



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Njeri v Wamathai (Civil Appeal E013 of 2021)  
[2025] KEHC 1488 (KLR) (26 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1488 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CIVIL APPEAL E013 OF 2021  
DKN MAGARE, J  
FEBRUARY 26, 2025**

**BETWEEN**

**ERICK GITAHU NJERI ..... APPELLANT**

**AND**

**ROSEMARY WAMBUI WAMATHAI ..... RESPONDENT**

**JUDGMENT**

1. This is an appeal from the Judgment and decree of Hon. H. Adika, Senior Resident Magistrate dated 26.4.2021 arising from Nyeri CMCC No. 272 of 2018.
2. The Plaintiff dated 24.9.2018 claimed damages for an accident on 27.4.2018 involving the Appellant's motorcycle Registration No. KMDN 876F Captain and the Respondent's motor vehicle Registration No. KBS 995E Mitsubishi Lancer along Tetu-Kamakwa road at Gwa-Kibara area.
3. The Appellant set forth particulars of negligence for the accident motor vehicle, special damages and injuries. It is unnecessary to set out injuries as the appeal is on liability only.
4. The Respondent entered appearance and filed defence, denying the particulars of negligence and injuries pleaded in the plaint. She blamed the Appellant as the rider of the said motorcycle Registration No. KMDN 876F Captain.
5. The lower court heard the parties and proceeded to render the impugned judgment in which the court found 70% liability against the Appellant and awarded Ksh. 250,000/- in general damages and special damages of Ksh. 8,700/-.
6. Aggrieved by the finding of the lower court, the Appellant lodged the Memorandum of Appeal dated 4.5.2021 hence this appeal. The memorandum of appeal is concise, devoid of verbosity, repetition, or empty rhetoric. Increasingly, such precise memoranda of appeal are dwindling and probably growing unpopular despite the expectations of the law. This memorandum of appeal bespeaks of only a singular



issue of liability. It is a model memorandum of appeal that should be emulated. In *Nasri Ibrahim v. IEBC & 2 Others* [2018] eKLR, the court stated as follows:

“We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs.” The 18 grounds of appeal presented by the Appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues...”

### **Evidence**

7. During the hearing, PW1 was No. 91943, PC Caleb Ochola of Nyeri Police Station. He relied on the Police Abstract, P3 form and OB extract. On cross examination, it was his testimony that the motor vehicle was driven by the Respondent and was from Nyeri heading to Tetu direction. At the junction, the Respondent collided with the motorbike. According to him, the motorcycle had the right of way.
8. PW2 was the Appellant. He adopted his witness statement in his testimony in chief, dated 24.9.2021. He also produced his bundle of documents, dated 24.9.2021. On cross-examination, he claimed he was carrying two pillion passengers who wore helmets. He had not brought the helmets in court. The motor vehicle did not indicate. He posited that he had the right of way. He stated that the motor vehicle failed to give way.
9. DW1 was the Respondent. She testified that on the material day, while she was driving at the junction of Kinunga, she took the right turn. On turning, two people were crossing, and she slowed down almost to stop. She heard a bang and a person landed on her windscreen and off the other side and two pillion passengers landed on the ground. The motorcycle was moving at a high speed, and it was overloaded. On cross-examination, it was her stated case that there was no vehicle from Tetu direction when she turned to the right. She had already turned when she heard the bang.

### **Submissions**

10. The parties did not file submissions.

### **Analysis**

11. This being a first appeal, this court is under a duty to reevaluate and assess the evidence and make its own conclusions. It must, however, remember that a trial court, unlike the appellate court, has the advantage of observing the demeanour of the witnesses and hearing their evidence firsthand.
12. This court’s jurisdiction to review the evidence should be exercised with caution. In the cases of *Peters v Sunday Post Limited* [1958] EA 424, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”
13. I must bear in mind that I did not have the advantage of seeing and hearing the witnesses as did the lower court, yet this court must reconsider the evidence, evaluate it itself and draw its own conclusions.



In *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... 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...”

14. The court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.
15. The Appellant urged me to find that the lower court erred in finding 70% liability against the Appellant. They propose that the trial court’s judgment be set aside and liability of 100% be granted against the Respondent. On the other hand, the Respondent’s case is that the judgement of the lower court was correct on both quantum and liability and should not be disturbed.
16. The matter before me is whether the lower court erred in finding, on a balance of probabilities, that the Appellant was 70% liable for the accident. The legal burden of proof lies upon the party who invokes the aid of the law and asserts an issue based thereon. The burden of proof is set out in Sections 107-109 of the [Evidence Act](#) as follows:

“ 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.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

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 that fact shall lie on any particular person.”

17. The burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue as held in *Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, where the Court of Appeal held that:

“ 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 case 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 initial burden of proof lies on the Plaintiff, but the same may shift to the Defendant, depending on the circumstances of the case. In *Evans Nyakwana v 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. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in *William Kabogo Gitau v George Thuo & 2 Others* [2010] 1 KLE 526 stated that:

“In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

20. The balance of probabilities is also about what is likely to have happened than the other. Lord Nicholls of Birkenhead in *Re H and Others (Minors)* [1996] AC 563, 586 held that;

“The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.....”

