



REPUBLIC OF KENYA



KENYA LAW
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**Siele v Nyabeta (Civil Appeal E009 of 2024)
[2025] KEHC 1939 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1939 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CIVIL APPEAL E009 OF 2024
CM KARIUKI, J
FEBRUARY 27, 2025**

BETWEEN

EMMANUEL SIELE APPELLANT

AND

KENNEDY NYABETA RESPONDENT

*(Being an appeal from the judgment and decree of Hon. H.M. Nyaberi
(C.M.) delivered on 23/01/2024 in Narok CMCC NO. E056 OF 2021)*

JUDGMENT

1. This appeal challenges the judgment of the Chief Magistrate’s Court at Narok in Civil Suit No. E056 of 2021, delivered on 22/01/2024, in which the trial court made awards as follows: -
 - a. Defendant not to blame as the rider is 100% to blame
 - b. General damages Kshs. 700,000/=
 - c. Special damages Kshs. 11,550/=
 - d. Future treatment costs Kshs. 350,000/=
 - e. Case dismissed with costs to the defendant
2. The amended memorandum of appeal dated 24/04/2024 cited nine grounds of appeal which relate to i) liability.

Background

3. The suit arose from a road traffic accident, which occurred on 01/11/2020 along Narok-Bomet road involving motorcycle registration number KMEY 832X and motor vehicle chassis number



ZZT230-0061768. The appellant was a pillion passenger aboard motorcycle registration number KMEY 832X. The appellant sustained serious bodily injuries.

4. The appellant testified and called one witness, whereas the respondent testified and did not call any witness.

Directions of the court

5. The application was canvassed by way of written submission.

The Appellant's Submissions

6. The appellant submitted that the lower court judgment on liability was unfair and erroneous. The appellant contends that throughout the lower court proceedings, no third-party proceedings were instituted against the rider. The respondent, in this case, did not rebut the fact that a third-party notice was not served upon the rider. The Court did not lay a basis for its adoption of liability against the rider, considering he was not a party to the suit and the appellant had given evidence against the Respondent only. The parties in E180 of 2020 were never called as witnesses, nor were the proceedings therein availed in evidence for purposes of cross-examination. The issue of notice of liability was not even pleaded in the Statement of defence. The appellant relied on Order 1 Rule 15 (1) of the Civil Procedure Rules, 2010, *Nzai & 57 others v Invesco Assurance Co. Ltd* (Miscellaneous Civil Application 51 of 2019) [2022] KECA 66 (KLR) (21 January 2022) (Ruling), Nairobi COA Application No. 228 of 2013 *Nicholas Kiptoo Arap Korir Salat VS Independent Electoral and Boundaries Commission & 6 others* [2013] eKLR, *Stephen Ngugi Kinuthia v David Peter Owuor* [2019] eKLR, *Dyer and Blair Investment Bank Limited v John Kungu Kiarie & CFC another* [2017] eKLR, *Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007*, *Nicholas King'oo Kithuka v Jap Quality Motors & another* [2021] eKLR and *Ochieng vs. Ayieko* [1985] KLR 494,
7. The appellant submitted that the awards in the judgment should suffice for each head.
8. The appellant prayed for the costs of this appeal. The appellant relied on *Jasbir Sign Rai & 3 Others- Vtarochan Singh Rai & Others* (2014) eKLR and section 27(1) of the [Civil Procedure Act](#).

The respondent's submissions.

9. The respondent submitted that it is trite law that the burden of proof rests with he who alleges to prove his allegations. Irrespective of the issue of whether or not the rider was to blame for the accident, the burden remained on the Appellant to prove to the required standard that the material accident was caused by the Respondent. If the evidence on record shows that the respondent was blameless, then the suit had to be dismissed. The Respondent was not claiming that he was entitled to contribution or indemnity. Thus, Order 1 Rule 15(1) of the Civil Procedure Rules is not applicable. The respondent contends that civil suit no. E180 of 2020 was not the basis of the court's findings. The court's attention was drawn to the existence of the suit, and the trial court merely took note of it. The respondent relied on Section 107 of the [Evidence Act](#), *Nyakwana -Vs.- Cleophas Bwana Ongaro* (2015) eKLR *Nickson Muthoka Mutavi -Vs.- Kenya Agricultural Research Institute* [2016] eKLR, *Postal Corporation Of Kenya & Anor -Vs.- Dickens Munayi* [2014] eKLR and *William Kabogo Gitau -Vs.- George Thuo & 2 Others* [2010] eKLR

Analysis And Determination.

