



REPUBLIC OF KENYA



KENYA LAW
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**Maina v Njeri & another (Civil Appeal E086 of 2024)
[2025] KEHC 9422 (KLR) (24 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9422 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL E086 OF 2024
GL NZIOKA, J
JUNE 24, 2025**

BETWEEN

PAUL NJOROGE MAINA APPELLANT

AND

MARY NJERI 1ST RESPONDENT

HEMWIL INVESTMENTS LIMITED 2ND RESPONDENT

*(Being an appeal from the Judgment of Hon. Y. M. Barasa (PM) in
Naivasha CMCC No. E950 of 2022 delivered on 19th July, 2024)*

JUDGMENT

1. By a plaint dated 18th October, 2022, the plaintiff (herein ‘the appellant’) sued the defendants (herein ‘the respondents’) seeking for judgment against the respondents jointly and severally for;
 - a. General damages.
 - b. Special damages – Ksh 212,250 with interest from the date of filing this suit.
 - c. Costs of future medical expenses Ksh 200,000 for removal of Implant.
 - d. Cost of the suit and interest.
2. The appellant’s case is that on or about 14th day of April, 2022, he was a lawful pillion passenger on a motor cycle when the respondents’ authorized driver and/or agent so negligently and/or carelessly drove motor vehicle registration number KDD 220C causing it to lose control and hit the motor cycle from behind and thus causing the accident. That as a result, he suffered loss and damage.
3. The appellant blames the respondent’s driver or authorized driver for negligently causing the accident. The particulars of negligence tabulated to



4. to that driver are tabulated at paragraph 6 of the plaint. In a nutshell, it is averred that the respondent's driver or agent drove the subject motor at an excessive speed, failed to brake, swerve, stop or control the vehicle to avoid the accident and/or have a proper look out for other road users.
5. That as a result of the accident, he suffered the following bodily injuries:
 - a. Fracture right tibia and fibula
 - b. Fracture mid shaft right and femur.
 - c. Fracture left clavicle
 - d. Soft tissue injuries of the right leg.
 - e. Blunt injury to the head leading to mild head injury.
 - f. Soft tissue injuries chest
6. In addition, the appellant avers that he suffered special damages as tabulated at paragraph 9 of the plaint as follows;
 - a. Medical Report.....Ksh 8,000.00
 - b. P3 Form.....Ksh 1,100.00
 - c. Search.....Ksh 550.00
 - d. Medical expenses.....Ksh 2,600.00
 - e. Cost of future medical Expenses
for removal of implant.....Ksh 200,000.00Total.....Ksh 212,250.00
7. However, the 1st respondent filed a statement of defence dated 9th November, 2022 and denied each and every allegation in the plaint. The 1st respondent denied being the beneficial owner of the vehicle KDP 220C, that the accident occurred, that the respondent's authorized agent caused it out of negligence or that the appellant was involved in the accident and injured.
8. The 1st respondent pleaded in the alternative and without prejudice, that if the accident occurred then it was caused solely or substantially contributed to by the negligence of the appellant. The particulars of negligence attributed to the appellant are stated at paragraph 5 of the defence. It is alleged that he failed to wear a helmet and reflector jacket and to take precautions for his safety.
9. The 2nd respondent did not enter appearance nor filed a statement of defence. By a letter dated 13th January, 2024, the appellant sought for a judgment against the 2nd respondent in default of appearance and/or defence. The judgment was entered on 10th January, 2024.
10. The case proceeded to hearing with the appellant adducing evidence through (PW1) No. 96714 PC Josephat Makau to the effect that the subject accident occurred on 13th April, 2022 and involved motor vehicle registration KDD 220C Toyota Hiace matatu and motor cycle registration No. KMEF 362R. That the owner of the vehicle was the 1st respondent. He produced the police abstract and indicated that the matter was still under investigation. In cross-examination, he confirmed that he is not the investigating officer.



