



**Simiyu & another (Suing as the Father and Mother as Legal Representatives
of the Estate of Oliver Sikuku Wekesa – Deceased) v Motrex Limited (Civil
Appeal E118 of 2022) [2025] KEHC 2959 (KLR) (13 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 2959 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E118 OF 2022
REA OUGO, J
MARCH 13, 2025**

BETWEEN

WYCLIFFE SIKUKU SIMIYU 1ST APPELLANT

GLADYS NALIKA SIKUKU 2ND APPELLANT

**SUING AS THE FATHER AND MOTHER AS LEGAL REPRESENTATIVES OF
THE ESTATE OF OLIVER SIKUKU WEKESA – DECEASED**

AND

MOTREX LIMITED RESPONDENT

*(Being an appeal against the judgment of Honourable Magistrate C.A.S Mutai (SPM) delivered
on the 11th November 2022 in Bungoma Chief Magistrate’s Court Civil Case No. E293 of 2021)*

JUDGMENT

1. The appellant’s appeal is against the trial magistrate’s finding on liability. By way of background, the appellant sued the respondent alleging that on 19/7/2021 the deceased was a pillion passenger aboard motorcycle registration number KMEU 891Q heading towards Bungoma from Bukembe. At Makotelo area, the respondent’s driver driving the respondent’s truck registration number KCE 466M Mercedes Benz Prime Movers hauling trailer number ZF 1614 while heading in the same, started overtaking the but swerved into the motorcycle’s lane, knocked the deceased, run him down and caused him fatal injuries.
2. The respondent denied the appellant’s averments and pleaded that the accident was solely caused by the respondent. It was averred that if an accident was caused, then the same was due to the sole negligence of the deceased. The accident was outside the scope and control of the respondent; hence they cannot be held liable.



3. After conducting a full trial, the trial magistrate made the following decision on liability:

“I find on the totality of the evidence before the court on the balance of probability the accident was caused by the negligence of the driver and or agent of the defendant acting as an authorized driver of the defendant. I will however find that there shall be contribution of 20%.”
4. The grounds of appeal raised by the appellant are as follows:
 1. The learned Magistrate erred in fact and in law by apportioning liability to the deceased when the evidence was clear that it is the respondent who was to blame for the accident.
 2. The learned magistrate erred in fact and in law in apportioning liability whereas the deceased was a pillion passenger and not in control of the suit motor cycle and could thus not contribute to the accident.
 3. The learned magistrate erred in fact and in law in apportioning liability whereas the respondent never tendered any evidence showing blameworthiness of the deceased and or absolving themselves of the negligence.
5. The appellant criticized the decision of the trial magistrate on grounds that it did not give any reason for apportioning liability as it did. It was argued that considering that the deceased was a pillion passenger, not in control of the motorcycle and therefore, could not be blamed for the accident. (See *Baro Ngo Sevelius Yopben v Jared Ndemo* [2020] eKLR and *Njogu & another v Simiyu* (Civil Appeal E066 of 2021) [2022] KEHC 14199 (KLR) (19 October 2022) (Judgment). The respondent’s driver was blamed for the accident and this was not controverted.
6. The respondent opposed the appeal arguing that although the appellant relied on the testimony of PW2, he was not listed in the abstract as a witness, and neither was he called by the investigating officer to assist in investigations. He faulted the appellant for failing to show how the rider avoided the accident. It was submitted that where an accident occurs in the middle of the road, then both parties are liable (See *Simplicious Maende Osiche & Another v Cleophas Kundu Masibo (suing as the legal administrator and representative of estate of Salton Walunywa Kungu – Deceased)* [2020] eKLR). The respondent had no fault on his part and was not arrested for a traffic offence. It was submitted that since the deceased boarded motorcycle registration no. KMEU 891Q the principle of *volenti non fit injuria*.

