



**Simiyu & another v Okuta (Suing as the legal representative of
the Estate of Grace Achieng Okuta (Dcd) & another (Civil Appeal
E030 of 2023) [2023] KEHC 27128 (KLR) (21 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 27128 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E030 OF 2023
MS SHARIFF, J
DECEMBER 21, 2023**

BETWEEN

JAMES SIMIYU 1ST APPELLANT

ISAAC KIPKEMOI 2ND APPELLANT

AND

**JACOB ODHIAMBO OKUTA (SUING AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF GRACE ACHIENG OKUTA (DCD) 1ST RESPONDENT**

WILSON OKOTH NGETHE 2ND RESPONDENT

*(Being an appeal from the judgment and decree of Samson Temu
delivered on 7/2/2023 in Nyando PMCC NO 101 Of 2019 between Jacob
Odhiambo Okuta OKUTA (Suing as the legal representative of the estate
of GRACE ACHIENG OKUTA (DCD) & anor vs James Simiyu & Anor)*

JUDGMENT

Background and Facts

1. The Appellants herein were sued by the 1st Respondent at the lower court for jointly and severally causing an accident which resulted in the death of the deceased. The 2nd Respondent was enjoined in the suit as a third party but did not enter appearance. The circumstances surrounding the case were that on or about the 26/10/2018 while the deceased was riding as a pillion passenger along the Kendu Bay Katito road at Sangoro, the Appellants acting in concert as either the owners or controllers of a motor vehicle registration no KBM 073N knocked the deceased then a pillion passenger thus occasioning her fatal injuries. The 1st Respondent attributed the accident to careless and reckless driving on the Appellant’s part.



2. Via a defence dated 25/6/2020 the Appellants denied causing the accident and averred without prejudice that the deceased was negligent for among other things failing to take adequate precaution for her own safety and agreeing to board a motorcycle ridden by an unqualified rider. They equally blamed the rider for reckless riding and failing to heed to traffic rules and regulations.
3. In support of his case at the lower court the 1st Respondent called three witnesses. PW1 the 1st Respondent the deceased's brother testified that he was informed of the accident and found the deceased at the mortuary after which the family started making funeral arrangements. PW2 a police officer from Pap Onditi police station produced a police abstract regarding the accident and stated that the deceased died as a result of the accident. PW3 on his part just reiterated what PW2 stated.
4. The Appellants on their part called one witness, the driver of the vehicle, who stated that the rider of the motorbike encroached on his lane thereby occasioning the accident. He averred that he could not swerve to avoid the accident because there was a ditch on the side of the road.
5. After due consideration of the pleadings, evidence and submissions the Learned Magistrate rendered his judgment on the 7/2/2023 finding the Appellants and the 2nd Respondent liable on a 50:50 basis. He equally awarded damages of Kshs 998,036/= plus costs and interest.

The Appeal

6. Aggrieved by this judgment the Appellants have now proffered this Appeal on the following grounds; -
 - i. That the learned magistrate erred in law and fact in holding the Appellants 50% liable.
 - ii. That the magistrate erred in law by failing to dismiss the Respondent's suit against the Appellants in view of the evidence adduced.
 - iii. That the Magistrate erred in law and in fact in failing to appreciate and to take into account that there was no eye witness who testified in support of the Respondent's case against the Appellants.
 - iv. That the Magistrate erred in law and in fact in failing to appreciate that the driver of the vehicle was the sole eyewitness of the accident and his evidence was unshaken.
 - v. That the magistrate erred in law and fact in failing to consider the submissions by the appellants on liability.
7. On the 14/6/2023 the directions were taken that the appeal be canvassed by way of written submissions.

Appellant's Submissions

8. In their submissions dated 21st August 2023 the appellants urged this court to allow the appeal and reiterated the duty of a first appeal court as stipulated in *Selle & Anorther vs Associated Motor Boat Co. Ltd & Others* [1968] EA.
9. They outlined the following issues for determination; -
 1. Whether the trial magistrate erred in law and in fact in holding that the Respondent had discharged his burden of proof and found the Appellants 50% liable for the accident.
 2. Whether the trial magistrate erred by failing to consider the defendants (appellants) submissions and the evidence tendered during trial on the issue of liability.



10. On the first issue the Appellants' urged this court to regard PW1's evidence as hearsay given that he did not witness the accident. They also urged this court to disregard the evidence of PW2 given that she wasn't the investigating officer and did not produce sketch maps and photos showing the point of impact.
11. On the flipside they urged that the evidence of DW1 who was the only one at the scene of the accident should be given more weight. They specifically urged this court to consider the fact DW1 had to swerve to the extreme left to avoid the collision, and the rider who was racing with another motorcyclist veered into his lane and collided with him.
12. Moreover, they urged that default judgment on liability having been entered at 100% against the third party, meant that they were the ones solely responsible for the accident.
13. In a nutshell they submitted that in the absence of an eyewitness and on the totality of the evidence the 1st Respondent had not discharged his burden of proof as stipulated by section 107 and 108 of the Evidence Act.
14. In respect of the second issue the appellants submitted that the mere fact that the accident occurred and the deceased died does not prove negligence on their part. Furthermore, they contended that the 50% liability attributed to them was arrived at on the basis of non-existent evidence and speculation.
15. They called this court's attention to the fact that the trial magistrate did not make reference to their submissions in coming up with his judgment. This they said was the reason he arrived at a judgment that was speculative at best.
16. In conclusion they urged this court to award them costs of both the appeal and of the lower court.

1st Respondent's Submissions

17. In the submissions dated 28/7/2023 the 1st Respondent submitted on both liability and quantum. On liability he urged this court to uphold the lower court's finding of 50:50 based on the uncontroverted facts that;
 1. The deceased was a lawful pillion passenger.
 2. The motor vehicle was at the material time being driven by the Appellants' driver, agent, servant and/or employee.
 3. The deceased died as a result of the accident.
 4. The driver pleaded guilty to causing death by dangerous driving as evidenced by the police abstract produced.
18. On quantum the 1st Respondent urged this court to uphold the damages awarded by the trial magistrate. It was their contention that the Appellants had not sufficiently demonstrated that the trial magistrate had acted on the wrong principles, awarded an excessive amount or had considered matters he shouldn't have thereby arriving at a wrong decision. To buttress this, he relied on the case of Butler vs Butler in which it was stated that assessment of damages is an exercise of discretion and an appellate court should be slow to reverse the same, unless it is shown that the trial judge acted on the wrong principles or awarded excessive or very little damages.



Analysis and Determination

19. After careful analysis of the record of appeal and the submissions the only issue that arises for determination is whether the learned magistrate erred in apportioning 50% liability to the appellants.
20. Before delving into the merits of the appeal, it is important to reiterate this court's duty being the first appellate court, which is to re-evaluate, re-analyse and re-consider the evidence and draw its own conclusions, giving due allowance to the fact that that it did not see the witnesses testifying. (see the case of *Selle & Another v Associated Motor Boat Co. Ltd. & Others* (1968) EA 123).
21. It is not in dispute that both PW1 and PW2 did not witness the accident. In his submissions the 1st Respondent alluded to the conviction of the 1st Appellant of the charge of causing death by dangerous as per the produced police abstract. However, a cursory look at the police abstract shows that the case was pending under investigation wherefore that assertion by the 1st Respondent is unsubstantiated and is made without any basis. Even if it was true, this evidence was not produced at the magistrate's court. The abstract as produced did not apportion any blame on the 1st appellant.
22. Since DW1 was the only eyewitness, copies of the sketch maps of the scene would have provided additional information on the point of collision. It is also quite unfortunate that the other eye witnesses; the pillion passenger and the rider are both dead. The inability to procure an eyewitness on the 1st Respondent's side is therefore understandable. Be that as it may, in finding the appellants' 50% liable the magistrate stated as follows:

“The defendant's witness stated in his own words that he could do nothing to avoid the accident. That meant that he did not make any effort to save the deceased and the motor cycle rider.”
23. The standard of proof in civil cases is one on a balance of probability. The onus is on the Plaintiff to prove their case. See *Kiema Mutuku Vs. Kenya Cargo Handling Services Ltd.* [1991] KAR 464. Further, the onus can shift to the person who would lose if no evidence was presented by either side. Where the court is faced with two equal probabilities the court must go with what is more probable than not. In *Palace Investments Ltd. Vs Geoffrey Kariuki Mwenda & Anor.* [2007] eKLR, the Court of appeal cited *Miller V Minister of Pension* [1947] 2 ALL ER 372 and stated in respect to the burden of proof in civil cases thus: -

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘we think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not.”
24. In reaching his judgment it is evident that the magistrate considered evidence from the defence witness wherefore the appellant's assertion that their witness's testimony was disregarded was untrue. In fact from the judgment it is decipherable that the magistrate considered the contribution of the third party in coming up with his judgment.
25. The appellants urge this court to find the 3rd party 100% liable however on the totality of the evidence I am of the opinion taking into consideration the evidence of DW1 and the fact that the third party didn't enter appearance, I would attribute 40% negligence to the appellants.
26. The upshot of the foregoing is that the appeal partially succeeds to the extent that the appellants shall bear 40% liability while the 3rd party shall bear 60% liability.



DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF DECEMBER 2023

MWANAISHA. S. SHARIFF

JUDGE

