

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
CIVIL APPEAL NO. E334 OF 2024

CLASHER ALUBAHI.....
.....APPELLANT

VERSUS

MAKHULO ODUORI VICTOR.....
RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. V. Asiyo (PM) delivered on 14th December 2023 in Thika CMCC No. E216 of 2022)

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Thika Principal Magistrate in CMCC No. E216 of 2022 in a claim of damages in a traffic accident. The trial court found that the appellant failed to prove on a balance of probabilities that the respondent was to blame for the accident and thereby dismissed his case with costs to the respondent.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 9 grounds summarized as follows:-
 - a) The learned trial magistrate erred in law and in fact in dismissing the suit even with liability having been proved against the respondent.

b) The learned trial magistrate erred in law and in fact in considering only the evidence of the respondent and his witness and disregarding the plaintiff evidence, his witnesses and his submissions and authorities.

3. Parties put in written submissions.

The Appellant's Submissions

4. The appellant submits that during the hearing, he adopted his witness statement and confirmed that the said accident occurred and the same was wholly caused by the respondent's motor vehicle which hit his motor vehicle from behind. He confirmed that the police visited the scene of the accident and that he lost consciousness as a result of the accident. The respondent on the other hand testified by adopting his witness statement and confirmed that the said accident occurred which involved his motor vehicle and a motor cycle. He further confirmed that the damage on his motor vehicle was on the front side and that he is the one who reported the accident. He further testified that he did not have any document blaming the appellant for the said accident.

5. The appellant submits that the other witness was the police officer who visited the scene and confirmed that the initial investigations blamed the rider. She further admitted that she did not find the rider at the scene and that the rider had been taken to hospital. She further

stated that the statement of the rider was taken after he visited the scene and that several police abstracts were issued. The appellant

argues that the police officer who visited the scene was not there when the accident occurred. Further, the officer admitted that the only witness was the driver and that the initial information given by the driver placed blame solely on the appellant. The officer admitted that she took a statement from the appellant after he left the hospital and the abstract did not contain any conclusive investigations. The appellant argues that the trial court opted to believe the evidence of the respondent and ignored his evidence. In any event, the appellant submits that the trial court should have apportioned blame on both vehicles. To support his contentions, the appellant relies on the case of **Kariamburi (Deceased) vs Four by Four Safaris Company Ltd & Another (Civil Appeal 345 of 2000) KECA 65 (KLR)**.

6. The appellant submits that he was hit from behind by the respondent's motor vehicle and the respondent's witness admitted having hit him with the front side of the motor vehicle. The appellant relies on the cases of **Orioki vs Kevian Kenya Limited (Civil Appeal 341 of 2019) [2025] KECA 780 (KLR)**; **Cosmas Mutiso Muema vs Kenya Road Transporters Limited & Another [2014] eKLR** and **PAS vs George Onyango Orodi [2020] eKLR** and submits that the respondent never produced any document or photographs to the contrary and no copy

of the inspection report was produced to aid the respondent's assertion that he was riding on the opposite direction.

7. The appellant submits that he sustained injuries comprising of a right femur fracture; distal 1/3 tibia fracture and non displaced acetabular fracture. The appellant submits that an award of Kshs. 2,500,000/- is reasonable compensation whereas the respondent proposed an award of Kshs. 500,000/-. The trial court considered the rival submissions and held that an award of Kshs. 850,000/- for general damages and the appellant submits that the same should be enhanced to Kshs. 2,500,000/-. The appellant relies on the case of **Njuguna vs Mwabindo (Civil Appeal 41 of 2021) [2023] KEHC 24136 (KLR)** where the respondent was awarded Kshs. 1,800,000/- as general damages for comparable injuries and **Swalleh C. Kariuki & Another vs Violet Owiso Okuyu [2021] KEHC 4863 (KLR)** where the plaintiff was awarded Kshs. 1,500,000/- for almost comparable injuries in the year 2021.

The Respondent's Submissions

8. The respondent submits that the evidence on record points to the appellant having been wholly responsible for the accident by going against the flow of the traffic on a one way road. The respondent further submits that Corporal Makuti testified to having interviewed the

appellant himself who personally went to the police station after the accident and admitted to having been heading against the flow of traffic at the time of the accident. Further, the fact that the appellant went to the police station to give his evidence was admitted by the appellant during cross examination.

