



**REPUBLIC OF KENYA**

**IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT MAKINDU**

**CIVIL CASE NO E080 OF 2023**

**LINA**

**MWIKALI**

**BEN.....PLAINTIFF**

**VERSUS**

**KINATWA CO-OPERATIVE SAVINGS AND CREDIT SOCIETY  
LIMITED.....DEFENDANT**

**JUDGMENT**

**THE CLAIM**

Lina Mwikali Ben (hereinafter referred to as the plaintiff) filed this suit on 24/5/2023 vide a plaint dated 16/5/2023. She sued Kinatwa Co-operative Savings and Credit Society Limited (hereinafter referred to as the defendant) on account of a road traffic accident that allegedly occurred on 11/12/2022 within Kibwezi Township along Kibwezi-Kitui road. The plaintiff averred that on the material day, the plaintiff's driver was carefully and lawfully driving the plaintiff's motor vehicle registration number KCY 468D when the defendant's driver so negligently drove the defendant's motor vehicle registration number KCX 038A that he caused it to violently ram into the plaintiff's motor vehicle thereby occasioning extensive damage to it.

The defendant was sued as the registered owner of motor vehicle registration number KCX 038A at the material time. The plaintiff relied on the doctrine of *vicarious liability*, and pleaded the following particulars of negligence against the defendant's driver:

- a) Driving motor vehicle registration number KCX 038A at an excessively high speed in the circumstances;
- b) Failing to heed the presence of the plaintiff's *Matatu*;
- c) Negligently veering into the lane reserved for motor vehicles heading in the opposite direction and specifically into the plaintiff's driver's rightful lane;
- d) Failing to exercise effective control over *Matatu* registration number KCX 039A;
- e) Violating the provisions the Traffic Act and the Highway Code.

The plaintiff pleaded the particulars of loss/special damage and prayed for judgment against the defendant for:

- a) Special damages of Ksh. 595,066/=;
- b) Costs of this suit;
- c) Interest on the above from the date of filing suit.

### **THE DEFENCE**

After the interlocutory judgment had been set aside by consent of the parties, the defendant filed a statement of defence on 8/12/2023. The defendant made general denials of the contents of the plaint and further denied the particulars of negligence and special damages pleaded by the plaintiff. In the alternative, the defendant averred that the accident that occurred involving the two motor vehicles was caused and/or substantially contributed to by the gross negligence of the driver of motor vehicle registration number KCY 468D. The defendant pleaded the following particulars of negligence against the driver of motor vehicle registration number KCY 468D:

- a) Driving recklessly and on the wrong lane on the road;
- b) Abruptly stopping in the middle of the road on a busy highway without warning to the other road users;
- c) Negligently and without warning, blocking the lane of motor vehicle registration number KCX 039A;

d) Wholly disregarding the traffic laws and the Highway Code.

The defendant relied on the doctrine of *Res ipsa loquitur* and prayed that the plaintiff's suit be dismissed with costs.

## **THE EVIDENCE**

### **The Plaintiff's Case**

Three witnesses testified on behalf of the plaintiff. PW 1 Patrick Ng'ang'a Mwangi testified that he was a Principal Officer at Quantum Motor Assessors and Valuers. That he assessed motor vehicle registration number KCY 468D and quantified the damage at Ksh. 347,536/= inclusive of VAT. The witness stated that he charged Ksh. 17,900/= for labour. He produced the report and receipts in evidence. The plaintiff testified as PW 2 and adopted her statement filed in court as part of her testimony. She did not witness the accident. It was the evidence of the plaintiff that after the accident, the motor vehicle was assessed. That she used to earn an average of Ksh. 14,870/= per day from suing the motor vehicle. The plaintiff testified that she lost Ksh. 208,180/= as income for the two weeks that the motor vehicle would be under repairs. She produced documents in support of her claim. PW 3 Police Constable Daniel Ochola from Kibwezi Traffic Base testified that on 11/12/2022 a report was made at Kibwezi police station concerning the accident herein. He narrated the circumstances of the accident and produced a police abstract on the same.

### **The Defence Case**

The defendant called one witness in support of their case. DW 1 Paul Mbilo Musumbi adopted his statement filed in court as part of his testimony. He stated that he was the driver of motor vehicle registration number KCX 039A on the date of the accident. He confirmed that he was an employee of the defendant at the material time. That on the material day, he stopped at a fuel station within Kibwezi town and after fueling, he indicated that he was joining the main highway from Kitui to Kibwezi direction. DW 1 stated that two motor vehicles behind him stopped to give way but as soon as he joined the road, a speeding motor vehicle overtook the two motor vehicles that had stopped and rammed into the defendant's motor vehicle from the side, in a bid to avoid a collision with oncoming motor vehicles.

DW 1 identified the motor vehicle that rammed into the motor vehicle that he was driving as KCY 468D and stated that the said motor vehicle veered off the road and rammed into two other motor vehicles that had been parked off the road. That the plaintiff's motor vehicle and the defendant's motor vehicle were both headed in the same direction. DW 1 blamed the driver of the plaintiff's motor vehicle for the accident.

