



**Ochola [Suing as legal representatives of the estate of Victor Omondi Onyango-Deceased] v Marwa & another (Civil Appeal E069 of 2021) [2022] KEHC 3110 (KLR) (22 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 3110 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
CIVIL APPEAL E069 OF 2021**

**KW KIARIE, J  
JUNE 22, 2022**

**BETWEEN**

**PHILIP OCHOLA [SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF VICTOR OMONDI ONYANGO-DECEASED] ..... APPELLANT**

**AND**

**THOMAS MARWA ..... 1<sup>ST</sup> RESPONDENT**

**SAMMY TRADERS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the judgment in Homa Bay Senior Principal Magistrate's SPMCC No. 87 of 2018 by Hon. T. Obutu – Senior Principal Magistrate)*

**JUDGMENT**

1. The appellant herein was the defendant in Homa Bay Senior Principal Magistrate's SPMCC No. 87 of 2017. This was a claim that arose from a road traffic accident involving motor vehicle registration number KCK 230B and a motor cycle on which the deceased was riding as a pillion passenger. The learned trial magistrate delivered judgment dated 21<sup>st</sup> July, 2021 and dismissed the claim.
2. The appellant was aggrieved by the said judgment and filed this appeal. The firm was represented by Veronica Migai & Company Advocates. The following grounds of appeal were raised:
  - a) That the learned trial magistrate erred in law and in fact in basing his findings on irrelevant issues not supported by evidence adduced or applicable law.
  - b) That the learned trial magistrate erred in law and in fact by finding that liability was not proved against the defendant despite overwhelming evidence to the contrary.
  - c) That the learned trial magistrate erred in law and in fact by finding that liability was of proved against the defendant despite the fact that all the evidence of the defence witnesses were



contradicting and finally the police officer who produced a police file DW PC (W) Monica Walikina stated categorically that the said investigations were not over.

- d) That the learned trial magistrate erred in law and in fact by finding that the liability was not proved against the defendant despite the fact that the investigating officer confirmed and indicated that the police did not record evidence of any independent witness but only recorded the statement of the driver of the suit motor vehicle alone.
  - e) That the learned magistrate grossly misdirected himself in treating the evidence and submissions on liability and quantum before him superficially and consequently coming to a wrong conclusion on the same.
  - f) The learned trial magistrate misdirected himself in ignoring the principles applicable in awarding liability and quantum of damages and the relevant authorities on quantum cited in the written submissions presented and filed by the appellant.
  - g) The learned trial magistrate erred in adopting a proposal multiplier of 28 years which was inordinately low given the fact that the deceased died at the age of 27 years and therefore the same was entirely erroneous estimate.
  - h) The learned trial magistrate erred in adopting a proposal multiplicand of kshs.6, 736.30 based on a minimum wages of unskilled employee even after the appellant confirmed that the deceased was a plumber and therefore the same was entirely erroneous estimate.
3. The appeal was opposed by the respondent through the firm of Kimondo Gachoka & Company, Advocates. It was contended that the appeal lacked merits.
  4. This court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of *Selle vs. Associated Motor Boat Co. Ltd.* [1965] E.A. 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.
  5. The learned trial magistrate was confronted by three versions on how the accident that claimed the life of the deceased herein occurred. The evidence of Samson Otieno Otieno (PW2) was that the accident occurred while the driver of motor vehicle registration number KCK 230B was overtaking another motorist when he collided with the oncoming motor cycle.
  6. PC Nicholas Muthama (PW3) testified that the motor cycle was ahead of motor vehicle registration number KCK 230B and both were going to the same direction when the rider made a right turn and this is when the collision occurred. This was the gist of the evidence of PC Monica Walikina (DW2).
  7. The third version was by the driver of motor vehicle registration number KCK 230B, Moses Ochieng (DW1). He testified that the motor cyclist joined the road when he was very close to him. Since he was very close and there was an oncoming lorry, he tried to control his vehicle but unfortunately he hit the motor cyclist.
  8. Two of the versions of how the accident is said to have happened blamed the motor cyclist while one version blamed the driver of motor vehicle registration number KCK 230B.
  9. The Court of Appeal in *Hussein Omar Farah v Lento Agencies* [2006] stated:

“In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs the



question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame... The trial court, as we have said, had two conflicting versions of how the accident occurred. Both parties insisted that the fault lay with the other side. As no side could establish the fault of the opposite party we would think that liability for the accident could be equally on both the drivers. We therefore hold each driver equally to blame."

10. In the circumstances of this case and the evidence on record, I find that the motor vehicle registration number KCK 230B and the motor cyclist were equally to blame.
11. It is trite law that an appellate court will only interfere with an award of the trial court if certain circumstances are satisfied. In *Butt vs. Khan* [1981] KLR 349 at page 356 Law JA stated:

“...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. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived a figure which was either inordinately high or low.”
12. The appellant had submitted that an award of Kshs. 4,940,000.00 would be adequate compensation. It would appear that the respondent had not filed any submissions. The learned trial magistrate said he could have awarded Kshs. 874,465.60. I have looked at the basis on which he arrived at the said figure and I have no reason to depart from it.
13. I therefore set aside the order of dismissal of the suit by the learned trial magistrate and substitute it with a finding on liability at 50: 50 and an award of Kshs. 874,465.60 before factoring contributory negligence.
14. The appeal therefore succeed with half costs.

**DELIVERED and SIGNED at HOMA BAY THIS 22<sup>ND</sup> DAY OF JUNE, 2022**

**KIARIE WAWERU KIARIE**

**JUDGE**