21. Furthermore, the standard of proof in civil cases must carry a reasonable degree of probability but not so high as is required in a criminal case, for such a standard is based on a preponderance of probabilities. In *Palace Investment Ltd -vs- Geoffrey Kariuki Mwenda & Another* [2015] eKLR, the Judges of Appeal held that:

“Denning J, in *Miller v Minister of Pensions* [1947] 2 All ER 372 discussing the burden of proof had this to say;-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

22. The Appellant’s case is that he was coming towards Nyeri town. The Respondent was coming from Nyeri, was turning right at Kinunga junction. When approaching a junction, a motorist was to give



way or stop. DW1 testified that she slowed down to the point of stopping because two pedestrians were crossing the road. There was no vehicle from Tetu's direction. She stated that the motorcycle was moving at a high speed. The motorcycle was also heavily laden with two passengers and luggage.

23. The Appellant's case, on the other hand, was that he was coming from Tetu towards Nyeri town, and the motor vehicle did not indicate before turning into his side. The Appellant and the Respondent, if prudent, were supposed to slow down at the junction. The Respondent testified that there was no vehicle from Tetu direction. From the facts and evidence, the collision was such violent that the Appellant was thrown onto the windscreen and off to the other side of the road. The two pillion passengers were thrown to the side. This pointed to the circumstances that the Appellant was riding at a considerably high speed at a junction.
24. The court found that the motor cycle was more reckless. From the impact, this was a correct finding of fact. There were two versions on the occurrence of the accident. The evidence on record and common sense supports the court's finding of fact. This court cannot set aside a finding of fact by the lower court unless it is plainly wrong. The Court of Appeal in *Mwangi v Wambugu* [1984] KLR 453 pronounced itself as follows:-

“A court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding and an appellate court is not bound to accept the trial Judge's finding of fact if it appears either that he has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

25. The Court of Appeal for Eastern Africa in *Pandya v Republic* [1957] EA 336 had this to say in respect of the first appellate court on reviewing evidence:

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the Appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

26. The next question is whether, the court was right in apportioning liability at 70:30 instead of any other apportionment, including equally. The court exercised discretion. The motor cycle was to blame more than the motor vehicle. The court exercised its discretion and found the motor cycle 70% to blame. This discretion was exercised judiciously. This court cannot interfere with the same unless the discretion was abused or the court was clearly wrong. The former Court of Appeal of Eastern African addressed the issue of discretion in the case of *Mbogo and Another v Shah* [1968] EA 93:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself



or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

27. In the circumstances, the discretion was properly exercised on the basis of the evidence on record. There was nothing untoward in the finding of liability. It does not matter that this court probably will have given 80:20 or 40:60. The court cannot substitute the court’s discretion with its own. In the case of *Masembe v Sugar Corporation* (supra) the court posited as doth:

“When a man drives a motor car along the road, he is bound to anticipate that there may be things and people or animals in the way at any moment, and he is bound not to go faster than will permit him at any time to avoid anything he sees after he has seen it.... A reasonable person driving a motor vehicle on a highway with due care and attention, does not hit every stationary object on his way, merely because the object is wrongfully there. He takes reasonable steps to avoid hitting or colliding with the object ... Whereas a driver is not to foresee every extremity of folly which occurs on the road, equally he is not certainly entitled to drive on the footing that other users of the road, either drivers or pedestrians, will exercise reasonable care. He is bound to anticipate any act which is reasonably foreseeable, that is to say anything which the experience of the road users teaches them that people do albeit negligently.... There may be occasions when criminal or traffic offences are committed without giving rise to civil liability.”

28. Although contributory negligence was proved, the Appellant had a higher liability for the accident than the Respondent and the lower court was correct in its finding on liability and the same is upheld. In *Masembe v Sugar Corporation and Another* [2002] 2 EA 434, it was held that:

“Negligence is not actionable per se but is only actionable where it has caused damage and, in that regard, the primary task of the court in a trial of a negligence suit is to consider whether the act or acts of negligence caused the damage was caused by the negligent acts of different persons to assess the degree of their respective responsibility and blameworthiness, and apportion liability between or among them accordingly... There is no act or omission that has static blameworthiness and therefore each case must be assessed on its own circumstances and the apportionment ought to be a result of comparing the negligent conduct of the tortfeasor, to determine the degree to which each one was in fault, both in regard to causation of the wrong and unreasonableness of conduct.”

29. Having found no fault in the lower court decision, it follows that the appeal must give way. The same lacks merit and is accordingly dismissed. What then becomes of costs? The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

- (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.



- (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.
30. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -
- “(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or Respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.
31. The Respondent is successful in the appeal. Even where the success is razor thin, it is still success. However, the Respondent did not file submissions. The order that is just in the circumstances, is that each party bears their own costs.

#### **Determination**

32. In the upshot, I make the following orders: -
- a. The appeal is not merited and is dismissed.
  - b. Each party to bear their own costs.
  - c. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 26TH DAY OF FEBRUARY, 2025.**

**Judgment delivered through Microsoft Teams Online Platform.**

**KIZITO MAGARE**

**JUDGE**

In the presence of: -

No appearance for parties

Court Assistant – Michael

**M. D. KIZITO, J.**

