



Muchira & another (Suing as the legal representatives of the Estate of James Mburu Ngugi - Deceased) v Ufanisi Freighters Kenya Limited (Civil Appeal E003 of 2022) [2024] KEHC 9940 (KLR) (30 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9940 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CIVIL APPEAL E003 OF 2022
F GIKONYO, J
JULY 30, 2024**

BETWEEN

**CHARITY WAWIRA MUCHIRA 1ST APPELLANT
JOHN NGUGI MICHUKI 2ND APPELLANT
SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF JAMES
MBURU NGUGI - DECEASED**

AND

UFANISI FREIGHTERS KENYA LIMITED RESPONDENT

(Being an appeal from the judgment and decree of Hon. S. Mungai (CM) delivered on 28.02.2022 in Narok CMCC Suit No. 3 of 2020)

JUDGMENT

Impugned judgment

1. This appeal challenges the judgment of the Chief Magistrate's Court at Narok in Civil Suit No. 3 of 2020 delivered on 28.02.2022 in which the trial court dismissed the appellants' case with costs on account that, the appellant did not discharge the burden of proof on the balance of probabilities that the respondent is liable to compensate them.
2. The memorandum of appeal dated 23.03.2022 cited nine (9) grounds of appeal which relate to;
 - i) liability.



Background

3. The suit arose from a traffic accident along Narok-Bomet road in the Tengero area on 27.06.2019 involving a motor vehicle registration Nos. KBL 350K and KCM 179S. The deceased was driving a motor vehicle registration No. KBL 350K. As a result of a head-on collision, the deceased lost his life.
4. During the trial, the appellants called two witnesses- Charity Wawira Muchira And Peter Muriithi Mwaniki.
5. The Respondent called one witness Nicodemus Ndogo.

Directions of the court

6. The appeal was canvassed by way of written submission.

The Appellants' Submissions

7. The appellants submitted that from the evidence tendered before the trial court, the respondent was to blame for the accident that occurred on 27.06.2019 as the respondent's driver was issued with a notice of intended prosecution citing causing the accident by dangerous driving and the point of impact was on the lawful lane of KBL 350K.
8. The appellants urged this court to allow the appeal and enter liability of 100% against the respondent and judgment on quantum as granted by the trial court. The appellants relied on the case of [Mercy Ben & Another V Mt Kenya Distributors & Another](#) [2022] eKLR.

The Respondent's Submissions

9. The respondent submitted that the trial court properly analyzed the evidence on record before reaching the finding it did. The respondent contends that the eye witness (PW2) testified that the accident occurred at night and hence could not tell which vehicle the deceased was driving. The trial court found PW2 not to be credible and that he contradicted himself.
10. Furthermore, the appellants did not call the police despite listing as a witness. Therefore, there is no reason for this court to interfere with the said findings. The respondent relied on the cases of Court of Appeal for East Africa In *Peters V Sunday Post Ltd*, Embu HCCA No. 53 Of 2010, [Robert Muriithi Njeru V Diocese of Embu Salesians Od Don Bosco](#), Bungoma High Court Election Appeal No. 56 Of 2013, [Millah Nanyonga Masungu Vs Robert Mwembe & 2 Others](#), and Nakuru HCCA No. 148 Of 2019, [Benter Atieno Obonyo Vs Anne Ng'ang'a & Anor](#).

Analysis And Determination

Duty of court

11. The appellate court exercises the same powers and performs nearly the same duties as are conferred and imposed by the [Civil Procedure Act](#) on courts of original jurisdiction in respect of suits instituted thereto (Section 78(2) of the [Civil Procedure Act](#)).
12. The first Appellate Court, therefore, evaluates the evidence afresh and makes its conclusions albeit it must bear in mind that it did not have the opportunity of seeing or hearing the witnesses firsthand. See the case of *Selle & Anor –Vs- Associate Motor Boat Co. Ltd* 1968 EA 123.



Issues

13. This court has been called upon to determine liability.

Liability

14. Who is to blame for the accident, and by what proportion if at all? Where does the evidence lead the court?
15. It was not disputed that the accident occurred on 27.06.2019. The vehicles involved were also not disputed. PW1- did not witness the accident.
16. PW2- Peter Muriithi Mwaniki testified that he witnessed the occurrence of the accident which occurred around 9:30 p.m. He stated that he was ferrying a customer on his boda-boda to Tengero area and was following motor vehicle KBL 350K heading towards Bomet direction. There was an oncoming trailer from Bomet's direction while ahead of it was a combined harvester. According to PW2, the accident occurred when the trailer was trying to overtake the Mitsubishi and veered off its lane.
17. On cross-examination he stated that he was behind the Mitsubishi when he witnessed the accident. His lights were on although he could not see the approaching vehicles. He stated that the trailer veered to the opposite lane of the Mitsubishi while overtaking the harvester but did not have any contact with the harvester.
18. The respondent's witness DW1- Nicodemus Olole Ndogo testified that he was driving trailer KCM 179S. According to him, he was heading towards Narok from Kisii direction when he met the harvester coming from Narok. Before he could pass it, the Mitsubishi which was behind the harvester suddenly started overtaking the harvester and since there were guard rails on the side of the road he could not swerve off the road to avoid colliding with the Mitsubishi. The two vehicles collided head-on smashing the guard rail.
19. The eye witnesses gave quite disparate evidence on how the accident occurred. The appellant's eye witness claimed that the trailer was overtaking a combined harvester. DW1 who was an eye witness claimed that motor vehicle registration KBL 350K was overtaking the combined harvester. It is not clear the direction the combined harvester was travelling and who was overtaking the combined harvester. Making it most obscure who caused the accident. Which made it absolutely necessary to have called the investigating officer as a witness or produce the investigation file.
20. Road traffic accident investigations are based on the findings made of the scene of the accident and are supported by the sketch plan and witness statements, among other things, and depict the manner the accident happened through simple graphic impressions and expressions of how the accident occurred, the point of impact, the position of the vehicles involved, the general layout of the scene, any relevant marks, and the person the investigation blames for the accident. The court did not have the benefit of these pieces of evidence. The only evidence available is that of PW2 against that of DW1.
21. As long as there is no proper anchoring of one of the two accounts of evidence as most reliable account, the obscurity cannot permit a finding as to who was to blame for the accident. Hence, the conclusion that, the appellants did not prove that the respondent's driver was responsible for the accident.
22. Accordingly, this court finds that the trial court did not err in finding that the appellants did not prove their case on liability on a balance of probability.
23. In the upshot, the appeal is dismissed with costs to the respondent.



24. Orders accordingly

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH THE TEAMS APPLICATION,
THIS 30TH DAY OF JULY, 2024.**

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HON. F. GIKONYO M

JUDGE

In The Presence Of

C/A: Mr. Otolo

Kagura for Appellant – Present

Mugambi for Respondent – Present

