



Achieng v Oduor (Suing as Widow and Legal Representative to the Estate of Isaac Osundwa Makau Wamukoya (Deceased) & another (Civil Appeal E018 of 2023) [2025] KEHC 1646 (KLR) (7 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1646 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL APPEAL E018 OF 2023
DK KEMEL, J
FEBRUARY 7, 2025**

BETWEEN

RAPHAEL OMONDI ACHIENG APPELLANT

AND

**LYDIA ACHIENG ODUOR (SUING AS WIDOW AND LEGAL REPRESENTATIVE TO THE ESTATE OF ISAAC OSUNDWA MAKAU WAMUKOYA (DECEASED) 1ST RESPONDENT
RANA AUTO SELECTION LIMITED 2ND RESPONDENT**

(Being an appeal from the judgment of Hon. PJ Nandi (SPM)) delivered on 29/6/2023 in Bondo PMCC E051 of 2021)

JUDGMENT

1. Vide a Complaint dated 7th April 2021, the 1st Respondent herein filed a claim against the Appellant and the 2nd Respondent at the trial court under the [Fatal Accidents Act](#) and the [Law Reform Act](#) wherein she claimed for both general and special damages plus costs and interest. Vide a judgement dated 29/6/2023, the learned trial magistrate apportioned liability against the Appellant at 100% and in favour of the 1st Respondent. On the aspect of quantum of damages, the trial court awarded as follows:
 - i. Loss of dependency under the [Fatal Accidents Act](#).....Ksh 1,621,972.80/=
 - ii. For pain and suffering under the [Law Reform Act](#)-Kshs 50,000/=
 - iii. For loss of expectation of life under the [Law Reform Act](#)-Kshs 100 000/=TotalKshs 1,771,972.80/=
- Less loss of expectation of life Kshs 100,000/=



Total (GD)KSHS 1,671,972.80/=

- vi. Interest on general and special damages from date of filing suit till payment in full.
2. Dissatisfied with the aforesaid judgement of the trial court on liability, the Appellant filed a Memorandum of Appeal dated 24th July 2023 wherein he raised the following grounds of appeal:
 - i. That the learned trial magistrate erred in fact and in law in failing to dismiss the suit by apportioning 100% liability to the Appellant without considering the circumstances of the case.
 - ii. That the trial magistrate erred in law and in fact by finding in favor of the 1st Respondent when there was no credible evidence or proof of negligence on the part of the Appellant.
 - iii. That the trial magistrate failed in law and in fact in failing to consider the submissions of the Appellant on liability, completely disregarding the submissions and authorities, resulting in the unjustified decision on liability.
 3. Being a first appeal, this court is obligated to re-evaluate the evidence afresh and subject it to an independent analysis and to arrive at its own conclusion as to whether or not to uphold the decision of the trial court. This court has to take into consideration that the trial court had the advantage of seeing and hearing the witnesses. The court in *Selle & Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123 held thus:

“...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. In particular, this court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”
 4. It is therefore incumbent upon this court to relook, re-evaluate, reanalyze the evidence at the trial court and arrive at its independent verdict, bearing in mind that it did not see the witnesses first hand.
 5. PW1 Lydia Achieng Oduor testified that she is a resident of Mumias and that she is jobless. Her witness statement dated 7/4/2021 was adopted as her evidence in chief. Her national ID produced as exhibit 1. That the deceased was her husband who had been a boda boda rider and a cake supplier earning Kshs 15,000/- per month who met his death at the age of 50 years. That she did not witness the accident but she prays for compensation as she has been left to take care of their three children.

On cross examination, she stated that she did not witness the accident and that she did not produce a school report.
 6. PW2 Paul Juma Onyango testified that he is a resident of Siaya town and sells cakes and eggs within Siaya and Bondo towns. His witness statement dated 7/4/2021 was adopted as his evidence in chief. That it was at about 5.30 am, while he was riding a motorcycle along Bondo-Kisumu road when he saw a motor cycle in front of a motor vehicle headed to Bondo direction. Then he heard a screeching sound then followed by a big bang. That there were two ladies walking beside the road who rushed to the scene. That he found the motor cycle and the rider lying on the side of the road. That on a closer look, he realized that he knew the motor cycle rider as a person who used to get scones and cakes from Popo Bakery like himself.



