Orioki v Kevian Kenya Limited (Civil Appeal 341 of 2019) [2025] KECA 780 (KLR) (9 May 2025) (Judgment)

Neutral citation: [2025] KECA 780 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 341 OF 2019

DK MUSINGA, M NGUGI & FA OCHIENG, JJA

MAY 9, 2025

BETWEEN

JACOB MOMANYI ORIOKI .... APPELLANT

AND

KEVIAN KENYA LIMITED .... RESPONDENT

(Being an appeal against the judgment and decree of the High Court of Kenya at Nairobi (J. Kamau, J.) dated 6th December, 2018 in HCCC No. E290 of 2014)

JUDGMENT

1. This is a second appeal from the judgment of M. Chesang, Ag. SPM, in which the court found that the appellant was wholly to blame for an accident that occurred on 17th February 2009. The court then entered judgment in favour of the respondent, against the appellant for the sum of Kshs.435,761 together with costs and interest from the date of the judgment.

2. Being dissatisfied with the judgment, the appellant appealed to the High Court. His appeal was dismissed with costs, leading to the present appeal.

3. The appellant's case was that on 17th February 2009, along Thika Road, the respondent's motor vehicle registration No. KAW 519G rammed into a third-party TP motor vehicle registration No. 74 CD 2K. To avoid ramming into the respondent's vehicle, he applied emergency brakes to his motor vehicle registration No. KAT 086V. He stated that although he was not able to stop before his vehicle hit the respondent's vehicle, his vehicle was not damaged. He denied causing the accident but admitted to having hit the respondent's vehicle. He was of the view that the respondent sued him due to diplomatic immunity because the third-party motor vehicle was a diplomatic vehicle.

4. The appellant stated that he had no cause of action against the owner of the third-party motor vehicle, and there was no need to have enjoined him in the proceedings before the trial Court. He faulted the

trial Court for attributing negligence to him, given that the respondent's driver had an obligation to observe the Highway Code, by driving at a reasonable speed.

5. The appellant submitted that it was the respondent's motor vehicle that had obstructed him, and therefore, the party who had committed the offence. He faulted the trial Court for finding him wholly liable for the sum of Kshs.435,761.

6. The respondent's case was that the appellant ought to have kept a proper lookout, and should have had regard for other road users. It were of the view that the appellant had not taken any evasive action to avoid the collision, and was, therefore, wholly liable for the accident.

7. According to the respondent's driver at the time, who testified as PW1, the third-party motor vehicle stopped abruptly, and so he also stopped. While he was stationary, the appellant's motor vehicle hit his vehicle from the rear. Due to the impact, he rammed into the third-party motor vehicle. He pointed out that the police, in the police abstract, had blamed the appellant for causing a ripple effect. He conceded that had the driver of the third-party motor vehicle been joined in the suit, he could have assisted in apportioning the blame.

8. PW2 was a legal officer at ICEA Insurance Co. Ltd, which had insured the respondent's motor vehicle. He told the court that the insurance company had repaired the respondent's motor vehicle at a sum of Kshs.435,761.

9. According to the testimony of PW3, the assessor, the respondent's motor vehicle had no damage to its rear. It had only sustained damages at the front.

10. The police abstract showed that the appellant was blamed for having caused the accident. The trial court held that since the appellant had failed to demonstrate the evasive action he took to avoid the collision, he was held 100% liable for the accident.

11. In dismissing the appellant's appeal, the learned Judge held that the appellant had admitted that he had hit the respondent's motor vehicle, which was sufficient proof that he did not keep a safe distance. The learned Judge was of the view that if the appellant had kept a safe distance, he would have had enough space to take evasive action so as not to hit the respondent's motor vehicle.

12. The learned Judge further held that there being no other evidence to rebut the contents of the police abstract, coupled with the appellant's admission to have hit the respondent's motor vehicle in the rear, the appellant was wholly liable for the accident.

13. Consequently, the appellant's appeal was dismissed and the judgment by the trial Court was upheld.

14. Dissatisfied, the appellant lodged this appeal and raised the following grounds of appeal:

    a. The learned Judge erred in failing to re-evaluate the evidence on record, and misapprehending the said evidence.

    b. The learned Judge erred in upholding the trial Court's finding on liability.

    c. The learned Judge erred in dismissing material evidence of the motor vehicle assessor as incomprehensible.

    d. The learned judge made an error by not thoroughly examining the evidence related to causation.

    e. The learned Judge based the negligence finding on incorrect legal principles.

15. When the appeal came up for hearing on 9th December 2024, Miss Mwangi from the firm of Majanja Luseno Advocates represented the appellant, while the firm of Njeri Kariuki was on record for the respondent, although no representative was present at the hearing. The Court confirmed that the hearing notice was served upon the respondent, on 28th November 2024.

