Omanga (Suing as the Personal Representatives of the Estate of Charles Omega Ochieng - Deceased) v Mwaura (Civil Appeal E002 of 2023) [2025] KEHC 1350 (KLR) (10 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1350 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL E002 OF 2023

PN GICHOHI, J

FEBRUARY 10, 2025

BETWEEN

PETER OCHIENG OMANGA (SUING AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF CHARLES OMEGA OCHIENG - DECEASED) .... APPELLANT

AND

PETER KARIUKI MWAURA .... RESPONDENT

(Being an appeal from the judgment and decree of Hon. C.N. Ndegwa in Nakuru Chief Magistrate Court Civil Case No. 428 of 2026 Peter Ochieng Omanga vs Peter Kariuki Mwaura as delivered on 05/12/2022)

JUDGMENT

1. The background of this matter is that the Appellant herein sued Respondent before the trial court vide a Plaint dated 17th March, 2016 where he sought judgment against the Respondent for: -

   a. General damages under the Law Reforms Act and Fatal accident Act, laws of Kenya.

   b. Costs of this suit.

   c. Interest on (a) and (b) above.

2. The claim was that on or about the 2nd April, 2015, the deceased was a lawful rider along Njoro-Nakuru road near RVIST Ngata Stage when the Respondent's motor vehicle registration number KAZ 029 C Toyota Matatu was carelessly and recklessly driven, controlled and/or managed by the Respondent's servant, agent and or employee thereby causing and/or permitting the said motor vehicle to veer off the road, collide with /hit the deceased.

3. The Appellant wholly blamed the accident on the negligence of the Respondent's driver

4. It was claimed that at the time of his death, the deceased was aged 27 years and was working for Comply Industries Limited in Nakuru as a machine attendant, earning a salary of Kshs. 18,131 per month and that he was survived by his wife Mary Otieno, son Brush Ochieng Omega and his parents Peter Ochieng Omanga and Florence Awiti Ochieng. That as a result of his untimely death, the family has suffered loss a and damage.

5. In his defence dated 31st May, 2016, the Respondent denied the entire claim and in particular, he denied that such accident happened or that he was the registered owner of the motor vehicle.

6. On a without prejudice basis, he pleaded that the deceased rider was to blame for the accident for failing to keep proper look out on the road before joining the main road, driving at excessive speed and causing his motor cycle to collide with the subject motor vehicle.

7. After hearing both parties, the trial court dismissed the entire suit with costs to the Respondent on the grounds that the Appellant had not proved his case to the required standard as the police officers who testified for the rival parties confirmed that the deceased was to blame for the accident.

8. Aggrieved by that decision, the Appellant lodged this Appeal by a Memorandum of Appeal dated 30th December, 2022, raising the following grounds; -

    1. That the learned magistrate erred in law and in fact in failing to state the ratio decidendi.

    2. That the learned magistrate erred in fact and in law in arriving at a decision that was erroneous in the circumstances.

    3. That the learned magistrate erred in law and in fact in dismissing the Plaintiff's case without considering the evidence on record.

    4. That the learned magistrate erred in law and in fact in making a decision based on a wrong principle of law.

    5. That the learned magistrate erred in law and in fact in failing to appreciate and take into account the pleadings, evidence and submissions at all in the subordinate court.

    6. That the judgment is against the weight of evidence.

7. That the trial court erred in law in finding the Appellant 100% liable for the accident.

9. He therefore prays that: -

    a. The trial court's finding dismissing the Appellant's case with costs be substituted with an award of damages with costs in favour of the Appellant.

    b. Costs of the Appeal be borne by the Respondent.

Appellant's Submissions

10. He submitted on one issue only that is, whether or not that the Appellant proved his case a balance of probability. He emphasised sections 107,109 and 112 of the *Evidence Act* on the burden of proof in civil cases and further placed reliance in the case of Anne Wambui Nderitu Vs Kiprono Ropkoi & Another [2005] 1 EA 334 where the Court held: -

> " As a general proposition under section 107(1) of the *Evidence Act* Cap 80. The legal burden of Proof lies upon the Party who invokes the aid of the Law and substantially asserts the

affirmative of the Issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in the existence which is captured in Section 109 and 112 of the Act."

