



REPUBLIC OF KENYA



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

Jumbo Foam Mattresses Industries Ltd v Kiptanui & 8 others (Civil Appeal E114, E111, E112, E113 & E115 of 2024 & E040 & E023 of 2025 (Consolidated)) [2025] KEHC 9330 (KLR) (24 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9330 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

**CIVIL APPEAL E114, E111, E112, E113 & E115 OF 2024
& E040 & E023 OF 2025 (CONSOLIDATED)**

GL NZIOKA, J

JUNE 24, 2025

BETWEEN

JUMBO FOAM MATTRESSES INDUSTRIES LTD APPELLANT

AND

DANIEL KIPTANUI 1ST RESPONDENT

PATRICK HELLINGTON OTIENO 2ND RESPONDENT

ALEX KENGURU ANYOKA 3RD RESPONDENT

LESHINKA OLE KIBARKE 4TH RESPONDENT

JOSEPH KIPRUTO TARUS 5TH RESPONDENT

JULIUS OUMA ABOK 6TH RESPONDENT

JOSPHAT MUTINDA KIVUTSU 7TH RESPONDENT

SAMUEL M. KANYI NDIRANGU 8TH RESPONDENT

JOHN MWANGI NJUGUNA 9TH RESPONDENT

(Being an Appeal from the Judgment of Hon. W. Rading (PM) in Naivasha CMCC No. 871 of 2018 delivered on 29th August, 2024)

JUDGMENT

1. By a Plaint dated 3rd September, 2018, the plaintiff sued the defendants seeking for judgment against the defendants for;
 - a. General Damages



- b. Special Damages
 - c. Costs and interest of the suit
 - d. Interest on (a) & (c) above from the date of judgment and (b) from the date of filing of this suit.
2. It is the plaintiff's case that on 29th day of June, 2018, he was travelling as a lawful passenger on motor vehicle No. KAY 886T along Mai Mahiu road. That the vehicle was being driven by the 2nd and 3rd defendants' agent and was involved in a collision with another motor vehicle registration No. KCK 407C driven by the 1st defendant's agent.
 3. The plaintiff blamed both drivers of the vehicles for driving the same negligently thus causing the accident in which he was injured and suffered bodily harm. The particulars of negligence attributed to each driver are tabulated in the plaint. Similarly, the plaintiff has pleaded in the plaint the injuries he suffered.
 4. Upon service of the pleadings, the 1st defendant filed a statement of defence dated 1st February, 2019 and denied liability. However, 1st defendant on a without prejudice basis, pleaded that, if the accident occurred as alleged, then it was caused by the negligence of the 2nd and 3rd defendants and/or their agent. The particulars of negligence attributed to the 2nd and 3rd defendants are tabulated in the statement of defence.
 5. Notably, there is no evidence that the 2nd defendant entered appearance and/or filed a statement of defence. However, from paragraph 7 of the judgment, it is indicated that there is an interlocutory judgment against the 2nd defendant as he was served but did not enter appearance.
 6. The 3rd defendant is stated at paragraph 4 of the judgment that he entered appearance and filed a defence, denying the contents of the plaint seriatim serve for its admission of the descriptive parts and jurisdiction of the court. That the 3rd defendant blames the driver of the motor vehicle registration KCK 407G for the accident and attributes to that driver. The particulars of negligence attributed to that driver are tabulated in the defence. However, it is noteworthy that the 3rd defendant's statement of claim is not in the record of appeal filed.
 7. At the conclusion of the filing of pleadings, the matter proceeded to full hearing. The plaintiff testified in support of his claim reiterating averments in the plaint and called the evidence of PW 2 PC Letaya who produced an OB extract and police abstract (Pexhibit 1).
 8. Upon hearing the parties and considering the evidence adduced together with the submissions filed, the trial court delivered a judgment dated 29th August, 2024 in which the defendants were held 100% jointly liable and severally. The quantum was entered in favour of the plaintiff in the total sum of Ksh 129,320 with interest as indicated plus costs of the suit.
 9. However, the 1st defendant herein the appellant is aggrieved by the decision of the trial court on liability and appeals against it on the following grounds:
 - a. That the learned Magistrate erred in fact and in law in holding the Appellant jointly and severally liable for causing the accident, in total disregard of the evidence on record.
 - b. That the learned Magistrate erred in law and in fact by failing to appreciate the evidence on record, which blames the 2nd and 3rd Respondent's motor vehicle for causing the accident.



10. Be that as it were, the appeal was disposed of vide filing of submissions. The appellant in submissions dated 25th April 2025 argued that the trial Magistrate erred by holding that the appellant was jointly and severally liable for causing the accident which was contrary to the evidence on record.
11. That the 1st respondent led evidence through PW2 No. 91912 PC Letaya Sirere who testified that motor vehicle registration No. KAY 886T lost control, veered to the right-hand side of the road and collided head on with motor vehicle registration No. KCH 407 belonging to the appellant. PW2 produced the police abstract (P.exh 3) and in cross-examination stated that motor vehicle registration No. KAY 886T was to blame for causing the accident.
12. The appellant referred the court to the case of Ojiambo alias Stephene Sanya Odhaimbo alias Stephine Sanya Odhiambo vs Muchai [2024] KEHC 16975 (KLR) where the High Court relied on the case of, Khambi & Another vs. Mahithi and Another [1968] EA 70 of the Court of Appeal of East Africa (as it then was) where the principles an appellate court should consider before interfering with a trial court's determination on liability were stated to be where there is some error of principle or the apportionment is manifestly erroneous.
13. The appellant urged that the trial Magistrate's apportionment of liability was erroneous and should therefore be interfered with on appeal.
14. However, the 1st respondent in response submissions dated 14th May 2025 argued that, he had proved his case on a balance of probability and the trial court decision was based on merit.
15. That he gave his evidence on the occurrence of the accident and blamed drivers of both motor vehicles for causing the accident. That his evidence was corroborated by PW2 No. 91912 PC Letaya Sirere who confirmed the occurrence of the accident but stated that it was still pending under investigation, but does not indicate whether the driver of motor vehicle KCK 407G tried to avoid the accident.
16. The 1st respondent submitted that the appellant closed its case without calling any witnesses and therefore his evidence on occurrence of the accident was uncontroverted and unchallenged. Furthermore, the appellant's pleadings were not supported and/or substantiated by any evidence and therefore lacked any probative value and remained mere statements of fact.
17. In support of his contention the 1st respondent referred the court to the case(s) of; Trust Bank Limited vs Paramount Universal Bank Limited & 2 Others Nairobi Milimani HCCCS No. 1243 of 2001, Linus Nganga Kiongo & 3 others vs Town Council of Kikuyu (2012) eKLR, Embu Public Road Services limited vs Riimi (1968) EA 22, Interchemie EA Limited vs Nakuru Veterinary Centre Limited Nairobi (Milimani) HCCC No. 165B of 2000, and Edward Muriga through Stanely *Muriga vs Nathaniel D. Schulter Civil Appeal No. 23 of 1997.*
18. The 1st respondent faulted the appellant for relying on the extract of the Occurrence Book (OB) arguing that the investigating officer was not at the scene when the accident occurred. Further, the information recorded in the OB was given to the Investigating officer by the driver of motor vehicle KCK 407G in a bid to escape liability taking into account that the driver of motor vehicle KAY 886T succumbed to his injuries. That in the circumstances, the 1st respondent's evidence on the occurrence on the accident was more credible than that of the Investigating officer who was not at the scene at the time the accident occurred.
19. The 1st respondent relied on the case of, Pauline Kainyera Simion (Suing as a legal administrator of the Estate of Luka Mutwiri – deceased) vs Mary Namunya [2021] eKLR where the High Court weighing two sets of conflicting evidence disregarded the evidence of the police officer who produced the police abstract as he was not a witness to the accident and his evidence amounted to inadmissible hearsay.



20. Further, the 1st respondent argued that the High Court in the case of *Bwire vs Wayo & Sailoki* (2022) KEHC 7 KLR) stated that eye witness testimony is crucial in both criminal and civil cases and accorded a high status in court. That the High Court dismissed the evidence of respondent's witnesses stating that neither the police officer nor the respondent were eye witnesses to the accident which was secondary evidence.
21. Finally, the 1st respondent submitted that the trial court was correct in holding the appellant and the 2nd and 3rd respondents jointly and severally liable for causing the accident. That he was a passenger in motor vehicle KAY 886T and had no control of the motor vehicles involved in the accident. Furthermore, there was no evidence that motor vehicle registration number KCH 407G owned by the appellant tried to avoid the collusion. Additionally, the police abstract indicated that the accident was still pending under investigation.
22. At the conclusion of the arguments on appeal and in considering the submissions filed, I find that the appeal herein rests purely on the decision on liability wherein the appellant was held jointly and severally liable at 100% for the accident together with the 2nd and 3rd defendants/respondents.
23. In considering the same, I note first and foremost, the role of the role of first appellate court is to re-evaluate the evidence adduced in the trial court afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses as held by the Court of Appeal in the case of; *Selle & Another vs Associated Motor Boat Co. Ltd. & Others* (1968) EA 123.
24. The Court of Appeal thus observed: -

