



Mwangi & another v Olum (Suing as the Legal Admin of the Estate of the Late Alice Akoth Okeyo - Deceased) ((Suing as the Legal Admin of the Estate of the Late Alice Akoth Okeyo - Deceased)) (Civil Appeal 089 of 2023) [2025] KEHC 7945 (KLR) (13 February 2025) (Judgment)

Neutral citation: [2025] KEHC 7945 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL 089 OF 2023
AB MWAMUYE, J
FEBRUARY 13, 2025**

BETWEEN

GEORGE WAMBUGU MWANGI 1ST APPELLANT

JOEL GACHUHI NGARI 2ND APPELLANT

AND

NICHOLAS OKEYO OLUM RESPONDENT

**(SUING AS THE LEGAL ADMIN OF THE ESTATE OF THE LATE ALICE
AKOTH OKEYO - DECEASED)**

JUDGMENT

A. Introduction & Background

1. This appeal arises from the decision of the Principal Magistrate at Maseno in Civil Case No. E002 of 2022. The Appellants were aggrieved by part of the decision that apportioned 100% liability on the Appellants to the exclusion of the Respondent who it is alleged contributed to the negligence that caused and/or aggravated the accident.
2. The Respondent as the legal administrator of who perished in the accident approached the trial court by way of a plaint wherein he was seeking both special and general damages under the Fatal Accident Act and *Law Reform Act* as compensation for the fatal injuries the deceased sustained following the accident that occurred on or about 24th April, 2021. The 1st Appellant was driving a motor vehicle registration KCV493Z FUSO recklessly thereby hitting a motorcycle registration KMET605Z Boxer, which the Deceased was a pillion passenger on, causing an accident that claimed the lives of the motorcycle's pillion passengers as well as inflicting some bodily injuries on the rider of the said motorcycle.



3. The Respondent lodged a suit in the trial court to pursue compensation for the injuries. There doesn't seem to be a dispute on the facts of the incident and the appropriate quantum in damages. The quarrel seems to be on the apportionment of liability. As stated above, the trial court found the 1st and 2nd Appellants a hundred percent liable.
4. In the 1st and 2nd Appellant's memorandum of appeal instituting the present appellate proceedings, the Appellants want this court to make a finding that the learned trial magistrate misdirected herself by failing to appreciate the evidence in totality thereby failing to apportion liability accordingly between the Appellants and the Respondent as she ought to have done as a consequence whereof, she found 100% against the Appellants on liability.
5. It is the Appellants' prayer that I set aside the judgment of the trial court to make my own findings on liability based on evidence and sound legal principles.
6. There is no contention on the quantum of damages, and neither is there any on whether the accident happened or didn't. The balance of the issues that is before me to determine is whether there was contribution to the accident by the deceased who was a pillion passenger on a motorbike that was involved in the aforesaid accident.

B. Analysis and Determination

7. It is not in contention that the deceased and another person were pillion passengers on motorcycle registration KMET605Z Boxer. Despite this apparent fact, the trial magistrate even after noting the same, went ahead to assign the Appellants with 100% liability for the accident.
8. The fact that the deceased was one of two pillion passengers being ferried on the Motorcycle registration KMET605Z Boxer is beyond conjecture. The Respondent's witness, PW2 James Ogutu, who was the rider of the motorcycle, testified that he was carrying the deceased and another passenger when he was involved in a road accident.
9. According to the Appellants, this act constitutes contributory negligence that should have been factored by the trial court to apportion liability between the parties.
10. The Respondent see it differently, of course. There are credible arguments on both sides.
11. In the trial court no evidence was led to prove the deceased's contribution to the accident. However, on appeal, it is the contention of the Appellants that the deceased contributed to the negligence that caused the fatal accident. Her contribution is evident in the fact that she was willingly an excess passenger on the ill-fated Motorcycle.
12. Section 60 of the *Traffic Act*, CAP 403, proscribes carrying excess pillion passengers. The Section states as follows:
 - “(1) It shall not be lawful for more than one person in addition to the driver to be carried on any two-wheeled motorcycle, nor shall it be lawful for any such one person to be so carried otherwise than sitting astride the motorcycle and on a proper seat securely fixed to the motorcycle behind the driver's seat. (2) If any person is carried on any such motorcycle in contravention of this section, the driver of the motorcycle shall be guilty of an offence and be liable to a fine not exceeding ten thousand shillings.”
13. Flowing from that particular section in the *Traffic Act*, CAP 403, it is clear that carrying excess pillion passengers is unlawful. However, the legal responsibility to ensure against overloading a motorcycle



- is incidental on the rider, and not the passengers. Section 60(2) of the *Traffic Act*, CAP 403 further provides that if there is an excess passenger on the motorcycle, the rider shall commit a traffic offence attracting a penalty of Kshs. 10, 000/- or less.
14. The *Traffic Act*, the Highway Code, and associated regulations do not contemplate any sanction on an excess pillion passenger. Whether this is by design is not clear. What is apparent, though, is the obtaining view in Kenyan jurisprudence that an excess pillion passenger is a victim of an unlawful act, and not the culprit.
 15. In *West Kenya Sugar Co. LTD vs. Lilian Auma Saya (2020) Eklr*, Justice Njagi held that:

“The Respondent is only a passenger on the motorcycle. A passenger cannot be held liable when a vehicle he/she is traveling in is involved in an accident.”
 16. In *Highland Creamers & Food Ltd vs. Ronald Ngetich (Civil Appeal No. 40 of 2023) KEHC 11128*, the appellate court decided that:

“The Respondent bore no liability as he was a pillion passenger and had no control of the motorcycle.”
 17. In *Janet Kathambi vs. Charity Kanja Njiru (Suing as the Legal Representative of the Estate of Moses Gitonga – Deceased) 2021 EKLR*, the court stated that