11. The appellant adopted his statement as evidence in chief in which he reiterates the averments in the plaint as to how the accident occurred. In cross-examination, he denied the allegation that the motor cycle was turning off the main road.
12. The appellant's case was also supported by the evidence of Dr. Obed Omuyoma who examined him, prepared and produced a medical report dated 27th August, 2022. He assessed the appellant's permanent disability at 40% and stated that he will require implant at a cost of Ksh 200,000.
13. The defence case was supported by the evidence of No. 84867 PC Rachael Lokiton who gave evidence similar to that of PW1 on occurrence of the accident and the vehicle and motor cycle involved. According to her and the police abstract she produced, the cyclist was to blame for the accident.
14. DW2 Alex Kagithi further testified on behalf of the 1st respondent to the effect that he is a matatu driver, that the motor cycle was on his lane and that he tried to avoid the accident but the cyclist could not as the cyclist suddenly branched at a junction. He blamed the cyclist for the accident.
15. The parties filed their respective submissions at the close of the case and by a judgment dated 19th July, 2024, the trial court entered judgment in favour of the Appellant as follows;
 - a. Liability is entered in the ration of 50:50.
 - b. The plaintiff is awarded general damages of Ksh 1,600,000
 - c. The plaintiff is awarded future medical expenses of Ksh 200,000.
 - d. The Plaintiff is awarded special damages of Ksh 13,150.
 Sub-Total.....Ksh 1,813,150
 Less 50%.....Ksh 906,575
 Total.....Ksh 906,575
 - e. The plaintiff is awarded half costs of the suit plus interest.
16. However, the appellant is aggrieved by the decision of the trial court on the following grounds;
 - a. That the learned trial magistrate erred in law and in fact in finding the plaintiff liable to the extent of 50% liability when there was no justification and/or evidence adduced by the defence to contradict the plaintiff's evidence.
 - b. That the learned trial magistrate erred in law and in fact in failing to consider the Plaintiff/Appellant's evidence.
17. The appeal was disposed of vide filing of submissions. The appellant submitted that the trial Magistrate erred in apportioning liability at the ratio of 50%:50% which was contrary to the evidence produced in the trial court. That, the evidence adduced at the trial was to the effect that the appellant was a pillion passenger who did not have control of the motor cycle and therefore there was no reason why he should bear 50% of the blame.
18. Further, the evidence by both the appellant and the 1st respondent's driver and witness DW2 Alex Kagithi was the subject vehicle was being driven behind the motor cycle heading in the same direction. That at a junction, the motor cyclist was joining a feeder road when the subject vehicle knocked it from behind with its left mirror. That, the evidence proved the particulars of negligence to the effect that the 1st respondent's driver failed to keep a safe distance, failed to keep a proper lookout, failed to avoid the accident.



19. The appellant faulted the 1st respondent for failing to enjoin the rider of the motor cycle as a third party despite the 1st respondent producing a police abstract blaming him for the accident.
20. That in his submissions in the trial court, the appellant addressed the issue of the third party and relied on Order 1 Rule 15 of the Civil Procedure Rules that provides for a notice to a third party. However, the trial court did not consider the same nor did it make a finding resulting in a miscarriage of justice.
21. The appellant cited the case of; Kubai Kithinji Kaiga (Suing as the Legal Representative of the estate of John Kaiga (deceased) vs Kenya Wildlife Service (2021) KEHC 7088 (KLR) where the High Court held that it was unfair to apportion liability on the appellant who was a pillion passenger for the mistake of the rider of a motor cycle.
22. That the High Court further held that the respondent, who raised the issue of the third party during the hearing, should shoulder 100% liability for the accident for failing to enjoin the third party pursuant to Order 1 Rule 15 of the Civil Procedure Rules.
23. The 1st respondent did not file any submissions as at the time of writing the judgment.
24. In considering the appeal, I note 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.
25. 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.”
26. Having considered the appeal in the light of the evidence herein, I find that the appellant sued the respondents and tabulated the negligence attributed to them. On the other part, the 1st respondent blamed the appellant for the accident and attributed particulars of negligence to him. Each party was thus bound to adduce evidence to support their respective averments.
27. The evidence of PW1 did not blame either the rider or the motorist. His evidence was that the matter was still under investigations. The evidence of DW1 was that, the rider was to blame. Notably, both of these officers were from the same police station where the accident was reported and yet produced two police abstracts bearing contradictory information. By the mere fact that the abstracts were contradictory in content, they could not be relied on.
28. But even if they were relied on, none of them laid blame on the appellant. The abstract produced by the 1st respondent blamed the rider of the motor cycle. The appellant was not that rider. He had no control of the motor cycle. He could not have caused the accident. Having found that, both the rider and motorist caused the accident, the trial court cannot have attributed any liability against the appellant. To that extent, the trial court erred in fact in apportioning liability at 50% against the appellant.



29. Furthermore, although the respondents pleaded that the appellant was negligent, they did not adduce any evidence to substantiate the allegations. Instead they blamed the rider who is not a party to this matter and to whom they did not plead any negligence.
30. The law is clear that he who alleges proves. It is the respondents who alleged that the rider was to blame, Consequently, it was the respondents who should have enjoined the rider through third party proceedings pursuant to the provisions of Order 1 Rule 15 of the Civil Procedure Rules. As the respondents failed to do so, they will have to bear 100% liability for the accident.
31. Consequently, I set aside the trial court's finding apportioning liability between the parties at 50% - 50% and substitute it with a finding on liability in favour of the appellant and against the respondents jointly and severally at 100%. The appeal succeeds to that extent. There was no appeal on quantum and no orders are made on the same. Each party to meet its costs. That is the judgment of the court.

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

GRACE NZIOKA

JUDGE

In the presence of:

Mr. Owour for the appellant

Mr. Mabonga for the respondents

Ms. Hannah: court assistant