11. It was the Appellant's submissions that PW1 and PW2 did not witness the accident take place but PW3, who was the pillion passenger did and categorically stated that they were hit from behind and he also recorded a statement to that effect.

12. The Appellant submitted that the evidence tendered was not challenged by the Respondent. He further submitted that the admitted facts are that the deceased was fatally injured by motor vehicle registration number KA7 029C Toyota Matatu which was being driven by the Respondent at the material time. That the Respondent was on his lane at the time of the accident but the only dispute is who was to blame for the accident.

13. He argued that the trial court gave a verdict without elucidating the detailed reasoning, analysis of the evidence and giving a conclusive, convincing, acceptable reason as to why the court shifted blame to the Appellant and as a result went ahead to dismiss the Plaintiff/Appellant case. That while shifting the blame, the court failed to establish the main reason and instead appeared to be laying blame on the Appellant without assessing the evidence by the Respondent.

14. He further submitted that DW1's evidence points a finger at his careless driving in that his evidence is that he swerved and that if he had avoided hitting the Plaintiff/Appellant, he would have rolled. The Appellant therefore submitted the Respondent's motive was to injure the Appellant and the motive caused fatal injuries. In the circumstances, he submitted that the Respondent was clearly not in control of his motor vehicle. He wondered why the Respondent swerved if he was driving at a moderately manageable speed.

15. It is the Appellant's submissions that considering the evidence by DW1, DW2 and DW3 that the area where the accident occurred had a sharp corner, then it is common sense that driving at an exorbitant speed was reckless on the part of the Respondent and therefore, the Respondent should shoulder substantial blame for the accident.

16. Further, the Appellant submitted that the Respondent's alleged failure to see the motor cycle as it was 7.00 pm is an issue that he would have mitigated by putting on the headlights and slowing while navigating a corner. In support of that argument, the Appellant cited the case of Masembe Vs Sugar Corporation & Another (2002)2 EA 434, where it was held that: -

> " When a man drives a motor vehicle along the road, he is bound to anticipate that there may be things and people and animals in the way at any moment and he is bound not to go faster that will permit his can at any time to avoid anything he sees after he has seen it..."

17. The Appellant further cited the case of William Kabogo Gitau -Vs-Geoffrey Thuo & 2 others [2010] 1 KLR 526 where the court held that: -

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the Court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms a party who is able establish his case to percentage of 51% as opposed to 49% of the opposing party is said to have established that it is probable than not that the allegations that he made occurred."

18. Flowing from the above cases, the Appellant submitted that the trial court erred in relying on the testimony of the police officer who was not the investigating officer and who did not witness the

accident. He further submitted that there was no report by a credible registered investigator given the conflicting versions of the evidence brought before Court.

19. Lastly, the Appellant submitted in absence of contrary submissions by the Respondent, the accident was solely caused by the Acts of negligence of the Respondent and the Court should set aside the dismissal order of the suit. In support, he placed reliance on the case of Joseph Muthuri v Nicholas Kinoti Kibera [2022] eKLR where there was a dispute as to who was to blame for the accident and Patrick J.O Otieno, J held:

> "In my view, the trial court erred in dismissing the suit against the respondent, who did not dispute the occurrence of the accident that led to the demise of the deceased. I find that the respondent contributed to the occurrence of the accident, because he was expected to exercise a duty of care to other road users, including the deceased herein. The deceased ought to shoulder some bit of blame since he was also expected to exercise care and caution when crossing the road. I am of the view that both the appellant and respondent were equally to blame for the occurrence of the accident and I hereby apportion liability in the ratio of 50:50."

