

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CIVIL APPEAL NO. E003 OF 2025

JAMES KISINCHA.....APPELLANT

-VERSUS-

EVANCE OKOTH OBORA.....1ST RESPONDENT

JEREMIAH IRUNGU NDUNGU.....2ND

RESPONDENT

**(Being an appeal from the judgment/decree of the
Honourable J. P. Nandi (PM) dated 22/11/2024 in Bondo
PMCC No. E056 of 2021)**

BETWEEN

EVANCE OKOTH OBORA.....PLAINTIFF

VERSUS

JAMES KISINCHA.....DEFENDANT

JUDGMENT

1. The appeal herein arises from the judgement of Hon J.P Nandi (SPM) dated 22/11/2024 in Bondo PMCC No. E056 of 2021 wherein he held the Appellant 100 % liable in negligence and awarded Kshs 150,000/ as general damages plus costs of the suit and interest.
2. The Appellant being dissatisfied with the Judgement and decree aforesaid, filed his Memorandum of Appeal dated 16/12/2024 wherein he raised the following grounds of appeal:-
 - i. That the learned trial Magistrate erred in fact and in law in failing to dismiss the suit and by apportioning 100% liability to the Appellant without considering the circumstances of the case.
 - ii. That the learned trial Magistrate erred in law and in fact in finding in favour of the Respondent against the Appellant when there was totally no credible evidence or proof of negligence on the part of the Appellant.

- iii. That the learned trial Magistrate erred in fact and in law in failing to consider the Appellant's submissions on liability by completely disregarding the submissions and authorities of the Appellant and as a result arrived at an unjustified decision on liability.

The Appellant prays for the following orders;

- i. That the appeal be allowed and the decree of Honourable J. P Nandi (SPM) be set aside.
- ii. That the Honourable Court be pleased to re-assess the award on liability in view of the evidence tendered and dismiss the trial court suit.
- iii. That the Appellant be awarded the costs of this Appeal.

3. This being the first appellate court, its duty is to re-evaluate the evidence adduced before the trial court and subject it to

an independent analysis so as to arrive at its own conclusion as to whether or not to uphold the decision of the trial court. The court must also take into account the fact that it neither saw nor heard the witnesses testify and thus to make due allowance for that. See **Selle & Another Vs Associated Motor Boat Co. Ltd [1968] 1 EA 123** where it was held:

“...this court is not bound necessarily to accept the findings of facts by the court below. An appeal to this court from a trial...is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances and probabilities materially to estimate the evidence.”

4. The record of appeal indicates that the Plaintiff had sued the Defendant vide a plaint dated 2nd December, 2020 seeking

general damages, special damages, costs and interest of the suit as a result of a road traffic accident that occurred on the 2/1/2019 along Bondo-Usenge road. The plaintiff averred that she was a pillion passenger aboard motorcycle Registration number KMEA 339E Bajaj Boxer along Bondo- Usenge road when at Heritage Feeds area the defendant's driver agent and/or employee acting in the ordinary cause of employment, carelessly drove, managed and/or controlled motor vehicle KAN 314A Toyota Corolla that he lost control causing an accident to occur and occasioning the plaintiff multiple severe injuries. The Plaintiff duly pleaded particulars of negligence and injuries sustained and prayed for compensation as well as costs of the suit. On the other hand, the defendant filed defence dated 23rd August, 2022 denying the averments contained in the plaint and attributed negligence on the rider who had ferried the Plaintiff.

5. The plaintiff **Pw1 Evance Okoth Obora** testified and adopted his written statement filed in court on 10/5/2021 as his evidence. He relied on the documents in the list of documents as exhibits. In the said statement he stated that on 2/1/2019 at 1900 hours he was riding his motorcycle while carrying a pillion passenger from Usenge towards Bondo direction on his

left lane extreme verge outside the white lane. He had reflector and had his front lamp on. On reaching Heritage feeds area motor vehicle KAN 314A which was coming from Bondo direction suddenly lost control and crossed to his side and knocked his motorcycle. This happened in a split of seconds.

