



Rayori (Suing as the Legal Representative of the Estate of Martin Ochieng Bayori) v Channan Agricultural Contractors Kenya Limited & 2 others (Civil Appeal E143 of 2023) [2024] KEHC 10168 (KLR) (15 August 2024) (Judgment)

Neutral citation: [2024] KEHC 10168 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E143 OF 2023
RE ABURILI, J
AUGUST 15, 2024**

BETWEEN

**ERICK ODHIAMBO RAYORI APPELLANT
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MARTIN
OCHIENG BAYORI**

AND

**CHANNAN AGRICULTURAL CONTRACTORS KENYA LIMITED 1ST
RESPONDENT
IMPERIAL BANK LIMITED 2ND RESPONDENT
ABDALLAH SAID MBARAK 3RD RESPONDENT**

*(An appeal arising out of the Judgement & Decree of the Honourable
J.M. Wekesa in the Senior Principal Magistrate's Court at Nyando
delivered on the 18th August 2023 in Nyando PMCC No. E092 of 2021)*

JUDGMENT

Introduction

1. The appellant instituted suit vide a plaint dated 7th June 2021 in which he sought general damages under the [Law Reform Act](#) and Fatal Accident Act as well as interest on the same and costs of the suit.
2. The plaintiff's case was that on or about the 19.11.2020 at around 8pm, the deceased whilst driving home from work aboard motor vehicle registration number KBV 926M along Awasi – Kericho road when the 1st respondent, its driver, servant or agent who was in charge of motor vehicle registration number KTCA 523D negligently and illegally caused an obstruction by parking in the middle of the road without any warning signs while the 2nd and 3rd respondent's driver, servant or agent while



driving motor vehicle registration number KBM 421B so negligently drove, managed and or controlled the said vehicle so as to cause it to collide with the deceased's motor vehicle resulting in the deceased's fatal injuries.

3. The 1st respondent entered appearance and filed his defence dated 8.1.2021 whereby he denied the appellant's claims and instead blamed the deceased for negligence on his part that caused the alleged accident. The 2nd and 3rd respondents never entered appearance.
4. In her judgement, the trial magistrate found that based on the evidence on record, the deceased was 100% liable for the accident for failure to exercise due care on his part while seeking to overtake another vehicle. The trial magistrate went on to dismiss the appellant's suit with costs to the respondents.
5. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 23rd August 2023 raising the following grounds of appeal;
 - a. The learned magistrate erred in law and fact by dismissing the plaintiff's suit with costs to the defendant.
 - b. The learned magistrate erred and acted on the wrong principles and misdirected herself in considering irrelevant issues while arriving at her finding.
 - c. The learned magistrate erred in failing to evaluate the entire evidence on record thereby arriving at wrong findings.
 - d. The learned magistrate erred in law and fact by failing to take into consideration the appellant's case.
 - e. The learned magistrate erred in law and fact by failing to consider the appellant's submissions and authorities thus leading to resultant miscarriage of justice to the appellant.
 - f. The learned magistrate erred in not sufficiently taking into account evidence presented to him in totality and in particular the evidence presented on behalf of the appellant.
 - g. Judgement was against the weight of the evidence.
6. The parties filed written submissions to canvass the appeal.

The Appellant's Submissions

7. The appellant submitted that in view of the evidence rendered before the trial court and submissions filed, the trial magistrate misdirected herself and went against the weight of evidence produced by the appellant in proving its case on a balance of probabilities.
8. The appellant submitted that had it not been for the reckless acts of the 1st respondent's actions then the accident would have not happened and as the trial magistrate held that the tractor and the trailer were on their rightful lane, then the impact by the deceased's motor vehicle on the side of the trailer as was the evidence of DW1, it would have caused it to veer off the road to the left however it maintained its lane and almost maintained the same position it was.
9. It was submitted that the 1st respondent owed the deceased a duty of care to mind to have indicators and/or signs on its trailer for visibility while on the road with the other road users and thus the trial magistrate erred in dismissing the appellant's case by failing to consider that the appellant suffered loss and pain resultant from the accident and that this court should allow the instant appeal by awarding liability at 100% against the 1st respondent.



