



**Musau (Suing as the Administrator of the Estate of Benard Mutua Maundu (Deceased)) v Njuguna
(Civil Appeal E018 of 2021) [2024] KEHC 13933 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 13933 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E018 OF 2021
BK NJOROGE, J
SEPTEMBER 26, 2024**

BETWEEN

**DAMARIS NZILANI MUSAU APPELLANT
SUING AS THE ADMINISTRATOR OF THE ESTATE OF BENARD MUTUA
MAUNDU (DECEASED)**

AND

ANDREW MUTHANWA NJUGUNA RESPONDENT

JUDGMENT

1. This Appeal arises from the decision of Hon. Oscar Wanyaga (DR) who on 9th February, 2021 dismissed the Appellant's case with costs.
2. The Appellant unsuccessfully sued the Respondent seeking damages arising out of road traffic accident on 10th April, 2018. The damages were sought under the Fatal Accident Act and the [Law Reform Act](#).
3. The dismissal of the entire claim by the Trial Court is what has triggered this Appeal.

Background facts

4. The Appellant as the Original Plaintiff filed this claim as the Administratrix of the Estate of her deceased husband. She sued the Respondent who was the original Defendant. She maintained that her husband had been driving a motor cycle registration Number KMDP 595B along the Thika-Matuu Road when it was involved in a Collision with a Motor Vehicle KBY 494B.
5. The Appellant's husband sustained fatal injuries and succumbed on the same day on 10th April, 2018.
6. The Appellant held the Respondent liable in negligence and claimed general and special damages.
7. The Respondent on the other hand denied that the accident was attributed to the negligence of the Respondent's driver.



8. Whereas the accident and the fatal injuries to the deceased were not denied, liability was contested.
9. The Respondent maintained that the accident was caused by the negligence on the part of the deceased who rode the motor cycle KMDP 595B recklessly and negligence.
10. In the circumstances, the Respondent maintained that it was not liable for any damages and losses that arose from the deceased's death.
11. In the decision of the Trial Court, it found that the Appellant had not proved any negligence against the Respondent. In any event the Respondent's witness had in his testimony demonstrated that it was the deceased who was to blame for the accident.
12. The Trial Court found that the Appellant having failed to prove negligence was not entitled to claim any damages. It therefore proceeded to dismiss the Appellant's claim with costs.
13. Upon the filing of the Appeal, parties agreed to dispose of the same by way of written submissions. The Appellant filed her written submissions dated 30th November 2020 with several authorities in support of her Appeal.
14. The Respondent also filed their written submissions dated 19th September, 2022 with several authorities attached in response to the Appeal.
15. Thereafter, the matter was flagged down for the Rapid Results Initiative (RRI) and directions for this Judgment given on 3rd June, 2024. Due to other work engagements, the decision was not ready on 3rd June, 2024. The Court apologises for the delay in delivery of this Judgement.
16. This Court has gone through the submissions well prepared by Counsels on record as well as the authorities cited, which the Court has fully considered.
17. This is a first Appeal from the decision of the Trial Court. It therefore falls upon this Court to review the evidence adduced before the Trial Court and arrive at its own independent and fair decision.
18. The guiding principles on the first Appeals were enunciated in the case of *Selle & another -vs- Associated Motor Boat Co. Ltd & others* [1968] E/A 123 as follows;

“...this Court is not bound necessary to accept the findings of fact by the Court below. An appeal to this Court... is by way of retrial and the principles upon which this Court acts in such an aspect are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”

Analysis

19. This Court proceeds to frame two issue for determination in this Appeal as follows;
 - a. Whether the Appellant proved her case to the required standard?
 - b. Who should bear the costs of this Appeal?
20. The Court proceeds to analyse the two issues in seriatim as follows;
 - a. Whether the Appellant proved her case to the required standard?



21. The starting point is that he or she who alleges must prove. That is borne out by Section 107 of the Evidence Act which states as follows;
 - “(1) Whoever desires any Court to give Judgment as to any legal right dependent on the existence 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.”
22. The Courts have further breathed life to these statutory requirements in the case of *Mary Wambui Kabugu -vs-kenya Bus Services Limited* [1997] eKLR where the Court of Appeal was emphatic as follows:

“The age Long Principle of Law is that he who alleges must prove. The Appellant’s case in the Court below was that her husband was seriously injured in a road traffic accident due to negligence on the part of the Respondent’s driver. She did not however, adduce evidence to establish that fact or any blame on the Respondent. Her evidence on the accident was that she simply looked for the husband who had not been seen for three days and found him admitted at Kenyatta National Hospital with multiple influences and in critical condition..... The nurses who told her about the accident were not called to testify. Nor did the Appellant call any eye witness or witnesses to the accident to testify on it. She did not call any other evidence from which some interference could be drawn as to the cause of the accident. In these circumstances the learned Trial Judge was bound to come to the conclusion he did that the Appellant did not on a balance of probabilities prove her case.”
23. This Court is also alive to the principle of law that there can be no fault without any liability.
24. The standard of proof expected in Civil Cases is on a balance of probabilities.
25. Therefore, the Court proceeds on the premises that the duty to prove her case lay with the Appellant.
26. That she had to prove a fault or negligence against the Respondent so as to succeed.
27. That all this had to be done on a standard test of on a balance of probabilities.
28. The Appellant was not an eye witness to the accident so her testimony in Court would not aid her in proving negligence.
29. PW1 was the Police Officer summoned to produce the Police Abstract. He simply was not an eye witness. The Police file was produced to show the results of the Police Investigation into the accident.
30. The Police Abstract produced in Court indicates that the police blamed the motor cyclist (the Appellant’s deceased husband) for the accident.
31. That is the evidence that the Trial Court had to contend with on the Appellant’s side; as relates to how the accident happened.
32. The Respondent presented an eye witness to the accident, the driver of the subject motor vehicle.
33. His version of how the accident happened was that the motor cyclist was overtaking and left his lane on the left lane occupied by the Defendant’s motor Vehicle.
34. The scenario presented is of a Defendant’s motor vehicle being driven at night, then it comes across an oncoming motor cycle which is overtaking another vehicle. The motor cycle encroaches on to the



lane occupied by the Respondent's motor vehicle which despite the driver's evasive action, ends up colliding with the motor cycle.

35. The Trial Court was faced with two versions of how the incident occurred, with one thin on the details and the other deep on the surrounding circumstances.
36. When a road traffic accident occurs, such as in this case, the human facts can lie with either the driver the motor cycle or the driver of the motor vehicle or both of them. It depends on the circumstances presented before the trial Court.
37. Having reviewed the evidence presented before the Trial Court, there is no evidence to link the Respondent with any wrong doing that led to the accident. There was no eye witness testimony, save for the Respondent's driver. The police did not hold the Respondent liable.
38. If this Court was to disregard the evidence of the Police Officer, (as is argued by the Appellant in this appeal), the Appellant's case would even be watered down further.
39. The Respondent on the other hand went at lengths to exonerate himself from the circumstances that led to the accident. He produced the driver of the subject motor vehicle as an eye witness. The Respondent was not charged by the police.
40. Just like the Trial Court, this Court finds no evidence produced by the Appellant, sufficient to hold the Respondent liable in negligence.
41. On the basis of the evidence on record it is safe to state that the Appellant did not prove the issue of negligence to the required standard, being on a balance of probabilities.
42. Without proof of blameworthiness, there can be no negligence.

Is Res-Ipsa- Loquitur applicable?

43. The Appellant relies this doctrine, but the same is unfortunately inapplicable to this case.

The issue of the Police abstract.

44. This evidence was presented by the Appellant. The Police officer was her witness. That the Abstract had an adverse report cannot be taken against the Respondent.
45. The Court finds rhyme and reason in the findings of the Trial Court on the issue of negligence to wit that the same was not proved.
46. The Court answers this issue in the negative.

Failure by the Trial Court to assess quantum

47. The Court's view is that the Trial Court ought to have assessed the quantum, even if its final decision was to dismiss the suit.
48. Since this Court has not overturned the Trial Court's decision on liability, nothing turns on this issue for purposes of this Appeal.

b. Who should bear the costs of this Appeal?

49. The costs of a suit follows the event and are awarded at the discretion of the Honourable Court. Ordinarily the successful party is awarded the costs, unless for other sufficient reasons, the Court rules otherwise.



50. The Court sees no reasons to deny the costs of the Appeal to the Respondent.

Determination

51. The Court has not been persuaded that it ought to interfere or overturn the decision of the Trial Court.

52. The final orders that commend this Appeal is that the same is dismissed with costs to the Respondent.

53. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF SEPTEMBER, 2024.

NJOROGE BENJAMIN. K

JUDGE

In the presence of: -

..... for the Appellant

..... for the Respondent

Court Assistant:

