



Mburu (Suing on her own behalf and on behalf of the estate of David Muchiri Wambui-Deceased) v Kinyua (Civil Appeal 432 of 2018) [2022] KEHC 11191 (KLR) (Civ) (31 May 2022) (Judgment)

Neutral citation: [2022] KEHC 11191 (KLR)

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

CIVIL

CIVIL APPEAL 432 OF 2018

JK SERGON, J

MAY 31, 2022

BETWEEN

TERESIAH WAMBUI MBURU APPELLANT

**SUING ON HER OWN BEHALF AND ON BEHALF OF THE ESTATE OF DAVID
MUCHIRI WAMBUI-DECEASED**

AND

GERALD THUMBI KINYUA RESPONDENT

(Being an appeal from the judgment and decree of Honourable D.A. Ocharo (Mr.) (Senior Resident Magistrate) delivered on 22nd August, 2018 in CMCC no. 8716 of 2016)

JUDGMENT

1. The appellant instituted the suit vide against the respondent in her capacity as the legal representative at litem of the estate of David Muchiri Wambui (“the deceased”) through the plaint dated September 26, 2016 seeking both general and special damages as well as costs of the suit and interest.
2. The respondent was sued in his capacity as the registered owner of the motor vehicle registration number KAY 200A (“the subject motor vehicle”).
3. The appellant pleaded in the plaint that sometime on or about June 10, 2014 while the deceased was riding the motorcycle registration number KMCU 002D (“the motorcycle”) along the Northern Bypass at Kamuthi area, the respondent negligently drove the subject motor vehicle, causing the same to lose control and collide with the motorcycle being ridden by the deceased, causing his death. The particulars of negligence were laid out under paragraph 4 of the plaint.
4. The respondent entered appearance and put in his statement of defence dated June 30, 2017 to deny the averments made in the plaint.



5. At the trial, the appellant testified and called two (2) additional witnesses whereas the respondent testified for the defence case.
6. Upon close of submissions, the trial court by way of the judgment delivered on August 22, 2018 dismissed the suit with costs.
7. Being aggrieved by the abovementioned judgment, the appellant has now approached this court by way of an appeal. Her memorandum of appeal dated September 15, 2018 features six (6) grounds of appeal challenging the finding on liability as follows:
 - i. That the learned trial magistrate erred in law and in fact by dismissing the appellant's suit against the respondent.
 - ii. That the learned trial magistrate misdirected himself in law and in fact by finding that the appellant had not proved her case against the respondent despite the overwhelming evidence led by the appellant.
 - iii. That the learned trial magistrate erred in law and in fact by failing to address his mind on the evidence adduced and hence made an erroneous finding.
 - iv. That the learned trial magistrate misdirected himself in law and in fact by placing too much reliance on the respondent's evidence and failed to consider evidence by the appellant.
 - v. That the learned trial magistrate erred in law and in fact by failing to consider the totality of the evidence adduced at the trial.
 - vi. That the learned trial magistrate erred in law and in fact by failing to consider the parties' written submissions.
8. The appeal was canvassed through written submissions.
9. The appellant on the one part urges this court to find that not only did an accident occur on the material date pleaded in the plaint, but that the accident involved the deceased and the respondent, the latter being the registered owner of the subject motor vehicle.
10. The appellant further urges this court to disturb the finding by the trial court and to hold the respondent liable for the accident and consequent death of the deceased, since the evidence tendered shows that it is the subject motor vehicle that rammed into the motorcycle.
11. The appellant is of the view that the respondent did nothing to avoid the accident and hence he ought to be held fully liable. Reliance has been placed on the case of *Agnes Akinyi Okeyo v Marie Stopes – Kenya* [2004] eKLR in which the court determined that a driver who had done little to nothing to prevent the occurrence of the accident in question was found 100% liable.
12. The appellant is therefore of the view that the learned trial magistrate ought to have taken the above factors into account and found the respondent 100% liable.
13. It is also the appellant's submission that upon this court setting aside the finding on liability, it upholds the assessment made by the trial court on quantum.
14. In retort, the respondent by way of his submissions argues that the trial court arrived at a proper finding since the evidence tendered points to negligence on the part of the deceased and not the respondent.
15. The respondent further argues that in any event, he has never been charged, prosecuted and/or convicted in relation to the accident and hence there would have been no basis for finding him liable.