That he rushed to Popo Bakery and informed an employee there who knew the injured person and together they went to the scene, placed the victim in the matatu and was taken to hospital. That he later found out that the victim had died.

That the victim was hit from behind by the matatu and thus it was the matatu driver who was over speeding and careless thus causing the accident. That he did not record a statement with the police because by the time he left the scene the police had not arrived.

On cross examination, he stated that he was about 20-30 metres from the scene of the accident. That the accident occurred at about 5.30 am at shell petrol station where there was security lights that enabled him to witness the accident. That the deceased had a helmet and a yellow reflector jacket. That the driver of the matatu was a stranger to him but must have been driving on behalf of the 2nd Respondent. That on 15/12/2020 on the day of the accident he slept in Siaya, left Siaya at 5.00am. That the deceased was headed to Bondo while he was headed towards Kisumu. That he was concerned with the victim. The registration of the motor cycle was KMFC XXXXU.

On reexamination, he stated that he saw the matatu before the accident and that he saw the matatu knocking the victim. The driver did not turn left before the accident. That he did not notice the colour of the clothes worn by the victim.

7. PW3 IP Sabastian Maloba testified that he was the base commander Bondo Police Station. That he had the police abstract in respect of Isaac Osundwa Wamukoya who died on 15/12/2020 as a result of a road traffic accident at 5.30 Am while riding motor cycle registration No. KMFC XXXXU. That the accident occurred near Shell Petrol Station along Bondo- Kisumu road when the motor cycle collided with motor vehicle No. KCR 841 W. That the vehicle was headed to Kisumu while the motor cycle was from Kisumu direction. That the point of impact was on left side heading to Kisumu meaning that it was on the side of the vehicle. That the matter was reported by the driver. That in the company of PC Peris and the deceased's workmate called Fredrick Nyangweso, they went to the scene. That he recorded a statement on the urgency of the driver and arranged for a postmortem and inspection of both the motor cycle and motor vehicle to be done.

He testified further that it was the driver of the motor vehicle that was fully to blame for the accident. That upon arriving at the scene, the victim had already been rushed to the hospital where he died while undergoing treatment. He stated further that the owner of the motor vehicle as per the police abstract was Raphael Omondi Achieng.

On cross examination he stated that the rider was to blame for the accident.

8. DW 1 Ali Marwa testified that he was the operational Manager of Rana Auto Selection limited. That he recorded a statement on 14/3/2021 which was adopted as his evidence in chief. That he produced the documents in his list of documents as Exhibit 1-3 which comprised of a sale agreement dated 11/9/2018, copy of purchaser's ID card and bank statement. That they sold the vehicle to the Appellant but did not transfer the same. That they are the legal owners but not in possession of the vehicle.
9. DW2 I P Sabastian Maloba testified that he was the Investigation Officer. That the accident occurred on 15/12/2020 at 5.30 Am along Bondo-Kisumu road near shell petrol station involving motor cycle KMFC XXXXU and a motor vehicle. That the motor vehicle was headed to Kisumu while the motor cycle was from Kisumu. That at the scene of the accident, the rider emerged from the side and collided with the vehicle causing the rider injuries. That the rider was rushed to hospital but was turned away due to the medics' strike. That he was rushed to Siaya where he succumbed. That the driver reported the accident. That he rushed to the scene in the company of the driver and a workmate of the deceased. That



he drew the road view and gave the driver Kshs 10,000/= cash bail. That the vehicles were inspected and on 17/12/2020 he recorded the statement of the driver under inquiry on 16/12/2020. That they did a postmortem.

On cross examination, he stated that it was the second time he was testifying. That he did not witness the accident. That the accident occurred at 5.30 Am and that he went to the scene at 10.08 Am. The scene was already disturbed and that there were scratches on the ground. That the motor vehicle and the motorcycle were not at the scene and that's why he did a road view not a sketch map. That besides the driver, no other eye witness recorded statement. That there was no family member of the deceased when he visited the scene.