### **FACTS NOT IN DISPUTE**

From the evidence on record, the following facts are not in dispute:

- a) An accident occurred on 11/12/2022 in Kibwezi town along Kibwezi-Kitui road involving motor vehicles registration numbers KCX 039A and KCY 468D;
- b) The two motor vehicles were headed in the same direction;
- c) Motor vehicle registration number KCY 468D belonged to the plaintiff whereas motor vehicle registration number KCX 039A belonged to the defendant.

### **MAIN ISSUES FOR DETERMINATION**

In my opinion, the main issues for determination are as follows:

- i. Whether the defendant's driver is liable for the accident and thus to blame;
- ii. Whether the plaintiff suffered loss and damage as a result of the alleged accident;
- iii. Whether the plaintiff is entitled to damages as against the defendant and if so, the nature and quantum thereof;
- iv. Who should bear the costs of this suit?

### **THE PLAINTIFF'S SUBMISSIONS**

The plaintiff relied on her evidence on record and submitted that the defendant ought to be held vicariously liable for the accident. The plaintiff further submitted that it is not mandatory to tender a receipt for repairs in order for her claim to succeed. That the Plaintiff proved the extent of the damage to her *Matatu* through the Assessment Report produced in Court. The plaintiff argued that the Assessment Report is conclusive evidence of the loss suffered by her. The plaintiff urged the court to find that the plaintiff's evidence on the extent of damage was uncontroverted. She further urged the court to assess damages as

pleaded and award her costs of the suit as well as interest from the date of filing suit. The plaintiff relied on the following authorities:

- a) *Karisa & another v Solanki & another [1969] EA 318;*
- b) *Abdi Ali Dere v Firoz Hussein Tundal & 2 others [2013] eKLR;*
- c) *Nkuene Dairy Farmers Co-op Society Ltd & another v Ngacha Ndeiya [2010] eKLR.*

### **THE DEFENDANT'S SUBMISSIONS**

The defendant submitted that the plaintiff had failed to prove her case on a balance of probabilities and that the same ought to be dismissed. That the plaintiff failed to prove negligence and/or culpability for the accident on the part of the defendant's agent. The defendant relied on the evidence on record and submitted that the plaintiff's driver was to blame for the accident. They urged the court to dismiss the plaintiff's suit.

### **ANALYSIS AND DETERMINATION**

I will address the issue of liability. The plaintiff pleaded several particulars of negligence as against the defendant's driver. It is trite law that it is not enough to adorn the pleadings with particulars of negligence. The plaintiff must adduce evidence to prove such particulars of negligence and it is from the evidence that the court can make a finding on liability. The above position appears to be anchored on the provisions of sections 107 and 109 of the Evidence Act which basically provide that the burden of proof lies on the person who alleges the existence of facts upon which he desires the court to give judgment in his favour. In the case of *Kirugi & Another v Kabiya & 3 Others [1987] KLR 347*, the Court of Appeal held as thus:

***"The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof."***

None of the plaintiff's witnesses was present when the accident occurred or could tell, of their own knowledge, how the accident occurred. The evidence of the plaintiff and that of PW 3 on how the accident occurred was mere hearsay. The plaintiff appears to rely on the contents of the police abstract and in particular paragraph 7 thereof where the words "KCX 039A to blame" appear. There is absolutely no evidence to show that the driver of KCX 039A

was charged with a traffic offence arising out of the accident, and the results of such prosecution. Can that be said to be sufficient evidence of negligence on the part of the defendant's driver.

In the authority of *Moses Theuri Ndumia v I G Transporters Limited & another [2018] KECA 297 (KLR)*, the Court of Appeal observed:

*".....the Police Abstract form that indicated the driver of the 1<sup>st</sup> respondent's motor vehicle was to blame for the accident. The respondents did not call any evidence to counter this evidence..... In the absence of any evidence from the defence, we are persuaded there was preponderance of evidence by the appellant that amounted to a prima facie case and it required to be countered by the respondent."*

Further, in *David Onchangu Orioki (Suing as personal representative of Anthony Nyabondo Onchangu (Deceased) v Ismael Nyasimi & Charles Michieka Nyoungo [2019] KECA 434 (KLR)*, the Court of Appeal had this to say:

*"When a collision occurs between two vehicles, as between them, the issue of contributory negligence and apportionment may arise. However, as between a passenger and the owners/drivers of the two vehicles involved in the accident, liability on the part of the owners is 100% joint and several and no question of apportionment arises unless it is proved the passenger was negligent.....In the instant matter, the respondents pleaded negligence on the part of the deceased. No evidence was led to prove the alleged negligence. The doctrine of res ipsa loquitor applies in cases where the deceased or an injured person is a passenger in a motor vehicle involved in an accident. In such cases, what must be proved is the occurrence of the accident and that the person injured or deceased was a passenger in vehicle."*

