



**Katimi v County Government of Kakamega (Civil Appeal
132 of 2024) [2025] KEHC 9240 (KLR) (25 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9240 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL 132 OF 2024**

**S MBUNGI, J
JUNE 25, 2025**

BETWEEN

LADYSLAS WESAMBA KATIMI APPELLANT

AND

COUNTY GOVERNMENT OF KAKAMEGA RESPONDENT

(Being an appeal against the Judgment and Decree of the Hon. T.A. Obutu – CM delivered on the 27th June, 2024 in Mumias Senior Principal Magistrate's Court Civil Case Number 74 of 2023)

JUDGMENT

Background

1. The appellant [plaintiff] instituted Mumias SPMCC No. 74 of 2023 seeking general damages for pain and suffering, special damages amounting to Kshs. 9,750/=, costs of the suit, interest, and any other relief the court may deem fit.
2. Her claim arose from a road traffic accident that occurred on 4th April 2023, in which she was a pillion passenger on a motorcycle that was allegedly struck by the respondent's motor vehicle, Registration No. 37CG 222A, a Toyota Prado. The plaintiff sustained various injuries including blunt trauma to the shoulders, chest, back, and bruises on both knees. The respondent [defendant] filed a statement of defence denying liability and attributing negligence to the motorcyclist and/or the plaintiff.
3. By agreement, the issue of liability was addressed and determined in a related file, Mumias SPMCC No. 88 of 2023 – Patrick Matseshe Wasulu v County Government of Kakamega, where the trial court apportioned liability at 50:50 between the parties.
4. Following that finding, the trial court in the instant matter proceeded to assess quantum and awarded Kshs. 320,000/= as general damages for soft tissue injuries. After factoring in the 50% contributory



negligence, the net award was Kshs. 160,000/=, plus Kshs. 6,000/= in special damages, bringing the total to Kshs. 166,000/=, together with costs and interest.

5. The appellant, being dissatisfied with the judgment of the trial court, proffered this appeal on the following grounds:
 - a. That the Learned Trial Magistrate erred in law and in fact in apportioning liability in the ratio of 50:50 against the weight of the evidence on record.
 - b. That the Learned Trial Magistrate erred in law and in fact in awarding damages that were inordinately low given the nature of the injuries sustained by the Appellant and the authorities cited by the appellant.
6. The appellant prayed that the appeal be allowed, the lower court judgment on liability be set aside and the same be substituted with a judgment finding the Respondent wholly liable for the accident and/or the Honorable Court do re-assess the evidence and come up with a different decision on liability and further the Honorable Court do re-assess the damages payable to the Appellant with the costs of the appeal be awarded to the Appellant.
7. The merits of the appeal were canvassed by way of written submissions. On record are the appellant's submissions dated and respondent's submissions dated both of which I have carefully considered.

Appellant's Case

8. The Appellant submitted that the trial court misapprehended the evidence on record in apportioning liability equally between the parties. It was contended that the evidence by the Appellant and her witness was consistent and unshaken, showing that the Respondent's motor vehicle left its lawful lane and violently collided with the motorcycle on which the Appellant was lawfully riding as a pillion passenger.
9. The Appellant argued that the Respondent failed to demonstrate that its motor vehicle was roadworthy or properly maintained. It was pointed out that this issue was raised in cross-examination and not addressed in re-examination. The Appellant relied on *Kenya Bus Service Ltd v Dina Kawira Humphrey C.A. 295 of 2000* and *Rahab Micere Murage [Estate of Esther Wakiini Murage] v Attorney General & 2 Others [2015] eKLR*, where the Court of Appeal held that properly maintained and carefully driven vehicles do not cause unexplained accidents.
10. Further, the Appellant submitted that the Respondent's driver attempted to mislead the trial court as to the direction he was traveling at the time of the accident. The driver claimed to be driving from Mumias towards Kakamega, contrary to the physical evidence and testimony that placed him traveling from Kakamega towards Mumias. It was submitted that the point of impact was on the lawful lane of the Appellant and the rider.
11. To support the proposition that the Respondent's driver was solely liable, the Appellant cited the case of *Nester Shikuri v Ibrahim Okwiri Matanji [2020] eKLR*, where the court found a motor vehicle driver wholly liable for turning into the lane of a motorcycle rider. It was submitted that the same reasoning applied in the present case.
12. The Appellant contended that in light of the credible and uncontroverted evidence, the trial court erred in apportioning liability at 50:50. The Appellant emphasized that the apportionment of liability is only applicable in situations where the evidence is unclear or inconclusive. Reliance was placed on the decision in *Hussein Omar Farar v Lento Agencies C.A. No. 34 of 2005 [2006] eKLR*, where the Court of Appeal held that liability should not be split in the absence of uncertainty.