Analnsis and Determination

7. A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in *Selle & another v Associated Motor Boat Co. Ltd. & others* and in *Peters v Sunday Post Limited* [1958] EA page 424.
8. Wycliff Sikuku Simiyu (PW1) testified that he went to the scene after the accident. He admitted to not witnessing the accident but saw the deceased’s body at the scene. Wakifu Muchenje (PW2) testified that he was riding his motorcycle on the material day and motorcycle KMEEU 891Q was on the same lane in front of him. The respondent’s truck approached and hit the motorcycle that was in front of him. The rider was on his rightful side and therefore he blamed the driver of the truck. The pillion passenger who was wearing a helmet and reflective jacket fell over and was run over.



9. PCW Mwanari Mukavi (PW3) was not the investigating officer but produced the police abstract.
10. It is not in contest that the deceased was a passenger. The respondent in arguing that liability as apportioned was proper cited the case of *Ndatbo v Chebet* [2022] KEHC 346 (KLR) where the court held that the deceased cyclist certainly bore more responsibility than the 20% assessed by the trial magistrate. The cyclist had failed to take evasive action and was carrying three passengers, which likely impaired his control of the motorcycle when confronted with danger.
11. In this case, the deceased was the only pillion passenger and had no control of the motorcycle. The respondent did not call any witnesses to provide evidence. In *Moses Theuri Ndumia v I G Transporters Limited and Another* MSA CA Civil Appeal No. 42 of 2018 [2018] eKLR, the Court of Appeal discussed the effect of failure of a party to call evidence and citing various decisions, observed as follows:

“(12) In the absence of any evidence from the defence, we are persuaded there was preponderance of evidence by the appellant that amounted to a prima facie case and it required to be countered by the respondents. If the respondents had information that the impact of collision was in the centre of the road, we are persuaded under the provisions of Section 112 of the *Evidence Act*, they had a responsibility to adduce that evidence so as to disprove the appellant and the police officer who produced the abstract form. See *Kenya Power & Lighting Co Ltd v Pamela Awino Ogunyo* Civil Appeal No 315 of 2012 where a Bench of this Court differently constituted had the following to say;

“We note, in any event, that the appellant made various allegations in its statements of defence against the respondents. These included, inter alia, that the appellant was not the supplier of electricity in the stated region where fire damage took place; that the damaged crop was illegally planted in an area reserved for the appellant as a way-leave for its power lines and electric cables and that the respondents had failed to leave adequate space between the crops and electric poles so as to prevent the possibility of the crop being burnt in the event that a fire broke out. A party who asserts or alleges that certain facts exist has a legal burden to prove those claims – Section 107- 109 of the *Evidence Act* which place a burden of proof or what may be called evidential burden of proof on the party making the assertion. In *Janet Kaphiphe Ouma & Another v Marie Stopes International Kenya* (Kisumu) HCCC No 68 Of 2007 Ali Aroni, J. Citing Edward Muriga through Stanley Muriga v Nathaniel D. Sculter Civil Appeal No 23 Of 1997 had this to say on the said provisions of the *Evidence Act*;

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations. Section 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence.”



12. In this case, the appellant's evidence was clear. PW2 testified that the deceased was a pillion passenger, and when the respondent's truck was overtaking, it hit the motorcycle, causing the deceased to fall down and be run over. PW2 was cross-examined, and his evidence was not shaken on cross-examination.
13. The trial magistrate, in apportioning liability as against the appellant, did not provide any reason for doing so in light of the evidence pointing to the respondent to be liable for the accident. PW2 testified that the deceased wore a reflective jacket and helmet. In my view, the deceased, who was not in control of either the motorcycle or the vehicle, cannot be held liable, particularly in the absence of any evidence establishing liability on his part.
14. Consequently, I find merit in the appeal, set aside the trial magistrate's decision on liability, and find that the respondent was 100% liable for the accident. The appellant shall have the costs of the appeal.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 13TH DAY OF MARCH 2025.

R.E. OUGO

JUDGE

In the presence of:-

Miss Wanyama h/b for Mr. Anwar - For the Appellant

Mr. Mattah - For the Respondent

Wilkister -C/A