16. Highlighting the appellant's submissions, Miss Mwangi began by stating that while this Court ordinarily confines itself to matters of law in a second appeal, it can consider facts if it is demonstrated that the High Court did not consider matters it should have. Counsel submitted that the matter before the Court was based on a claim for the tort of negligence, which required establishing a duty of care, a breach of that duty, and a causal link between the breach and the injury or damage.

17. Counsel emphasized the damage to the respondent's vehicle, stating that there was no damage to the back of the respondent's vehicle, only to the front. She referred to the High Court's judgment, stating that the learned Judge indicated the appellant's vehicle hit the respondent's vehicle at the rear. Counsel was of the view that the High Court failed to consider the location of the damage on the respondent's vehicle. She pointed out that the respondent's vehicle, (an SUV), rammed into a third-party vehicle at the front, while the appellant's vehicle was a Nissan Sunny.

18. Counsel contended that the force required to push the respondent's SUV into the vehicle ahead would have caused damage to the rear of the SUV and the front of the appellant's smaller vehicle, neither of which was present. Based on this, counsel submitted that there was no causal connection between the alleged breach of duty of care (the appellant hitting the respondent from behind) and the damage to the respondent's vehicle (front damage).

19. Moving to the issue of breach of duty, counsel submitted that the respondent, driving on a highway, came to a sudden stop, which caused the accident. She further submitted that the High Court should not have relied solely on the police abstract to determine the appellant's liability, as it was not proof of liability. Counsel relied on the case of Francisca Njeri Mwangi & James K. Mwangi & Another, Civil Appeal No. 97 of 2009, in submitting that a police abstract was merely a record of the initial report and not conclusive evidence of the facts or fault.

20. Counsel reiterated the importance of considering the damage caused and the causal connection. She concluded by praying that the court set aside the decisions of the High Court and the trial court and allow the appeal with costs.

21. In his written submissions, the appellant cited the principles established in the case of Donoghue v Stevenson [1932] AC 562 and discussed in Charlesworth & Percy on Negligence, in emphasizing that liability arose only when the damage was the direct result of the carelessness. The appellant acknowledged that as a motorist, he owed a duty of care to other road users, including the respondent, to operate his vehicle with due care and skill. However, he also contended that the respondent similarly owed a duty of care to other road users, including a duty not to stop suddenly or without due cause on a highway.

22. The appellant relied on the case of Gussman v Gratton-Storey [1968] 112 Sol Jo 884, which discussed a scenario involving sudden braking and swerving; and Section 53 (1) of the *Traffic Act*, which prohibits vehicles from being left in a position that obstructs or endangers other traffic, except under specific circumstances.

23. The appellant emphasized that the burden of proof lay with the respondent to establish negligence and the causal link between that negligence and the damage suffered. He cited Jane Wangui Obwogi v Lawrence John Aburi, Civil Appeal No. 46 of 1997, in submitting that the negligence proven must be the proximate cause of the damage claimed.

24. Finally, the appellant referred to the principle stated in Kenya Ports Authority v East African Power & Lighting Company Ltd. [1982] KLR 445 and submitted that liability for a breach of duty does not automatically equate to responsibility for all subsequent damages if the causal link was not clearly established.

25. Opposing the appeal, the respondent submitted that the appeal had no merit and that the trial court correctly found that the appellant was negligent when he failed to keep a safe distance between his vehicle and the respondent's vehicle, and this negligence would have caused or would have contributed to the rear-end collision.

26. The respondent asserted that its driver exercised his duty of care by keeping a safe distance between his vehicle and the 3rd party motor vehicle ahead of him, while the appellant, on the other hand, failed to exercise his duty of care towards other road users, and in particular, the respondent, behind whose vehicle he was driving.

27. The respondent submitted that the trial Court was correct to direct its mind to the Court of Appeal decision in Multiple Hauliers (E.A.) Limited Vs. Justus Mutua Malundu & 2 Others, Civil Appeal 93 of 2015, which stated that:

> " Every driver on a public road is duty bound to be on the lookout at all times to avoid possible injury and loss to other road users. Where a collision occurs between two motor vehicles, it is in many a situation possible to establish, with evidence of eyewitnesses, who between the two contributed to what extent to the collision."

28. The respondent emphasized the equitable doctrine that the first in time is stronger in law and submitted that this was indeed applicable in the Highway Code and Traffic Regulations, which repeatedly inform driving lesson students to "move forward only when the road is clear". It pointed out the cautionary lesson that a driver was supposed to leave enough room in front of his car to stop when the car in front stops suddenly.

