

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAROK**

**CIVIL APPEAL NO. E026 OF 2024 AS HEARD TOGETHER WITH HCCA NO. E028**

**OF 2024**

**(CORAM: HON. CHARLES M. KARIUKI – J)**

(Being an Appeal from the Judgment on liability of Hon. E.M. Mutuku, Resident Magistrate/Adjudicator at NAROK SCCC NO. E036 OF 2024 delivered on 20<sup>th</sup> September, 2024)

**MILLICENT CHEPKEMOI..... APPELLANT**

**VERSUS**

**WELLS FARGO COURIER LIMITED..... RESPONDENT**

**JUDGMENT**

**27/03/2026**

**INTRODUCTION**

- 1) This is a first appeal arising from the judgment of the Small Claims Court at Narok delivered on 20th September 2024 by Hon. E. M. Mutuku (Resident Magistrate/Adjudicator) in Narok SCCC No. E036 of 2024, Millicent Chepkemoi v Wells Fargo Courier Limited. In that judgment, the trial court found the Respondent liable for the accident at 80% and apportioned 20% contributory liability to the rider of the motorcycle on which the Appellant was travelling as a pillion passenger. The court consequently

awarded the Appellant general damages of Kshs. 500,000 and special damages of Kshs. 56,510, making a total of Kshs. 556,510, which, after deducting the 20% contribution, resulted in a net award of Kshs. 445,208, together with costs and interest.

- 2) The dispute arose from a road traffic accident which occurred on 26th April 2024 along the Narok–Nairobi Road at the Cereals area, involving motor vehicle registration number KCR 015H, owned by the Respondent and driven by its employee, and motorcycle registration number KMFQ 019F, on which the Appellant was travelling as a pillion passenger. The Appellant sustained several injuries, including a huge haematoma on the right thigh, blunt injury to the head, lacerations on the upper limb, a cut wound on the left periorbital region, and soft tissue injuries to the legs.
- 3) Dissatisfied with the trial court’s finding on liability, particularly the apportionment of 20% contributory negligence—the Appellant lodged the present appeal challenging that determination. The Appellant contends that the evidence on record demonstrated that the Respondent’s driver was wholly responsible for the accident and that the trial court erred in law and fact in failing to hold the Respondent 100% liable.
- 4) As this is a first appeal, this Court is duty-bound to reconsider and re-evaluate the evidence that was presented before the trial court and arrive at its own independent conclusions while bearing in mind that it neither saw nor heard the witnesses testify. This principle was well stated in **Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123**, where the Court of Appeal held that a first appellate court must reconsider the evidence, evaluate it itself and draw its own conclusions, though giving allowance for the fact that the trial court had the advantage of seeing and hearing the witnesses.

- 5) Exercise, in **Peters v Sunday Post Ltd [1958] EA 424**, the Court emphasized that while an appellate court has jurisdiction to review the evidence and reach its own conclusions, it should exercise caution before interfering with findings of fact by the trial court unless it is shown that the trial court misapprehended the evidence or applied the wrong principles.
- 6) Guided by the foregoing principles, this Court will determine whether the trial court erred in its evaluation of the evidence and in apportioning liability as it did.

### **MEMORANDUM OF APPEAL**

- 7) The appeal before this Court is premised on the Memorandum of Appeal dated 17th October 2024, in which the Appellant raises the following grounds:
  - i. That the Trial Magistrate/Adjudicator erred in law and fact in apportioning liability to the Appellant at 20% contrary to the evidence on record which ought to have found the Respondent 100% liable.
  - ii. That the Trial Magistrate/Adjudicator erred in law and fact by failing to evaluate the evidence on record and consequently failed to find the Respondent wholly to blame for the accident.
  - iii. That the Trial Magistrate/Adjudicator erred in law and fact in failing to adequately appreciate and consider the submissions made on behalf of the Appellant.
- 8) On the basis of the foregoing grounds, the Appellant prays that this Court:
  - a) Sets aside, reviews, revises and/or substitutes the trial court's finding on liability.
  - b) Substitutes the same with a finding holding the Respondent wholly liable for the accident; and
  - c) Allows the appeal with costs to the Appellant together with such further orders as the Court may deem just and appropriate in the circumstances.

## **SUBMISSIONS**

9) The appeal was canvassed by way of written submissions. The Appellant filed written submissions dated 5th September 2025, while the Respondent, despite indicating that it would file submissions, did not file any submissions. Consequently, the appeal proceeded for determination based on the Appellant's submissions and the record of appeal.

## **APPELLANT'S SUBMISSIONS**

10) In her submissions, the Appellant first set out a brief background of the dispute. Counsel submitted that the appeal arises from the judgment of the Small Claims Court delivered on 20th September 2024 in Narok SCCC No. E036 of 2024, where the trial court apportioned liability at 80% against the Respondent and 20% against the Appellant. The Appellant was dissatisfied with that finding and lodged the present appeal on the grounds that, being a pillion passenger, she ought not to have been held contributorily liable. It was further submitted that the appeal is related to Narok HCCA No. E028 of 2024, which arose from the same accident involving the rider of the motorcycle.

11) Counsel for the Appellant identified two issues for determination in the appeal, namely:

- i. Whether the trial court erred in apportioning liability to the Appellant at 20% instead of holding the Respondent fully liable; and
- ii. Whether the Appellant should be awarded the costs of the appeal.

12) On the first issue, counsel submitted that the trial court erred in law and fact in finding that the Appellant bore 20% liability for the accident. It was argued that the evidence on record demonstrated that the accident occurred when the Respondent's motor vehicle, registration number KCR 015H, attempted to overtake the motorcycle on which the Appellant was travelling and, upon noticing an oncoming vehicle, returned to its lane and hit the

motorcycle from behind. Counsel referred the Court to the Appellant's testimony in the record of appeal, where she stated that they were already travelling on the Narok–Nairobi Highway and were not joining the road from any feeder road or junction when the Respondent's driver attempted to overtake them and collided with the motorcycle.

- 13) Counsel further submitted that the Appellant's account of the accident was not shaken during cross-examination and was corroborated by the evidence of the police officer who testified as CW2. The police officer, who had access to the occurrence book (OB), confirmed that the Respondent's driver attempted to overtake the motorcycle and, in the process, hit it from behind, causing the rider and the Appellant to fall and sustain injuries. It was therefore submitted that the evidence of the police officer clearly attributed blame to the driver of the Respondent's vehicle for overtaking without due care.
- 14) The Appellant also relied on the evidence of the motorcycle rider given in the related appeal, Narok HCCA No. E028 of 2024, where the rider similarly testified that they were travelling along the highway when the Respondent's vehicle hit them from behind while attempting to overtake. Counsel submitted that the rider maintained during cross-examination that the accident did not occur at a junction and that they were not joining the highway from a feeder road.
- 15) It was further submitted that the Respondent's case relied solely on the testimony of its driver, who alleged that the motorcycle had joined the highway from a junction and collided with the vehicle. Counsel contended that the driver's evidence lacked credibility and should not have been relied upon by the trial court.
- 16) Counsel argued that the trial court erred in concluding that the rider of the motorcycle had failed to give way to the Respondent's vehicle. It was submitted that there was no evidence

on record to support such a finding and that the issue of failure to give way had not been raised by any of the parties during the trial. The Appellant therefore argued that the trial court introduced a ground of contributory negligence that had not been established by the evidence.

- 17) Counsel also emphasized that the Appellant was merely a pillion passenger on the motorcycle and had no control over how the motorcycle was being ridden. It was therefore submitted that she could not have contributed to the occurrence of the accident. In support of that argument, reliance was placed on **Boniface Waiti & Another v Michael Kariuki Kamau [2007] KEHC 2609 (KLR)**, where the Court held that passengers do not control the manner in which a driver operates a vehicle and should not be denied relief on that basis.
- 18) Further, counsel argued that the trial court erred in apportioning liability in circumstances where the rider of the motorcycle had not been joined as a third party to the proceedings. It was submitted that since the Respondent had not issued a third-party notice against the rider, the court could not properly attribute liability to him or indirectly to the Appellant. In support of this proposition, counsel relied on **Edward Kamau & James Karanja v Hannah Mukui Gichuki & Gestetner Limited [2015] eKLR**, where the High Court held that a pillion passenger cannot be found contributorily liable where the alleged tortfeasor, such as the motorcycle rider, had not been joined as a third party in the proceedings.
- 19) On the issue of costs, counsel submitted that the Appellant should be awarded the costs of the appeal. Reliance was placed on Section 27 of the Civil Procedure Act, Cap 21 Laws of Kenya, which provides that costs are in the discretion of the court but generally follow the event unless the court orders otherwise for good reason. Counsel further cited **DGM v**