9. The respondent argues that the appellant did not produce any evidence to controvert the abstract, the testimony of the investigating officer PC Makuti and neither did the appellant adduce any evidence showing liability on his part. Furthermore, the appellant was contradictory about the facts of the accident as at one point he stated that he did not remember what happened and that he woke up in hospital and at another point he was hit but did not give details on how the collision occurred. The respondent submits that the appellant did not produce any photographs showing the point of impact for his motor cycle was from the rear.

10. The respondent relies on the cases of **Mati & Another vs Gicheru (Civil Appeal E002 of 2024) [2025] KEHC 2062 (KLR)** and **Evans Nyakwana (Civil Appeal E077 of 2023) [2025] KEHC 4105 (KLR)** and submits that he who alleges must prove and the appellant failed to adduce evidence in support of his case and further the evidence tendered was pointed towards the accident having been the fault of the appellant for riding

against the flow of traffic on a one way road. The appellant having asserted that his injuries were due to his negligence, he had a duty to adduce evidence pointing to his negligence. The respondent argues that the appellant failed to adduce such evidence and failed to adduce any evidence which controverted the evidence by the investigating officer and him. The respondent submits that the evidence on record is consistent with the appellant having been riding against the flow of traffic and there is no justifiable ground to apportion liability to him.

11. The respondent relies on the cases of **Hayer Bishan Singh & Sons Construction vs Paul Oduor Ogola [2009] eKLR** and **Kagiri vs Republic [1986] eKLR** and submits that where a party causes an accident and are on the wrong side of the road, the party on the wrong side is deemed to be wholly at fault and liable for the accident.
12. The respondent submits that the appellant's injuries were confirmed by the two medical reports filed by Dr. Cyprianus Okoth dated 27th January 2022 and Dr Maina Ruga dated 27th February 2023 however they did not agree on the degree of incapacity with Dr. Okoth giving 40% incapacity while Dr. Ruga gave only 20%. The respondent further submits that Dr. Ruga's medical review was done a year after Dr. Okere's and is therefore more likely to be accurate on the degree of incapacity since the appellant would have had more time to heal.

13. The respondent submits that the damages proposed by the appellant were excessive in the circumstances and the cases cited are not applicable in the circumstances. The respondent proposes an award of Kshs. 500,000/- and relies on the cases of **Jitan Nagra vs Abdinego Nyandusi Oigo [2018] eKLR** where the respondent sustained injuries of lacerations on the occipital area, deep cut wound on the back, right knee and lateral lane, bruises at the back extending to the right side of the lumbar region, blunt trauma to the chest, bruises on the left elbow, compound fracture of the right tibia/fibula, segmental distal fracture of the right femur and the appellate court set aside the award of Kshs. 1,000,000/- and

substituted it with an award of Kshs. 450,000/-. In **Civicon Limited vs Richard Njomo Omwancha & 2 Others [2019] eKLR** the High Court awarded Kshs. 500,000/- to a third party who sustained the injuries of fracture of four upper teeth, cut wound on the upper and lower lips, swollen and tender upper lip, bruises on the chin, dislocation on the left shoulder, bruises on the right knee, fracture of the right tibia and fibula in addition to a 30% permanent disability.

Issue for determination

14. The main issue for determination is whether the appellant proved his case on a balance of probabilities.

The Law

15. Being a first Appeal, the court relies on a number of principles as set out in **Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123:**

“.....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind 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 either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

16. In **Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR** the Court of Appeal stated that:-

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

17. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-

- a) That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
- b) That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
- c) That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Whether the appellant proved his case on a balance of probabilities

18. The principles guiding the appellate court's power to interfere with the trial court's finding on liability are well settled. In **Khambi & Another vs Mahithi & Another [1968] EA 70** it was held that:-

It is well settled that where a trial Judge has apportioned liability according to the fault of the parties, his apportionment should not be interfered with on appeal, save in exceptional circumstances,

as where there is some error in principle or the apportionment is manifestly erroneous and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.

