Odero v Mwanyae & another (Suing as the Legal Representatives of the Estate of Lalo Lugwe Lalo) (Civil Appeal E022 of 2023) [2025] KEHC 3579 (KLR) (21 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3579 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CIVIL APPEAL E022 OF 2023

M THANDE, J

MARCH 21, 2025

BETWEEN

DORA ATIENO ODERO .... APPELLANT

AND

CHIRIRO NDORO MWANYAE .... 1ST RESPONDENT

ALEX CHUGWE LALO .... 2ND RESPONDENT

SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF LALO LUGWE LALO

(Being an Appeal from the decision of Hon. N. C Adalo, Senior Resident Magistrate delivered on 21.2.23 in Mariakani PMCC No. E003 of 2021)

JUDGMENT

1. The Respondents filed Mariakani PMCC No. E003 of 2021 against the Appellant, as legal representatives of the estate of Lalo Lugwe Lalo (the deceased) under the *Fatal Accidents Act* and the *Law Reform Act* on their own behalf and on behalf of the estate of the deceased. They claimed both general and special damages arising from a road traffic accident that occurred on 15.5.2020 at Maji ya Chumvi along the Mombasa-Nairobi Highway between the Appellant's motor vehicle registration number KCS 979C and motor cycle registration number KMEE 750K, in which the deceased, a pillion rider in the said motorcycle, sustained fatal injuries

2. In its statement of defence dated 17.2.21, the Appellant denied that the accident occurred and that if it did, then the same was caused or substantially contributed to by the rider of the motor cycle.

3. The matter proceeded to hearing and at the conclusion, the trial Magistrate entered judgment for the Respondents against the Appellant in the following terms:

   Liability 100%

Pain and suffering Kshs. 50,000.00

Loss of expectation of life Kshs. 100,000.00

Lost dependency Kshs. 776,608.00

Total Kshs. 928,533.00

Costs and interest from date of judgment till payment in full.

4. Being aggrieved, the Appellant filed the Appeal herein raising the following grounds:

   1. That the learned trial magistrate erred in law and in fact in holding that the Plaintiff had proved his case of negligence by failing to appreciate the proximate cause of the accident and the doctrine of causation and blameworthiness.

   2. The Learned trial magistrate erred in law and in fact in holding that the Plaintiff had proved her case on the required standard and that the Defendant was solely to blame for the accident contrary to the testimony of Pw 3 and evidence on record thereby arriving at an erroneous and legally unsustainable decision.

   3. That the learned trial magistrate erred in law and in fact by holding the Defendant was 100% liable contrary to the weight of evidence on record, considered extraneous and irrelevant factors, misunderstood and misapplied the correct law on causation and blameworthiness.

   4. That the learned trial magistrate erred in fact and in law in assessment of special damages by awarding fees for obtaining grants of representation ad litem contrary to binding judicial precedents occasioning a miscarriage of justice.

5. The Appellant prayed that the quantum of damages in the impugned judgment be set aside and replaced with an order setting aside liability against the Appellant and the suit against the Appellant herein be dismissed with costs or alternatively the deceased be substantively blamed for the accident.

6. Being a first appeal, this Court is called upon to re-evaluate and analyze the evidence on record being mindful that it neither saw nor heard the witnesses testify. (See *Selle v Associated Motor Boat Co*. [1968] EA 123). The Court is also guided by the Court of Appeal decision in *Samuel Mwanasokoni v kenya Bus Services Ltd* [1985] eKLR, where it stated:

> Although this Court on appeal will not lightly differ from the judge at first instance on a finding of fact it is undeniable that we have the power to examine and re-evaluate the evidence on a first appeal if this should become necessary. As was said by the House of Lords in Sotiros Shipping v Sauviet Sohold, The Times, March 16, 1983:
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> "It is uncertain whether their Lordships should have reached the same conclusion on the evidence, but it is important that, sitting in the appellate Court they should be ever mindful of the advantages enjoyed of the trial judge who saw and heard the witnesses and was in a comparably better position than the Court of Appeal to assess the significance of what was said, how it was said, and, equally important, what was not said."

7. Parties filed their written submissions which the Court has duly considered.

8. The Appellant faults the trial Magistrate for holding that she was the driver of the motor vehicle and finding her liable for the accident. The Appellant contended that the trial Magistrate erred because the evidence on record showed that the Appellant's sister, DW1 and not the Appellant, was the driver of the vehicle. Further that in her evidence, DW1 stated that she used the vehicle since her sister purchased

it, for her own purposes and business, going to and from work and not for the benefit of the Appellant. There was no evidence adduced to show that DW1 was the agent, servant and/or employee of the Appellant. As such the Appellant could not be held vicariously liable for the negligence of DW1. The Appellant thus faulted the trial magistrate for holding the Appellant vicariously liable for the accident, just because she is the owner of the motor vehicle. To support her case, the Appellant cited various authorities which the Court will consider later in the judgment.

