

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
CIVIL APPEAL NO. E080 OF 2025

CHARLES IRUNGU.....

APPELLANT

VERSUS

JUDY WAMBUI NDUGIRE & LUCY NJERI NJUGUNA

(Suing as the Personal Representatives of the Estate of STEPHEN NJUGUNA

SAMUEL - DECEASED.....

.....RESPONDENT

(Being an appeal from the judgment of Hon. Joan Irura, Senior Principal Magistrate, delivered on 7th July 2025 in Kigumo MCCC No. E320 of 2021)

JUDGMENT

Background

1. This appeal arises from the judgment of the Senior Principal Magistrate's Court at Kigumo delivered on 7th July 2025 by Hon. Joan Irura, Senior Principal Magistrate, in Kigumo MCCC No. E320 of 2021.
2. In the impugned judgment, the learned trial magistrate found the appellant 100% liable for a road traffic accident which resulted in the death of Stephen Njuguna Samuel. Judgment was entered in favor of the respondents, who had sued as personal representatives of the

estate of the deceased. The appellant, being dissatisfied with the finding on liability, lodged the present appeal.

Background

3. The plaintiffs (respondents herein) instituted the suit against the defendant (appellant herein) by way of a plaint dated 6th December 2021 in Kigumo MCCC No. E320 of 2021. They sued in their capacity as the personal representatives of the estate of the late Stephen Njuguna Samuel, pursuant to a limited grant of letters of administration ad litem issued on 13th January 2021.
4. The respondents' claim arose from a fatal road traffic accident alleged to have occurred on or about 3rd October 2020 along Kabiti-Githiani-Karega Road. It was pleaded that the deceased was riding motorcycle registration number KMDQ 749V when motor vehicle registration number KBN 001X, allegedly owned by the appellant, knocked him down, occasioning fatal injuries. The respondents averred that the accident was wholly caused by the negligence of the appellant, his driver, servant and/or agent.
5. The particulars of negligence pleaded against the appellant included driving motor vehicle registration number KBN 001X at an excessive speed, driving without due care and attention, driving without regard to the safety of other road users, failing to stop, brake, swerve or

otherwise control the vehicle so as to avoid the accident, and failing to see the deceased in time or at all. The respondents also pleaded reliance on the doctrine of *res ipsa loquitur*.

6. The respondents sought damages under both the **Fatal Accidents Act** and the **Law Reform Act**. They pleaded that the deceased was married, aged about 48 years, and was survived by dependants, including his wife and children. They further pleaded that the deceased worked with Murang'a South Water and Sanitation Company Limited as a zonal officer, earning an average monthly income of Kshs. 18,438/=.
7. The appellant entered appearance and filed a statement of defence dated 24th January 2022. In the said defence, the appellant denied the respondents' claim and put them to strict proof. He also filed a list of witnesses and list of documents of even date. The matter thereafter proceeded through the trial court process.
8. Upon considering the pleadings, evidence tendered during the hearing and written submissions by the parties, the learned trial magistrate delivered judgment on 7th July 2025, finding the appellant 100% liable for the accident and proceeded to award damages to the respondents.
9. The appellant, being dissatisfied with the said finding on liability, lodged the present appeal by way of a memorandum of appeal dated 22nd July 2025, citing the following grounds:
10. Consequently, the appellant prayed for the following orders:

- i. **THAT the learned Magistrate erred in law and fact in failing to consider and find that the appellant had shown a prima facie case with a high probability of success.**
- ii. **THAT the learned Magistrate erred in law and fact by apportioning 100% liability against the Appellant.**
- iii. **THAT the learned Magistrate erred in law and fact in failing to consider and find that there was no concrete evidence placed before the court to determine who was to blame for the accident between the Appellant and the deceased.**
- iv. **THAT the learned Magistrate erred in law and fact in failing to consider and find that the contents of a police abstract as extracted from the records held by the police is merely evidence that a report of an accident was made and not that an accident occurred.**
- v. **THAT the learned Magistrate erred in law and fact in failing to consider and find that a police abstract is not conclusive proof of liability.**
- vi. **THAT the learned Magistrate erred in law and fact in failing to consider and find that the evidence tendered by PW2, PW3 and PW4 goes against the**

evidentiary rules of direct evidence thereby rendering their testimony as hearsay since they were not present at the scene of the accident and as such cannot render any account leading up to or surrounding the alleged accident.

