



REPUBLIC OF KENYA



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

**Afripack International Ltd & another v Lima Ltd & 2 others (Civil Appeal  
67 of 2016) [2025] KEHC 5393 (KLR) (25 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5393 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL 67 OF 2016  
SM MOHOCHI, J  
APRIL 25, 2025**

**BETWEEN**

**AFRIPACK INTERNATIONAL LTD ..... 1<sup>ST</sup> APPELLANT**

**JAMES INVESTMENTS ..... 2<sup>ND</sup> APPELLANT**

**AND**

**LIMA LTD ..... 1<sup>ST</sup> RESPONDENT**

**WILLIAM AGOLA NYAPOLA ..... 2<sup>ND</sup> RESPONDENT**

**ALLAN KIPRONO CHERUIYOT ..... 3<sup>RD</sup> RESPONDENT**

*(Being an Appeal against the Judgment delivered by the Honourable J.Wanyanga  
(Resident Magistrate) in Molo CMCC No.30 of 2013 delivered on 19th May, 2016)*

**JUDGMENT**

**Introduction**

1. This appeal arises from the judgment delivered 19<sup>th</sup> May 2016 in Molo CMCC No.30 of 2013 where the 1<sup>st</sup> and 2<sup>nd</sup> Appellant were held liable at 100% and judgment entered in favour of the 3<sup>rd</sup> Respondent herein for Kshs. 161,350/- awarded as general and Special, damages, together with costs and interest from the date of the judgment.
2. The Appellant did not include the plaint filed in trial as part of the Record of Appeal however the 3<sup>rd</sup> Respondent was on 28<sup>th</sup> May 2012 a passenger in motor vehicle registration number KAX 902B travelling from Mau Narok heading to Nakuru when it collided head on with motor vehicle KAZ 812B and he sustained serious body injuries.



3. He sued the drivers and owners of both vehicles to enable the court to decide of liability in respect of each. According to the trial proceedings, as a result of the accident, the 3<sup>rd</sup> Respondent sustained the following injuries:
  - a. Bruises on the face.
  - b. Blunt injury to the anterior chest wall.
  - c. Multiple cut wound on both legs.
  - d. Severe soft tissue injuries of the right knee joint.
4. Being aggrieved by the said judgment, the 1<sup>st</sup> and 2<sup>nd</sup> Appellants instituted this appeal vide a Memorandum of Appeal dated 16/06/2016 which essentially revolved on the issue of liability.
5. The Appellants prays that the judgment and decree on liability be set-aside or otherwise reviewed and substituted with a suitable award. He also pleads for costs of the appeal. The Respondent opposes this appeal.
6. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:
 

“.....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 into account of particular circumstances or probabilities materially to estimate the evidence.”
7. In *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR the Court of Appeal stated that: -
 

“An appeal to this court from a trial by the High 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”.
8. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles: -
  - a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
  - b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
  - c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.
9. The Argument advanced was that, the Learned magistrate erred in fact and in law in failing to consider the evidence tendered by the witnesses presented by the Appellants hence arriving at an erroneous finding wherein the Appellants were held 100% liable. That he failed to consider submissions filed by the Appellants and he erred in fact and in law in failing to fully consider the evidence of the Police



Corporal Kivava (DIDW2) on record and the evidence of Benson Waiganjo (DIDW1) hence arriving at an erroneous finding.

10. This Appeal is being considered in the absence of any filed written submissions by the Appellants despite being afforded ample opportunity to file the same.
11. The Appellant unilaterally without the leave of the court filed supplementary record of appeal dated 5<sup>th</sup> February 2025 on the 17<sup>th</sup> February 2025 having been absent on the 14<sup>th</sup> February 2025 when the judgment date was fixed which is indicative of their duty to file written submissions.
12. Filing a Supplementary record of appeal after close of pleadings and where judgment is fixed is presumptuous, mischievous and is only intended to disadvantage the Respondent having been served with its filed written submissions.
13. This court is persuaded to strike-out the Supplementary Record of Appeal filed without the leave of the court. In fact, it was the 3<sup>rd</sup> Respondent that had identified the incompleteness of the Record of Appeal dated 6<sup>th</sup> March 2023.
14. A first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for rehearing both on the question of fact and law.
15. The judgment of the appellate court must therefore reflect its conscious application of mind and record the findings supported by reasons, on all issues arising along with the contentions put forth and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the appellate court had discharged the duty expected of it.
16. A first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the *civil procedure Act* a court of first appeal can appreciate the entire evidence and come to a different conclusion. See Kurian Chacko vs Varkey Ouseph AIR 1969 Kerala 316
17. I have considered the entire proceedings of the trial court, the entire record of Appeal and the submissions of the parties herein. I note that the finding of fact by the trial court that;

