



**FN & Another (Suing as the legal representative of the estate of BNN (Deceased)  
the legal representative of the Estate of BNN - Deceased) v Mwiranda (Civil  
Appeal 53 of 2018) [2025] KEHC 1795 (KLR) (12 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1795 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL 53 OF 2018  
REA OUGO, J  
FEBRUARY 12, 2025**

**BETWEEN**

**FN & ANOTHER (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE  
OF BNN (DECEASED) ..... APPELLANT**

**AND**

**ROSE NANGAMI MWIRANDA ..... RESPONDENT**

*(Being an appeal from the judgment of the Principal Magistrate Hon. M.  
Munyekenye delivered on 1/8/2018 in Webuye PMCC No 101 of 2016)*

**JUDGMENT**

1. The appellant at the lower court filed a plaint seeking general and special damages, costs and interest of the suit. Following an accident on 22/1/2016 along Webuye Milo Murram road in the Soko Mjinga area, the appellants lost their daughter BNN aged 4 years. The appellant claimed that the deceased was knocked down by the respondent's motorcycle, KMDJ 622S when it lost control and veered off the road.
2. The respondent denied the claim and averred that the rider was not her authorized agent. She claimed that the accident was caused substantially by the deceased and her parents.
3. The trial court held that the appellant did not call evidence to show that the motorcycle rider was negligent in controlling the vehicle. Further, no evidence was presented to show the point of impact, whether on the road or outside the road. According to the trial court, the appellant failed to prove its case on a balance of probabilities. However, had the appellant succeeded in its claim, the trial court would have made the following award:

Pain and suffering Kshs 100,000/-



Loss of expectation of life Kshs 200,000/-

Loss of dependency Kshs 1,500,000/-

4. The appellant has therefore filed this instant appeal against the decision of the subordinate court on the following grounds:
  1. That the learned trial magistrate erred in law and fact in holding that the appellant had not proved his case on a balance of probabilities in the face of clear and cogent evidence that the fatal accident was caused by the respondent.
  2. That the trial magistrate did not bring her mind to bear judiciously on the burden, standard and incidence of proof in civil proceedings and fell short of elevating it to proof of beyond reasonable doubt.
  3. That the learned magistrate fell into an error of law in holding that the appellant did not prove that the accident was caused by the motorcycle of registration number KMDJ 622S TVS STAR which was driven by the agent or authorised driver of the respondent.
  4. That the appellant having pleaded the doctrine of *res ipsa loquitur* and the respondent having admitted being the owner of the motorcycle registration no/ KMDJ 622S TVS STAR at the time and place of the accident, the trial magistrate, therefore, fell into the error of law and fact in holding that the appellant case lay in the realm of conjecture or speculation.
  5. That the learned trial magistrate erred in law and fact in holding that the respondent had on the evidence on record, sufficiently rebutted the appellant's case.
  6. That the learned trial magistrate erred in law and fact in absolving the respondent totally from liability for the said accident against the weighty evidence on record and holding a 4-year-old deceased liable for the accident.
  7. That the learned trial magistrate erred in law and fact in holding that failure by the appellants to produce a sketch plan, the appellants' case had been proved on a balance of probability.
  8. That the learned trial magistrate did not adhere to the civil law principles of balance of probability hence his findings are insupportable both in law and in fact.
5. The appeal was opposed by the respondent who filled the following grounds to the opposition of the memorandum of appeal:
  1. That the learned trial magistrate did not make any error in law and fact in finding that the appellant did not prove his case on a balance of probabilities.
  2. That the learned trial magistrate properly considered all the evidence and facts produced and placed before her at the hearing of the matter and properly arrived at her finding that the appellant did not produce evidence to prove how the accident occurred and hence did not discharge his burden of proof are required on a balance of probabilities.
  3. That the learned trial magistrate did not make any error in law and fact in finding that the appellant did not provide the trial court with evidential material to enable it evaluate how the accident occurred, who was to blame etcetera.
  4. That the learned trial magistrate did not make any error in law and fact in reaching the fact that the appellant did not call any witness to the accident hence liability was not proved.



5. That the learned trial magistrate did not make any error in law and fact that the police officer by the appellant did not provide sketch plans on the scene and any other evidence on how the accident occurred hence his evidence was not of any evidential value on the issue of liability and sis not assist the court to determine how the accident happened and who was to blame.
  6. That the learned trial magistrate did not make any error in law and fact in finding that the appellant did not discharge his burden/duty of proof to the required standard on a balance of probabilities.
  7. That the learned trial magistrate did not make any error in law and fact in finding that the appellant had failed to prove any negligence on the respondent.
  8. That the learned trial magistrate did not make any error in law and fact in reaching its finding that the appellant failed to prove his case on a balance of probability and hence properly dismissed the case.
  9. That the learned trial magistrate properly adjudicated the burden and standard of proof in the matter and properly arrived at her finding that the appellant did not discharge the burden of proof to the required standard of balance of probabilities in civil proceedings.
  10. That the learned trial magistrate did not make any error in law and fact in absolving the respondent as the appellant did not prove liability against the respondent as properly evaluated by the trial magistrate.
  11. That the learned trial magistrate did not make any error in law and fact in dismissing the appellant's case for lack of proof.
6. The appeal was canvassed by way of written submissions. The appellant identified two issues for the court's determination:
- a. Whether the appellant being parents of the deceased could be held liable for the negligence of the deceased minor.
  - b. Whether the deceased aged 4 years could be held liable for the accident.
7. On the first issue it was submitted that the law does not hold parents vicariously liable for the negligent acts of their children. In such a suit, the parent names are used for the litigation, for the minor lacks the capacity and standing to sue in his or her own name (see *LMN (Minor suing through mother and next of kin RMN) v Kenya Ferry Services* (2017) eKLR).
8. On the second issue, it was submitted that the minor was only 4 years old and a child of tender years. Liability, whether in civil or criminal cases, hardly attaches to children of such tender years as they lack the intellectual capacity to take precautions for their safety. In *Esther Nkudate v Touring & Sporting Cards Ltd & another* [1979] eKLR the court stated:
- “The determining factor in deciding whether or not a child below the age of 10 years can be guilty of contributory negligence is whether the child is mature enough to be able to take precautions for his or her safety, having in mind that young children do not usually have sufficient experience in these.”
9. The respondent submitted that it was incumbent upon the appellant to put forth evidence to prove their allegations of negligence against the respondent on a balance of probability, but they failed to do so. Further, the trial court was correct in finding that the police abstract produced by the police



