**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CIVIL APPEAL NO 14 OF 2019**

**LONA ATIENO OKUTA.....APPELLANT**

**VERSUS**

**CHRISTINE ALOO OUMA.....RESPONDENT**

**(Being an appeal from the Judgment and decree of Hon Yalwala (PM)**

**delivered at Kisumu in Chief Magistrate's Court Case No 530 of 2014**

**on 22nd January 2019)**

**JUDGMENT**

## INTRODUCTION

1. In his decision of 22nd January 2019, the Learned Trial Magistrate, Hon C. Yalwala, Principal Magistrate, entered Judgment in the following terms:-

> **a. Liability at 30% against the Respondent and 70% against the deceased rider of motor cycle.**
>
> **b. General Damages Kshs. 250,000/=**
>
> **less 70% Kshs 75,000/=**
>
> **Plus cost of the suit and interest thereon at court rates.**

2. Being aggrieved by the said decision, on 12th February 2019, the Appellant filed a Memorandum of Appeal dated 11th February 2019. It relied on four (4) grounds of appeal. On the other hand, the Respondent was aggrieved with the said decision and filed a Cross-Appeal to wit **HCCA No 45 of 2019 Christine Aloo vs Lona Atieno Okuta**.

3. On 12th November 2020, parties agreed that the Appeal and Cross-Appeals herein be consolidated and be heard together. However, the court did not fix a date for the Judgment of the Cross- Appeal as 20th July 2021, the date when the Cross-Appeal was to be mentioned, was declared a public holiday.

4. Parties filed Written Submissions which they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions in respect of **HCCA No 14 of 2019 Lona Atieno Okuta Ouma vs Christine Aloo** only.

## LEGAL ANALYSIS

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

6. This was aptly stated in the case of **Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123** where the court therein rendered itself as follows:-

**"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ...is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that 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..."**

7. Having looked at the Grounds of Appeal and the respective parties' Written Submissions, it appeared to this court that all the grounds of appeal were related and that the question that had been placed before it was to consider whether or not the liability that was awarded was against the weight of evidence in the circumstances warranting its interference. The Appellant had not challenged the award on quantum and that of special damages. All the grounds of appeal were therefore dealt with together as they were all related.

8. The Appellant submitted that she adduced sufficient evidence on the circumstances leading to the accident and therefore the Trial's Court finding in favour of the Respondent was against the weight of evidence presented. It added that in apportioning liability, the Trial Court relied heavily on the evidence of Moses Migaywa Malawa (hereinafter referred to as "DW1") blamed a motor cycle rider (hereinafter referred to as "the deceased") who was not a party to the suit for speeding.

9. She submitted that she did not make any allegation against the deceased whom she termed as a "stranger" to the suit but the Respondent proceeded to adduce evidence against him instead of enjoining him to the suit as provided in Order 1 Rule 15 of the Civil Procedure Rules 2010 to defend himself and/or give evidence to rebut the Respondent's case.

10. It was her contention that DW1 went against the principle of natural justice as the intent of his evidence was to put blame on a party who was not a party to the suit and therefore was condemned unheard. She pointed out that during Cross-examination, DW1 asserted that he was not aware that the Respondent could have enjoined the deceased as a third party to the suit despite being dead. The Appellant was emphatic that the Respondent could have cited the deceased's surviving relatives to take out letters of administration and enjoin the administrator as a third party on behalf of the deceased's estate.

11. In this regard, the Appellant submitted that ignorance of the law was not a defence and that in any event, the Respondent was not a witness in the suit and therefore did not offer any explanation as to why he did not enjoin the deceased's estate as a third party to the suit.

12. She contended that the driver of the Respondent's motor vehicle was substantially to blame for the accident. She added that even if the deceased was a party to the proceedings, the evidence on record was not sufficient for the Trial Court to have found him 70% liable. She submitted that at worst, liability should have been apportioned equally between the Respondent and the deceased.

13. She relied on the cases of **Hussein Omar Farah vs Lento Agencies [2006] e KLR** among other cases courts apportioned liability at 50:50 against parties in circumstances that were similar to the instant appeal herein.