“it would be unfair to determine liability based on an undetermined position. No further documents were availed to confirm if this position by the police was confirmed by the court. So, the only fact we know was confirmed in both Plaintiffs witnesses’ testimonies as well as 1<sup>st</sup> and 2<sup>nd</sup> Defendants’ witnesses were that, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants motor vehicle swerved onto the path of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants motor vehicle. It is cardinal traffic rule that vehicles swerving in times of emergencies should always swerve outwards and not inwards to the right. I find that the collision having happened on the legal lane for motor vehicle KAZ 812B, I will therefore hold that the driver for motor vehicle KAX 902B played a greater role to the cause of the accident. I will award liability at 100% against the 3<sup>rd</sup> and 4<sup>th</sup> Defendants, but in favor of the Plaintiff. 1<sup>st</sup> and 2<sup>nd</sup> defendant played no role in the cause of the accident”

18. My re-evaluation of the Record of Appeal trial proceedings at pages 21, 23 and 25 is indicative that the Driver of Motor vehicle KAZ 812B was to blame for the accident notwithstanding the final resting point of the accident scene.



19. Where there is a conflict of testimony, the appellate court should in order to reverse decision not merely entertain doubts whether it is right but be convinced that it is wrong. In a matter of appreciation of evidence and the credibility of witnesses, the opinion of the trial judge should not be lightly disturbed in appeal. It requires circumstances of exceptional character to justify a reversal.
20. I equally note the skid marks were all attributable to driver of motor vehicle KAX 902B while the ultimate landing spot of the collision was on the right lane towards Nakuru where Driver of Motor vehicle KAZ 812B was driving from and which would lead a prudent man to conclude that motor vehicle KAX 902B skidded while breaking before the ultimate collision on the right lane with Motor vehicle KAZ 812B.
21. This is a misdirection by the trial court in attributing liability at 100% against KAZ 812B was an exceptional flaw in appreciation of the evidence presented warranting disturbance by this court.
22. This court further notes the conflicting evidence by D1W, William O Nyabola driver of Motor vehicle KAZ 812B and D3W1 Benson W. Mwangi driver motor vehicle KAX 902B on the circumstances of the accident does not affect the liability as in favor of the 3<sup>rd</sup> Respondent I am however inclined that on a balance of probability based on the detailed description by Benson W. Mwangi and how his vehicle ultimately landed on the right side leads one to appreciate the evidence to imply while he admits to err by swerving to the right, he attributes the accident to William O. Nyabola who he asserts was over speeding on the right lane. It thus means both Benson W. Mwangi and William O. Nyabola contributed to the occurrence of the accident on the 28<sup>th</sup> August 2012.
23. This court equally notes the undated submissions filed on 17<sup>th</sup> March 2016 by the 3<sup>rd</sup> Respondent urging that the 1<sup>st</sup> and 2<sup>nd</sup> Appellants be held 50% liable and the 1<sup>st</sup> and 2<sup>nd</sup> Respondent be held 50% liable.
24. The court find partial merit in the Appeal and accordingly set aside the Judgment by Honourable J. Wanyaga (Resident Magistrate) in Molo CMCC No. 30 of 2013, Delivered on the 19<sup>th</sup> day of May, 2016 and vary the same on the following terms;
  - i. I thus disturb the finding on liability and attribute liability at 50% as against the 1<sup>st</sup> and 2<sup>nd</sup> Appellants and at 50% as against the 1<sup>st</sup> and 2<sup>nd</sup> Respondent.
  - ii. All other aspect of the judgment by the trial court remain unaffected.
25. The Costs for this Appeal are awarded to the 3<sup>rd</sup> Respondent.  
It is so Ordered.

**DELIVERED, DATED AND SIGNED AT NAKURU ON THIS 25<sup>TH</sup> OF APRIL, 2025**

---

**MOHOCHI S.M.**

**JUDGE**