29. They also pointed out that the logic of this rudimentary yet very critical and cardinal traffic rule was not difficult to discern, as cars are driven towards the front and not backward on the highway, and drivers take the foremost front seat and have a wider front windshield compared to smaller rear windshields and rearview mirrors. They noted that visibility could be impaired by darkness or bad weather, and extra caution is always advised, leading to the presumption that he who hits another from behind is at fault. The respondent submitted that a higher duty of care was, indeed, owed by the appellant to the respondent.

30. The respondent submitted that the appellant breached this duty of care by failing to anticipate injury to other road users. It referred to Section 53 of the *Traffic Act*, which provides that:

> " No vehicle shall be allowed to remain in any position on any road so as to be likely to obstruct or cause inconvenience or danger to other road traffic unless the stopping of the vehicle was unavoidable owing to mechanical breakdown or other sufficient cause or unless such stopping is allowed by law, and, save where the contrary is expressly provided in this Act, every vehicle on a road, when not in motion, shall be drawn up as close to the side of the road as possible."

31. The respondent was of the view that the purpose of this section appeared to have been misunderstood by the appellant, and therefore, wrongly applied. In the instant case, the respondent's vehicle was neither parked on the road nor had it stopped to pick up passengers on the road as the particulars in

respect of charges for obstruction would usually indicate, but rather that the driver was forced to apply emergency brakes which, as the phrase denotes, involved an emergency which the appellant ought to have anticipated by keeping a safe distance between himself and the vehicle ahead of him.

32. The respondent contended that its driver was neither charged nor convicted on his own plea of guilty or otherwise for a traffic offense of causing obstruction contrary to Section 53(1) as read with Section 53(2)(b) of the *Traffic Act*, which would bring Section 47(a) of the *Evidence Act* into play to the effect that the final judgment of a competent court in any criminal matter was proof of guilt, and thus stand as a substantiation of the appellant's submissions on obstruction.

33. The respondent submitted that both the lower court and the High Court required the respondent to demonstrate that the appellant breached this duty of care by failing to keep a safe distance when driving, which is in tandem with section 107 of the *Evidence Act*, which provides that:

> "(1) 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.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

34. The respondent submitted that both the trial Court and the High Court indeed, found that the appellant had failed to keep a safe distance from the respondent's vehicle while driving, and this was the direct and proximate cause of the accident.

35. The respondent submitted that the law of physics did not support the appellant's assertion in paragraph 32 of his submissions. He quoted Lord Reid in Stapley v Gypsum Mines Limited [1953] AC 663 at pg 68, where he stated that:

> "To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation, it is quite irrelevant in this connection in a court of law as this question must be decided as a properly instructed and reasonable jury would decide it …" and "…The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history, several people have been at fault but that if one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the fault of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases, it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally."

36. The respondent asserted that the trial court and the High Court agreed with the respondent that a case had been established on a balance of probabilities that the subject motor vehicle had, indeed, been damaged as a consequence of the appellant's negligent acts.

37. The respondent submitted that they proved in the trial Court that the joining of the 3rd party vehicle should have been met with the same vigour and determination that the appellant called upon the court to consider the pertinence of the 3rd party to this case, and the High Court rightly observed that it was the duty of the appellant to join the owner of the 3rd party vehicle as the basic premise of his argument was that the accident was occasioned by the said 3rd party Vehicle.

38. The respondent submitted that the damage suffered by the respondent's vehicle happened as a result of the accident caused by the appellant and the subject vehicle had indeed been damaged as a consequence of the appellant's negligent acts. The respondent relied on the case of Cotecna Inspection S.A. v Hems Group Trading - Company Limited, where this Court held that:

> " The mere fact that a party is found liable for breach of duty to another party does not of necessity mean that the party in breach must meet all the damages that the offended party suffers. The offended party still has the duty to show that the breach of duty caused the damages he suffered".

39. The respondent submitted that it was imperative to note that the trial court did not haphazardly come to the conclusion that the appellant should bear the brunt of the damages for the accident. The appellant was not only found to be in breach of the duty of care owed but also that this breach was the proximate cause of the loss suffered by the respondent in the circumstances.

40. We have carefully considered the record of appeal, the submissions by the parties, the authorities cited, and the law. The issues for determination are:

    a. Whether the High Court erred in its evaluation of the evidence on record, particularly with regard to causation and liability.

    b. Whether the trial court's finding that the appellant was wholly liable for the accident was supported by the evidence.

    c. Whether the High Court misapplied legal principles in its judgment.

    d. Whether the failure to join the owner of the third-party vehicle to the proceedings affected the outcome of the case.

