



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Transline Company Limited & another v Akinyi & another (Civil Appeal
E025 of 2023) [2025] KEHC 10769 (KLR) (17 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10769 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E025 OF 2023**

**AM MUTETI, J
JULY 17, 2025**

BETWEEN

TRANSLINE COMPANY LIMITED 1ST APPELLANT

MOTOROLOGY LIMITED 2ND APPELLANT

AND

EUNICE AKINYI 1ST RESPONDENT

**THOMAS OUMA ANDITI (SUING AS THE ADMINISTRATORS OF THE
ESTATE OF MICHAEL OMONDI OMANGO (DCD) 2ND RESPONDENT**

JUDGMENT

Introduction

1. The incident giving rise to this appeal happened on 21st January 2020 along Kisumu Aher Road.
2. The accident involved motor vehicle KMEN 081T make; Boxer and motor vehicle registration number KCV 294W Toyota Hiace Matatu.
3. The matter was heard by the Principal Magistrate Winam Law Courts who on the 31st January 2023 entered judgment in favor of the respondents in the following terms:-
 - a. Liability 50% : 50%
 - b. Pain and suffering 20,000
 - c. Loss of expectation of life Kenya shillings 120,000
 - d. Loss of dependency 512,336
 - e. Special damages Kshs.15,450



Total = Kshs. 667,786

f. Less 50% contribution Kshs.333,893

Amount payable Kshs.333,893.

4. The appellant aggrieved by the decision of the court filed the instant appeal raising the following grounds:
5. The appeal is that is for determination in this appeal is:- Who was to blame for the accident?

Appellant's Case

6. The appellant contends that the deceased who was a rider was solely to blame for the occurrence of the accident and that the learned Honorable magistrate erred in apportioning liability at 50:50 in favor of the respondent.
7. The contends that had the learned Honorable magistrate properly analyzed the evidence he would have found the deceased 100% liable for the accident and proceed to dismiss the suit.
8. On negligence the appellant submitted that the cue witness called by the respondent was untruthful and his allegation that the motor vehicle enclosed on the deceased's lane could not be true in view of the sketch of the scene and the fact that the motor vehicle windscreen was damaged.
9. Further the appellant contended that the eyewitness testified that the deceased was not carrying any pillion passenger yet the police record showed that the deceased had a to passenger who also suffered injuries to which he later succumbed.
10. The discrepancies in the evidence of the eyewitness account according to the appellant should have led the court to believe the testimony of the appellants witness DW2 who was the driver and proceeds to dismiss the respondents case.
11. The appellant further urged this court to consider the evidence of DW1 CPL Joshua Otieno which corroborated that of DW2.
12. The appellant contended that the entire evidence taken is a whole would clearly show that the learned Honorable magistrate fell in error by apportioning liability at 50:50 since the deceased occasioning the accident by carelessly overtaking.
13. The appellant did not address the issue of quantum.
14. The appellant urged this court to allow the appeal and set aside the judgment of the lower court in its entirety.

Respondent's Case

15. The respondents vide their submissions dated 9th July 2024 contested the appeal on both liability and quantum.
16. It must however be pointed out that though the appellant raised the issue of quantum in the grounds of Appeal, the appellant close to focus on liability in their submissions.
17. The respondents position in this appeal in regard to liability is that the appellants should have been found 100% liable on account of the evidence tendered by the respondent through the eye witness.



18. According to the respondents DW2 who was the driver of the motor vehicle at the material time drove the motor vehicle so carelessly and at a very high speed causing him to lose control of the vehicle, veered of its lane and ended up hitting the deceased's motor cycle.
19. According to the respondents the evidence of PW3 favoured their clients position that it was the appellants driver who was at fault.
20. I have considered and duly noted the respondent's submissions on quantum.

Analysis And Determination

21. As a first appellate court it is my duty to reevaluate the evidence tendered in the lower court and draw my own conclusions from the same cognizant of the fact that unlike the lower court I did not have the opportunity to hear or see the witnesses- See *Selle v Associated Motor Boat Ltd* [1968] EA 123.
22. The witness PW2 was called by the respondents testified that he witnessed the accident that the Nissan driver is the one that was overtaking a tuk tuk when it collided head on with the cyclist.
23. According to PW2 the cyclist was on his line when the accident happened.
24. He also told the court that the cyclist was alone at the time of the accident. Upon cross examination he stated:-

“I would be surprised if I am told several people died in the accident I only saw the rider.”
25. PW3 who was called by the respondent to produce the police abstract stated:-