“authorities have held time and again that there is nothing a pillion passenger could do to prevent an accident since he does not have control over the motorcycle. This Court agrees.”
 18. The deceased in the instant case was a pillion passenger. No evidence was led to show whether she was excess or not, and not that it would matter if it were, because any two passengers are simultaneously excess if they are onboarding a motorcycle that should carry one passenger.
 19. In *Rosemary Kaari Murithi vs. Benson Njeru Muthithi & 3 Others (2020) EKLR* the court reasoned as follows;

“I am also inclined to find that a person who voluntarily gets on a boda boda when he/ she finds that there are more than one should equally be held accountable and hence culpable.....”
 20. The presumption here is that anyone who voluntarily boards a motorcycle as an excess pillion passenger willingly exposes themselves to danger and cannot therefore be completely absolved of culpability.
 21. They may not do anything that causes the accident or exacerbates the consequences of an accident to others, but they also do not do enough to protect themselves from harm in that case. This very fact is what distinguishes negligence from contributory negligence.
 22. The Appellants in the instant case do not contest the finding that they were negligent, they just invite the court to find that there was contribution from the deceased. As a pillion passenger she had no control of the motorcycle and therefore could not have caused the accident, or exacerbated. As a pillion she owed no duty of care and attention to anyone as would be required for a finding of negligence. But it is not a finding of dereliction of duty that is necessary to find the Respondent responsible for their misfortune; on the contrary, what is needed is evidence of careless exposure of oneself to any hazard that may arise out of the unthinking acts of others.



23. I draw inspiration from a holding by Justice K.G. Balakrishnan in the Indian case of Pramodkumar Rasikhhai Jhaveri v. Karmasey Kunvargi Tak, (2002) 6 SCC 455: AIR 2002 SC 2864 where the good Judge said that:

“the question of contributory negligence arises when there has been some act or omission on the claimant’s part, which has materially contributed to the damage caused, and is of such a nature that it may properly be described as negligence. Negligence ordinarily means breach of a legal duty to care, but when used in the expression “contributory negligence” it does not mean breach of any duty. It only means the failure by a person to use reasonable care for the safety of either himself or his property, so that he becomes blameworthy in part as an author of his own wrong.”

24. From the above it is clear that contributory negligence refers to the lapses that lead to a self-inflicted harm. By way of an example, protective clothing, helmets, and such are some of the devises that could mitigate the impact of an accident. Another example of what can mitigate an accident– which is the subject of this judgment – is the refusal to overload a motorcycle.

25. The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in *Stapley v Gypsum Mines Ltd* (2) (1953) A.C. 663 at p. 681 as follows:

“To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it...

“The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally.”

26. In *Gerald Muthengi Ndatho vs. Helen Chebet* (Civ. Appeal No. 8 of 2020) (2022) KEHC 346 (KLR) the learned court reasoned that:

“In a road traffic accident involving a collision between two motor vehicles, the court apportions liability depending on the blameworthiness of the drivers. Other parties such as the passengers who cannot be held liable will have liability attach to them as apportioned to the drivers.

In this case the finding by the I.O. was that he did not know who to blame since there were no independent witnesses to the accidents. He further stated that he could not blame the appellant for the accident. It is my finding that apportionment of liability by the trial magistrate was not supported by the evidence. The collision was between the vehicle driven by the appellant and the motor cycle. They both bear blame for the collision, they should both be held to blame for the collision. The apportionment of liability by the trial magistrate



cannot be upheld.....the deceased cyclist had carried three passengers which must have interfered with his control of the motorcycle when confronted with danger.”

27. Applying these principles, it is true that the Deceased had no control over how the rider steered or managed the motorcycle. However, there is evidence that she voluntarily boarded a motorcycle that was manifestly overloaded. By so doing, she assumed a known risk, particularly in view of the common knowledge that a motorcycle’s maneuverability and stability are seriously compromised when overloaded and therefore equally contributed to the risk.
28. Moreover, there was no evidence adduced at trial that the Deceased was wearing a helmet or any protective gear. This omission fortifies the conclusion that she failed to take reasonable measures for her own safety. Although such failure is not always determinative, it is indeed one factor that helps establish contributory negligence due to lack of ordinary care for one’s well-being.
29. This Court notes that since the motorcycle rider is found negligent for contributing to the accident by operating an overloaded motorcycle with insufficient maneuverability, then the Deceased, as a knowing excess passenger, shares in that negligence.
30. Thus, the logical effect here is that since the motorcycle rider has been found culpable for contributing to the accident, the Deceased, as an excess passenger, cannot be wholly absolved. She is deemed to have equally participated in creating the very risk that materialized, amounting to contributory negligence.
31. In light of the foregoing analysis, this Court finds that the trial court erred in attributing 100% liability to the Appellants. Since the rider of the motorcycle is equally to blame for the accident, the Deceased must bear some responsibility for her own role in the fatal accident, namely, knowingly boarding an overloaded motorcycle without wearing protective gear and thus must also be equally liable as the rider of the motorcycle.
32. Accordingly, the Court makes the following orders:
 - a. The appeal on liability is hereby allowed.
 - b. The Judgment of the Honourable Principal Magistrate in Maseno PMCC No. 002 of 2022 is hereby set aside as to the finding on liability.
 - c. Having found that both the Appellants and the Deceased (as an excess passenger) contributed to the accident, liability is hereby apportioned at 50%: 50%.
 - d. The quantum of damages as assessed by the trial court shall be subject to a 50% reduction, reflecting the Deceased’s contributory negligence.
 - e. Each party shall bear its own costs in the Appeal.

It is so ordered.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 13TH FEBRUARY, 2025

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BAHATI MWAMUYE

JUDGE

