



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU.**

**CIVIL APPEAL NO. E134 OF 2022**

**JUSTUS LUYIAKHA .....**

**APPELLANT**

**-VERSUS-**

**BYRUM NJENGA KAMAU.....**

**RESPONDENT**

*{(Being an Appeal from the Judgement of the Chief Magistrate's court at Molo (Hon. M.W Kamau - RM) in CMCC NO. E403 of 2021 delivered on 12.09.2022)}*

**JUDGEMENT**

**Grounds of appeal and reliefs sought**

1. The Appeal before me is against the trial court's Judgement on liability for the claim in which the court apportioned responsibility for the tortious act from which

the cause of action arose in the ratio of 60% to 40% against the Respondent.

2. Aggrieved by the judgement , the Appellant, the Plaintiff in the suit, filed a Memorandum of Appeal dated 11.10.2022 upon 5 grounds that may be condensed to only one ground namely,

***THAT the Learned Trial Magistrate erred in law and fact by determining contributory negligence of 40% by the Appellant against the weight of evidence.***

3. It is proposed to ask the court to set aside the trial court's Judgement on liability and and substitute it with its own Judgement , and that the costs of the Appeal be awarded to the Appellant.

### **Guiding legal Principles**

4. This being a first appeal I am required to reconsider the evidence adduced, evaluate it and draw my own conclusions bearing in mind that I did not hear and see the witnesses who testified{ (see **Selle & Another vs Associated Motor Boat Company Ltd & Others**

**[1968] EA 123** }. The Court of Appeal for East Africa in **Peters vs Sunday Post Limited [1958] EA 424** underscored the same principles delivering itself thus:

- “i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;***
- ii. 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 her; and***
- iii. 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.”***

### **Background to the appeal**

5. As noted hereinabove, the Appellant is challenging the trial court’s Judgement on liability for the claim. The suit in the lower court arises from a road traffic accident that allegedly occurred on 26.10.2021 on the Nakuru - Molo road at Karunga area when the Respondent’s

motor vehicle registration number KCW 339 K allegedly lost control due to negligent driving thereby colliding with a motorcycle registration number KMEJ 015 N the Appellant was riding thereby causing him bodily injury. The Appellant lodged the claim in the lower court praying for general damages for pain and suffering , special damages of Kshs. 12,960/=, the costs of the suit and interest.

6. The Respondent entered appearance and filed defence to the suit. He traversed all the material averments therein, putting the Appellant to strict proof. The Respondent averred in the alternative that if it shown that the accident did occur on the material date then the Appellant was to blame for his own negligent acts. The trial court was therefore urged to dismiss the suit with costs.
7. The suit was consolidated with Civil Suit Nos. 401 and 402, both of 2021, arising from the same cause of action. Civil Suit No. 402 of 2021 was selected as the test suit for the purpose of determination of liability.

8. The Appellant underscored the averments in the suit in his oral evidence. He adopted his statement dated 29.10.2021 recorded with his Advocates and filed in court as his evidence. He told the court that as he rode on the motorcycle to the left of the road facing Njoro town while carrying two pillion passengers, the Respondent's vehicle approached from the opposite direction and veered onto the lane of the motorcycle after losing control. He swerved to the far left in an unsuccessful bid to avoid a collision. The vehicle kept driving towards them, thereby causing a collision and personal injuries to them.
9. The Claimants in Civil Suits Nos. 401 and 402 of 2021 fully confirmed the evidence of the Appellant while confirming they were the pillion passengers on the motorcycle. The Appellant told the court that he had a valid driving licence but he didn't produce it during the hearing of the case. He also claimed to have insured the motorcycle but did not tender the insurance certificate.
10. A police officer (PW4) attached to Molo Police Station tendered police abstract reports of the accident issued

to the three victims. The witness informed the court that he was not the accident's investigating officer and had not visited the scene. Police investigations are said to have shown that the motorcycle involved in the accident was not insured against third party risks contrary to the law. However, occurrence of the collision was attributed to the motor vehicle registration number KCW 339 K as noted in the abstract reports.

11. The Respondent did not offer evidence in the lower court.
12. In apportioning liability for occurrence of the accident in the ratio of 60% :40% against the Respondent, the learned trial magistrate observed that the Appellant didn't have a rider's license as well as the motorcycle insurance. The court also found adversely against the Claimants because it was unlawful to carry more than one pillion passenger on a motorcycle. The Respondent was faulted on his part for negligently driving on the motorcycle's lane.

### **Analysis and determination**

13. I have perused the record and considered the parties' submissions in the lower court and in this Appeal. The Appellant submits that the issue of liability was not determined according to the applicable standard of proof on a balance of probability. In the case of **Kanyangu Njogu vs Daniel Kimani Maingi (2000) eKLR** and **William Kabogo Gitau vs George Thuo & 2 Others (2010) 1 KLR 526** it was opined that where the court is to decide between two probabilities a balance of probability is shown if there is evidence that one probability is more probable than not. The same legal position was taken in the case of **Palace Investments Ltd vs Geoffrey Kariuki Mwenda & Another (2007) eKLR**.
14. The judicial determination in **Naftaly Muiruri Macharia vs Samuel Maina & Another (2018) eKLR** and **Janerose Auma Ochumba vs John Nyangi & Another (2021) eKLR** is also relevant. It was held in the case liability for occurrence of a road traffic accident may not be attributed to the Claimant who was merely passenger in the vehicle.

15. The court is further guided by the case of **Ribiru vs Ndung'u (suing on behalf of the Estate the Late Joram Ndung'u Mwaniki) & 2 Others (Civil Appeal No. 37 of 2023) (2024) KEHC 339 (KLR) (25 January 2024) (Judgement)** wherein it was observed that interference with a trial court's Judgement on liability for a claim can only happen in exceptional circumstances, as in instances where wrong principles are invoked or proper legal principles are not taken into account.

### **Determination**

16. It is common ground that the Respondent's motor vehicle had veered onto the lane of the motorcycle and knocked it down. I agree with the Appellant's submissions on authorities cited even if as the motorcycle rider he did not have a driving license and/or insurance certificate, this would not have absolved the Respondent from blame as the vehicle negligently knocked the motorcycle on its side. The fact that the motorcycle apparently carried excess passengers was not also the course of the

accident on the evidence. The Appellant's evidence on the Respondent's blaworthiness remained unrebutted, the latter having failed to offer evidence. There is therefore no basis on the evidence and I the circumstances of the case on which to ascribe the collision to the Appellant.

17. The upshot is that the Appeal is allowed. The lower court's judgement apportioning liability between the parties in the stated ratio of 60:40 against the Respondent is set aside and substituted with this court's Judgment adjudging the Respondent wholly liable for the tortious act that caused the road accident from which the cause of action arose. The Appellant is granted the costs of the Appeal.
18. Judgement accordingly.

**J. M. NANG'EA , JUDGE.**

**Judgement delivered virtually this 29<sup>th</sup> day of April, 2026.**

**In the presence of:**

The Appellant's Advocate, Ms Chepkorir for Ms Chelang'at.

The Respondent's Advocate, Ms Odhiambo.

The Court Assistant, Jeniffer.

**J. M. NANG'EA, JUDGE.**

Original