vii. THAT the learned Magistrate erred in law and fact in failing to consider and find that where there is no concrete evidence to determine how the accident occurred and who is to blame for causing an accident, both parties should be held equally liable.

viii. THAT the learned Magistrate erred in law and fact in failing to consider and find that there can be no liability without fault.

11. The appellant consequently prayed that the appeal be allowed, that the judgment delivered on 7th July 2025 in Kigumo MCCC No. E320 of 2021 be set aside, that costs and interest of the appeal be borne by the respondents, and that the court grants any other relief it may deem fit.

12. The appeal was canvassed by way of written submissions. On record are submissions dated 9th October 2025 filed by the appellant, and submissions dated 18th November 2025, filed by the respondent; both of which this court has carefully considered.

Appellant's Submissions.

13. Counsel for the appellant submitted that the appeal turns principally on the question whether the appellant was to blame for the accident, and consequently whether the trial court was right in apportioning liability at 100% against him. Counsel further submitted on the issue of costs.
14. On whether the appellant was to blame for the accident, counsel submitted that the trial magistrate failed to correctly assess the evidence and the degree of liability to be apportioned between the parties. It was argued that the respondents' case was founded on the testimony of PW1, a medical doctor; PW2, the wife of the deceased; PW3, a police officer; and PW4, who was presented as an eyewitness. According to counsel, that evidence did not prove, on a balance of probabilities, that the appellant was wholly to blame for the accident.
15. Counsel submitted that the police officer, PW3, merely produced a police abstract, which is an abridged version of the Occurrence Book. It was contended that a police abstract is not conclusive proof of liability and does not, by itself, prove how an accident occurred. Reliance was placed on **Margaret Wambui Thidigwa v Eliud Sidigu Otiato [2021] eKLR.** Counsel further relied on **ZAO & CAO (Suing as the Legal Representatives in the Estate of SAO (Deceased) v Amollo Stephen [2019] eKLR,** where the court held that a police

abstract is not proof of the occurrence of an accident but proof that an accident was reported to the police. Counsel also cited **Kennedy Nyangoya v Bash Hauliers [2016] eKLR**, where it was held that a police abstract is not conclusive proof of liability in the absence of supporting evidence.

16. It was further submitted that the trial court expressly noted in the judgment that PW3 had stated that the matter was still pending investigations, that the driver was not conclusively blamed, and that it was not possible to apportion blame. Counsel argued that in light of that evidence, it was unjust for the trial court to hold the appellant 100% liable. Reliance was placed on **Florence Mutheu Musembi & Geoffrey Mutunga Kimiti v Francis Karengi [2021] eKLR**, where the court stated that a police abstract, unless it contains information regarding investigations and their outcome, cannot without more be evidence of negligence.

17. Counsel also attacked the evidence of PW2, PW3 and PW4 on the basis that it did not amount to direct evidence on the manner in which the accident occurred. It was submitted that PW2, being the wife of the deceased, was not present at the scene; PW3 did not witness the accident; and PW4, though described as an eyewitness, was unable to recall material particulars such as what the deceased was wearing, which side of the road the deceased was riding on, and which part of the vehicle made contact with the motorcycle. Counsel submitted that

their evidence on the manner of occurrence of the accident was therefore hearsay and contrary to **section 63(1) and (2) of the Evidence Act.**

18. On apportionment of liability, counsel submitted that where there is no concrete evidence to determine who is to blame for an accident, liability should be apportioned equally. Reliance was placed on **Farah v Lento Agencies [2006] 1 KLR 124**, where the Court of Appeal held that where there is no concrete evidence to determine who between two drivers is to blame, both should be held equally liable.

