

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
(CORAM: R. MWONGO, J.)
CIVIL APPEAL NO. E034 OF 2025

JOHN NJAGI NJERU.....APPELLANT

-VERSUS-

EDWIN MANYONGE SIBOE.....RESPONDENT

(Appeal arising from the decision of Hon. C.K. Kisiangani, PM in the Runyenjes SPMCCC

No. E117 of 2023 delivered on 27th March 2025)

J U D G M E N T

The Appeal

1. The appellant filed a memorandum of appeal dated 23rd April 2025 challenging the findings of the trial court in Runyenjes SPMCCC No.E117 of 2023. He is seeking orders that:
 - 1) That the learned trial Magistrate's order on liability against the appellant be set aside and the suit against the appellant herein be dismissed with costs; and
 - 2) That the costs in this appeal be awarded to the appellant.
2. The appeal is premised on the grounds that:
 - 1) That learned trial magistrate erred both in law and fact in finding in making a finding of negligence against the appellant without evidence and in holding that the Respondent had proved his case on liability on a balance of probability;
 - 2) That the learned trial Magistrate erred in law in making findings on liability based on hearsay evidence and in failing to analyze and weigh the evidence against the rules of evidence before making any findings based on it;
 - 3) That the learned trial magistrate erred both in law and fact in making a finding that the Appellants evidence on the cause of the accident was unsubstantiated;
 - 4) That the learned trial magistrate erred both in law and fact by failing to consider the Appellants evidence as to the contributory negligence of the driver of motor vehicle KCS 664D;
 - 5) That the learned trial magistrate erred in law and in fact in believing in whole the evidence of a police abstract and disregarding the testimony and evidence of the defendant/appellant; and

- 6) That the learned trial magistrate failed to properly and/or at all evaluate the evidence on record cumulatively and hence reached a wrong conclusion in view of the evidence on record.

Background

3. The respondent filed a plaint dated 04th October 2023 seeking judgment against the appellant for Kshs.356,193/= with interest from the date of filing the suit until payment in full, and costs of the suit with interest. His claim was that on or about 10th October, 2020 his motor vehicle registration number KCS 664D was lawfully and carefully being driven by his authorized driver along Embu-Runyenjes Road. Thereupon the appellant and/or his authorized driver, servant, agent, and/or employee so negligently, carelessly and/or recklessly drove, controlled and/or maneuvered motor vehicle registration number KBN 183W that it rammed into the respondent's motor vehicle. As a consequence, thereof the respondent's motor vehicle registration number KCS 664D was extensively damaged. The respondent blamed the appellant's negligence for the accident.
4. The appellant filed a statement of defense through which he denied the averments made in the plaint and stated that the respondent was responsible for any negligent acts at the time of the accident. He stated that he was a stranger to the allegation made by the respondent and that he was never served with a notice of intention to sue in the matter.

The Evidence in the trial court

5. The matter was heard *viva voce*.
6. PW1 was PC Leonard Githinji of Runyenjes Traffic Base. He testified on behalf of the investigating officer who had since been transferred to another station. He stated that the accident was reported at the station and that it occurred at Sharif Area. That it involved motor vehicle registration number KCS 664D Toyota Harrier which was heading towards Embu from Runyenjes, and Motor vehicle registration number KBN 183W Nissan X-trail moving in the opposite direction.
7. That at the scene, motor vehicle registration number KBN 183W left its lane, veered into the oncoming lane and knocked motor vehicle registration number KCS 664D head-on. The vehicles got damaged but nobody was injured. He blamed the driver of motor vehicle registration number KBN 183W for the accident. He produced the OB and police abstracts as evidence. In cross-examination, he stated that he was testifying on behalf of a colleague who worked on the case and who has since been transferred. That he did not know whether anyone was charged with a traffic offence following that accident.

8. PW2 was Japheth Mumo Kilonzi of CIC Insurance who stated that the insurer had already compensated the respondent and it wished to recover the costs of Kshs.136,173/= paid. This witness attempted to produce documentary evidence but the appellant objected on grounds that the insurer could not produce the plaintiff's documents because it was not a party to the proceedings. The objection was upheld by the court.
9. PW3 was Vincent Kinyua, a motor vehicle assessor at Prime Accident Assessor who produced an assessment report and a supplementary report as evidence.
10. PW4 was the respondent who stated that his motor vehicle KCS 664D was being driven by his driver Leonard Kyungu who informed him that it had been involved in an accident and it was extensively damaged. He instructed the driver to report the matter at Runyenjes Police Station and it was investigated. It was found that the driver of the appellant's motor vehicle was to blame for the accident. He informed his insurers of the accident and they advised him to tow the vehicle to the garage for assessment and repairs.
11. The car was repaired by the insurer who intended to pursue compensation through subrogation. In cross-examination, he stated that his driver is since deceased, but he did not have proof of his death. That the driver was authorized to use his motor vehicle at the time of the accident, even though he did not have proof in writing. The accident was blamed on the appellant's negligence.
12. DW1 was the appellant. He stated that as he was driving his motor vehicle, he slowed down at a speed bump when his vision was overwhelmed by the high beam lights of the oncoming motor vehicle. As a result, he lost control of his motor vehicle as he was distracted by the bright lights. Suddenly, he heard a loud bang. He remained in the motor vehicle and someone came and took away his car keys. The police arrived at the scene and took his vehicle to the police station. He was asked to visit the police station the following Monday and he did. By that time, the respondent's vehicle had already been taken away.
13. He took his motor vehicle and repaired it. Since then, he has never heard of any other issue arising from the accident. On cross-examination, he stated that he did not know that his insurer had repudiated his claim and they did not take up this case on his behalf. He stated that, indeed, he lost control of his motor vehicle because he was temporarily blinded by the respondent's motor vehicle lights, although he could not prove this. He stated that the police blamed him for the accident although he contests this position. He did not have any witnesses to support his case neither did he file a counterclaim.