20. In conclusion, he urged this Court to allow the appeal, set aside the judgement of the trial court and enter judgment in favour of the Appellant.

Respondents' Submissions

21. The Respondent submitted on both liability and quantum. With regard to liability, it was submitted that PW1 did not witness the accident, while the Police Officers (PW2) confirmed that the rider (deceased) was to blame for the accident and that a charge of careless driving was preferred.

22. It was further submitted that the motor vehicle driver (DW1) testified that the rider was coming from the opposite direction, lost control and hit the motor vehicle while on his lane. That despite trying to avoid the accident by swerving to the extreme end of the road his vehicle was still hit by the motor cycle.

23. He further submitted that according to DW2, who is a police officer who testified for the Respondent, the rider failed to negotiate a sharp corner due to excessive speed and ended up hitting the motor vehicle.

24. The Respondent therefore submitted that the statement by DW1 and PW2 was consistent while PW3's evidence was contradictory hence unbelievable and therefore, there was no reason why the Respondent was to be faulted for the said accident.

25. While laying emphasis that the onus of proof is on he who alleges, the Respondent cited several cases including the Court of Appeal decision in Kiema Muthuku v Kenya Cargo Handling Services Ltd (1991) 2 KAR 258 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."

26. In this case, the Respondent submitted that the pillion passenger (PW3) testified that rider was hit from the rear and during cross examination, he confirmed that there were two pillion passengers on the motor cycle KMDL 641H.

27. In the circumstances, the Respondent submitted that it is trite that a motor cycle is supposed to carry only one pillion passenger for safety of the rider and the passenger as the rider is able to control the motor cycle in case of an eventuality like in this case and for that argument, the Respondent cited the

case of Rosemary Kaari Murithi v Benson Njeru Muthitu & 3 others [2020] eKLR where on appeal R.K. Limo J held:-

> "The question I ask myself is whether it is proper to let boda bodas in general get away with impunity of illegality carrying excess pillion passengers. My answer to the question is in the negative. A rider who knowingly and deliberately breaks the law by carrying more pillion passengers than permitted by the law should be held accountable for his actions. In this instance, Kenneth Mwiti Mbuba was not held accountable for carrying excess passengers and should have shouldered more liability than 10% attributed to him by the trial court. 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. To that end this court finds that the trial court apparently misdirected himself on that score and had he done so certainly he would have attributed more liability to the Respondent. I find that the Appellant should have been found 60% liable and I hereby do find that the Appellant was 60% liable while the Respondents were 40% liable for either carrying excess pillion passengers or being excess pillion passengers and hence causing more liability to the Appellant after the accident occurred.

28. Further, the Respondent cited that case of Lakhamshi v Attorney General (1971) EA 118, 120 where Spry VP stated: -

> "It is not settled law in East Africa that where the evidence relating to a traffic accident is insufficient to establish the negligence of any party, the court must find the parties equally to blame."

29. Regarding general damages, the Respondent submitted that an appellate court should be slow to interfere with the discretion of the trial court unless the trial court is shown to have acted on wrong principles, took into account an irrelevant factor or failed to take into account a relevant factor leading to an award that is so inordinately low or so inordinately high it must be wholly erroneous estimate of the damages.

30. In this case, he submitted that the trial court acted on correct principles when it found the Appellant to blame for the accident. He therefore urged the Court to dismiss the Appeal and uphold the trial court's judgment and costs to follow the event.

31. This being a first appeal, this Court is obligated to re-evaluate and re-appraise the evidence adduced before the trial court in order to arrive at its own independent conclusion, taking into account that it did not have the advantage of seeing and hearing the witnesses as they testified. [Selle vs. Associated Motor Boat Company Ltd [1968] EA 123.]

