

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. E1085 OF 2024

MORRIS NZAU..... APPELLANT

-VERSUS-

EXECUTIVE FOOD COMPANY LIMITED.....1ST RESPONDENT

DAVID CHEGE.....2ND RESPONDENT

(Being an appeal from the judgment of Hon. Nelly W. Kariuki (PM) in Milimani CMCC No. E4978 of 2022 delivered on 6/9/2024)

JUDGMENT

- 1) The appellant filed Milimani CMCC No. E4978 of 2022 seeking general damages for pain and suffering, special damages of kshs.3550 and future medical expenses of kshs.66,000 together with costs and interest for injuries the appellant sustained on 17/05/2022 while he was riding motor cycle registration no. KMFN 272N along Likoni road at Lokitaung junction he was hit by motor vehicle registration no. KCA 088V which was being driven by the 2nd respondent belonging to the 1st respondent.

- 2) The appellant's case was that the 2nd respondent was driving on the wrong side of the road and he entered a petrol station through a short cut when he hit him.
- 3) The appellant sustained injuries in the left tibia and left fibula.
- 4) The 2nd respondent testified as DW 1 and said he was driving on Likioni road near Tetrapac heading towards Jogoo and when he put an indicator to enter the petrol station, the appellant who was riding a motor cycle at a high speed collided with his stationary motor vehicle while overtaking.
- 5) The trial court found that there was a lack of clarity on how the accident occurred.
- 6) The trial court apportioned liability at 50:50% and assessed damages as follows;

General damages	ksh. 1,000,000
Special damages	ksh. 3,550
Future medical expenses	kshs. 65,000
Total	kshs. 1,069,550
Less 50% contribution negligence	(543,776)
Total payable	<u>kshs. 525,775</u>

7) The appellant has appealed against the said judgment on the following grounds;

- i. The learned magistrate erred in law and fact in finding that the appellant was 50% liable for the accident in the absence of any concrete evidence to demonstrate the same.***
- ii. The learned magistrate erred in law and fact in failing to find the respondent 100% liable for the accident when all particulars of negligence had been proved.***
- iii. The learned magistrate erred in law and fact in finding that the appellant contributed to the accident consequently, the decision occasioned a miscarriage of justice.***

8) The Appellant filed written submission and stated that at the time of the accident PW1 and PW2 testified that motor vehicle registration Number KCZ 088V was being driven on the wrong side of the road.

9) The 2nd Respondent drove his motor vehicle in disregard of the Highway code, his own safety and the safety of other road users. The 2nd respondent indicated that police officers came to the scene of the accident.

- 10) The said police officers took scene details, the impact of the collision and witness statements before investigating officer PW2 arrived at the scene.
- 11) The appellant submitted that is a fact that the motor vehicle was being driven on the wrong side of the road. The motor vehicle encroached onto the lane of the motorcycle and was the main cause of the accident.
- 12) In light of the above the appellant argued that they proved their case and urged this court to find the respondents 100% liable for the accident.
- 13) The Respondents did not file submissions in this appeal.
- 14) This is a first appeal, and this court is enjoined to re-evaluate the evidence on record and draw its own independent conclusions, bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify.
- 15) That duty was firmly established in the case of **Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123**, a principle consistently followed by Kenyan courts.

16) I have carefully considered the record, the grounds of appeal, and the written submissions by the appellant.

17) The sole issue for determination in this appeal is whether the learned trial magistrate properly analyzed the evidence on liability before arriving at the 50:50 apportionments.

18) The circumstances surrounding the accident were highly contested by the appellant.

19) The appellant and his witness testified that the 2nd respondent drove motor vehicle registration number KCA 088V on the wrong side of Likoni Road at Lokitaung junction, encroaching into the lane of the appellant's motorcycle, before hitting him.

20) In contrast, the 2nd respondent testified that he was driving lawfully, indicated to enter a petrol station, and that the appellant, who was riding at high speed and overtaking, collided with his stationary motor vehicle.

21) The trial magistrate, confronted with these two irreconcilable versions of events, found that there was a "lack of clarity on how the accident occurred" and proceeded to apportion liability equally.

22) The appellant contends that the trial magistrate erred in finding him 50% liable in the absence of concrete evidence to demonstrate contributory negligence.

23) Section 107 of the Evidence Act (Cap 80) provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

24) Therefore, the appellant bore the burden of proving the respondents' negligence, and the respondents bore the evidential burden to rebut that claim.

25) Where a trial court finds that both parties have failed to discharge their respective burdens to a satisfactory degree, or where the evidence is so evenly balanced that the court

cannot determine which version is more probable, the court may make a finding that both parties are to blame.

26) However, the finding of "lack of clarity" on how the accident occurred does not automatically justify an equal apportionment of liability.

27) A court cannot simply apply a blanket 50:50 apportionment without identifying the specific act of negligence on the part of the appellant.

28) In the instant case, the trial magistrate did not make any explicit finding that the appellant was speeding or that he was overtaking negligently, as had been alleged by the 2nd respondent.

29) The trial court simply concluded that the evidence was unclear.

30) I find that the trial magistrate's finding here was not based on a reasoned assessment of the credibility of the witnesses but on a perceived lack of clarity.

- 31) The appellant's evidence that he was hit by a vehicle that was on the wrong side of the road, if believed, would establish the 2nd respondent's liability fully.
- 32) The 2nd respondent's evidence that the appellant was speeding and collided with a stationary vehicle, if believed, might exonerate him or point to the appellant's full liability.
- 33) The trial magistrate was required to resolve this conflict by evaluating the probabilities, not by dismissing both accounts as unclear.
- 34) The failure to resolve this conflict and simply divide liability equally was an error in principle.
- 35) It is well settled that the standard of proof in civil cases is on a balance of probabilities.
- 36) The trial court did not find that the appellant had failed to prove his case but it found that the evidence was unclear and apportioned blame.
- 37) Given the direct conflict in evidence where the appellant places the respondents' vehicle on the wrong side of the road

and the 2nd respondent places his vehicle stationary, it is more probable than not that the 2nd respondent, as the driver of a motor vehicle who owed a higher duty of care to other road users, was the author of the accident.

38) In the absence of concrete evidence to rebut the appellant's testimony that the vehicle was on the wrong side, the scales of justice tip in favor of the appellant.

39) Consequently, the finding of 50% contributory negligence on the part of the appellant is unsupported by the evidence and is a misdirection.

40) The upshot of the foregoing is that this appeal has merit and is hereby allowed.

41) The judgment of the trial court on liability is set aside and substituted with a judgment holding the respondents 100% liable for the accident.

42) The trial court's award on quantum of damages (Kshs. 1,000,000 in general damages, Kshs. 3,550 in special damages, and Kshs. 65,000 in future medical expenses) is

upheld in its entirety, but the deduction of 50% contribution is hereby set aside.

43) Consequently, the appellant shall have judgment against the respondents jointly and severally for the full sum of Kshs. 1,068,550, plus costs and interest in the trial court from the date of the judgment in respect of general damages and from the date of filing suit in respect of special damages until payment in full.

44) The appellant shall also have the costs of this appeal.

45) Orders to issue accordingly.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 7th day of May, 2026.

A. N. ONGERI

JUDGE

In the presence of:

Miss Ogiuda for the Applicant

Miss Kibet for the Respondent