



REPUBLIC OF KENYA



KENYA LAW
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**Barasa v Oduol & another (Civil Appeal E043 of 2024)
[2025] KEHC 7460 (KLR) (29 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7460 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL APPEAL E043 OF 2024
WM MUSYOKA, J
MAY 29, 2025**

BETWEEN

FRANCIS ODUORI BARASA APPELLANT

AND

SAMUEL ODUOL 1ST RESPONDENT

EQUATOR BOTTLERS LIMITED 2ND RESPONDENT

(Appeal from judgement and decree in Busia CMCCC No. 306 of 2022, delivered on 23rd August 2024, by Hon. TA Madowo, Senior Resident Magistrate, SRM)

JUDGMENT

1. The suit at the trial court was filed by the appellant herein against the respondents. It was for compensation, for injuries that he sustained in a road traffic accident, on 7th August 2022, along the road from Funyula to Port Victoria, at a place called Sinongo. He was a pedestrian along that road, where he was hit by a motor vehicle registration mark and number KBP 834V, allegedly belonging to the respondents. He claimed that it had been negligently driven. The defendants filed a joint defence, they denied everything, and attributed negligence on the appellant.
2. A trial was conducted. Three witnesses testified for the appellant, and one for the respondent. Judgement was delivered, on 23rd August 2024. Liability was apportioned at 50:50, between the two parties. General damages were assessed at Kshs. 800,000.00, special damages at Kshs. 6,000.00 and further medical expenses at Kshs. 150,000.00. The appellant was awarded costs and interests.
3. The appellant was aggrieved, hence the appeal. His memorandum of appeal is dated 26th August 2024. It lists only two grounds of appeal, around liability, which he pleads should have been assessed at 100% against the respondents.



4. Directions were taken, on 16th February 2024, for canvassing the appeal by written submissions. Both sides have filed their respective written submissions.
5. In his written submissions, the appellant argues that liability would only be at 50:50, where there is no concrete evidence to determine who is blame, and he cites *Hussein Omar Farah vs. Lento Agencies* [2016] eKLR (Omolo, Tunoi & Githinji, J). He also submits that the case was not based on pleadings and evidence, as the respondents had not pleaded or particularised negligence against the appellant. He cites *Ogwari vs. Hersi* [2023] KEHC 20111 (KLR) (Magare, J).
6. He further submits that parties are bound by their pleadings and their evidence must support their pleadings. He cites *Independent Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & 3 others* [2014] eKLR (GBM Kariuki, Kiage & M’Inoti, JJA). He submits that his testimony, on how the accident happened, was not controverted, nor shaken in cross-examination. He argues that his version of events was corroborated by the 1st respondent. He submits that the 1st respondent testified that he had not seen him prior to the collision.
7. On their part, the respondents submit that the appellant testified that he was knocked down from behind, as he pushed his bicycle, and that he had not seen the vehicle prior to the collision. On the police evidence, it is submitted that no sketch plan or photographs of the scene were produced, and the police officer who testified stated that he was unable to know who to blame for the occurrence of the accident. He submits that the 1st respondent testified to hearing an impact on the driver’s side of the vehicle, prompting him to stop. It is submitted that the appellant did not prove negligence against the respondents.
8. They cite *ZOS & CAO (Suing as the Legal Representatives in the Estate of SAO (Deceased) vs. Amollo Stephen* [2019] KEHC 9268 (KLR) [2019] eKLR (Aburili, J), *William Kabogo Gitau vs. George Thuo & 2 Others* [2010] eKLR (Kimaru, J), *Palace Investments Limited vs. Geoffrey Kariuki Mwenda & another* [2015] KECA 616 (KLR) (Karanja, Okwengu & GBM Kariuki, JJA), *Treadsetter Tyres Ltd vs. John Wekesa Wepukhulu* [2010] eKLR (Ibrahim, J) and *Nickson Muthoka Mutavi vs. Kenya Agricultural Research Institute* [2016] eKLR (Nyamweya, J).
9. So, what really happened? That can only be gauged from the testimonies. The appellant testified that he was hit from behind. He had not seen or heard the motor vehicle approach. His witness, a police officer, testified that it was difficult to determine who was to blame. The 1st respondent testified that he did not see how the accident happened, he just felt an impact, and when he stopped, he established he had hit the appellant. He had not seen him prior. From those testimonies, it is difficult to gauge who bore the greater liability for the collision. Both road users appear to have lacked situational awareness of their immediate environment before the collision occurred.
10. On whether the respondents pleaded negligence on the part of the appellant, I am persuaded that they did. There is a pleading, at paragraph 4 of the defence, that “... the said accident was solely caused by the plaintiff’s negligence.” That was sufficient for the purpose of attributing negligence on the part of the applicant.
11. An accident happened. None of the parties had sensed the presence of the other prior to the collision. That suggested lack of proper lookout, of awareness of the surroundings, and of care and attention for other road users, by both sides. In such circumstances, liability is apportioned equally between the two sides to the collision



12. I am not persuaded that the trial court erred, in assessing liability at 50:50. There is no merit in the appeal. I hereby dismiss it. Each party shall carry its own burdens as to costs. The trial court file shall be returned to the relevant registry, while the instant file shall be closed. Orders accordingly.

DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, ON THIS 29TH DAY OF MAY 2025.

W.M. MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. F. Omondi, Esq., Advocate for the appellant.

Ms. Nyiva, instructed by Ngaywa & Kibet Partners LLP, Advocates for the respondents.