10. DW3 George Adega testified that he was a resident of Bondo and knew why he was in court. That he recorded his statement on 27/12/2020 and which was adopted as his evidence in chief. That he blamed the rider as he crossed to his lane and knocked his motor vehicle. He produced the vehicle inspection report as exhibit 2, his driving licence as D. exhibit 3. That he was never charged for causing the accident.

On cross examination, he testified that from his statement the motor cycle was coming from the opposite direction but that he did not see him. That he only saw him when he had entered his lane and knocked his vehicle. That he knocked his vehicle from the left head lamp and the windscreen. That they collided with the rider on the driver's lane. That there is no junction where they collided. That he was the one who reported the accident and came to the scene with the police. That at the scene, it was only him and the police- the base commander and no other person. That he was the only one who told the police on how the accident occurred.

11. The appeal was canvassed by way of written submissions. The Appellant submitted that as per PW3 who was also DW2, the investigation officer Ip Sabastian Maloba that the rider of the motorcycle was to blame for the accident thus concluded that the trial magistrate did not consider the submissions of the appellant at the lower court.
12. The Respondent submitted that the trial magistrate fully and thoroughly considered the evidence together with the submissions at the trial and thus prayed that the Judgment be upheld and that the appeal dismissed with costs.
13. I have considered the evidence tendered before the lower court as well as the submissions and authorities relied upon and find that the issue for determination is whether the 1st Respondent proved her case at the lower court on a balance of probability.
14. PW1 testified that she was the widow of the deceased and that the deceased was the bread winner and that she has been left with three children to take care of and who prayed for compensation for her husband's death. This testimony does not help much in terms of liability.

PW2 gave a sworn testimony that he was about 20-30 metres from the scene of the accident. That it was at about 5.30 am, while he was riding a motorcycle along Bondo-Kisumu road when he saw a motor cycle in front of a motor vehicle headed to Bondo direction. Then he heard a screeching sound followed by a big bang. That there were two ladies walking beside the road and that they all rushed to the scene. That he found the motor cycle and the rider lying on the side of the road. That the victim was hit from behind by the matatu, thus it was the matatu driver who was over speeding and careless thus causing the accident. That he did not record a statement with the police because by the time he left the scene the police had not arrived.

On cross examination, he stated that he was about 20-30 metres from the scene of the accident. That the accident occurred at about 5.30 am at shell petrol station where there was security lights that enabled him to witness the accident. That the deceased had a helmet and a yellow reflector jacket.