13. In the alternative, it was submitted that even if contributory negligence were to be found, the Respondent bore a higher burden of responsibility as the driver of a lethal machine. The Appellant invoked the principle in *Isabela W. Karanja v W. Malele* [1982–88] KLR, where the court held that drivers of motor vehicles owe a higher duty of care to vulnerable road users such as cyclists and pedestrians.
14. On the issue of quantum, the Appellant elected not to pursue the appeal. It was submitted that the award of Kshs. 320,000/= in general damages was acceptable, provided that liability was revised accordingly. The Appellant therefore urged this Honorable Court to uphold the award on damages but set aside the finding on liability and substitute it with a finding that the Respondent was 100% liable for the accident.
15. Consequently, the Appellant prayed that the lower court’s judgment on liability be set aside and substituted with a finding of full liability against the Respondent, or in the alternative, that liability be apportioned more heavily against the Respondent, and that the award on general damages be maintained. The Appellant also prayed for the costs of the appeal.

Respondent’s Case

16. The Respondent supported the judgment of the trial court delivered on 27th June 2024 and submitted that the same was sound in law and fact and ought not to be interfered with. It was argued that appellate courts only interfere with the findings of trial courts where it is shown that the court exercised its discretion improperly, misdirected itself, considered irrelevant matters, or failed to consider relevant ones, thereby reaching an erroneous conclusion.
17. The Respondent submitted that the Appellant failed to prove the allegations of negligence pleaded in the plaint. The Appellant merely adopted her witness statement and alleged that the accident occurred on her lawful lane, but this evidence was not corroborated by any independent or objective witness.
18. The Respondent emphasized that the police officer [PW2], who could have shed light on the point of impact, did not conduct the investigation and merely produced a police abstract. He had no Occurrence Book [O.B.], no police file, and could not speak to the status of the investigations. Reliance was placed on *Machakos Civil Appeal No. 64 of 2020 – Fredrick Kimenye Musau v Explico Insurance Co. Ltd*, where the court similarly held that a police abstract is not proof of the cause of an accident. In this case, the Respondent submitted that while the occurrence of the accident was not in dispute, the manner in which it occurred was at the core of the case.
19. The Respondent submitted that it discharged its evidentiary burden by calling the driver of the motor vehicle, who adopted his witness statement and blamed the motorcycle rider for the accident. An investigating officer also testified as DW2 and similarly blamed the rider, stating that the motorcycle was on the wrong lane, that the rider was unlicensed, and that the motorcycle was uninsured.
20. The investigating officer drew a skeleton sketch plan and stated during cross-examination that the police file had been forwarded to the Base Commander and was still with the Office of the Director of Public Prosecutions [ODPP]. The Respondent therefore maintained that the Appellant failed to establish liability against it to the required standard.
21. The Respondent cited *Kevin Asira Osebe v Stephen Mwangi Njoroge, Nairobi* [Milimani] Civil Appeal No. E048 of 2023, where the court held that where the evidence is inconclusive as to who caused the accident, the proper course is to apportion liability equally. Similar reliance was placed on *Machakos Civil Appeal No. E079 of 2022 – Moiz Motor Ltd & Another v Jacob Kioko Muthoka & 2 Others*, and the classic case of *Khambi & Another v Mahithi & Another* [1968] EA 70, where the



court stated that an appellate court should not interfere with apportionment of liability by a trial court unless it is based on a clear error of principle.

22. The Respondent further invoked the reasoning in *Welch v Standard Bank Ltd* [1970] EA 115, as cited in the aforementioned decisions, to the effect that where the material on record does not support a firm finding of blameworthiness on either side, it is fair and just to hold both parties equally responsible.
23. In conclusion, the Respondent submitted that the Appellant failed to discharge the burden of proof under Sections 107 and 109 of the *Evidence Act* and that the trial court's finding of 50:50 liability was both reasonable and supported by the totality of the evidence and prayed that the appeal be dismissed with costs.

Analysis and Determination.