“The motor vehicle (must have meant motorcycle) was driven by Michael Omondi Onyango carrying a pillion passenger. The two of them died I did not prepare the police abstract”
26. He also went on to say that he did not know how the accident occurred. He was categorical that he did not know whom to blame for the accident.
27. The police abstract produced by the witness PW3 on the part where the police indicate if there is any intention to prosecute his nil. In fact it reads no one has been charged and there is no indication of any likelihood to prosecute anyone.
28. It is therefore not clear to this court where the defense respondents got the evidence of intention to prefer charges against the driver of the appellants driver.
29. The submission by the respondent in that respect is not backed by the police abstract on record and the evidence of PW3 was clear that he did not know who to blame for the accident that limp of submission by the respondent is to say the least calculated to mislead this court.
30. The driver of the motor vehicle owned by the appellant testified and his evidence was supported by DW1 No.86557 P.C Joshua Otienwho produced the police records which included the Occurrence book, the Police File and other documents.
31. According to DW1 the motorcycle rider was overtaking a pick up when he collided head on with the matatu. The pillion passenger landed on the windscreen of the matatu and damaged it.



32. In fact DW1 states:-

“The pillion passenger landed on the windscreen of the pick up the rider was carrying two pillion passenger one died at the hospital.”
33. The evidence of DW1 casts doubt into the accuracy of the account given by PW2 who alleged to have been at the scene of the accident when it happened.
34. One wonders, would it have been possible really for motorcyclist who had passengers on his bike to be hit and the witness PW2 failed to see the victims of the accident?
35. From his testimony PW2 did not come to the scene after the accident therefore he ought to have been able to give a vivid account of the circumstances surrounding the occurrence of the accident.
36. It is clear to this court that PW2 was not a truthful witness and the court should have treated his evidence with great caution before apportioning liability.
37. DW2 Benard Okari Gesare stated in his statement that he was the driver of the Matatu KCV 294W and on 21/1/ 2020 as he was driving from Kisii towards Kisumu when he got to the scene of the accident he saw two oncoming motorcyclists who appeared to have been ceasing each other from the right lane and “encroached onto my lane in a zigzag motion I reduced my speed to about 5 kilometers per hour since I could not understand what the two were up to I then stopped then one of the motorcyclists swerved at my front to the other side on our left side of the road the other one hit my vehicle on the right front offside....”
38. From the drivers testimony there is no mention of a tuk tuk before accident happened that in this court view must been a creation by the respondents witness PW2 in a desperate attempt to assist the respondent’s case.
39. The evidence of DW1 and DW2 taken together and weighed against the evidence of PW2 leaves no doubt in the mind of the court that the motorcyclist was to blame for the occurrence of the accident.
40. The decision of the learned honorable magistrate apportioning liability at 50:50 could not be supported by the evidence on record.
41. The issue of who was liable for the accident is therefore resolved in favor of the appellant. The rider who was the deceased in this case was the author of his own misfortune.
42. The statement of the driver of motor vehicle KCV 294W left no doubt that the deceased and another engaged in some very dangerous game on the road of trying to outpace each other. They deceased knew of the risk of driving reckless as a rider, He assumed the risk and suffered the damage. It was a clear case of *volenti non fit injuria* based on the evidence of DW1 & DW2.
43. It is unfortunate that this country continues to lose the lives of able bodied youth on our roads due to their reckless behavior on the roads. The authorities concerned must rise up and tame this errant cyclists. It cannot remain business as usual.
44. As a result of the analysis above I find that the respondent did not meet the test set out under Section 107 & and 108 of the *Evidence Act* and the evidence they tendered by the respondent did not establish a causal limi between the injury suffered by the deceased and the negligence of DW2.
45. As a consequence the court finds that the respondent failed to discharge the burden of proof on a balance of probabilities .The fact of the deceased’s death alone is not sufficient to hold the appellant liable for negligence in view of the evidence on record. See Nairobi HCCA No. 152 of 2003 Statpack



Industries Ltd v James Mbithi cited in Nakuru HCCA No. 320 of 2004 Timsales Ltd v Willy Ng'ang'a Wanjohi.

46. Liability must follow some degree of fault on the part of the defendant. The defendant/ appellant in this case was not at fault at all.
47. The upshot of the above is that they appealed by the appellant is allowed with costs.
48. It is so ordered

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 17TH DAY OF JULY 2025.

A. M. MUTETI

JUDGE

In the presence of:

Court Assistant: Kiptoo

Wanunzi for the Respondent

Kimondo Gachoka for the Appellant Absent