41. This being a second appeal, our jurisdiction is generally limited to considering matters of law, unless it is demonstrated that the appellate court failed to consider matters it should have considered or reached conclusions that were not supported by the evidence. In the case of Charles Kipkoech Leting v Express (K) Limited & Another [2018] eKLR, this Court held that:

> "Our mandate..., on a second appeal, the court confines itself to matters of law only, unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered..."

42. The appellant argued that the High Court did not adequately reassess the evidence regarding the location of the damage to the respondent's vehicle. The appellant claimed that a rear-end collision should have affected the rear, and not caused the damage at the front. The appellant was of the view that this inconsistency raised doubts about the connection between the appellant's actions and the damage. He claimed this discrepancy undermined the causation element in the tort of negligence.

43. The trial court found that the appellant was liable for the rear- end collision, as the appellant admitted to hitting the respondent's vehicle. Under common law, a driver who hits another vehicle from behind is generally presumed to be at fault, unless there is sufficient evidence to rebut this presumption. (See: Njuguna v Chogo [1985] KLR 452). In this case, the appellant admitted that he collided with the respondent's vehicle from behind. This fact alone placed the burden on the appellant to prove that the collision was not due to his negligence.

44. The appellant argued that the High Court's finding was unsupported by evidence. If a factual finding was contrary to the record, this Court could intervene. However, it was the duty of the appellant to

demonstrate a clear error of law or misapprehension by the lower courts to overturn their concurrent findings of liability.

45. Although the appellant challenged the factual findings about vehicle damage and causation, he failed to place any evidence before this Court, from which the Court could make reference to verify the accuracy of his assertions in that respect. Given that there was no clear evidence contradicting the High Court's findings and the concurrent findings of the lower court, we are not convinced there is a valid basis to interfere with the High Court's decision. Maintaining a safe distance to prevent collisions is an essential duty of care for drivers.

46. The appellant contended that the respondent's vehicle was at fault for stopping abruptly. However, the evidence showed that the respondent's vehicle had stopped as a result of an emergency, (a third-party vehicle stopped abruptly in front of it). Under Section 49 of the *Traffic Act*, a driver is required to maintain a safe distance to prevent accidents, especially in emergencies. The appellant failed to maintain such a distance, thereby hitting the respondent's vehicle from the rear.

47. The appellant failed to provide convincing evidence that the third-party vehicle or any other factor was the primary cause of the accident. The police abstract, though not conclusive, supported the finding that the appellant's actions caused the accident. Furthermore, the evidence showed that the appellant did not maintain a safe distance, which contributed to the collision. In Kenya Ports Authority v East African Power & Lighting Co. Ltd, (supra), it was held that a police abstract is prima facie evidence of facts reported to the police, and in the absence of contrary evidence, it can be relied upon.

48. In this case, the appellant failed to adduce any compelling evidence to counter the police abstract or to disprove the causal link between his actions and the damage. The police abstract, while not conclusive, indicated that the appellant was at fault for the rear-end collision.

49. Upon reviewing the evidence, we find that the front damage to the respondent's vehicle can still be linked to the appellant's vehicle, considering the nature of the collision. The evidence clearly showed that the appellant's vehicle struck the respondent's vehicle from behind, causing it to hit the third-party vehicle ahead.

50. The appellant relied on the Donoghue case to argue that negligence must be the proximate cause of the damage. However, the principle established in the Donoghue case is generally applied in product liability cases and does not directly affect the issue of negligence in road traffic accidents. In road traffic cases, the duty of care requires that drivers maintain a safe distance, and the failure to do so can lead to a finding of negligence if it results in a collision.

51. The appellant, as a driver, owed a duty of care to the respondent and all other road users. His failure to maintain a safe distance from the respondent's vehicle was a breach of this duty. The case of Stapley v Gypsum Mines Limited, (supra), as cited by the respondent, emphasized that legal causation must be determined by common sense and an analysis of the facts at hand. In the circumstances, we find that the breach of duty by the appellant directly resulted in the accident.

52. The appellant argued that the owner of the third-party vehicle should have been joined in the proceedings. However, the failure to do so did not affect the appellant's liability. The appellant admitted to hitting the respondent's vehicle from behind, and there was no compelling evidence that the third- party vehicle's actions were the primary cause of the accident. Therefore, the trial court's decision to hold the appellant solely liable was justified.

53. In light of the above analysis, we find that the appellant has not demonstrated that the two courts below considered matters they should not have considered, or failed to consider matters they should have considered. The High Court correctly upheld the trial court's decision that the appellant was wholly

liable for the accident. The appellant failed to maintain a safe distance from the respondent's vehicle, and this negligence was the proximate cause of the accident.

54. The appeal is therefore dismissed with costs to the respondent.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY, 2025.

D. K. MUSINGA, (PRESIDENT.)

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JUDGE OF APPEAL MUMBI NGUGI

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR