REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CIVIL APPEAL NO E054 OF 2024

JASTAN TRADERS LIMITED.....APPELLANT

VERSUS

PHILIP MASIMBA MAGOVI.....RESPONDENT

(*Being an appeal from the Judgment and Decree of Hon J. A. Agonda (PM) delivered at Vihiga in the Principal Magistrate's Court Civil Case No E042 of 2022 on 10th September 2024*)

JUDGMENT

1. In her decision of 10th September 2024, the Learned Trial Magistrate, Hon J. A. Agonda, Principal Magistrate, entered Judgment in favor of the Respondent as against the Appellant at 100% liability in favor of the Respondent herein in the following terms: -

General damages	**Kshs 130,000/=**
Special damages	**NIL**
TOTAL	**Kshs 130,000/=**

Costs of the suit plus interest thereon at court rates from the date of the said Judgment until payment in full.

2. Being aggrieved by the said decision, on 7th October 2024, the Appellant herein filed a Memorandum of Appeal dated 3rd October 2024. He relied on thirteen (13) grounds of appeal. The grounds are reproduced as hereunder:

a. The Learned Trial Magistrate erred in law and in fact in holding the Appellant liable in negligence while there was no evidence of such negligence.
b. The Learned Trial Magistrate erred in law in holding that the Respondent's evidence was corroborated by a police abstract.
c. The Learned Trial Magistrate erred in law and misdirected herself by purporting to rely on the demeanor of a witness that she did not see or hear in deciding liability.
d. The Learned Trial Magistrate erred in law and in fact in treating the hearsay evidence of PW2 as that of the police Investigating officer, which PW2 was not.
e. The Learned trial magistrate erred in law and in fact in unduly placing reliance on a police abstract while the maker of that document, or the investigating officer was never called.
f. The Learned Trial Magistrate erred in law and in fact in holding that the Appellant's lorry hit the Respondent while there was no evidence at all that the lorry collided with or ever came into contact with the Respondent.
g. The Learned Trial Magistrate erred in law in misconstruing the purpose of a speed governor, and holding that without a speed governor, a driver would not know what speed he was doing.
h. The Learned Trial Magistrate erred in law and in fact in finding that the Plaintiff was not negligent as he was a lawful

pedestrian on the road side while the Plaintiff was a motorcycle rider.

i. The Learned Trial Magistrate erred in law in making an adverse inference against the appellant for failure to call a motor vehicle inspector, while there was no basis for such an inference in the first place and secondly as the motor vehicle's test examination report was produced in court and available for scrutiny.

j. The Learned Trial Magistrate erred in law and in fact in holding that the Appellant's driver was unskilled and careless without any evidence thereon.

k. The Learned Trial Magistrate erred in law and in fact in miscounting, misunderstanding, downplaying and misrepresenting in her judgment, the evidence of DW-1, leading to unstoppable conclusions.

l. The Learned Trial Magistrate erred in law in misunderstanding and misinterpreting the evidence of the Respondent and ignoring its purport especially in cross examination, and thus reached the wrong conclusions.

m. The Learned Trial Magistrate erred in law in ignoring the evidence by the Respondent that the accident happened when he hit a stone, and thus reached the wrong conclusions.

3. In the end, the Appellant prayed that the appeal be allowed and for orders that:

a. *The Respondent's suit against the Appellant in the lower court be dismissed.*
b. *The Judgment of the lower court be set aside in its entirety.*
c. *The Costs of the suit in the lower court and of this appeal be paid to the Appellant by the Respondent.*

4. The appeal was canvased by way of written submissions and as at the time of writing this Judgment, the Appellant had not filed any Written Submissions. The Respondent's Written Submissions were dated 26th November 2025 and filed on 27th November 2025.

Respondent's submissions

5. The Respondent through counsel identified one issue for determination being: *whether the Learned Trial Magistrate erred in fact and in entering judgment in favor of the Respondent as against the Appellant*.

6. It is submitted for the Respondent that a keen look at the Trial Court's record, it clearly indicates that both the Appellant and Respondent called their respective witnesses who gave out their testimonies before the trial court. That the Appellant called DW1, the driver who gave out his testimony and acknowledged during cross examination that when the accident happened, he was joining the road and admitted that he did not produce any other document to show how the accident occurred. That he also agreed that pursuant to paragraph 7 of the Police abstract produced as Respondent's exhibit 1, that the motor vehicle registration number KDD 547Z he was driving was blamed for the accident. Learned Counsel added that the appellant however never called the police to either rebut the case that was put forth by the Respondent or corroborate his evidence

before the trial court. That it is therefore inaccurate for the Appellant to claim that the trial court failed to consider the circumstances of the case.

7. In sum, it is submitted for the Respondent that the trial court never made any error in arriving at its judgment as the trial court records clearly depicts what the judgment entails as the court cannot arrive at a finding without giving justification and considerations to the evidence and submissions presented by both parties to which the trial court gave consideration to both parties submissions and evidence.

ANALYSIS AND DETERMINATION

8. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

9. This was aptly stated in the case of **Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123** where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.

10. It is in ***Kiilu & Another-v- Republic (2005) 1 KLR 174*** where the Court of Appeal stated: -

> *"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the*

evidence. The first appellate court must itself weight conflicting evidence and draw its own conclusions.

It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion. It must itself make its own finding. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had advantage of hearing and seeing the witnesses."

11. Having considered the Grounds of Appeal and the respective parties' Written Submissions, it is apparent to this court that the grounds are interrelated and crystallise into a single issue for determination, namely, whether the Learned Trial Magistrate erred in finding the Appellant wholly (100%) liable for the accident.