Findings of the Trial Court

14. The trial court considered the evidence adduced and apportioned liability at 90%:10% against the appellant. It awarded special damages of Kshs.356,193/= as prayed together with costs and interest.

Parties' Submissions on Appeal

15. The appeal was canvassed by way of written submissions.

16. The appellant submitted that the evidence adduced was not considered in its totality to reach a fair conclusion. He relied on the cases of **Patrick Lumumba Kimuyu v Prime Fuels (K) Limited [2018] KECA 198 (KLR)**, **Odera t/a AJ Odera & Associates v Machira t/a Machira & Co Advocates [2013] KECA 208 (KLR)**, **Mogoi v Makori [2025] KECA 418 (KLR)**, **Kennedy Nyangoya v Bash Hauliers [2016] KEHC 2616 (KLR)**, **Mary Wambui Kabugu v Kenya Bus Service Limited [1997] KECA 402 (KLR)** and **Bwire v Wayo & Sailoki [2022] KEHC 7 (KLR)**. He argued that no eye witnesses were called to corroborate the respondent's evidence, hence the findings of the trial court were made in error.

17. It was also his argument that the respondent's driver was speeding with his full lights on, against the highway code. As a result, the blinding lights caused him to veer onto the oncoming lane and a collision occurred. He stated that if the respondent's driver had slowed down or stopped at the speed bump, the collision would not have occurred. That with this evidence, the trial court would have reached a different finding on liability. He urged the court to set aside its findings on damages in reliance on the case of **Fredrick Wichenje Ikutwa v Florence Mwikali [2020] KEHC 7298 (KLR)**.

Issues for Determination

18. The issue for determination is whether the trial court's finding on liability should be set aside or reviewed.

Analysis and Determination

19. As a first appellate court, it is the duty of this court to examine the evidence adduced at trial afresh. This was held in the case of **Coghlan v. Cumberland (1898) 1 Ch. 704**, where the Court of Appeal (of England) stated as follows:

"Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with

such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong...When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen."

20. A question of liability is a question of fact that is determinable through evidence. The evidence adduced must be subjected to the required standard of proof in civil cases in order for the court to reach a finding. Matters of fact are determined from evidence and the burden of proof lies on the party alleging the facts to prove them. This is as provided by Section 107 (1) of the Evidence Act which states:

"Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist." See also the case of **Nyakwana v Ongaro [2015] KEHC 8440 (KLR)**.

21. The standard of proof in civil cases such as this one is on a balance of probabilities and onus was on the respondent to prove his case against the appellant. In the case of **Miller v Minister of Pensions (1947) 2 All ER 372** discussing the burden of proof the court had this to say;-

"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not. This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

22. In the present case, PW1 stated that his driver, who is now deceased, was driving along the named road when the appellant's vehicle veered off its lane and caused an accident involving the 2 vehicles. On his part, DW1 stated that as he was driving, he slowed down at a speed bump where an oncoming vehicle had its main lights on full and high beam. That the bright lights distracted him and caused him to veer off his lane thus causing the collision. The evidence of the plaintiff and appellant is in consonance on how the accident occurred. Both were negligent. As a result, the trial court apportioned liability between the drivers of the 2 vehicles according to their contribution at 90%: 10% in favour of the plaintiff.

23. In **Joseph Musee Mua v Julius Mbogo Mugi & 3 others [2013] KEHC 803 (KLR)**, one of the drivers was driving with his lights on full beam and too bright, causing the other driver to be blinded. The court apportioned liability and held:

“I find that the accident was caused by the negligence of both drivers of the saloon car and the matatu. From the evidence on record, I find that the driver of the saloon car was 80% to blame or liable for the accident for overtaking at a dangerous place, and the driver of the matatu was 20% to blame for not slowing down or swerving to avoid the accident.”

Conclusion and Disposition

24. In the present case, both drivers contributed to the negligent acts which led to the accident. The findings of the trial court are not wrong in the circumstances. Accordingly, the applicant's appeal challenging the findings on liability by the trial court lacks basis.

25. The appeal is therefore dismissed with costs, and the lower court's judgment is hereby affirmed.

26. Orders accordingly.

Delivered, dated and signed at Embu High Court this 29th day of April, 2026.

**R. MWONGO
JUDGE**

Delivered in the presence of:

1. Amuyunzu for Appellant
2. Jayo holding brief for Ms. Masudi for Respondent

3. Francis Munyao - Court Assistant