14. On her part, the Respondent submitted that the Learned Trial Magistrate took into consideration the evidence on record and arrived at a sound finding. She argued that Order 1 Rule 15 of the Civil Procedure Rules had no provision to enjoin a party who was deceased.

15. She further submitted that even if proceedings were to be instituted against the estate of the deceased as submitted by the Appellant the estate would not have been in a position to adduce evidence on the issue of negligence and liability regarding the above accident as the incident at hand was a personal tort, and the only evidence that would have assisted the court in arriving at the finding would have been the evidence of the deceased.

16. She relied on the case of **Homa Bay High Court Civil Appeal No. 43 of 2016 Razco Company Limited vs Casmiel Odhiambo Okati & Another** (eKLR citation not provided) where the court held that a separate suit could be filed against the party against whom a finding on liability had been made and who was not a party to the original suit. She added that the Appellant had the option of filing a separate suit against the deceased who was not joined as party in the suit, a finding on liability having been made against him.

17. She further contended that the Appellant had failed to demonstrate that upon the Trial Court analysing the entire evidence, it was unable to reasonably decide on the evidence of the witnesses who testified on both sides as to who was to blame for the accident. She urged this court to depart from the authorities that had been relied upon by the Appellant in support of the apportionment of liability at 50:50% for the reason that the circumstances therein were different from this instant case.

18. Having said so, this court reconsidered the evidence on record all the while bearing in mind that it did not see the witnesses testify. The Appellant testified that on 30th November 2013, she was on board the Respondent's motor vehicle registration number KBG 247 F (hereinafter referred to as "the subject Motor Vehicle") in the company of Monica Adhiambo Ogonyo, Jane Ajwang Odhiambo and Mary Atieno Ouma and were travelling to Kano. She stated that the accident occurred at Lela along Kisumu Busia Road. She said that she was at the back of the subject Motor Vehicle which was being driven at a high speed. She said that the subject Motor Vehicle swerved and overturned.

19. When she was Cross-examined, she said that she did not see the oncoming vehicle and that she was dozing so that all that she could remember was the subject Motor Vehicle having overturned.

20. Her co-passenger, Jane Ajwang Odhiambo, testified that on the material date, she was on board the Respondent's motor vehicle registration number KBG 247 F (hereinafter referred to as "the subject Motor Vehicle") in the company of the Appellant herein, Lorna Atieno Okuta and Mary Otieno Ouma.

21. It was her evidence that at Chulaimbo area, she saw an oncoming vehicle. At the time, DW I was speeding and was driving the subject Motor Vehicle in a zig zag manner. She added that she saw an oncoming motorcyclist and it was DW 1 who swerved into the lane of the

motor cyclist causing the subject Motor Vehicle to overturn. She was emphatic that the deceased did not come into their lane, a fact that she reiterated during her Cross-examination. She added that DW 1 was told to slow down but he did not.

22. Her other co-passenger, Monica Adhiambo Ogonyo testified that on the material date, she was on board the Respondent's motor vehicle registration number KBG 247 F (hereinafter referred to as "the subject Motor Vehicle") in the company of three (3) other passengers and were travelling from Busia to Kisumu.

23. Her evidence was that between Chulaimbo and Kuoyo area along Kisumu Busia Road, she saw an oncoming Matatu. There was a motorcyclist behind the Matatu. It tried to overtake the Matatu. It was her testimony that the subject Motor Vehicle left its lane and collided with the motorcyclist and then landed on the right side of the road. She blamed the driver of the subject Motor Vehicle for driving fast, leaving his lane and being careless.

24. She further testified that she was awake at the material time and was sitting behind DW 1 who was the driver. On being cross-examined, she stated that she did not see the registration numbers of the Matatu and the Motorcycle.

25. Her co-passenger, Monica Adhiambo Ogonyo testified that on the material date, she was on board the Respondent's motor vehicle registration number KBG 247 F (hereinafter referred to as "the subject Motor Vehicle") in the company of the Appellant herein, Lona Atieno Okuta and Mary Otieno Ouma and were travelling from Busia to Kisumu.