15. Looking at the evidence of DW2 the investigating officer, he stated on cross examination that the accident occurred at 5.30Am and that he went to the scene at 10.08 Am and that the scene was already disturbed. That he did not witness the accident and that he did not find the said motor vehicle nor the motor cycle at the accident scene. That his road view sketch was solely dependent on the narration of the driver as to how the accident occurred. That no eye witness was there when the police arrived at the scene. This position was corroborated by the evidence of DW3 the driver who testified on cross examination that at the scene, it was only him and the police- the base commander; no other person. That he was the only one who told the police how the accident occurred.
16. Further, it was the evidence of DW3 that the motor cycle was coming from the opposite direction but he did not see him. That he only saw him when he had entered his lane and knocked his vehicle. That he knocked his vehicle from the left head lamp and the windscreen. That they collided with the rider on the driver's lane. That there is no junction where they collided.
17. It seems to me that the statement DW3 does not add up. This is simply because if he was driving at a speed of 50KPH as he alleged and that the motor cycle came from the opposite direction, then he ought to have seen it, yet he says he did not see it. Secondly, DW3 testified that it was the left head lamp and windscreen that was knocked, which means that the accident occurred in front of him. Logic would have it that if the rider crossed to his lane, he would have hit the right headlamp not the left one. He added that there was no junction at the point where they collided and hence, there is nothing to insinuate that the rider had tried to enter onto the road from another junction. This seems to be a fabrication by the driver in order to evade liability. The evidence of PW2 who was the eye witness stated that the driver of the vehicle hit the rider from behind sounds more logical and which is further backed by the damage on the vehicle. Again, the Appellant's witness (DW2) appeared to have given contradictory evidence in that he testified for the 1st Respondent as PW3 and that he had blamed the Appellant's driver for the accident only to switch his loyalties to the Appellant's side. This was quite unfortunate for an investigating officer and who should have been charged for perjury. The Appellant's driver who was behind the motorcyclist ought to have respected the Highway Code of traffic by keeping his distance (at least 7 metres) and thus by knocking him was clear evidence that he was negligent and must be held solely to blame for the accident. I find on the whole, the deceased did not contribute to the accident and that it is the Appellant's driver to blame for the accident. The finding on liability at 100% against the Appellant by the learned trial magistrate was therefore quite sound and must be upheld. Consequently, the appeal on liability lacks merit.
18. On the issue of damages, it is noted that the parties herein have not made any submissions thereon. However, iam obliged to consider the same even though the issue of liability has been determined. It is noted that the trial court made awards on all the heads of damage namely pain and suffering, loss of expectation of life, loss on dependency and special damages.
19. On pain and suffering, the Appellant had proposed a sum of Kshs 10,000/ while the 1st Respondent proposed a sum of Kshs 100, 000/. The trial court awarded Kshs 50, 000/. The deceased was rushed to the first hospital but that there had been a doctors' strike and that he was rushed to Siaya County hospital but later died of the injuries. It is obvious that he must have felt a lot of excruciating pain before he breathed his last. The conventional awards under this head usually range between 10, 000/ - 100, 000/. I find the award by the trial court to be reasonable and that I uphold the same.
20. On the issue of loss of expectation of life, I find the sum of Kshs 100, 000/ was awarded. The same is a conventional sum and that the same is upheld.
21. On loss of dependency, the deceased died at the age of 31 years old. Counsel for the Appellant proposed a multiplier of 18 years while the counsel for the 1st Respondent proposed a multiplier of 39 years.



The trial court adopted a period of 28 years and relied on the case of Imatare Nairi & Another (suing as the personal representative of the estate of Jackline Soin Lemaiyan Vs Civiscope Ltd [2020] eKLR where a multiplier of 29 years was used and in which the deceased was aged 31 years. I am unable to fault the learned trial magistrate on the multiplier used as the deceased still had a long productive life even though the issue of vagaries of life must be taken into account. Indeed, the deceased worked as a boda boda operator and which is a risky business. However, due to improvement in the health sector and a vibrant economy, the quality of life has improved significantly in sub Saharan Africa and that the mortality rates had significantly reduced. On the multiplicand, it was stated by the deceased's widow that the deceased used to deliver items on behalf of a certain bakery and earned 15000/ per month but she did not avail evidence of income. The trial court rightly relied on the Regulation of Wages (General) Amendment Order 2018 as the deceased fell in the category of unskilled artisan and labourer whose wage was Kshs 7, 240/95 per month. On the dependency, the deceased provided for his wife and three children and hence a ratio of 2/3 was appropriate in the circumstances. This sum would work out as $7, 240/95 \times 28 \times 12 \times 2/3 = \text{Kshs } 1, 621, 972.80$

The total sums would attract a deduction of the amount under the loss of expectation of life (100, 000/) so as to prevent double compensation thereby coming to sum of Kshs 1, 671,972/80. As the issue of Special damages was not finally prayed for by the 1st Respondent, the same will not be awarded. In any case, the 1st Respondent did not file a cross appeal and did not submit on it.

22. In the result, it is my finding that the appeal lacks merit. The same is hereby dismissed with costs to the 1st Respondent.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 7TH DAY OF FEBRUARY 2025.

D. KEMEI

JUDGE.

In the presence of :

M/s Ongonga.....for Appellant

Juma.....for 1st Respondent

N/A.....for 2nd Respondent

Ogendo.....Court Assistant

