

**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. E045 OF 2025**

**VERONICAH WANGECHI MWANGI .....**

**APPELLANT**

**VERSUS**

**HARRIS GENERAL SUPPLIES LTD .....**

**RESPONDENT**

***(Being an appeal from the judgment of Hon. Nelly W. Kariuki (CM) delivered on 18 December 2024 in Milimani in Civil Suit No. E6513 of 2020)***

**JUDGMENT**

**Introduction**

1. The Appellant sued the Respondent before the trial court seeking special damages of Kshs. 198,896/=, interest, and costs arising from a road traffic accident that occurred on 4<sup>th</sup> March 2020 involving motor vehicles Registration Numbers KBM 631R and KCP 804M.
2. The Appellant alleged negligence on the part of the Respondent's driver, while the Respondent denied liability and attributed negligence to the Appellant.
3. The Appellant's case was that her motor vehicle was lawfully parked at a petrol station when the Respondent's lorry rammed into it.

4. The Appellant presented the evidence of 4 witnesses before the trial court, namely; PW1 (driver), PW2 (Appellant), PW3 (motor vehicle assessor) and PW4 (police officer). Documentary evidence included a police abstract attributing blame to the Respondent, a motor vehicle assessment report quantifying damage at approximately Kshs. 194,880/= and repair-related documents.
5. The Respondent did not call any witness.
6. The trial court however dismissed the Appellant's case holding that there were inconsistencies in the Appellant's evidence regarding how the accident occurred and that there were no corroborative eyewitness or investigation evidence. The court also held that the Appellant had not established negligence on a balance of probabilities.
7. The Appellant is aggrieved by the trial court's decision and she filed the instant appeal wherein she challenges the decision on grounds that the trial court:
  - i) **Misapplied the standard of proof;**
  - ii) **Failed to properly evaluate evidence;**
  - iii) **Relied on minor inconsistencies;**
  - iv) **Failed to determine liability;**
  - v) **Failed to assess damages.**
8. The appeal was canvassed by way of written submissions, which I have considered.

### **The Appellant's Submissions**

9. The Appellant reiterated the grounds listed in the Memorandum of Appeal and submitted that it was not disputed that the accident involved both vehicles and that

the Respondent did not offer any evidence to rebut her case. She further noted that the police abstract and the motor vehicle assessor's report corroborated her evidence and faulted the trial court for elevating minor inconsistencies to defeat an otherwise proven claim. She maintained that the trial court erred in failing to assess damages.

10. The Appellant relied on authorities including; ***William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526*** on balance of probabilities; ***Anastassios Thomos vs. Occidental Insurance Co. Ltd [2017] eKLR*** on causation and ***Lei Masaku vs. Kalpama Builders Ltd [2014] eKLR*** on the duty to assess damages.

### **Respondent's Submissions**

11. The Respondent, on the other hand, submitted that the burden of proof remained with the Appellant despite absence of defence evidence and that the Appellant's evidence was inconsistent and contradictory.
12. It was submitted that there was no direct eyewitness evidence and that the police abstract was not conclusive proof of liability. The Respondent added that the police officer was not the investigating officer and produced no investigation file. Reference was made to several cases including; ***Kirugi & Another vs. Kabiya & 3 Others (1987) KLR 7*** on burden of proof; ***Kennedy Nyangoya vs. Bash Hauliers [2016] eKLR*** on police abstract not

being conclusive proof and ***Mbogo vs. Shah (1968) EA 93*** on appellate interference.

### **Issues for Determination**

13. From the record of appeal and the rival submissions, I find that the following issues arise for determination:

- a) Whether the Appellant proved negligence against the Respondent on a balance of probabilities.***
- b) Whether the trial court erred in failing to determine or apportion liability.***
- c) Whether the trial court erred in failing to assess damages.***

### **Analysis**

#### **Negligence**

14. It is settled that the burden of proof lies on the plaintiff to prove her case on a balance of probabilities (See ***Kirugi vs. Kabiya*** (supra). Further, in ***William Kabogo Gitau vs. George Thuo*** (supra) the court held that a party succeeds if their case is more probable than not.