16. Consequently, the respondent urges this court to uphold the decision entered by the trial court and further urges that should this court be inclined to interfere with the finding on liability, then it would only be fair for the deceased to bear the larger portion on liability and quantum.
17. I have considered the rival submissions and various authorities cited on appeal. As is required of an appellate court, I have re-evaluated the evidence which the trial court had the opportunity to consider, as well as the trial court's findings on the same.
18. As earlier mentioned, the appeal touches purely on the finding on liability since the assessment of damages which would have been awarded by the trial court remain unchallenged on appeal.
19. PC John Ouko who was PW1 produced the police abstract and set out its contents regarding the occurrence of the material accident involving the subject motor vehicle and the motorcycle.
20. The police officer stated that the matter was still pending under investigations as at the time of giving his evidence and that he was not the investigating officer.
21. In cross-examination, the police officer testified that he was not present at the scene of the accident and could not tell who was to blame for the same.
22. James Wangai Nganga who was PW2 testified that he had witnessed the accident since he was at the flyover on Kamiti Road.
23. According to the witness, the deceased had indicated on the motorcycle that he intended to take a turn and that the witness soon thereafter heard a loud bang and saw the deceased being thrown into the air.
24. In cross-examination, the witness stated that the motorcycle was behind the subject motor vehicle prior to the accident and that the deceased was in the process of turning onto a footpath.
25. In re-examination, the witness gave evidence that it is the subject motor vehicle that hit the motorcycle from behind.
26. The appellant who was PW3 mainly produced her signed witness statement and documents as evidence and exhibits respectively and stated that she did not witness the accident.
27. On the part of the respondent who was DW1, the testimony given is that he was driving along the Northern By-pass on the material date at a speed of 40-50kmph when he suddenly saw the motorcycle approaching from the left side of the road and that he tried to swerve but the deceased knocked the subject motor vehicle.
28. In cross-examination, it is the evidence of the respondent that he applied emergency brakes as he swerved and that he did not see any indicator signal to alert him that the deceased intended to take a turn.
29. Upon hearing the parties, the learned trial magistrate found that there was no sufficient evidence to indicate the manner in which the accident occurred and that going by the testimony of the respondent, the deceased rammed into the subject motor vehicle, which is an indicator that the deceased had not exercised caution on the road.
30. Resultantly, the learned trial magistrate arrived at the conclusion that the deceased was solely to blame for the accident.
31. Upon my re-examination of the evidence, it is not in dispute that the accident took place on the material date and involving the respondent herein and the deceased. It is also not in dispute that the deceased died as a result of injuries sustained in the accident.



32. Upon my re-examination of the evidence, it is apparent; as the learned trial magistrate correctly pointed out; that the evidence tendered did not shed clear light on who was to blame for the accident, not even the police abstract which only stated that the matter was pending under investigations, the status and/or outcome of which were never disclosed either to the trial court or to this court.
33. In the circumstances, I am of the view that the learned trial magistrate could only consider the material placed before him, including the oral evidence of the parties.
34. Going by the evidence, it is apparent that the appellant and the respondent each provided varying accounts of the events leading up to the accident, none of which could be verified for the reasons I have set out hereinabove.
35. Furthermore, I did not find the testimony by PW2; who stated that he was in the vicinity of the accident; to offer much help since he was at a flyover above the By-pass and stated that he only heard a bang and then realized that the accident had occurred. It is apparent that he did not witness the events leading up to the accident.
36. Consequently, I agree with the reasoning by the learned trial magistrate that it was difficult to accurately determine who caused the accident in question between the deceased and the respondent.
37. In view of the foregoing circumstances, I am of the view that the learned trial magistrate ought to have apportioned blame equally between the deceased and the respondent.
38. In so finding, I am supported by the recent case of *Calistus Juma Makhanu v Mumias Sugar Co. Ltd & another* [2021] eKLR where the court reasoned that:

“In the case of *Lakhamshi v Attorney General*, [1971] EA 118, 120 Spry VP observed as follows;-

“It is now settled law in East Africa that where the evidence relating to a traffic accident is insufficient to establish the negligence of any party, the court must find the parties equally to blame. A judge is under a duty when confronted by conflicting evidence to reach a decision on it. In the case of most traffic accidents, it is possible on a balance of probabilities to conclude that one other party was guilty or both parties were guilty of negligence. In many cases as for example where vehicles collide near the middle of a wide straight road in conditions of good visibility with no courses, there is in the absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the center of the road, the other must have been negligent in failing to take evasive action. Although it is usually possible, but nevertheless often extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence, yet where it is not possible it is proper to divide the blame equally between them. Where, however, there is a lack of evidence, the position is different. It is difficult to see how a party can be found guilty of negligence if there is no evidence that he was in fact negligent and if negligence on his part cannot properly be inferred from the circumstances of the accident.”

39. For all the foregoing reasons, I disagree with the finding arrived at by the learned trial magistrate on liability and I am satisfied that it is necessary to interfere with the same by apportioning liability between the parties herein.



40. On the issue of consideration of the submissions and authorities cited by the appellant, upon my perusal of the record and the impugned judgment, I did not come across anything to indicate that the learned trial magistrate overlooked or otherwise ignored the submissions and/or authorities relied upon by the appellant.
41. As earlier noted, the appellant did not challenge the assessment of damages and hence the same shall apply accordingly.
42. The upshot therefore is that the appeal partially succeeds. Consequently, the dismissal order made by the trial court is hereby set aside and is substituted with a finding on liability in the ratio of 50:50 as between the appellant and the respondent.
43. For the avoidance of doubt, the judgment on appeal is as follows:
- a. Liability is apportioned in the ratio of 50:50
 - b. General damages
 - (i) Pain and suffering Kshs. 50,000/=
 - (ii) Loss of expectation of life Kshs. 100,000/=
 - (iii) Loss of dependency Kshs. 1,486,560/=
 - c. Special damages Kshs. 32,150/=
Gross Total Kshs. 1,668,710/=
Less 50% Kshs. 834,355/=
Net Total Kshs. 834,355/=
 - d. The appellant shall have interest on special damages at court rates from the date of filing suit and interest on general damages at court rates from the date of judgment until payment in full.
 - e. The appellant shall also have the costs of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 31ST DAY OF MAY, 2022.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