Duty of court



10. The appellate court shall have the same powers and shall perform nearly the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted herein (Section 78(2) of the *Civil Procedure Act*).
11. The first Appellate Court should, therefore, evaluate the evidence afresh and draw some of its conclusions, albeit it must bear in mind that it did not have the opportunity of seeing or hearing the witnesses firsthand. See the case of *Selle & Anor –vs. Associate Motorboat Co. Ltd* 1968 EA 123.

Issues

12. This appeal relates to liability

Liability

13. Who is to blame for the accident, and by what proportion, if at all?
14. The trial court took notice of civil suit 180 of 2020 that had been determined, and the cause of action arose from the same transaction. The trial court also noted that the suit was not a test suit on liability. However, the trial court adopted the findings in liability in CMCC no. 180 of 2020 and held that the respondent was not at fault and no blame should be apportioned to him as the rider was 100% liable.
15. The trial court the fashions of evidence from both sides tendered. The plaintiff /appellant stated that motor vehicle CE412AN knocked the motorcycle he was aboard from behind. He blamed the driver of the motorcycle. On cross-examination, PW1 stated that there were four pillion passengers on the motorcycle, plus the rider made 5 of them.
16. PW2 PC Faith Keter produced a police officer abstract as P Exh 1 she stated that the motorcycle was ahead of the motor vehicle and were both headed in the same direction. The rider slowed down in order to join a feeder road on the right side facing Narok's direction when it was knocked down from behind.
17. On cross-examination, PW2 stated that she was not the investigating officer, and she did not visit the scene of the accident. According to PW2, it is unlawful for the rider to carry more than one pillion passengers.
18. DW1, Kenneth Bosire Nyabate, a police officer and driver of the suit motor vehicle. He blamed the rider and the passenger. He denied knocking down the motorcycle. He stated that the motorcycle emerged from outside and entered the road, resulting in the accident. He further stated that the case was investigated, and he was never charged with a traffic offence.
19. It is not clear how the accident occurred. What other evidence was required to support this kind of testimony to persuade the court to find it in his favor? Could the police abstract or P3 form have given any credence to his testimony? I find in the negative, there being no eyewitness to this accident, the onus of proving how the accident occurred and how negligent the respondent was never shifted to the respondent, and that is the purport of Section 107(1) of the *Evidence Act* which provides that

107 (1) "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."
20. Be that as it may, the appellants bear the burden of proof and establish negligence or contribution by the respondent.



21. I find no valid basis for apportioning liability against the respondent, in as much as I appreciate the fact that determination of liability in road accident cases is not a scientific affair as Lord Reid put more graphically in *Stapley – Vs. – Gypsum Mines Ltd (2) (1953) AC 663* at pg 681 that

“To determine what caused an accident from the point of new legal liability is a most difficult task. If there is any valid logical or scientific theory of 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 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 the items. 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.”

22. The respondent did not join the rider whom he blamed for the accident as there was uncertainty as to who to blame in view of diametrically opposing testimonies of PW1 and the court was not supposed to refer to another suit which was not a test suit but ought to have weighed all pieces of evidence tendered and arrive at its conclusion aided by previous authorities. Visiting a passenger with the blame was erroneous as no joinder of motorist was sought. In the uncertainty as to who to blame, the court relies on the case of *Lakhamshi v the Attorney General (1971)* for the proposition that, where it cannot be precisely determined who between two drivers was to blame for the accident, the liability is shared equally. Accordingly, this court finds the appeal merit, and the same is hereby allowed to the extent that the appellant and the rider are to share 50% ;50% with costs to the appellant assessed at 50%. The appellant can recover 50% from the respondent and the other 50% from the rider.

i. Thus, the plaintiff recovers 50% of damages and costs from respondents herein.

ii. Costs in the lower court and appeal also apportioned at rate of 50%,50%

Orders accordingly.

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS
27TH DAY OF FEBRUARY, 2025**

CHARLES KARIUKI

JUDGE