26. Her evidence was that between Chulaimbo and Kuoyo area along Kisumu Busia Road, she saw an oncoming Matatu. There was a motorcyclist behind the Matatu. It tried to overtake the Matatu. It was her testimony that the subject Motor Vehicle left its lane and collided with the motorcyclist and then landed on the right side of the road. She blamed the driver of the subject Motor Vehicle for driving fast, leaving his lane and being careless.

27. She further testified that she was awake at the material time and was sitting behind DW 1 who was the driver. On being cross-examined, she stated that she did not see the registration numbers of the Matatu and the Motorcycle.

28. The other co-passenger, Mary Atieno Ouma also testified that on the material date, she was on board the Respondent's motor vehicle registration number KBG 247 F together with Monica Adhiambo Ogonyo, Jane Ajwang Odhiambo and Lona Atieno Okuta and were coming from Busia headed to Kisumu.

29. It was her evidence that at Chulaimbo area along Maseno-Kisumu road they met an oncoming Matatu. She testified that just after the subject Motor Vehicle by-passed the said Matatu, the driver swerved back to the middle of the road and collided with a motor cycle that was about ten (10) meters behind the Matatu. As a result, the said subject Motor Vehicle moved off the right hand side of the road and rolled over several times. Consequently, she sustained injuries together with her co-passengers while a motor cyclist died. It was her case that the Respondent's driver was substantially to blame for the said accident.

30. In his evidence, DW 1 stated that the accident occurred at Lela area. He testified that he was about to bypass an oncoming vehicle coming from Kisumu going to Busia when a third head light which he later realised belonged to a motor cycle appeared from behind the said vehicle. He stated that he swerved to the left side of the road to avoid a head on collision with the said motor cycle which was already on his lane and he swerved back to the road to avoid colliding with it off the road on the left side. He was categorical that the deceased's motor cycle hit his bonnet while he was on the left side of the road.

31. He denied that he was speeding and asserted that he was driving at 70 kph because it was a highway. He contended that it he had been speeding, the subject Motor Vehicle would have rolled and they would have sustained broken limbs. He also asserted that if he was driving in a zig zag manner, the subject Motor Vehicle could have been hit by other vehicles. He was emphatic that the passengers who were sitting at the back were asleep and it was dark and hence they did not and could not have seem how the accident occurred. He blamed the deceased for having caused the said accident as he did all he could have in the circumstances.

32. It was this court's view, that if the motor cyclist hit the bonnet of the Respondent's motor vehicle that meant that that was a head on collision since the bonnet is at the front part of a motor vehicle. Notably, there were two sides to the story explaining the causation of the said accident. One, as testified by the Appellant and the second, as testified DW 1 herein. There were two possibilities herein, either the deceased motor cyclist was cycling on his right lane, or DW1 was driving on his right lane. Unfortunately, the motor cyclist died and was therefore not present to tender his evidence. Further, no eye witness was called upon to give evidence on the causation of the accident.

33. Having said so, 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 the driver and the deceased 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.

34. In the case of **Barclay – Steward Limited & Another vs. Waiyaki [1982-88] 1 KAR 1118**, the Court said:-

> **"The bare narrative of the accident gives rise to a number of possibilities. Either Waiyaki was driving on his correct side and the Datsun hit his vehicle on its correct side or Mr. Cottle was driving on his correct side where the Range Rover crushed it…The collision is a fact. It is, however, not reasonably possible to decide on the evidence of Waiyaki & Gitau who is to blame for the accident. In this state of affairs, the question arises whether both drivers should be held to blame."**

35. In this case, the Learned Magistrate believed DW 1's evidence. This court was of a firm view that liability for the accident could be equally on both the driver and the motor cyclist. It is clear that there was no evidence adduced by an independent eye witness to the material accident. No investigation report was adduced in court to prove who was to blame for the said accident. Liability could also not be deduced

from the Police Abstract Report that was produced in evidence as the same indicated that the case was still pending under investigations. DW I was also not charged with any traffic offence.

