



Nthiga (Suing as legal representative of Rosethios Mutethia Nthiga - Deceased) v Metro Trans Sacco & another (Civil Appeal E 631 of 2023) [2024] KEHC 15880 (KLR) (Civ) (18 December 2024) (Judgment)

Neutral citation: [2024] KEHC 15880 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E 631 OF 2023

H NAMISI, J

DECEMBER 18, 2024

BETWEEN

LUCY KARIUNGI NTHIGA (SUING AS LEGAL REPRESENTATIVE OF ROSETHIOS MUTETHIA NTHIGA - DECEASED) APPELLANT

AND

METRO TRANS SACCO 1ST RESPONDENT

OSIKUKU JACKSON OUNA 2ND RESPONDENT

(Being an Appeal against the Judgment of Hon. S. K. Onjoro (Mr.) delivered on 15 June 2023 in Milimani Civil Case No. E4706 of 2022)

JUDGMENT

1. The appeal arises out of a suit filed by the Appellant against the Respondents seeking the following reliefs:
 - i. Special damages amounting to Kshs 221,810/=;
 - ii. General Damages
 - iii. Costs
 - iv. Interest on (i), (ii) and (iii) above at court rates.
2. The Appellant's claim was that on 1 August 2021, the Deceased was a lawful pedestrian crossing the road along Mwiki-Kasarani Road, Nairobi County, when the 2nd Respondent so negligently, carelessly and/or recklessly drove, managed or controlled motor vehicle registration number KDA



044D causing it to lose control and hit the Deceased. The Deceased sustained severe injuries and succumbed to the said injuries.

3. The Appellant averred that at the time of his death, the Deceased was aged 27 years and employed as a Butcher. He was the sole breadwinner for his young family, earning approximately Kshs 700/- per day.
4. The Respondents entered appearance and filed Statement of Defence denying all liability.
5. At the hearing, only one witness testified. The Appellant adopted her witness statement which stated that on the material day, the Appellant was informed that her son, the Deceased, had been involved in a road traffic accident and that he had succumbed to his injuries. The Appellant proceeded to the City Mortuary, where she found the Deceased and positively identified him. The post mortem confirmed that the Deceased had died as a result of injuries sustained from the said accident. The Appellant testified that she was aware that the 2nd Respondent had been charged with the offence of causing death by dangerous driving. On 28 June 2022, the 2nd Respondent was found guilty and convicted for the said offence.
6. The Respondents did not call any witnesses.
7. In its judgement, the trial court identified two issues for determination, that is, liability and quantum of damages to be awarded. In determining liability, the trial court noted that the Appellant was the one person to testify, though she did not witness the accident and could not explain how it occurred. The Appellant merely relied on the Police Abstract, which blamed the Respondents for causing the accident. The trial court opined that in the circumstances, with no clear evidence as to how the accident occurred, liability would be apportioned in the ratio 50:50.
8. Judgement was entered in favour of the Appellant against the Respondents, jointly and severally, as follows:

Pain and suffering - Kshs 50,000/=

Loss of Expectation of Life - Kshs 150,000/=

Loss of Dependency - Kshs 1,000,000/=

Special Damages - Kshs 161,710/=

- Kshs 1,361,710/=

Less 50% liability - Kshs 680,855

Kshs 680,855/= Plus costs and interest

9. Aggrieved by the judgement, the Appellant lodged an appeal on the following grounds:
 - i. That the Learned Magistrate erred in law and in fact for apportioning liability at 50:50 whereas the Deceased did not contribute at all to the accident;
 - ii. That the Learned Magistrate erred both in law and in fact by disregarding the Appellant's evidence on record;
 - iii. That the learned Magistrate erred in law and in fact in failing to consider the Appellant's submissions and thereby ignoring relevant guiding facts to reach a fair and reasoned determination and thereby proceeding to apportion liability without putting into consideration the evidence on record.