19. Counsel further submitted that the legal and evidentiary burden of proof remained on the respondents throughout. Reliance was placed on **sections 107, 108 and 109 of the Evidence Act**, and on **Mumbi M’Nabea v David M. Wachira [2016] eKLR**, where the Court of Appeal discussed the standard of proof in civil claims as proof on a balance of probabilities. Counsel also cited **Karugi & Another v Kabiya & 3 Others (1987) KLR 347**, where the Court of Appeal held that the burden on a plaintiff to prove his case remains the same even where the matter is not defended, and that a plaintiff must still adduce credible and believable evidence capable of proving the claim on a balance of probabilities.

20. It was further submitted that negligence must be proved and cannot be presumed. In that regard, counsel relied on **Eastern**

Produce (K) Ltd v Christopher Atiado Osiro [2006] eKLR, where the court stated that the onus of proof lies on he who alleges, and that where negligence is alleged, some form of negligence must be proved against the defendant. Counsel also cited **John Simon Ashers & Another v Nelson Okello Onjao [2020] eKLR**, where the court interfered with a finding of liability that had been based substantially on entries in a police abstract without sufficient corroborating evidence, and apportioned liability at 50:50.

21. Counsel therefore prayed for the court to find that the respondents failed to discharge their burden of proof on liability. In the alternative, counsel submitted that the appellant ought not to have been held solely liable and that liability should instead be apportioned in the ratio of 50:50 between the appellant and the deceased. On costs, counsel relied on **section 27(1) of the Civil Procedure Act** and submitted that costs follow the event. The appellant accordingly prayed that the appeal be allowed with costs.

Respondent's Submissions.

22. Counsel for the respondents submitted that the deceased was lawfully on the road as a motorcyclist when the appellant, while driving his motor vehicle, attempted to turn into his gate without indicating or ensuring that the road was clear, thereby causing the fatal collision. It was submitted that the evidence adduced before the trial court

through PW1, PW2, PW3 and PW4 was consistent, credible and mutually reinforcing, and that the learned trial magistrate properly evaluated the same before reaching the finding on liability.

23. On whether the respondents discharged their burden of proof, counsel relied on **sections 107, 108 and 109 of the Evidence Act** and submitted that the respondents proved negligence on a balance of probabilities. Counsel argued that the trial court considered both the oral testimony and the documentary evidence, including the police abstract, and arrived at a reasoned finding that the appellant was wholly to blame. It was further submitted that the appellant did not testify and did not call any evidence in the lower court to rebut the respondents' case.
24. On the appellant's argument concerning the police abstract, counsel submitted that the appellant had mischaracterized the role of the said document. The respondents conceded that a police abstract is not conclusive proof of liability, but maintained that in the present case it was not the only evidence relied upon. Counsel submitted that the police abstract was supported by credible witness testimony.
25. On the probative value of PW4's evidence, counsel submitted that the appellant's attempt to discredit PW4 by relying on his inability to recall peripheral details, such as what the deceased was wearing, missed the real issue. According to counsel, the material evidence related to the dynamics of the accident, namely that the appellant cut

across oncoming traffic and failed to give way, and that PW4 testified to those facts. It was submitted that the trial court had the benefit of observing PW4's demeanor, clarity and consistency, and was therefore entitled to accept his evidence.

26. Counsel further submitted that there was no contradictory evidence from the appellant, who opted not to testify or call any witnesses. Reliance was placed on **Mwangi v Kamanda & 3 others [2024] KEHC 10615 (KLR)**, for the proposition that where there is credible evidence from one side and no meaningful contradiction from the other, full liability may be justified.

27. On apportionment of liability, counsel submitted that the appellant's proposal for a 50:50 apportionment was not justified. It was argued that equal apportionment applies only where neither party's case is clearly established, or where there are conflicting versions without a clear preponderance. According to counsel, the evidence before the trial court was not evenly balanced. The respondents maintained that PW4's evidence was uncontroverted, and that the appellant failed to offer any alternative account of how the accident occurred. Counsel therefore submitted that the trial court's finding of 100% liability against the appellant was reasonable, proportionate and legally sound.