32. From the submissions by the parties herein, it is apparent that the broad issue determination is on liability.

33. From the evidence on record, the Appellant Peter Ochieng Omanga (PW1) only received a message that the deceased who was the rider of motor cycle registration number KMDL 651H had been involved in a road traffic accident with motor registration number KAZ O29 C along Njoro Nakuru road and was admitted in intensive care unit as Provincial General Hospital Nakuru where he died. He visited the hospital and then recorded a statement with police and was issued with a police abstract. A post mortem was done and they were issued with the report and the death certificate.

34. His witness (PW2) No. 69679 PC Samson Okello of Nakuru Police Station did not witness the accident and did not visit the scene but produced the Police Abstract done by base commander one Mwaura. He also produced the inspection report.

35. In cross examination he told the court that according to the police abstract, the deceased (rider) was in the wrong and was to be charged with the offence of careless driving. He was however not aware if he was charged or not. In re- examination, he told the court that the matter was still pending under investigation.

36. John Ndungu (PW3) testified that they were three pillion passengers that is himself, Mwangi Charles and Mwaura on the said motor cycle being driven by the deceased who he knew well. They were heading to Nakuru at about 7.00 pm. They were on the left said of the road when the motor vehicle registration number KAZ 029 C which was overtaking at a high-speed lost control and hit them from behind while they were still on the left side.

37. On his part, the Respondent Benson Mwaura (DW1) Kariuki told the court that he was driving motor vehicle registration number KAZ 029 C heading to Njoro and there was a sharp corner. "A motor cycle drove in the sharp corner. I swerved from the lane to the left but I could not reach the near road. The motor cycle hit me. I was on my lane. I have not been charged with any offence."

38. On cross examination, DW1 stated: - "I was hit while on the left lane on the climbing lane. I was not trying to overtake. I swerved. I slowed down but I was hit by motor cycle. The motor cycle was to blame. My car tried to roll if I moved off the road."

39. DW2 No. 69679 PC Samson Okello was not the investigating officer or scene visiting officer but testified that the sketch maps showed that the point of impact was on the left lane as one heads from Nakuru to Njoro direction and that was the lane that was being used by motor vehicle registration number KAZ 029 C.

40. He testified that the rider had kept to his left lane but due to high speed, he was unable to control the motor cycle and therefor collided head on with the motor vehicle.

41. On cross examination, he told the court that they had an eye witness that the rider was at a high speed. He told the court that the rider was to be charged with careless driving but was never charged.

42. In its judgment, the trial court held: -

> " Two police officers gave evidence during the hearing, one for the plaintiffs and the other for the Defendant. Both of them were in agreement that the rider of the motor cycle was to blame for the accident and according to the police abstract the rider Charles Ochieng was supposed to be charged for careless driving. No blame was placed on the defendant. Accordingly, it is my finding that the plaintiff has failed to prove his case."

43. This Court notes that there was no analysis of the evidence done by the trial court before arriving at that verdict.

44. It is clear from the evidence on record that while the Appellant's eye witness talks of the motor vehicle to have been overtaking and hit the motor cycle from the rear while on the motor cycle's lane, the driver of the motor vehicle claimed to have been on his left lane when he was hit by the motor cycle. He denied that he was trying to overtake.

45. If the motor cycle and the vehicle were heading different directions, then it was not clear how the motor cycle was hit from behind per the evidence by PW3. The investigations diary by one PC John Manyara

(not a witness) indicates that the rider lost control and swerved to the right and hit the motor vehicle head on. There was however no other eye witness testified in support of the motor vehicle driver's testimony despite that his vehicle is said to have been ferrying passengers. The scene visiting officer and investigating officer did not testify. With the rider dead, he had no tale to tell as to the occurrence of the accident.

46. There being no doubt that the accident did occur between the motor cycle and the motor vehicle and there being no clear evidence as to who was to blame between the ride and the driver, and this being a civil case where burden of proof is on a balance of probabilities, then it was only fair that liability be shared between the two equally. In those circumstances, the trial court erred in dismissing the Appellant's claim.

47. As regards quantum, both parties had made rival submissions on the same before the trial court should the Appellant succeed on liability.