9. The Respondent distinguished the authorities relied on by the Appellant terming them irrelevant. The Respondent submitted that the Appellant did not testify in court stating that her sister DW1 was liable. DW1's evidence was not supported by any written agreement lease or corroborated by another witness. Further that from the conduct of parties, it is clear that there was a beneficial relationship between the 2 sisters and that is why the Appellant never instituted 3rd party proceedings against her sister. The Appellant is thus estopped from shifting blame to her own witness, a conduct that reeks of unclean hands, is vexatious and an abuse of the court process. The Respondent urged that on a balance of probability he proved that the Appellant is vicariously liable and that the judgment be upheld.

10. I have looked at the record. PW1 Cpl. Ann Wambui, stated that Nancy Odera, DW1, the driver of the vehicle was to blame for the accident and was charged with the offence of causing death by dangerous driving and fined Kshs. 45,000/= and in default 1 year imprisonment. The evidence of PW3 Shauri Chaka Chamongoni who witnessed the accident stated that the vehicle hit the motorcycle off the road as the motor cycle tried to evade the vehicle.

11. On her part, DW1 stated that when she got to Maji ya Chumvi, she indicated her intention to overtake a fleet of trucks ascending. All of a sudden, a speeding motorcycle descended downhill in the middle of the road. To avoid a head on collision, she swerved to the right and hit the left of the motorcycle. She confirmed that she was charged with the offence of causing death by dangerous driving and fined Kshs. 45,000/=.

12. In her judgment, the trial Magistrate stated that the circumstances of the case were clear that the motorcycle was on its lane and the motor vehicle had commenced to overtake when the motorcycle emerged. She found that the defendant had failed to comply with the Highway Code which requires that a driver overtaking must ensure that the road ahead is clear and there is sufficient room to overtake and safely return to his rightful lane. She proceeded to find the Appellant 100% liable for the accident.

13. While evidence shows that the learned Magistrate was correct on the finding on causation of the accident, it is not clear why she found the Appellant 100% liable for the accident. This is because the Appellant though the defendant in the court below, was not the driver of the motor vehicle. Indeed, DW1 stated that she was the driver of the vehicle and she was charged with causing death by dangerous driving. The trial Magistrate did not even say that she held the Appellant vicariously liable for the negligence of DW1. I do therefore find that the trial Magistrate erred and on this ground alone, the Appeal succeeds.

14. Even assuming that the trial Magistrate had found the Appellant vicariously liable, which she did not, the question that would then arise is whether the circumstances of the case would support such a finding.

15. In the case of *Joseph Cosmas Khayigila V Gigi & Company Ltd & Another* CA 119/1998, the Court of Appeal stated as follows regarding vicarious liability:

> In order to fix liability on the owner of a car for the negligence of the driver, it was necessary to show either that the driver was the owner's servant or that at the material time, the driver was acting on the owner's behalf as his agent. To establish the existence of the agency

relationship, it was necessary to show that the driver was using the car at the owner's request, express or implied or on his instructions and was doing so in performance of the task or duty thereby delegated to him by the owner.

16. In *Rentco East Africa Limited v Dominic Mutua Ngonzi* [2021] eKLR, cited by the Respondent, Odunga, J. stated:

 61. As regards the issue of vicarious liability, it was held in Kansa vs. Solanki [1969] EA 318 that;

 "Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible (See Bernard V Sully [1931] 47 TLK 557. This presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was still being driven for the joint benefit of the owner and the driver."

17. From the testimony on record, there is nothing to demonstrate that DW1 the driver of the motor vehicle was the Appellant's servant or agent at the material time or that she was acting on the Appellant's behalf as her agent. In her statement that although the vehicle belongs to her sister the Appellant, she has custody of the same. DW1 stated that she uses the vehicle for her domestic, social and professional related errands. Indeed, on the material date, she left the vehicle at Mariakani Police Station as usual, and proceeded for her assignment in Mombasa where she was working that week. In the evening she picked the vehicle as usual and headed to Samburu where she resides. The accident happened on reaching Maji ya Chumvi. Clearly, she was using the vehicle for her own benefit and not for the benefit of the Appellant.

18. In light of the foregoing, I find that the trial Magistrate erred by finding the Appellant 100% liable for the accident. Accordingly, the finding cannot stand. Having so found, there will be no value in delving into the issue of quantum of damages.

19. In the end, the Appeal succeeds and is allowed with costs. The finding on liability is hereby set aside with the effect that the suit against the Appellant in court below is dismissed with costs.

DATED SIGNED AND DELIVERED IN MALINDI THIS 21ST DAY OF MARCH 2025

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M. THANDE

JUDGE