24. I have I have carefully reviewed the entire record of appeal, the lower court proceedings, the submissions by both parties, and the relevant legal principles.
25. This being a first appellate court, my duty is to re-evaluate the evidence adduced before the trial court and draw my own conclusions, while bearing in mind that I did not have the benefit of seeing and hearing the witnesses testify firsthand. See the Court of Appeal decision in *Peters v Sunday Post Ltd* [1958] EA 424, where it was held that:

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusion of the trial court should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion or if the trial court has misapprehended the evidence or acted on wrong principles, then the appellate court will interfere.”
26. The appellant in submissions, abandoned the second ground of appeal. Therefore, the sole issue for determination by this court is whether the trial court erred in apportioning liability at 50:50.

On Liability

27. From the trial court record and proceedings, it is evident that the appellant and PW2 claimed that the respondent's motor vehicle veered into her lawful lane and struck the motorcycle on which she was a pillion passenger. On the other hand, the respondent's version by the driver one Festus Likuyani, was that it was the motorcyclist who changed lanes and collided with the right side mirror of the respondent's motor vehicle. Essentially, each party blamed the other, and no independent eyewitness evidence was adduced to clarify the actual cause of the accident.
28. The respondent called DW2, PC Erick Otwani No. 119701, who stated that according to his investigation, it was the motorcycle rider who was at fault. He testified that he had prepared a sketch plan indicating the point of impact and general configuration of the scene. However, critically, no sketch plan, no map legend, and no photographs were produced in court. The officer merely presented a police abstract, and under cross-examination, confirmed that the police file was with the Office of the Director of Public Prosecutions [ODPP]. Moreover, the abstract did not establish how the accident occurred.
29. This court aligns with the Respondent's submission relying on *Peter Kanithi Kimunya v Aden Goyo Haro* [2014] eKLR, where the court held:

“A police abstract is not proof of the occurrence of an accident but merely evidence that following an accident, a report was made at a particular police station.”



30. The trial magistrate was therefore left with conflicting testimonies and no objective or corroborative evidence to decipher the point of impact or which party was at fault. This Court agrees with the position of the law as set out in *Khambi & Another v Mahithi & Another* [1968] EA 70, where it was held:

“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, such as where there is some error in principle or the apportionment is manifestly erroneous.”

31. The Court in *Moiz Motor Ltd & Another v Jacob Kioko Muthoka & 2 Others* [2023] eKLR [Machakos Civil Appeal No. E079 of 2022], restated this principle by affirming a 50:50 liability finding where the evidence was contradictory and inconclusive. Additionally, the Court in *Kevin Asira Osebe v Stephen Mwangi Njoroge* [Nairobi Civil Appeal No. E048 of 2023] similarly held:

“The law is trite, as established by a line of authorities, that where the court is unable to determine who is to blame for the accident, liability is apportioned equally.”

32. In *Welch v Standard Bank Ltd* [1970] EA 115, the court stated thus:

“It would be just to say it is equally the explanation that both drivers are to blame equally as that only one of them was wholly to blame. Accidents do not just happen; they are caused. When there is no material to generate actual persuasion in the court’s mind, it would be an explanation which offers a solution of impartial practicability.”

33. In the present case, the absence of investigative materials such as sketch plans, photographic evidence, or any documentary support deprives the court of the ability to objectively ascertain fault. Accordingly, the trial court’s decision to apportion liability at 50:50 was neither arbitrary nor unsupported but grounded in well-established principles of law.

34. This position is also echoed in *Stapley v Gypsum Mines Ltd* [1953] AC 663, where the House of Lords observed:

“To determine responsibility where fault is alleged, the court must weigh all the probabilities in the light of the evidence and draw reasonable inferences. If the evidence does not tilt one way or another, the parties must share the responsibility.”

35. This court finds no misdirection in the trial court’s approach. The apportionment of liability at 50:50 was fair, reasoned, and legally sound.

36. Consequently, this court finds no merit in the appeal. It is dismissed in its entirety. The judgment and decree of the lower court are hereby upheld.

37. Costs awarded to the Respondent.

38. Right of appeal 30 days.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 25TH DAY OF JUNE, 2025.

S.N MBUNGI

JUDGE

In the presence of:



Court Assistant – Elizabeth Angong'a

Ms. Chebet holding brief for Akala for the Applicant present online.

Ms. Munihi for the respondent present online.

