



REPUBLIC OF KENYA



**KENYA LAW**  
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**Rukwaro & another v Maina (Civil Appeal 110 of 2018)  
[2025] KECA 177 (KLR) (7 February 2025) (Judgment)**

Neutral citation: [2025] KECA 177 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL 110 OF 2018  
W KARANJA, J MOHAMMED & LK KIMARU, JJA  
FEBRUARY 7, 2025**

**BETWEEN**

**JOHN NGURE RUKWARO ..... 1<sup>ST</sup> APPELLANT**

**STEPHEN NDIRANGU GITONGA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**GEOFFREY MAINA ..... RESPONDENT**

*(Being an appeal from the judgment/decree of the High Court of Kenya at Nyeri (A. Mshila, J.) dated 11th January, 2018 In Nyeri HCCA NO. 57 OF 2014 consolidated with HCCA No. 58 of 2014)*

**JUDGMENT**

**Background**

1. This is a second appeal arising from the judgment of the High Court, (A. Mshila, J.) dated the 11<sup>th</sup> January, 2018, dismissing the appellants' appeal against the judgment of the trial court in favour of the respondent in Nyeri CMCC No. 457 of 2013, dated 27<sup>th</sup> August, 2014.
2. The brief background to the appeal is that an accident involving John Ngure Rukwaro & Stephen Ndirangu Gitonga (the appellants) and Geoffrey Maina (the respondent) occurred on 3<sup>rd</sup> August 2013. The appellants were pillion passengers aboard motorcycle KMTC 293J when the accident occurred. The respondent was sued as the owner and driver of motor vehicle KAM 504K Toyota Saloon which collided with the motor cycle. The appellants sustained injuries resulting from the accident; the appellants blamed the respondent for the accident.
3. The respondent filed a defence admitting the description of the parties, but denied that the alleged accident was caused by the alleged or any negligence on the part of the respondent, their servants, or agents as particularized in the plaint. Instead, they contended that the said accident was caused or



substantially contributed to by the appellants negligence as particularized in the defence. They also pleaded the doctrine of “volenti non fit injuria”, and on that account, prayed for the dismissal of the appellant’s claim against them.

4. The matter proceeded for hearing, resulting in the judgment of the trial court dated 27<sup>th</sup> August, 2014, assessing liability at 50%, general damages at Kshs.350,000 less 50% contributory negligence thus Kshs.175,000 plus costs and interest at court rates from the date of the judgment; and special damages of Kshs.339,175 were also awarded.
5. Aggrieved by that judgment, the appellants filed Nyeri HCCA No. 57 of 2014 which was consolidated with HCCA No.58 of 2014, against the judgment of the trial court, raising four (4) grounds of appeal, to wit that; there was no evidence to warrant a finding that the appellants were equally to blame for the accident; the trial court took into account irrelevant factors thereby misdirected itself; hearsay evidence was unlawfully admitted; and, the appellants asserted that it was incumbent upon the respondent to have joined a third party if there was a case for contribution and/or indemnity.
6. The High Court upon re-assessing and re-analyzing the record reversed the trial court’s award on liability and set aside the trial court’s judgment and thus partially allowed the appeal ordering each party to bear its own costs.
7. Undeterred, the appellants filed this appeal relying on grounds that:
  - i. The appellate court’s judgment was against the weight of the evidence adduced;
  - ii. The 1<sup>st</sup> appellate court erred in law in failing to appreciate that there was no cross appeal on liability; and
  - iii. The first appellate court erred in law in framing the issue for determination thereby arriving at the wrong conclusion on the evidence that was not only hearsay but lacking in veracity and cogency and had been dismissed by the trial court.
8. The appeal was canvassed by way of oral submissions, buttressed by case law cited by the parties. Learned counsel for the appellants, Mr. Nderi submitted that the trial court ought to have noted that the appeals before it were only against the partial apportionment of liability; that the respondent had not appealed against the liability apportionment by the High Court. It was submitted that the respondent’s submission at the trial court had specifically confirmed that he was comfortable with the findings of the trial court which he sought affirmation by the trial court. It was further submitted that the 1<sup>st</sup> appellate court erred and misdirecting itself in principle on this particular aspect of the appeal. Reliance was placed on the case of *Peters vs Sunday Post Ltd* [1958] EA 424.
9. It was further submitted that in the circumstances of this case, culpability could only be established against two persons, the motorist, the rider or both. Counsel submitted that the appellants being passengers were passive participants whose fate was entirely in the hands of the two and their being two pillion passengers, their lack of helmet and or reflective jackets had no relevance to the chain of causation. It was further submitted that it was their controverted evidence that the appellants were hit from behind by a vehicle that should have kept its distance under the Highway Code and that no attempt was made to join the rider in the matter either as a co-defendant or a third party. Counsel further submitted that there was no evidence from which the High Court would make a finding on the respondent’s liability let alone its apportionment as found by the trial court.
10. It was further submitted that the trial court appears to have taken into account the evidence of the Investigating Officer as the basis upon which it found liability. Counsel asserted that the Investigation Officer was not an eye witness to the accident. Further, that the appeal before the High Court was



