



**Owinyo v The Chairman, Board of Governors, Nyabondo High School (Civil Appeal E013 of 2022) [2022] KEHC 15824 (KLR) (30 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15824 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
CIVIL APPEAL E013 OF 2022**

**KW KIARIE, J**

**NOVEMBER 30, 2022**

**BETWEEN**

**Jael Owuor Owinyo ..... APPELLANT**

**AND**

**THE CHAIRMAN, BOARD OF GOVERNORS, NYABONDO HIGH SCHOOL ..... RESPONDENT**

*(Being an Appeal from the judgment and decree in Oyugis Senior Principal Magistrate's SPMCC No. 80 of 2018 by Hon. Celesa Okore –Principal Magistrate))*

**JUDGMENT**

1. Jael Owuor Owinyo, the appellant herein, was the plaintiff in Oyugis Senior Principal Magistrate's SPMCC No.80 of 2018. She had sued seeking for relief in general damages and special damages following a road traffic accident involving motor cycle KMCL 549G and motor vehicle registration number KAL 382U Isuzu bus. The appellant was a pillion passenger on motor cycle registration number KMCL 549G. The bus hit the motor cycle she was traveling on and as a result of the accident she sustained injuries. Liability was apportioned at 50:50 and she was awarded Kshs. 400, 000/= general damages after factoring contribution.
2. The appellant was aggrieved by the said judgment and filed this appeal through the firm of M.A Okumu & Company Advocates. She raised the following grounds of appeal:
  - a. The learned magistrate erred in law and in fact by disregarding appellant's submissions on the issue of liability hence occasioning a miscarriage of justice by arriving at an erroneous conclusion.
  - b. The learned trial magistrate erred in law and in fact by failing to appreciate the principles informing the apportionment of liability against a pillion passenger and/or passenger generally by holding the plaintiff equally liable in negligence in the suit accident.



- c. The learned magistrate erred in law and in fact in failing to establish and/or make a finding on the exact role of the plaintiff in the occurrence of the suit accident hence reaching at an unjust finding and/or no finding at all.
  - d. The learned magistrate erred in law and in fact when she substantially deviated from the pleadings, evidence and submissions of the plaintiff and instead concentrated on issues relating to the motorcyclist and the defendant and making a finding on liability against the former when he was not a party to the suit.
3. The appeal was opposed by the respondent through the firm of Okongo Wandago & Company Advocates who contended that it lacked merit.
  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. It is trite law that no liability can be apportioned without fault. The Court of Appeal in *Kiema Mutuku vs. Kenya Cargo Hauling Services Ltd* [1991] 2KAR 258 stated that:

There is as yet no liability without fault in the legal system in Kenya and a plaintiff must prove some negligence against the defendant where the claim is based on negligence.
  6. According to the appellant, the complained of accident which is the subject of this case occurred when the bus in front of them slowed down and the motor cyclist attempted to overtake it.
  7. The police record that were produced by PC Alex Chege indicated that the motor cyclist was charged for careless driving.
  8. Gerald Otieno Owiyo (DW1) was the driver of motor vehicle registration number KAL 382U Isuzu bus. His evidence was that the motor cyclist attempted to overtake him from the wrong side and in the process hit the bus. IP David Korir (DW2) testified to the same effect.
  9. It was evidently clear that that the motor cyclist was the one who caused the accident. Since the appellant opted not to jointly sue him, the respondent can only be liable for his contributory negligence. Had the respondent appealed I doubt if the respondent's contributory negligence would have been apportioned at 50%. Since the appellant failed to enjoin the motor cyclist in the suit, she cannot be heard to lament that liability ought not to have been apportioned to him on the basis that he was not a party to the suit. I will therefore not disturb the finding on liability.
  10. From the foregoing, I find that I have no basis to interfere with the finding by the trial court. The appeal is therefore dismissed with costs.

**Delivered And Signed At Homa Bay This 30<sup>th</sup> Day Of November, 2022.**

**KIARIE WAWERU KIARIE**

**JUDGE**