did not blame the rider. Therefore, the appellant did not discharge his duty under section 107 of the [Evidence Act](#).

### **Analysis And Determination**

10. The duty of a first appellate court was discussed in *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, where the court stated as follows-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

11. FNS (Pw1) testified that the deceased was his child. On the material day, the deceased accompanied one of his children to a shop that was 30 meters from where he lived. Shortly he received a call that the deceased was involved in an accident and was rushed to hospital. Pw1 went to the hospital but the deceased died after one hour.

12. Isaac Kimani Njuguna (Pw2) of traffic base Webuye testified that although he was not the investigating officer he visited the scene. The rider who caused the accident had fled the scene but was charged with the offence of causing death by dangerous driving in Tr. Case No 944 of 2016. He testified that the rider caused the accident and not the child. On cross-examination, he testified that he did not witness the accident. He also testified that he was not aware of any report made of a stolen motorcycle.

13. Rose Ngami Mwibanda (Dw1) did not contest that she is the owner of the motorcycle. She testified that on 22/1/2016, her rider, Hosea Wasike, went about his usual duties. However, in the evening he came back without the motorcycle alleging that the same was stolen. Dw2's husband, Yonah Wafula Mumoki (Dw2) testified that he went to report the theft the following day at Webuye Police Station vide OB NO. 15/23/1/2016. He also supplied the police with the name of the suspect Domiano Nato.

14. In this case, it is not in dispute that an accident occurred on 22/1/2016 involving the respondent's motorcycle. The deceased was 4 years old and this is also not in dispute. However, the court did not consider that the child was one of tender years and that strict liability was attached to the respondent. The court in *NM & MNN (Suing as Representative of the Estate of LN (deceased) v Ndungu Isaac* [2020] KEHC 8411 (KLR) held as follows:

“34. In my judgement, it is clear that the learned trial magistrate did not take into account, the age of the deceased and whether in those circumstances she could be deemed to have negligently contributed to the accident or negligently caused the accident. The law when it comes to accidents involving children of tender years seem to place strict liability of the drivers and shifts the burden onto the drivers to show that the child is of such an age as to be expected to take precautions for his or her own safety.”

15. In *Attorney-General and another vs. Vinod and another* [1971] EA (Duffus P, Law & Mustafa, JJA), the court cited the case of *Gough vs. Thorne* [1966] WLR 1387 (Lord Denning), where it was said:

“A very young child cannot be guilty of contributory negligence. An older child may be. But it depends on the circumstances. A judge should only find a child guilty of contributory negligence if he or she is of such an age as to be expected to take precautions for his or her own safety; and then he or she is only to be found guilty if blame is attached to him or her.



A child has not the road sense of his or her elders. He or she is not to be found guilty unless he or she is blameworthy.”

16. There was evidence by Pw2 that the deceased was rushed to hospital where she died while receiving treatment. The police abstract shows that the appellant’s motorcycle was involved in an accident. The respondent did not dispute this fact but through Dw1 and Dw2 they testified that the bike was stolen. However, she did not produce the occurrence book or police abstract to show that the motorcycle was stolen. Pw2 who works at Webuye Traffic Base also testified that he was unaware of any report that the motorcycle was stolen.
17. The evidence by Pw1 was that the deceased sustained fatal injuries as a result of being knocked down by the respondent’s motorcycle. Pw2 testified that the respondent’s driver fled the scene. The deceased was only 4 years old and incapable of taking precautions for his or her own safety. I find that the trial magistrate did not consider the age of the child in making her determination on the issue of negligence.
18. Consequently, I find the respondent 100% liable for the accident. The appeal did not challenge the trial court’s finding of damages. Therefore, damages are awarded as follows:
  - a. Pain and suffering Kshs 100,000/-
  - b. Loss of expectation of life Kshs 200,000/-
  - c. Loss of dependency Kshs 1,500,000/-Total Kshs 1,800,000/-
19. The appellant shall have the cost of the appeal.

**DATED, SIGNED, AND DELIVERED AT BUNGOMA THIS 12<sup>TH</sup> DAY OF FEBRUARY 2025**

**R.E. OUGO**

**JUDGE**

In the presence of:

Appellant - Absent

Miss Tindi -For the Respondent

Wilkister -C/A