*31. In this matter, we are satisfied that PW1 testified and tendered in evidence a police abstract proving the occurrence of the accident and establishing that the deceased was a passenger in the motor vehicle. We are fortified in our finding when we consider that the respondents did not lead any evidence to demonstrate that the 2<sup>nd</sup> respondent, as the driver of motor vehicle KAY 718S, was not negligent."*

Similarly, in *Orioki v Kevian Kenya Limited [2025] KECA 780 (KLR)*, the Court of appeal held:

***“The police abstract, though not conclusive, supported the finding that the appellant’s actions caused the accident. Furthermore, the evidence showed that the appellant did not maintain a safe distance, which contributed to the collision. In Kenya Ports Authority v East African Power & Lighting Co. Ltd, (supra), it was held that a police abstract is prima facie evidence of facts reported to the police, and in the absence of contrary evidence, it can be relied upon. In this case, the appellant failed to adduce any compelling evidence to counter the police abstract or to disprove the causal link between his actions and the damage. The police abstract, while not conclusive, indicated that the appellant was at fault for the rear-end collision.”***

The police officer who produced the police abstract was not the investigating officer in respect of the accident. The information in the police abstract was not supported by any evidence. It is not known why the investigating officer found that the defendant’s driver was to blame for the accident. It is worth noting that the police abstract was filled the following day after the accident. It is not clear whether investigations were concluded. No sketch maps were produced to show the point of impact. The fact that the two motor vehicles collided is not in dispute. It is also not in dispute that the collision occurred on the tarmac road.

In the authority of *Orioki (supra)*, the Court of Appeal held that under common law, a driver who hits another vehicle from behind is generally presumed to be at fault, unless there is sufficient evidence to rebut this presumption. A driver is required to maintain a safe distance between his motor vehicle and the motor vehicle ahead to prevent accidents, especially in emergencies. Failure to do so can lead to a finding of negligence if it results in a collision. In my considered view, if there is a motor vehicle behind another, the driver of the motor vehicle behind owes a greater duty of care to the one in front. I say so for the following reasons:

- a) The driver behind has a clearer view of the motor vehicle ahead and can control their own speed, distance and reaction. The driver in front cannot easily monitor what happens behind them;
- b) Traffic laws and road safety regulations require that the driver behind should keep or maintain a safe distance so as to be able to stop or react in time if the vehicle ahead slows down or stops suddenly. Failure to maintain a safe distance often constitutes negligence;
- c) When a rear-end collision occurs, the law presumes that the driver behind was negligent unless there is strong evidence to the contrary;
- d) The driver behind must anticipate that the vehicle ahead may slow down, stop or turn and should drive in a manner that prevents a collision even if that happens.

The only version on record is the one that was given by the defendant's driver. If this version is anything to go by, then it would mean that the plaintiff's driver was to blame for the accident. There were two other motor vehicles between the plaintiff's and defendant's motor vehicles. It is said that the plaintiff's driver was overtaking when the accident occurred. This was in a built up area. The only evidence that would rebut that of the defendant's driver would have been that of the plaintiff's driver or an eye-witness. The contents of the police abstract, without any basis cannot be sufficient to override the testimony of the defendant's driver. I have no option but to go by the version given by the defendant's driver.

I have already pointed out that generally, if a motor vehicle collides with another from the rear, the driver in the motor vehicle behind is presumed to be negligent. In this case, the starting point should be that the plaintiff's driver is to be presumed negligent. The plaintiff did not call her driver to testify despite the fact that he had filed a witness statement. No reasons at all were given to explain why the plaintiff's driver was not called to testify. The result is that no negligence has been established against the defendant's driver. Even assuming that the defendant's driver had suddenly entered the road, without evidence on how close the plaintiff's driver was before the defendant's driver entered the road, it would be difficult to find the defendant's driver wholly or substantially liable.

I have already mentioned that the plaintiff's driver owed a greater duty of care to other road users, given the circumstances of the case. My view is that had the plaintiff's driver been driving at a moderate speed and not overtaken at such a busy road, the accident could have been avoided even if the defendant's driver had suddenly joined the tarmac. Even then, it would have been expected that the motor vehicles ahead of the plaintiff's motor vehicle could have been the first to be involved in the accident. This suit is one for dismissal. In the circumstances, the plaintiff is not entitled to damages as against the defendant. I do not need to delve into the question of whether the plaintiff proved the special damages pleaded.

**DISPOSITION**

In summary, I hold that the plaintiff has failed to prove her case on a balance of probabilities as against the defendant. Consequently, the plaintiff's suit is dismissed with costs to the defendant.

**DATED, SIGNED AND DELIVERED VIA CTS THIS 17<sup>TH</sup> DAY OF MARCH, 2026.**

**Y.A SHIKANDA**

**SENIOR PRINCIPAL MAGISTRATE.**