**EWG [2021] eKLR**, where the Court reaffirmed that the general rule is that the successful party is entitled to costs unless there are good reasons for departing from that principle.

20) On the basis of the foregoing arguments, the Appellant urged the Court to allow the appeal, set aside the trial court's finding on contributory negligence, hold the Respondent 100% liable for the accident, and award the Appellant costs of the appeal.

### **Issues for Determination**

21) Having carefully considered the Memorandum of Appeal, the record of appeal, the judgment of the trial court, and the Appellant's written submissions, the following issues arise for determination:

- i. **Whether the trial court erred in law and fact in apportioning liability at 80:20 between the Respondent and the rider of the motorcycle on which the Appellant was travelling.**
- ii. **Whether the Appellant, being a pillion passenger, could properly be subjected to contributory negligence in the circumstances of this case.**
- iii. **Who should bear the costs of the appeal?**

### **ANALYSIS AND DETERMINATION**

- i. **Whether the trial court erred in apportioning liability at 80:20.**

22) The Appellant challenges the trial court's finding that liability for the accident should be apportioned at 80% against the Respondent and 20% against the rider of the motorcycle on which the Appellant was travelling as a pillion passenger. The Appellant contends that the evidence on record demonstrated that the Respondent's driver was wholly responsible for the accident and that there was no basis for attributing any contributory negligence.

- 23) The law on the burden of proof in civil claims is well settled. Under Sections 107 and 109 of the Evidence Act, Cap 80 Laws of Kenya, the party who alleges must prove the existence of the facts upon which the claim is based. Section 107(1) provides that:
- “Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”*
- 24) Similarly, Section 109 of the Act provides that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence.
- 25) In the present case, it is not disputed that an accident occurred on 26th April 2024 along the Narok–Nairobi Road involving motor vehicle registration number KCR 015H and motorcycle registration number KMFQ 019F on which the Appellant was travelling as a pillion passenger. The issue in dispute concerns how the accident occurred and who was responsible for it.
- 26) The Appellant testified before the trial court that the motorcycle on which she was travelling was already on the highway heading towards Narok when the Respondent’s motor vehicle attempted to overtake it. According to her testimony, upon noticing an oncoming vehicle, the Respondent’s driver attempted to return to his lane and, in the process, collided with the motorcycle from behind. This account was corroborated by the evidence of CW2, a police officer, who referred to the contents of the occurrence book (OB) and confirmed that the Respondent’s driver had attempted to overtake the motorcycle and, in the process, hit it, causing both the rider and the Appellant to fall and sustain injuries.
- 27) On the other hand, the Respondent relied on the testimony of its driver, who contended that the motorcycle had joined the highway from a junction and collided with the Respondent’s

vehicle. The trial court, after considering the competing versions, found that the Respondent's driver was substantially to blame for the accident, but nevertheless apportioned 20% liability to the motorcycle rider on the basis that he failed to give way.

28) This Court has reconsidered the evidence on record as required of a first appellate court. In **Selle & Another v Associated Motorboat Co. Ltd & Others [1968] EA 123**, the Court of Appeal held that a first appellate court is under a duty to reconsider the evidence, evaluate it, and draw its own conclusions while bearing in mind that it did not see or hear the witnesses testify. Likewise, in **Peters v Sunday Post Ltd [1958] EA 424**, the Court held that although an appellate court has jurisdiction to review the evidence and reach its own conclusions, it should exercise caution before interfering with findings of fact unless it is shown that the trial court misapprehended the evidence or applied the wrong principles.

29) Upon re-evaluating the evidence on record, this Court notes that the finding by the trial court that the motorcycle rider failed to give way was not supported by any specific evidence. Neither the police officer nor any other witness testified that the rider failed to give way or contributed to the accident in any identifiable manner. Indeed, the Appellant's evidence was that the motorcycle was travelling ahead on the highway when the Respondent's driver attempted to overtake it and collided with it while returning to his lane.

30) The Court of Appeal has consistently held that liability in road traffic accidents must be based on the evidence presented before the court and not on speculation. In **Lakhamshi v Attorney General [1971] EA 118**, the East African Court of Appeal held that where the circumstances of an accident are not clearly established, the court may apportion liability, but such apportionment must still be supported by the evidence on record.

31) In the present case, while the trial court correctly found that the Respondent's driver was largely responsible for the accident, the basis upon which it attributed 20% liability to the motorcycle rider is not supported by any unambiguous evidence demonstrating negligence on the part of the rider. The finding that the rider failed to give way appears to have been speculative rather than grounded on the evidence presented during the trial.

32) In the circumstances, this Court finds that the trial court misapprehended the evidence in attributing contributory negligence to the rider of the motorcycle.

**ii. Whether the Appellant, as a pillion passenger, could be held contributorily liable.**

33) Even assuming that the rider of the motorcycle could have been partly to blame, the Appellant was merely a pillion passenger on the motorcycle and had no control over the manner in which the motorcycle was being ridden. The law is clear that passengers ordinarily have no control over the driving or riding of a vehicle and cannot easily be blamed for the negligence of the driver.

34) In **Boniface Waiti & Another v Michael Kariuki Kamau [2007] eKLR**, the High Court held that passengers do not dictate how a driver operates a vehicle and therefore cannot ordinarily be denied compensation on that account. The Court stated that:

*“Passengers do not dictate the manner of driving of their driver and cannot be denied relief on that account.”*

35) Similarly, in **Edward Kamau & James Karanja v Hannah Mukui Gichuki & Gestetner Limited [2015] eKLR**, the High Court held that a pillion passenger cannot be found contributorily liable where the alleged negligent rider had not been joined as a third party in the proceedings.

- 36) In the present case, the Appellant was a passenger on the motorcycle and there is no evidence that she in any way contributed to the occurrence of the accident. Furthermore, the Respondent did not issue any third-party notice against the rider of the motorcycle seeking contribution or indemnity.
- 37) In those circumstances, attributing any form of contributory negligence to the Appellant was erroneous. This Court therefore finds that the trial court erred in law and fact in subjecting the Appellant to a reduction of her damages on account of alleged contributory negligence.
- 38) Consequently, this Court finds that the Respondent's driver bore full responsibility for the accident, and the trial court's apportionment of liability at 80:20 cannot stand.

**iii. Who should bear the costs of the appeal?**

- 39) The general principle governing the award of costs is set out in Section 27(1) of the Civil Procedure Act, Cap 21 Laws of Kenya, which provides that costs are in the discretion of the court but shall ordinarily follow the event unless the court orders otherwise for good reason.
- 40) The Court of Appeal reiterated this principle in **Supermarine Handling Services Ltd v Kenya Revenue Authority [2010] eKLR**, where it held that a successful party is entitled to costs unless there are good reasons for denying them.
- 41) The same principle was reiterated in **DGM v EWG [2021] eKLR**, where the court emphasized that the successful party should ordinarily be awarded costs unless special circumstances justify a departure from that rule.

42) In the present appeal, the Appellant has successfully challenged the trial court's finding on contributory negligence. There is therefore no reason to depart from the general rule that costs follow the event. Thus, the final orders are.

- I. The appeal is allowed, and the Defendant/respondent driver is held 100% in Favor of the appellant/plaintiff.**
- II. Costs of the appeal are awarded to the appellant.**

43) It is so ordered.

44) **The orders herein apply to HCCA NO. E028 OF 2024 plus costs to the appellant.**

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS  
APPLICATION, THIS 27TH DAY OF MARCH.2026**

**CHARLES KARIUKI**

**JUDGE**