- Parties were directed to canvass the appeal by way of submissions. The Appellant filed submissions dated 13 June 2024. The Respondents did not file any submissions despite being accorded ample opportunity to do so.

Analysis & Determination

- The Court of Appeal for East Africa set out the duty of the first appellate court in the case of *Selle – Vs- Associated Motor Boat Co.* [1968] EA 123 as follows -

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.”

- An appeal to the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. 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. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did.

- I have keenly read the Record of Appeal and submissions by the Appellant. The Appellant takes issue with the impugned judgement on the issue of liability.

- It was the Appellant’s submission that since the 2nd Respondent was found culpable for causing the accident in the Traffic Case No. E5679 of 2021, then there was evidence beyond reasonable doubt that the 2nd Respondent was liable for the accident. The Appellant contended that the 2nd Respondent was negligent while driving and thus occasioning the accident resultantly causing death. Liability depends on where negligence lies and therefore, the Respondent was therefore 100% liable for the accident.

- The Appellant relied on the case of *Joshua Muriungi Ng’anathav Benson Kataka Lemureiyani* [2016] eKLR in which the Court said:

“While this court was not persuaded by the Appellant’s arguments that the Learned Trial Magistrate should not have found that he was to blame for the accident herein, the said Learned Trial Magistrate was not expected to ignore the findings of the said Inquest as the same could give direction on how to apportion liability between the Appellant and the deceased herein.”

- In Traffic Case No. E5679 of 2021; *Republic -vs- Osikuku Jackson Ouna*, the court held thus:

“I find that the accused person drove the said vehicle in a manner that was dangerous to the public and in particular the deceased who was crossing the road from right to left occasioning him fatal injuries. Had the accused been a careful driver he would have manage to stop immediately.”

- Section 47A of the [Evidence Act](#) provides as follows:

A final judgement of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for



an appeal against such judgement or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.

18. In *Kenyatta Obegi & Another Vs. Sebastiano Oino Mogusu* (2021) eKLR, the court held as follows:-

“24. The appellants’ did not prefer an appeal against their conviction in Criminal Case No. 947 of 2016 and cannot purport to challenge that decision in the present appeal. It cannot also be said that the trial magistrate erred for relying on the conviction of the appellants in the criminal case as he was empowered to do so based on section 47A of the *Evidence Act*.”

19. Similarly, in the case *Virginia Wangechi Wachira Vs. Wanjohi* (1988) eKLR the Court stated thus:-

“Accordingly, in my view, when the provisions of section 47A of the *Evidence Act* are applied to the facts of the case, the result should surely be that the defendant having been found guilty of unlawfully killing the deceased, he cannot in this suit be allowed to go behind the conviction and by explaining what the circumstances of the killing were, attempt to show that he was after all, not guilty. If such a defence were permissible, it would involve, in a subsequent civil suit, a retrial of the criminal case, with the awkward and obviously undesirable possibility of conflicting results on the same facts. In principle and in the law I find that the defendant cannot sustain a defence involving a denial of the unlawfulness of his acts after having been convicted of manslaughter.”

20. In the instant case, there was no evidence adduced that the 2nd Respondent appealed the decision of the Traffic Court. In the absence of any appeal against the conviction, the issue of whether he was negligent or not was not subject to any further debate, more so when the standard of proof required in a criminal case is higher than that warranted in civil proceedings. The conviction of the 2nd Respondent of the offence of causing death by dangerous driving entitled the trial court to find the Respondents liable since the civil case arose out of the same facts.

21. Having come to the foregoing conclusion, it is this court’s judgement that the trial magistrate erred in apportioning liability in the ratio 50:50. I, therefore, set aside that decision of the trial court on liability and in its place, do substitute and enter judgement finding the Respondents 100% liable for the accident.

22. As regards quantum, I find no basis for interfering with the same since this was not an issue for determination in this appeal.

23. The upshot is that the appeal succeeds. There shall be no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 18 DAY OF DECEMBER 2024.

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

..... for the Appellant

..... for the Respondents