10. The appellant submitted that for damages under the *Law Reform Act*, on pain and suffering an award of Kshs. 20,000 would suffice relying on the case of *Mercy Muriuki & Another v Samuel Mwangi Nduati & Another* (suing as the legal administrator of the estate of the LATE ROBERT MWANGI) [2019] eKLR.
11. On loss of expectation of life, the appellant submitted that an amount of Kshs. 100,000 and he relied on the case of *Omar Sharif & 2 Others v Edwin Matias Nyonga & Maxwell Musungu* (Suing as legal representative and administrators of the state of Emos Nyonga Deceased) [2020] eKLR.
12. As regards damages under the *Fatal Accidents Act*, the appellant submitted that on loss of dependency a multiplier of 29 years would be apt as the deceased was 31 years and further a dependency ration of 2/3 would similarly apply as the deceased was married for over 10 years and had 7 children. The appellant further submitted that the court ought to adopt a multiplicand of Kshs. 70,000 as the deceased was a businessman engaged as a sole proprietor in transport business of logistics and supplies earning roughly Kshs. 200,000 – 300,000 per month. Reliance was placed on the case of *JWN v Kassam Hauliers Limited* [2020] eKLR.
13. The appellant submitted that court ought to adopt the computation as follows; $70,000 \times 25 \times \frac{2}{3} \times 12 =$ Kshs. 14,000,000 and when all is totaled the award to the appellant ought to be Kshs. Kshs. 14,110,000.

The Respondent's Submissions.

14. It was submitted that the trial magistrate was right in dismissing the appellant suit after having listened to all the witnesses and evaluating the documents filed before her by both parties. It was submitted that the 1st respondent's motor vehicle was not liable for causing the accident at all and the trial magistrate was right in holding so.
15. It was submitted that the evidence adduced at the trial court clearly demonstrated that the deceased's motor vehicle collided with the 3rd respondent's motor vehicle as it tried to overtake the 1st respondent's tractor which from the photographs adduced as part of the investigation, could not have done anything to prevent the collision. It was further submitted that the police abstract forming part of the appellant's documents also indicated that charges were to be brought against the vehicle driven by the deceased who was to blame for causing the accident.
16. The 1st respondent further submitted that this appeal ought to be dismissed for lack of merits as the learned magistrate exercised her discretion properly and carefully analyzed the evidence placed before her as well as deducing the witnesses demeanour before arriving at her decision to dismiss the appellant's suit with costs. Reliance was placed in the case of *Michael Busakhala Luta v West Kenya Sugar Co. Ltd* [2017] eKLR.
17. It was submitted that the appellant failed to discharge their burden of proving their case on a balance of probabilities as stipulated in law to warrant judgement entered in their favour and as held in the case of *Jennifer Nyambura Kamau v Humphrey Mbaka Nandi NYR CA Civil Appeal No. 342 of 2010* [2013] eKLR.
18. It was submitted that the deceased was the author of his own misfortune and should therefore be found 100% liable and further that any contribution that the appellant may have proved was upon the 3rd respondent and the deceased.



Analysis and Determination

19. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court stated as follows-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”
20. In that regard, an appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in *Mkube v Nyamuro* [1983] LLR at 403, where *Kneller JA & Hancox Ag JJA* held that-

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”
21. Having considered the Appellant’s Grounds of Appeal and the parties’ Written Submissions, it appears to this court that the issues that had been placed before it for its determination: -

Whether the trial court erred in dismissing the appellant’s suit?
22. At the heart of the question for determination before this court is the issue of liability. The trial court found that the appellant had failed to prove his case and that on the contrary it was the deceased who was 100% liable for the accident for failure to exercise due care on his part while seeking to overtake another vehicle.
23. In *Khambi and Another v Mahithi and Another* [1968] EA 70, it was held that:

“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, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.”
24. That was the position in *Isabella Wanjiru Karangu v Washington Malele Civil Appeal No. 50 of 1981* [1983] KLR 142 and *Mahendra M Malde v George M Angira Civil Appeal No. 12 of 1981*, where it was held that apportionment of blame represents an exercise of a discretion with which the appellate court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle.
25. The law is clear that he who alleges must prove. The term burden of proof draws from the Latin Phrase *Onus Probandi* and when we talk of burden we sometimes talk of onus.
26. Burden of Proof is used to mean an obligation to adduce evidence of a fact. According to Phipson on the Law of Evidence, the term ‘burden of proof’ has two distinct meanings:



1. Obligation on a party to convince the tribunal on a fact; here we are talking of the obligation of a party to persuade a tribunal to come into one's way of thinking. The persuasion would be to get the tribunal to believe whatever proposition the party is making. That proposition of fact has to be a fact in issue. One that will be critical to the party with the obligation. The penalty that one suffers if they fail to prove their burden of proof is that they will fail, they will not get whatever judgment they require and if the plaintiff they will not sustain a conviction or claim and if defendant no relief. There will be a burden to persuade on each fact and maybe the matter that you failed to persuade on is not critical to the whole matter so you can still win.
 2. The obligation to adduce sufficient evidence of a particular fact. The reason that one seeks to adduce sufficient evidence of a fact is to justify a finding of a particular matter. This is the evidential burden of proof. The person that will have the legal burden of proof will almost always have the burden of adducing evidence.
27. Section 107 of *Evidence Act* defines Burden of Proof as– of essence the burden of proof is proving the matter in court. subsection (2) Refers to the legal burden of proof.
28. Section 109 of the *Evidence Act* exemplifies the Rule in Section 107 on proof of a particular fact. It is to the effect that the burden of proof as to any particular fact lies on the person who wishes to rely on its existence. Whoever has the obligation to convince the court is the person said to bear the burden of proof. Thus, if one does not discharge the burden of proof then one will not succeed in as far as that fact is concerned.
29. In *Kiema Mutuku v Kenya Cargo Hauling Services Ltd* [1991] 2KAR 258 the Court of Appeal stated that:
- “There is as yet no liability without fault in the legal system in Kenya and a plaintiff must prove some negligence against the defendant where the claim is based on negligence.”
30. In *Gideon Ndungu Nguribu & another v Michael Njagi Karimi* [2017] eKLR the Court of Appeal stated that “determination of liability in a road traffic case is not a scientific affair” and proceeded to quote Lord Reid in *Stapley vs Gypsum Mines Ltd* (2) [1953] A.C. 663 at p. 681 as follows:
- “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 this question must be decided as a properly instructed and reasonable jury would decide it ...
- 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 and that if any 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 faults 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.”
31. The question therefore is whether the appellant herein discharged the burden of proof that the respondent was liable in negligence for the occurrence of the accident leading to the deceased's demise.



32. As to whether the appellant proved liability on the part of the 1st respondent, neither the appellant nor the deceased's wife who testified as PW1 and PW3 witnessed the accident. The only witness brought forth by the appellant who testified as to how the accident occurred was PW2.
33. PW2 testified that he saw a trailer parked on the Awasi – Kisumu road and that as the deceased's vehicle approached it, the deceased dimmed his lights in an indication to overtake but the trailer did not respond and as the deceased was overtaking the trailer, he collided with a lorry that was coming from the Kisumu direction which he stated was being driven at a very high speed. PW2 further testified that the trailer had not placed any reflective triangles or any other signs or warnings other road users.
34. In cross-examination, PW2 testified that the tractor had blocked the road and the deceased had to go around it when he got involved in the accident. He testified that had the tractor been on the side of the road, the accident would not have happened.
35. Juxtaposed against this testimony was that by the 1st respondent who called DW1, the 1st respondent's supervisor. He testified that their vehicle, the tractor was going uphill when the accident occurred, that their vehicle did not have any wrong as it was on the rightful lane on the road. In cross-examination it was his testimony that he did not witness the accident and that his driver was not charged in court.
36. DW2, an investigator with Prudent Investigators produced an assessment report dated 16.8.2021 as DEX1. It was his testimony that the 1st respondent's tractor was on its rightful lane while the deceased's vehicle tried to overtake it and had a collision with an oncoming vehicle. He testified that the impact was on the right side of the trailer. DW2 reiterated that the deceased was trying to overtake carelessly without observing the other oncoming vehicle causing a collision with it. He testified that the oncoming lorry was not in any way to be blamed for the accident.
37. In cross-examination DW2 stated that the tractor was in good condition but that its trailer lacked tail lights and chevrons. In re-examination DW2 that the deceased was the one to be blamed for the accident as he was trying to overtake the trailer without due care.
38. I have considered the testimony before the trial court. It is not clear from the evidence adduced whether the 1st respondent's tractor was stationary or on the move. The evidence adduced by the appellant pointed to a stationary tractor whereas that adduced by the 1st respondent's witnesses pointed to a tractor that was moving albeit slowly as it was going uphill. Further going by the sketch map produced as part of DEX1, which was not contested, it clearly showed that that the accident occurred on a bend.
39. All that notwithstanding, it is my view that when driving around a bend, it is paramount for one to be vigilant and in most cases at bends, there is a continuous yellow line which according to the Traffic laws, indicates one is not supposed to overtake. DW1 testified that when he visited the scene, the deceased's vehicle was on the yellow line. There is no evidence that the oncoming vehicle was on the wrong side of the road or that the tractor obstructed the deceased. The deceased driver was expected to drive cautiously and only overtake when it was safe for him to do so and on a clear road with no oncoming traffic.
40. In this case, the deceased seemed not to have clearly observed whether there was an oncoming vehicle prior to overtaking the 1st respondent's tractor thus resulting in the accident. Conversely, it could be argued that the deceased could not see the oncoming vehicle since there was a bend where he was overtaking the 1st respondent's trailer and therefore in both instances, it clearly shows that the deceased failed to take due care and attention whilst overtaking the trailer.
41. Taking all the aforementioned into consideration, I am inclined to agree with the trial magistrate that the appellant failed to prove his case against the respondents on a balance of probabilities. The evidence



placed on record points at the deceased as the one who wholly caused the accident and the fact that there were other motor vehicles on the road at that time in itself does not mean that they contributed to the accident, in the absence of evidence of such contribution. The continuous yellow line on a road is usually placed and presumed to exist at corners or bends and is a sign barring any motor vehicle from any direction to overtake at that particular corner or bend.

42. I thus dismiss this appeal against liability and uphold the trial court's finding on liability at 100% against the deceased.
43. Regarding the quantum the trial court would have awarded had the appellant succeeded in proving liability against the respondent, I note that the same was not among the issues pleaded by the appellant in his memorandum of appeal.
44. In any case, an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate or it is shown that the judge proceeded wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low. See the cases of *Butt v Khan* 1982 -1988 1 KAR, *Kemfro Africa Ltd T/A Meru Express Services, Gathogo Kanini v A M Lubia & Olive Lubia* and *P. J. Dave Flowers Ltd v David Simiyu Wamalwa Civil Appeal No. 6 of 2017 [2018] eKLR*.
45. In the instant case the appellant has not shown that the trial magistrate proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was inordinately low.
46. I thus find no reason to interfere with the quantum that the trial magistrate arrived at had she found the respondents to blame for the accident.
47. The upshot of the above is that I find that the instant appeal lacks merit and I proceed to dismiss it. I however order that each party bear their own costs of the appeal, noting that the victim of the accident is dead and his kin have to bear the heavy loss.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 15TH DAY OF AUGUST, 2024

R.E. ABURILI

JUDGE