28. On costs, counsel relied on **section 27(1) of the Civil Procedure Act** and submitted that costs follow the event and prayed that the appeal be dismissed with costs.

Analysis and Determination

29. This being a first appeal, this Court has a duty to reconsider and re-evaluate the evidence adduced before the trial court and make its own independent conclusion. It should however give regard to the fact that it has neither heard nor seen the witnesses testify. See the cases of **Pandya v R {1957} EA 336; Ruwalla v R {1957} EA 570** and **Kisumu Criminal Appeal No. 28 of 2009 David Njuguna Wairimu v. Republic [2010] eKLR** where the Court of Appeal held that: -

“the duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusion on that evidence without overlooking the conclusion of the trial court. There are instances where the first appellate court may depending on the facts and circumstances of the case, come to the same conclusion as those of the lower court. It may rehash those conclusions. We do not think

there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

30. I have considered the record of appeal, the proceedings before the trial court, the judgment of the learned trial magistrate, the memorandum of appeal and the rival submissions filed by the parties. In my view, the issues that arise for determination are:

- a. Whether the respondents discharged the burden of proof on liability against the appellant.**
- b. Whether the learned trial magistrate erred in her evaluation of the evidence of PW2, PW3 and PW4 in determining liability.**
- c. Whether, in light of the appellant's failure to testify or call any witness, the learned trial magistrate erred in apportioning liability at 100% against the appellant.**

Issue I: Whether the respondents discharged the burden of proof on liability against the appellant

31. The law on burden of proof is settled. **Sections 107, 108 and 109 of the Evidence Act (Cap 80, Laws of Kenya)** place the burden upon the party who asserts the existence of a fact to prove that

fact. The respondents, being the plaintiffs before the trial court, bore the burden of proving on a balance of probabilities that the accident occurred, that the appellant's motor vehicle was involved, and that the accident was caused by the negligence of the appellant, his driver, servant and/or agent.

32. The appellant correctly submitted that negligence is not presumed merely because an accident occurred. There must be evidence from which the court may reasonably infer fault. In **Kiema Mutuku v Kenya Cargo Handling Services Ltd [1991] 2 KAR 258**, the Court of Appeal stated the principle in clear terms that "*there is as yet no liability without fault*" and that a plaintiff must prove some negligence against the defendant where the claim is founded in negligence. That statement of law accords with the appellant's submission that liability must be founded upon evidence and not speculation.

33. The question, therefore, is whether the evidence tendered by the respondents met that threshold. From the trial court record, PW1 was Dr. Robinson Thondu Nduati, a medical doctor. He testified that he conducted a post mortem on the body of the deceased on 12th October 2020 at Githumu Mission Hospital Funeral Home. He formed the opinion that the cause of death was cardiorespiratory arrest due to massive internal hemorrhage in the thorax and in the peritoneal region caused by blunt trauma sustained in a road traffic accident. He

produced the post mortem report as Exhibit 8. His evidence was relevant to proof that the deceased died as a consequence of injuries sustained in the road traffic accident.

34. PW2 was Judy Wambui Ndugire, the widow of the deceased, testified that she was called by the chief of Gachocho at 12:30 pm and informed that the accident had occurred. She proceeded to Kigumo Sub County Hospital where she arrived at about 1.00 pm and found her husband, who was bleeding from the chest area and wearing a reflective jacket. She stated that her husband died shortly thereafter as a result of the injuries sustained. She testified that the deceased was working with Muswasco (Murang'a South Water and Sanitation Company Limited) and was earning a salary of Kshs 17,560/-. She produced various documents, including the grant of letters of administration *ad litem*, as exhibits. She was not an eyewitness to the accident, and her evidence could not, standing alone, prove the manner in which the accident occurred.