“I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. 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. 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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
25. Furthermore, the law is settled that the legal burden to prove any fact is borne by the person alleging it. In that regard, the provisions of Section 107 of the [Evidence Act](#) states as follows:

“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”.
26. To revert back to the matter herein, I note that in the plaintiff's pleadings he blamed both drivers for the accident. In his evidence in chief, he adopted the statement he recorded and filed with the plaint. I have taken note of the content thereof and I find that all that the plaintiff stated in a rather brief statement is that motor vehicle KAY 886T collided with a lorry registration number KCK 407G from opposite direction as a result of which he was injured. He went on to record that ‘I blame both drivers of the above stated motor vehicles for careless driving and over speeding’. It is clear from the said statement that the plaintiff did not indicate in that statement the particular acts of negligence.
27. In addition, the plaintiff in oral evidence in court did not allude or testify to any act of negligence on the part of either driver. All that he said is that ‘I have a police abstract marked as “MFI No. 3” and also



- produced search records of both vehicles (Pexhibit 5(a)(b)). The cross-examination did not even address the said issue. The question that arises is, whether based on the afore evidence, PW1 ever explained how the accident occurred.
28. Be that as it were, the plaintiff called PW2 (though indicated in the proceedings as PW1) No. 91912 PC Letaya Sirere who testified and produced a police abstract relating to the accident. He stated that the accident was reported vide OB No. 26/29/6/2019. That according to the content of the police abstract, the two vehicles herein were involved in the accident. That the driver of the motor vehicle KAY 886T which had 14 passengers veered off the road to the right hand side and collided head on with KCK 407G. He then went on to state that the matter is pending under investigations and that the abstract does not indicated what the driver of KCK 407G did to avoid the collision. In cross-examination, he confirmed that he was not the investigating officer and neither did he visit the scene. In re-examination, he confirmed that the matter is still under investigation.
 29. It is on the basis of this witness PW2 that the appellant relies to exonerate itself from blame. However, several issues arose from the evidence of this witness, first and foremost, this witness was not the investigating officer and neither did he attend to the scene.
 30. Secondly, whereas he testified that the vehicle KAY 886T was to blame, his evidence is not supported by the very police abstract he produced. The police abstract indicates that the matter was still under investigation which means to date the investigations are not complete to lay the blame squarely on the driver of the vehicle registration number KAY 886T. Thirdly, in view of the fact that the evidence of PW2 was contradictory, then it was least helpful to the court and carried little or no evidential value. Fourthly and more importantly, the 1st defendant filed a statement of defence and blamed the 2nd and 3rd defendants.
 31. The appellant did not adduce any evidence to substantiate his allegations in the statement of defence it filed. It was not for the plaintiff to exonerate him by adducing evidence in support of its defence. If the appellant had adduced evidence to support its allegation that the driver of the motor vehicle KAY 886T was to blame and there was no evidence to rebut the same, then the 1st defendant/appellant would have exonerated itself from blame as the same would have been supported by PW2 and/or supported its averments. The appellant cannot have kept quiet against the allegations levelled against it by the plaintiff and rely on PW2's evidence to exonerate it. It suffices to note that a police officer who produces a police abstract is deemed to be an independent and/or neutral witness. This is because what he tells the court is based on investigation of the cause of the accident and where the investigation are still pending, then his/her evidence cannot be conclusive and reliable. In fact, had the police abstract indicated the driver of motor vehicle KAY 886T was to blame, that would have aided the appellant's case. It does not say so.
 32. Pursuant to the aforesaid, I do not find merit in the arguments by the appellant that PW2 exonerated it from blame.
 33. Consequently, the trial court did not err in fact or law in holding all the defendants 100% jointly and severally liable for the accident. I decline to interfere with the findings of the trial court in liability. The appeal is therefore dismissed in its entirety with costs to the respondents.
 34. It is so ordered.

DATED, DELIVERED AND SIGNED ON THIS 24TH DAY OF JUNE, 2025

GRACE NZIOKA

JUDGE



In the presence of

Ms Maina Mary for the Appellant

Ms Kiberenge for the Respondent

Hannah court assistant

