLR) (11 June 2024) (Judgment) Court equally sternly cautioned that:

“The respondent was blaming the driver who was not party to the suit. The court cannot apportion liability between parties who were not party to the suit. The rider was not joined and as such I cannot apportion liability. The evidence led showed the respondent was to blame. Had he thought for once that the Rider is to blame ...”

21. A finding on contributory negligence must be anchored on evidence and a clear factual foundation. It follows that the Court will be slow to interfere with such a finding unless it is demonstrated that the trial Court acted on no evidence or that the apportionment was plainly wrong in principle. In *Jones v Livox Quarries Ltd* [1952] 2 QB 608, the Court of Appeal stated that:

“An appellate court will generally only interfere with a finding of contributory negligence in the event of a substantial misjudgment of the factual basis of the apportionment by the trial court... if it is satisfied that the assessment made by the Judge was plainly incorrect.”

22. I say so because, the very doctrine of contributory negligence presupposes the existence of some negligent act or omission on the part of the Plaintiff which materially contributed to the occurrence of the accident. It is not to be inferred merely from the existence of conflicting versions of events. The



burden therefore lay upon the Respondent to demonstrate, through evidence, the specific conduct attributed to the Appellant which amounted to negligence. The record before this court discloses no such evidence.

23. As was stated in *MacDrugall App v Central Railroad Co.* Rbr 63 Cal 431:

“Contributory negligence on the part of the plaintiff is a matter of defence...”

24. Negligence itself is grounded upon the existence of a duty of care, breach, and resultant damage. In *Grace v Australian Knitting Mills Ltd* [1938] AC 85, the Court was emphatic that actionable negligence arises only where a legal duty is established and breached.

25. The Respondent’s defence largely hinged on attributing blame to the rider of the motorcycle. However, contributory negligence against a claimant cannot be founded on the alleged negligence of a third party who has not been joined to the proceedings. In *Obala v Okello & 2 others* (Civil Appeal E022 of 2022) [2022] KEHC 15762 (KLR), the Court held that:

“A court of law can only determine the case or issues between the parties who are before it and not those parties who should have been or are yet to appear or be made parties to proceedings before it.”

26. The law governing third party proceedings was addressed in *Kenya Commercial Bank v Suntra Investment Bank Ltd* [2015] eKLR, where the Court observed:

“In law, a third party is enjoined in a suit at the instance of the defendant... liability between the defendant and the third party... cannot be a bona fide issue triable between the defendant and the plaintiff.”

27. The natural implication here is that allegations directed at the rider could only have been properly ventilated through third-party proceedings. In the absence of such joinder, the trial Court could not indirectly shift liability to the Appellant by creating uncertainty as to the driver’s liability vis-à-vis a non-party.

28. Suffice to say, contributory negligence requires proof that the claimant failed to take reasonable care for their own safety. Nothing on record demonstrates that the Appellant failed in such duty. There was no evidence that she interfered with the riding of the motorcycle, failed to heed warnings, or engaged in any conduct capable of increasing the risk of harm.

29. Consequently, even assuming that the evidence left doubt as to the rider’s and the driver’s negligence, such doubt could not legally translate into contributory negligence against a pillion passenger. The principles emerging from the authorities cited demonstrate that contributory negligence must be specifically pleaded, proved, and linked to the claimant’s own conduct. In the absence of such proof, and in light of the failure to enjoin the rider as a third party, the apportionment of liability against the Appellant cannot stand.

30. A perusal of the Memorandum of Appeal and the submissions filed before this court reveals that the Appellant did not mount any substantive challenge against the award of damages made by the trial Court. The grounds of appeal as framed, as well as the arguments advanced by counsel, were directed entirely at the question of liability. Equally, the Respondent’s submissions were confined to defending the finding on liability and did not invite this Court to reassess the award on quantum.



31. Well aware that an appellate Court will not interfere with an award of damages unless it is demonstrated that the trial Court acted on wrong principles, took into account irrelevant factors, failed to consider relevant ones, or that the award is so inordinately high or low as to represent an erroneous estimate, I have seen nothing on record to suggest that the award of Kshs.250,000/= fell outside the acceptable range for the injuries sustained, nor is there evidence that the trial court misapprehended the medical evidence.
32. In the premises, and noting that no serious challenge was mounted on quantum by either party, I find no basis upon which to interfere with the award made by the learned trial magistrate. The assessment of damages shall therefore remain undisturbed.

Disposition:

33. In the end, and for the reasons set out above, this Court finds that the learned trial magistrate fell into error in apportioning liability against the Appellant who was a pillion passenger, in the absence of any evidence demonstrating contributory negligence on her part.
34. Consequently:
- a. The finding on liability at the ratio of 50:50 is therefore set aside and substituted with a finding on liability against the Respondent at 100%.
 - b. The judgment of the trial court is varied only to the extent that liability is hereby entered in favour of the Appellant against the Respondent at 100%. The awards of general damages in the sum of Kshs.250,000/= and special damages in the sum of Kshs.3,550/= shall stand, together with costs and interest as ordered by the trial court.
 - c. The Appellant shall have the costs of this appeal.
35. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 18TH DAY OF FEBRUARY, 2026

.....

HON. C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Ms. Moranga holding brief for Mutuku, Advocate for Appellant

Mr. Agata, Advocate for Respondent