6. **Pw2 Ip Simeon Nyandusi** testified that the accident occurred on 2/1/2019 along Usenge-Bondo Road. He was unable to trace the police file but testified on the basis of what was recorded in the Occurrence Book of 19/2/1/2019. The accident involved motor vehicle KAN 314A Toyota Corolla and motor cycle KMEA 339K which had a pillion passenger one Lilian Omondi Atieno. He produced the police abstract as exhibit-2(a) and OB as exhibit-2(b). The plaintiff then closed his case.
7. The defendant called two witness DW1 Dr. Steve Ochieng who produced a medical report by Dr. Jennipher Kahudho. In the said report the plaintiff sustained upon examination hip pain and chest pain, healed scars right knee and upper right thigh. He produced the report as Exhibit-D-1 (a, b & c).
8. **Dw2 Alexander More Okanda** testified and adopted his written statement filed in court in August 2022. He blamed the motorcycle rider as he did not keep on his left-hand side lane.

He was riding on the wrong side and it was at night. He has not been charged with any traffic case. he produced his driving licence as exhibit-D2. The defendant then closed the defence case.

9. The appeal was canvassed by way of written submissions. Both parties duly complied.
10. The Appellant's submissions mainly dwelt on the aspect of liability as raised in their Memorandum of Appeal. It was submitted that the accident had been caused by the rider of the motorcycle as per the evidence of the Appellant's driver and thus the trial court fell into error by shifting liability upon the Appellant yet it was actually the rider who moved to the Appellant's driver's lane. It was submitted that the appeal be allowed and the judgement be set aside and costs be awarded to the Appellant.
11. The 1st Respondent submitted that the Appellant's driver did not exercise a proper look out for other road users and thus caused the accident. It was also submitted that the 1st Respondent was a rider of motor cycle and who stated that he was on his rightful lane at the time when the Appellant's driver drove the vehicle into his lane and hit him thereby causing him to suffer injuries together with his pillion passenger. It was

finally submitted that the trial court duly considered all the principles and arrived at the conclusion that the Appellant should be held 100% liable. The 1st Respondent thus urged the court to dismiss the appeal.

12. I have given due consideration to the record of appeal and the rival submissions. It is not in dispute that the Appellant vide his Memorandum of Appeal has appealed against the issue of liability only and hence the award of general damages is to be left undisturbed.

13. As regards the issue of liability, it emerged from the evidence of the Appellant's driver and the rider of the motorcycle as well as the police officer that there was a collision at the time and that the accident took place at around 8.00 PM when it was dark. Even though both the Appellant's driver and the rider traded accusations regarding the culprit of the accident and in view of the fact that no sketch maps were availed by the traffic, it is my considered view that both of them must be held responsible for the accident. The rider and driver were under obligation at all times to observe the Highway Code of traffic. Had they observed the same, the accident could have been avoided. It is in that regard that I hold that the liability ought to have been apportioned in the

ratio of 50% to 50%. Even though the 1st Respondent has claimed that he was not to blame, he did not explain what evasive action that he took to avoid the accident. Again, the Appellant's driver stated that he saw the 1st Respondent (Rider) at a distance of 5 metres and therefore he should have managed to bring his vehicle to a stop to void coming into collision with the rider. Likewise, the rider (1st Respondent) was expected to have had proper lookout and be in position to see the oncoming motor vehicle. It is my view that both the driver and the rider was equal to blame for the accident. That being the position, the finding by the trial court on liability was therefore in error and must be interfered with. To that extent, the Appellant's appeal succeeds.

14. As the Appellant did not appeal against the award of general damages, the same shall remain undisturbed but will be subjected to the eventual percentage of contribution.

15. In the result, it is my finding that the appeal has merit. The same is allowed to the extent that the trial court's apportionment of liability of 100% be and is hereby set aside and substituted with apportionment of liability in the ratio of 50% to 50% between the Appellant and the 1st Respondent. The award on general damages shall remain undisturbed but

will be subjected to the 50% contribution. Each party to bear their own costs of the appeal.

Dated and delivered at Siaya
this.....15thday

of.....May2026

D .KEMEI
JUDGE

In the presence of :

Ms. Ngomefor Appellant

Ms. Ojwang for Ms. Oluochfor 1st Respondent

NA2nd Respondent

Ms. MoureenCourt Assistant