whether the respondent had adduced evidence on the particulars pleaded to give rise to the finding of 50% apportionment. That by its very nature, contributory negligence is a counterclaim that needs substantiation in material particulars.

11. It was further submitted that the task for the Court was to confirm whether the finding by the trial court in the aspect of apportionment could be supported by the evidence on record. Counsel submitted that the High Court was being tasked to interrogate if the reasons for the finding of the trial court were sound in law and evidence. That this was a task that the trial court abdicated and went on a frolic of its own in respect of the issues for determination. The appellants pray for the appropriate order to set aside the order of dismissal and substitute with the order allowing the appeal with necessary costs.
12. Opposing the appeal, learned counsel, Mr. Kariuki, holding brief for Mr. Kiplagat urged us to dismiss the appeal with costs and that the judgment of the High Court be affirmed.

### **Determination.**

13. This is a second appeal. Our mandate is as has been enunciated in a long line of cases decided by the Court. See *Maina versus Mugiria* [1983] KLR 78, *Kenya Breweries Ltd versus Godfrey Odongo*, Civil Appeal No. 127 of 2007, and *Stanley N. Muriithi & Another versus Bernard Munene Ithiga* [2016] eKLR, for the holdings inter alia that, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the Courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. See also the English case of *Martin versus Glywed Distributors Ltd (t/a MBS Fastenings)* 1983 ICR 511 wherein, it was held, inter alia, that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact as law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law.
14. Having carefully considered the record in the light of the rival submissions set out above and the principles of law relied upon by the respective parties, in this appeal, it is clear that the determination of the appeal revolves around the question of liability.
15. Section 107 (1) of the *Evidence Act* provides that:

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.
16. This refers to the legal burden of proof. There is however, an evidential burden of proof which is captured in Sections 109 and 112 of the *Evidence Act* as follows:
  109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.
  112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.
17. The two provisions were dealt with in the decision of *Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, in which this Court held as follows:

“ As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the



affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”

18. It follows that the general rule is that the initial burden of proof lies on the plaintiff, the appellants in this appeal, but the same may shift to the respondent depending on the circumstances of the case. In the persuasive High Court case of *Evans Nyakwana –vs- Cleophas Bwana Ongaro* [2015] eKLR it was held that:

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side.”

19. However, as held by this Court in *Michael Hubert Kloss & Another vs. David Seroney & 5 Others* [2009] eKLR:

“The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in *Stapley vs. 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...”

20. The issue is however whether the appellants as pillion passengers ought to have been found 100% liable. In this case, this Court is being called upon to interfere with the trial court’s finding on liability. In *Khambi and Another vs. Mahithi and Another* [1968] EA 70, 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.”

21. That seems to have been the position in *Isabella Wanjiru Karangu vs. Washington Malele* [1983] KLR 142 and *Mahendra M Malde vs. George M Angira* Civil Appeal No. 12 of 1981, where it was held



that apportionment of blame represents an exercise of a discretion with which the appellate court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle.

22. It was not disputed that the appellants were pillion passengers on the said motor cycle. The law does not permit more than one pillion passenger to be carried on a motor cycle. By riding on the said motor cycle against the law, the appellants exposed themselves to danger. Such conduct, in the event that an accident occurs, will attract the bearing of liability on the part of such pillion passengers, the degree of which will be determined by the court based on the evidence. Accordingly, the appellants ought to shoulder some blame for such reckless conduct.
23. Accordingly, we find that the trial judge did not misconstrue the law or was in error in setting aside the 50% liability as entered for the appellants against the respondent. We thus decline to set aside that finding and we uphold it.
24. The upshot of the above assessment is that we dismiss the appeal and affirm the 1<sup>st</sup> appellate court's judgment dated 11<sup>th</sup> January, 2018. The respondent will have costs on appeal and in the two courts below.

**DATED AND DELIVERED AT NYERI THIS 7<sup>TH</sup> DAY OF FEBRUARY, 2025**

**W. KARANJA**

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**JUDGE OF APPEAL**

**JAMILA MOHAMMED**

.....

**JUDGE OF APPEAL**

**L. KIMARU**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