15. I find that the Respondent's failure to call evidence does not automatically prove the Appellant's case.

16. From the record, and as I have already stated in this judgment, it is not in dispute that the accident occurred and that both vehicles were involved. The Appellant's version was that her vehicle was stationary within a petrol station, while the Respondent's submissions pointed to

inconsistencies suggesting the vehicle may have been on the road or overlapping.

17. This court notes that even though there was no direct eyewitness evidence and that the police officer who testified was not the investigating officer and did not produce investigation file, the trial court could still have discerned the circumstances of the accident from the evidence on record.
18. This court, as a first appellate court, is obligated to re-evaluate the evidence and draw its own conclusions (***Selle vs. Associated Motor Boat Co. Ltd (1968) EA 123***).
19. Upon re-evaluation of the record, I note that the trial court rendered itself as follows:

***“The matter was reported to Makongeni Police Station. PC Samuel Mwaura Ngugi (PW4) produced a police abstract dated 04.03.2020 which blamed motor vehicle KCP 804M. He testified that his colleague, the late PC Yongo, who was the investigating officer, noted on the Occurrence Book (O.B), that the lorry driver was to blame for the accident because of careless driving i.e. he rammed into the Nissan X-trail which had stopped to give way. He noted the lorry hit the X-trail from the back. While he confirmed the place and time of the accident, he noted he did not visit the scene of the accident. An investigation file, which he opined, would ordinarily contain the investigation diary, the inspection report, a sketch plan, driver records and witness statements and records were not opened. He***

**further noted that no witness statements were recorded.”**

20. From the above extract of the trial court’s judgment, it is clear that the trial court fell in error by disregarding the fact that there was a collision between the vehicles and that the Appellant’s motor vehicle was hit from the rear.
21. As held in ***Selle vs. Associated Motor Boat Co. Ltd***, (supra) an appellate court will interfere where the trial court failed to properly evaluate the evidence. It is trite that once a collision is established, and where there are competing versions as to how the accident occurred, the court is obligated to evaluate the evidence and, where appropriate, apportion liability. This is the position that was taken in ***Hussein Omar Farah vs. Lento Agencies [2006] eKLR***, the Court of Appeal held that where it is not possible to determine who is wholly to blame, liability should be apportioned.
22. Similarly, in ***Lakhamshi v Attorney General (1971) EA 118***, the court held that where evidence is conflicting and fault cannot be precisely determined, both parties may be held liable in proportions.
23. In the present case, the trial court found that there was a collision and there were inconsistencies as to how it occurred. Having so found, the trial court ought not to have dismissed the claim outright but instead, it ought to have considered apportionment of liability. I find that the failure to do so amounted to a misdirection in law and principle.

24. I find that the evidence on record establishes that the Appellant proved her case on a balance of probabilities, albeit not to the extent of establishing 100% liability against the Respondent.

25. In view of the evidentiary inconsistencies and lack of independent corroboration, I find that liability cannot be placed wholly on one party.

26. Doing the best I can on the available evidence, and guided by the authorities cited above, I apportion liability as follows at 80% to 20% in favour of the Appellant.

### **Failure to Assess Damages**

27. It is trite that a trial court must assess damages even where it dismisses a suit (See ***Lei Masaku vs. Kalpama Builders Ltd [2014] eKLR***). I find that the trial court therefore erred in failing to assess damages.

28. From the record, special damages of Kshs. 198,896/= were specifically pleaded and strictly proved.

29. In conclusion, I find that the appeal is merited and I therefore allow it in the following terms:

**a) *The judgment of the trial court dismissing the suit is hereby set aside.***

**b) *Liability is apportioned as follows:***

**i) *Respondent: 80%***

**ii) *Appellant: 20%.***

**c) *Judgment is entered for the Appellant for special damages of Kshs. 198,896/=, subject to 20% contribution, resulting in Kshs. 159,116.80/= payable.***

- d) The award shall attract interest at court rates from the date of this judgment until payment in full;***
- e) The Appellant shall have the costs of the suit and the appeal.***

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF APRIL 2026.**

**HON W. A. OKWANY**  
**JUDGE**

**In the presence of**  
**Odek for Applicant**  
**No appearance for Respondent**  
**Abdirzak - Court Assistant**