48. On his part, the Appellant had proposed a sum of Kshs. 50,000.00 for pain and suffering and Kshs 200,000 for los of expectation of life.

49. On loss of dependency, he submitted that the deceased was earning Kshs. 18,131.00 as a machine attendant at Comply Industries and could have retired at age 60 year but died at age 28 years and therefore proposed a multiplier of 32 years. He further proposed a dependency ratio of 2/3 as the deceased was married with a child. The therefore prayed for a total of Kshs. 4,641,536.

50. On the other hand, the Respondent submitted that it was not clear how the deceased stayed before succumbing to the injuries and submitted that from the evidence, it was more likely that the deceased died on the spot. He therefore proposed a sum of Kshs. 5,000.00 for pain and suffering.

51. On loss of expectation of life, he submitted that the deceased was aged 27 years at the time of death and therefore proposed a sum of Kshs. 70,000.00 under that head.

52. On loss of dependency, he proposed a minimum age of casual labourer at Kshs. 5,844.20 based on Regulation of Wages) General) Amendment Order 2015 applicable at the time the deceased died. He proposed a multiplier of 5 years since the deceased was a boda rider exposed to dangerous living going by the evidence on occurrence of the accident in this case. He therefore that dependency be at Kshs. 5,844.20 x 2/3 x 5 x 12 = Kshs. 233,768.00.

53. On special damages, the Respondent submitted that none was pleaded or proved and therefore such award cannot be entertained.

54. In its judgment, the trial court proceeded to assess the damages he would have awarded if the Appellant had succeeded on liability as follows: -

> - Kshs. 150,000.00 for pain and suffering on the grounds that the deceased did not die immediately.
>
> - Kshs. 100,000.00 for loss of expectation of life on the grounds that the deceased died aged 27 years.

55. On loss of dependency, the trial court held: -

> "Counsel for the Plaintiff has proposed a multiplier of 32 years, a dependency ratio of 2/3 and a multiplicand of Kshs. 18,131/-. Counsel for the Defendant has on the other hand proposed a multiplier of 5 years, a multiplicand of Kshs. 5,844.20 and a dependency ratio of 2/3. PW1 Peter Ochieng Omanga told the court in cross examination that the deceased

was earning a net salary of Kshs. 17,560/-. That is the figure I would use as his salary. There are so many imponderables in life and the deceased would have probably died of died due to another cause. I would therefore use a multiplier of 20 years. Using a dependency ratio of 2/3, that works to Kshs. 2,809600.00 (2/3 x 17,560 x 12x20).

No special damages were claimed and therefore I would not have awarded any"

56. It is settled law that an award of general damages is discretionary and that the Appellate court should be slow to interfere with such discretion. Indeed, the Court of Appeal in Gitobu Imanyara & 2 others vs. Attorney General [2016] eKLR held: -

> " ...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in Rook v Rairrie [1941] 1 All ER 297. It was echoed with approval by this Court in Butt v. Khan [1981] KLR 349 when it held as per Law, J.A that:
>
> > 'An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."

57. This Court has noted the evidence before the trial court. Considering the reasoning leading to the award and there being no arguments on the same by both parties in this Appeal, there is no reason to interfere with the discretion exercised by the said court in regard to that award.

58. In conclusion therefore, the Appeal is disposed of in the following terms: -

    1. The trial court's judgment dismissing the Appellant's suit with costs be and is hereby set aside and substituted with judgment on liability at the ratio of 50: 50 between the parties.

    2. The award of Kshs. 2,809,600/= be and is hereby upheld in favour of the Appellant as against the Respondent and to be subject to liability ratio.

    3. The costs of the suit before the trial court and this Appeal be borne by the Respondent

DATED, SIGNED AND DELIVERED AT NAKURU THIS 10TH DAY OF FEBRUARY, 2025.

PATRICIA GICHOHI

JUDGE

Ms Wafula for Appellant

Ms Nasimiyu for Respondent

Ruto, Court Assistant