35. PW3 was No. 62891 PC Patrick Muchemi, a police officer attached to Kigumo Police Station, who testified that he was the investigating officer. He produced a police abstract in respect of the deceased, a rider of motorcycle registration number KMDQ 749V, who was involved in a fatal road accident on 3rd October 2020 at about 11.30 am at Mathareini area along Kabati-Karega road, where he collided with motor vehicle registration number KBN 001X, a Toyota Noah.

36. He stated that the scene was visited, the motor vehicle was detained and inspected, and an inquiry file was later opened. He produced the police abstract as Exhibit 4. On cross examination, he confirmed that he investigated the case and referred it to the Office of the Director of Public Prosecutions (DPP) for advice, but the file was returned with directions that they obtain independent witnesses. He confirmed that he recorded the statements of the people who were in motor vehicle KBN 001X. He stated that he did not obtain any independent eyewitness. He stated that he had recommended that the case be disposed of by way of public inquest, and that the investigations were pending, thus the driver was not conclusively blamed. In re-examination, he stated that it was not possible to apportion blame, hence his recommendation for a public inquest.

37. PW4, James Kimani Mwangi, was presented as an eyewitness. He testified that on 3rd October 2020, he left his home to go to Kigumo. He stated that about two miles from his home, he came across a group of people and there was a motor vehicle nearby. He stated that there was someone lying near a certain home and a motorcycle was lying on him. He asked the court to adopt his recorded statement as his evidence in chief. On cross examination, he stated that he did not know what time the accident had happened as he was there at 11.30 am. That he did not witness the accident as he found it had already happened. He

confirmed that he could not recall the clothes the person who was under the motorcycle was wearing.

Issue II: Whether the learned trial magistrate erred in her evaluation of the evidence of PW2, PW3 and PW4 in determining liability

38. Having carefully reviewed the trial record, I find that the appellant's attack on the plaintiff's evidence is particularly meritorious. PW4, who was the eye witness, unequivocally stated on cross examination:

"I did not witness the accident happen. I found while it had already happened."

This admission is fatal to the respondents' case on liability. PW4 was not an eyewitness to the accident. He arrived at the scene after the accident had already occurred. He could not, and did not, testify as to how the accident happened, who was to blame, whether the appellant's driver indicated, whether the vehicle turned into a gate, or any other material fact concerning the occurrence of the accident.

39. Despite this clear admission, the learned trial magistrate in her judgment stated:

"According to PW4 the eye witness's evidence who happened to have arrived at the scene immediately after the occurrence of the accident; as per his recorded statement upon reaching the scene of the accident he

found that the accident motor vehicle was being driven towards the same direction as his motor vehicle while the motorcycle was coming from the opposite direction. He went on to add that the driver of the accident motor vehicle was turning to get to his gate but failed to indicate as such which clearly shows that he failed to give way to the motorcycle rider thus crushing on him."

40. To me, this was a misdirection by the trial court. The trial court treated PW4's recorded statement as evidence of the facts therein, yet PW4 himself testified in court that he did not witness the accident. Where a witness testifies that he did not see the accident occur, his out-of-court statement cannot be used to prove how the accident occurred. Such evidence is hearsay and is inadmissible to prove the truth of the matters stated therein, as provided under **Section 63 of the Evidence Act.**

41. The appellant also correctly attacked the evidence of PW3. PW3, the investigating officer, testified that he was unable to conclude how the accident happened and who was to blame. He recommended a public inquest. He stated that the driver was not conclusively blamed. In re-examination, he stated that it was not possible to apportion blame. This evidence does not support a finding of 100% liability against the appellant; rather, it demonstrates that the police investigations were inconclusive. On the police abstract, I agree with

the appellant that a police abstract is not, by itself, conclusive proof of liability.

42. In **Kennedy Nyangoya v Bash Hauliers [2016] eKLR, cited with approval in Gitau v Mundia [2025] KEHC 5887 (KLR)**, the court stated:

"Even if the police abstract indicated that DW1 was to blame for the accident, the said abstract was not conclusive proof of liability in the absence of evidence being called to support it."