12. The Respondent reproduced the evidence of the Appellant's driver, Kelvin Gitima Njoroge (hereinafter referred to as "DW 1") and submitted that the Appellant never called the police to either rebut his evidence or corroborate DW 1 's evidence. He argued that it was inaccurate for the Appellant to claim that the Trial Court failed to consider the circumstances of the case.

13. He was emphatic that the Trial Court exercised its discretion judiciously to evaluate and scrutinize the evidence, pleadings and arguments tendered by both parties before it made a determination. He placed reliance on the case of **Baro Ngo Sevelius Yophen vs Jared Ndemo[2020]eKLR** where it was held that the appellant who was driving his motor vehicle at the material time had a duty to look out for other road users including the respondent and the motor cycle rider.

14. He urged the court to dismiss the Appellant's appeal with costs for lack of merit.

15. The question of liability in road traffic cases was discussed by the Court of Appeal in the case of ***Michael Hubert Kloss & Another v David Seroney & 5 Others [2009] eKLR*** thus;

"*The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in Stapley v Gypsum Mines Ltd (2) (1953) A.C. 663 at p. 681 as follows:*

"To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it...

"The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally."

16. Apportionment of liability should be according to the degree of fault. In **Kenya Power & Lighting Company Ltd v JWK (Suing as father and next-friend of JKW) & another (Civil Appeal E012 of 2021) [2023] KEHC 1642 (KLR)**, LN Mugambi J posited as follows:

"*In apportionment of liability, I am guided by the case of* ***Khambi and Another vs. Mahithi and Another [1968] EA 70****, where 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 cases, 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."

17. In the case of **Khambi and Another vs Mahithi & Another [1968] EA 70**, it was held that an appellate court would not interfere with the apportionment of liability save where such apportionment was manifestly erroneous.

18. Notably, the Respondent who was the Plaintiff at the Trial Court testified as PW 1. He stated that on the material day he was riding a motor cycle from Majengo on Luanda-Majengo road when the Appellant's motor vehicle registration number KDD 547Z Isuzu Lorry (hereinafter referred to as "the subject motor vehicle") abruptly entered the road from the left, lost control and knocked him and that he was injured as a result of the said accident.

19. No 104937 PC Dancan Mutunga (hereinafter referred to as "PW 2") testified that as per the Police Abstract, the investigating officer, PC Koech had blamed the driver of the Appellant's motor vehicle. He produced the Police Abstract as an exhibit in court.

20. DW 1 testified that he was the driver of the said subject motor vehicle. He stated that on the material date, he was driving from Vihiga headed to Nakuru. He further testified that he was joining the road when the accident occurred and there was a motor cycle rider whom he had not seen behind his vehicle. He admitted that the Respondent was injured.

21. Having said so, DW 1's evidence corroborated that of PW 1. The Appellant did not produce evidence to rebut the Respondent's evidence. It did not call any police to give evidence or produce a sketch map adducing evidence contrary to the evidence tendered by the Respondent.

22. This court has had due regard to the case of **Isaac K. Chemjor & Another vs Laban Kiptoo[2019]eKLR** where it was held that the respondent had discharged his burden of proof under Sections 107 and 108 of the Evidence Act where no evidence could lead to any other probability that another person was involved or caused the accident.

23. The Appellant's grievance on the Police Abstract (Grounds (b), (d) and (e)) does not advance his case. It is settled that a Police Abstract is corroborative and not determinative of the question of liability. Even setting the Abstract aside, the evidence of DW 1 himself placed the Appellant's driver in the position of a vehicle joining the highway, who by his own admission had not seen the motor cycle rider behind him before the collision occurred. That admission, coming from the Appellant's own witness, independently discharged the Respondent's evidential burden, and rendered the question of whether PW 2 was or was not the Investigating Officer of secondary consequence. The Trial Magistrate's reliance on the Abstract was therefore neither misplaced nor decisive of her finding.

24. The Respondent having discharged her duty under Sections 107 and 108 of the Evidence Act, the burden of proof shifted to the Appellant to prove that the accident did not happen as stated. As the driver was entering the road, he owed a duty of care to other road users. He ought to have exercised caution to stop and ensure that the road was clear before joining.

25. Besides, the Appellant did not call any eye witness to tender evidence as to what may have happened and whether or not the Respondent was involved in the causation of the accident so as to enable the court determine the issue of contribution on liability on his part. Thus, the Trial Court could not have been faulted for having held the Appellant hundred (100%) per cent liable for the accident herein.

26. As to Ground (m), namely that the Trial Magistrate ignored evidence that the accident occurred when the Respondent struck a stone, I

have anxiously perused the record. Even taking the suggestion at its highest, the existence of a stone on the carriageway does not, of itself, exculpate a driver who, by his own evidence, was joining the road without ensuring that the same was clear and without having sighted a motor cycle that was, on the proved facts, immediately to his rear. The proximate cause of the collision remained the manner of the Appellant's driver's entry onto the road. The ground accordingly fails.

27. In the premises foregoing, Grounds of Appeal Nos (1), (2), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12) and (13) were not merited and the same be and are hereby dismissed.

28. For the foregoing reasons, the upshot of this court's decision is that the Appellant's Appeal dated 3rd October 2024 and lodged on 7th October 2024 is not merited and is hereby dismissed.

29. On the question of costs, the ordinary rule is that costs follow the event. The Appellant having lodged this appeal and prosecuted it to a conclusion adverse to him, and the Respondent having been put to the trouble and expense of opposing it, I find no reason to depart from the general rule. The costs of this appeal shall accordingly be borne by the Appellant.

30. Orders accordingly.

DATED, SIGNED AND DELIVERED AT VIHIGA THIS 11TH DAY OF MAY 2026

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R. NYAKUNDI

JUDGE