36. This court had due regard to the decision of the Court of Appeal in **Hussein Omar Farah Versus Lento Agencies [2006] eKLR** where it was held:-

> **"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 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."**

37. The Respondent's argument that the above case among others relied upon by the Appellant were not applicable to the circumstances of the instant case was therefore found of no merit. Assuming the Appellant had the option of filing a separate suit against the estate of the deceased motorcyclist as had been contended by the Respondent herein, this court found that in analysing the evidence that was adduced during trial, the Trial Court failed to apportion liability in a ratio befitting the circumstances hence warranting an interference by this appellate court.

38. Both the driver and the motor cyclist ought to have exercised due diligence in their driving bearing in mind that they were both in control of lethal machines. Accordingly, if the court were to speculate that the deceased had also contributed to the causation of the accident herein, then apportionment of liability at 50:50 between the Respondent and the deceased would have been fair in the circumstances.

39. However, it was evident from the evidence of the Appellant and her co-passengers that DW 1 was to blame for the accident as he was the one who veered towards the lane of the deceased. They were also categorical that DW 1 was speeding. Indeed, the fact that the deceased sustained died on the spot was evidence of the heavy impact caused by high speed. This court was thus not persuaded that DW 1 was driving at a speed of 70kph.

40. In **Jimnah Munene Macharia vs John Kamau Erera NBI.C.A.C.A.NO.218/1998** (unreported), the Court of Appeal cited with approval the case of **Barclays Steward Limited & Another vs Waiyaki (1982-88) KAR and** held as follows:-

> **"The base narrative of the accident gives rise to a number of possibilities. Either Waiyaki was driving on his correct side and the Datsun hit his vehicle on its correct side or Mr Cottle was driving on his correct side where the range power crushed it.… Collision is a fact. It is however not reasonable possible to decide on the evidence of Wainyaki** (sic) **and Gitau who is to blame for the accident. In this state of affairs the question arises whether both drives should be held liable."**

41. In the same case, the Court of Appeal had cited with approval the case of **Baker vs Harburough Industrial Co-operative Society Limited (1953) 1 WLR 1472**where Lord Denning observed as follows:-

> **"Everyday, proof of collision is held to be sufficient to call on the Defendant to answer. Never do they both escape liability. One or the other is held to blame and sometimes both. If each of the drivers were alive and neither chose to give evidence, the court would unhesitantly hold that both were to blame. They would not escape liability simply because the court had nothing by which to draw distinction between them.** ***So, also, if they are both dead and cannot give evidence, the result must be the same. In the absence of any evidence enabling the court to draw a distinction between them, they must be held both to blame, and equally to blame"***

42. This court did not therefore agree with the Respondent had submitted she could not have enjoined the deceased's estate as a party in the proceedings at the lower court for the reason that even a dead driver or motor cyclist cannot escape liability in the causation of an accident. In other words, the fact that the deceased could not give his side of the story because he was dead did not exonerate him from blame.

43. Having said so, as the Appellant had solely blamed the Respondent's driver for the accident herein and denied that the deceased was to blame for the accident, the onus was on the Respondent to have instituted third party proceedings against the deceased's estate. The Appellant did nothing to cause the subject Motor Vehicle collide with the deceased's motor cycle. She relied on the doctrine of *res ipsa loquitor*. Accidents do not just happen. They are caused. A respondent is under a duty to prove that he or she was not liable for negligence. Failure by the Respondent to enjoin the deceased's estate to the proceedings in the lower court dealt a fatal blow to her case.

**DISPOSITION**

44. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 12th February 2019 was merited. The effect of this is that the apportionment of liability at 30: 70 that was entered by the Learned Trial Magistrate be and is hereby set aside and/or vacated and the same be and is hereby replaced with a Judgement that liability be and is hereby apportionment at 100% basis against the Respondent herein in favour of the Appellant herein.

45. The Respondent will bear the Appellant's costs of this Appeal.

46. It is so ordered.

**DATED** and **DELIVERED** at **KISUMU** this **27th** day of **September 2021**

**J. KAMAU**

**JUDGE**