43. In the present case, the police abstract did not indicate who was to blame. PW3 confirmed that the driver was not conclusively blamed. The abstract therefore does not assist the respondents in proving negligence against the appellant. The respondents relied on **Marete v Gitonga & Another (Civil Appeal E182 of 2023) [2024] KEHC 14282 (KLR)** for the proposition that where a defendant fails to call witnesses, the plaintiff's evidence remains unchallenged. That principle is sound, but it applies only where the plaintiff has actually adduced admissible evidence proving negligence. Where the plaintiff's evidence does not, as a matter of law, establish negligence, the defendant's failure to testify does not cure the deficiency.

Issue III: Whether, in light of the appellant's failure to testify or call any witness, the learned trial magistrate erred in apportioning liability at 100% against the appellant

44. The appellant did not testify and did not call any witness. The appellant closed his case without calling any evidence. The law on the effect of failure to call evidence is settled. In **Kan Travellers v Amudavi [2023] KEHC 4005 (KLR)**, the court cited **Peter Ngigi & Another v Thomas Ondiki Oduor & Another [2019] eKLR** and stated:

"The general position running through such authorities is that uncontroverted evidence bears a lot of weight and a statement of defence without any evidence to support the assertions therein will amount to mere statements."

45. However, the principle that uncontroverted evidence must be accepted applies only where the evidence adduced is admissible, credible, and sufficient to prove the pleaded facts. Where the evidence adduced does not, on its own, establish a prima facie case, the fact that it is uncontroverted does not automatically entitle the plaintiff to judgment. The burden of proof remains on the plaintiff throughout.

46. In the present case, the respondents failed to adduce any admissible evidence on how the accident occurred. The only witness who could have given direct evidence, PW4, admitted he did not witness the accident. The investigating officer confirmed that investigations were inconclusive. The police abstract does not assign blame. There is simply no evidence before the court upon which a finding liability at 100% against the appellant can be based.

47. In **Farah v Lento Agencies [2006] 1 KLR 124**, the Court of Appeal held that where there is no concrete evidence to determine who between two drivers was to blame, liability should be apportioned equally. Similarly, In **John Simon Ashers & Another v Nelson Okello Onjao [2020] eKLR**, the court interfered with a finding of liability that had been based substantially on entries in a police abstract without sufficient corroborating evidence, and apportioned liability at 50:50. In **Onyango & another v Wanjiku [2025] KEHC 18308 (KLR)**, the court stated:

"If the appellants had testified, or if in cross-examination it had been shown that the respondent was to blame to a certain extent, that would have been found so. However, the court would not proceed to apportion liability where there is no iota of evidence to do so."

48. Applying that reasoning to the present appeal, I find that there was no iota of evidence to support a finding that the appellant was 100% liable. The trial court's finding of liability was based on PW4's recorded statement, which contradicted his oral testimony that he did not witness the accident. The trial court erred in relying on that statement to find the appellant 100% liable.

Conclusion

49. Having re-evaluated the evidence on record, I find that the respondents failed to discharge the burden of proof on liability against

the appellant at 100%. The evidence adduced shows that there was collusion between the motorcycle and the motor vehicle .

50. In the absence of any credible evidence as to who is to blame, liability should be equally apportioned.

51. Accordingly, I make the following orders:

I. The appeal is hereby allowed..

II. The judgment of Hon. Joan Irura, Senior Principal Magistrate, delivered on 7th July 2025 in Kigumo MCCC No. E320 of 2021, finding the appellant 100% liable, is hereby set aside.

III. Liability is hereby apportioned equally between the Appellant and the Respondent (50:50).

IV. Each party shall bear its own cost of the Appeal.

V. Right of appeal 30 days.

DATED, SIGNED AND DELIVERED AT KAKAMEGA ONLINE THIS 29TH DAY OF APRIL, 2026.

S.N MBUNGI

JUDGE

In the presence of:-

CA: Angog'a/Velma

Ms. Kaburu holding brief for Ms. Katabaki for the Respondent present online.

Mr. Lumulo for the Appellant absent.