19. The record shows that appellant testified but did not call any other witness. He testified as PW1 and adopted his witness statement and produced his bundle of documents. His evidence was that on 29th August 2021, he was lawfully riding motor cycle registration number KMFK 766N near Rubis filing station weighbridge Kimbo when the driver of motor vehicle registration number KCV 770V lost control of his said motor vehicle allowing the same to collide onto the motorcycle. PW1 further testified that he blamed the driver of the said motor vehicle because he hit him from the back at a high speed. On cross examination, PW1 testified that he went to the police after he left the hospital and picked the police abstract. The police abstract blamed the driver of the motor vehicle for the accident.

20. The respondent called two witnesses. DW1, the driver of motor vehicle registration KCV 770B adopted his witness statement and

testified that he was heading towards Nairobi on the service lane and the appellant was coming from the opposite direction as he was riding on the wrong lane. The witness testified that he was driving at a slow speed as he

was on the weigh bridge but the appellant lost control and crashed into his vehicle.

21. On cross examination, DW1 testified that he took the appellant to hospital as he was unconscious. He further testified that police officers went to the scene and they recorded a statement on the following day. The witness further testified that he was alone when reporting the accident. DW1 testified that he was on the service lane and not the highway and that the service lane only had one way. He further testified that the motor cycle was coming on the oncoming lane and it was the wrong lane because it was the service lane. The witness stated that there was another car in front of the appellant and he did not see the appellant before the accident. He further stated that he saw the appellant flying after hitting him.

22. DW2, police officer, testified that an accident occurred on 29th August 2021 at Rubis Petrol Station along Kimbo weigh bridge service lane Nairobi bound direction involving motor vehicle registration number KCB 770V and motor cycle KMFK 766N. The witness testified that the accident occurred on the service lane which was one way. She further testified that the motor cycle was being ridden on the wrong side. DW2 testified that she was the investigating officer and that she visited the scene of the accident. She further testified that the motor vehicle and the motor cycle

collided on the service lane and she blamed the motor cycle in the police abstract.

23. On cross examination, the witness testified that she visited the scene after the accident but did not find the rider at the scene as he was rushed to hospital by good Samaritans. DW2 further testified that she found the driver at the scene and the motor cycle was in a ditch on the right side of the road as you face Nairobi direction. The witness further testified that three police abstracts were issued on the accident involving the motor vehicle, motor cycle and the victim. According to the witness, the police abstract of the motor vehicle was conclusive on the accident. DW2 further stated that she recorded the statement of the rider when he went to the police station.

24. It is trite law that he who alleges must prove. **Section 107 (1) of the Evidence Act**, Cap 80 Laws of Kenya, 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.

25. In **Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another [2005] 1 EA 334**, the Court of Appeal held that:-

As a general proposition under Section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof

lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon

any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.

26. From the evidence on record, it is not disputed that an accident occurred on 29th August 2021 near Rubis petrol station at the weighbridge Kimbo between motor cycle registration number KMKF 766N and motor vehicle registration number KCB 770V.

27. According to the appellant, DW1 was to blame for the accident as he hit him from behind at a high speed. DW1 and DW2 in turn blamed the appellant for causing the accident as he was riding against the flow of the traffic at the service lane. This court is inclined to believe the accident occurred as per the testimony of DW1 and DW2. The burden of proof was upon the appellant to show that DW1 was responsible for causing the accident. The evidential burden shifted to the appellant to show that he was not on the service lane and he was not riding against the flow of the traffic when DW1 and DW2 testified that the appellant was on the service lane riding against the flow of the traffic. Furthermore, DW2 who was the investigating officer, visited the scene and testified that

she found the motor cycle in a ditch on the right side of the road as you face Nairobi direction. She further testified that based on her investigations she found the appellant solely to blame for the accident. The appellant failed to controvert the evidence adduced by the respondent's witnesses.

28. It is my considered view that the appellant was the author of his own misfortune as shown by the evidence on record. He did not explain how he went to wrong side of the service lane where he collided with vehicles from the opposite direction. In that regard, it is my view that the appellant did not discharge the burden of proof while on the other hand, the respondent did so. I find no fault in the trial magistrate's analysis of the evidence and in his determination. The decision was based on cogent evidence to the effect that the appellant was negligent and was to blame for the accident.

29. Accordingly, I find that the appeal lacks merit and is hereby dismissed with costs to the respondent.

30. It is hereby so ordered.

***JUDGMENT DELIVERED VIRTUALLY, DATED AND
SIGNED AT THIKA THIS 23RD DAY OF APRIL 2026.***

F. MUCHEMI
JUDGE