



Alando & another (Suing as the personal representative & legal administrators of the Estate of Jared Owino Aland (Deceased)) v Nyagowa (Civil Appeal E033 of 2022) [2024] KEHC 491 (KLR) (22 January 2024) (Judgment)

Neutral citation: [2024] KEHC 491 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E033 OF 2022
RE ABURILI, J
JANUARY 22, 2024**

BETWEEN

MILLICENT AKINYI ALANDO 1ST APPELLANT

BEATICE AWINO ORACHA 2ND APPELLANT

**SUING AS THE PERSONAL REPRESENTATIVE & LEGAL
ADMINISTRATORS OF THE ESTATE OF JARED OWINO ALAND
(DECEASED)**

AND

GEORGE ADADA NYAGOWA RESPONDENT

(An appeal arising out of the Judgement of the Honourable M.I. Shimenga in the Chief Magistrate's Court at Kisumu delivered on the 14th April 2022 in Kisumu CMCC No. 239 of 2017)

JUDGMENT

Introduction

1. The appellants herein *vide* an amended plaint dated 18th December 2017 sued the respondent for general damages under the *Fatal Accidents Act* and *Law Reform Act* as well as special damages for the fatal injuries to the deceased following an accident that occurred on or about the 19.3.2016 along the Kisumu – Kondele road when the deceased, who was riding his motorcycle registration number KMDC 362D was knocked down by motor vehicle registration number KBN 997B owned by the respondent.



2. In response, the respondent filed a statement of defence dated May 31, 2017 denying all allegations made by the appellants and on the contrary attributing the occurrence of the accident to the negligence of the deceased.
3. The trial magistrate in her judgement apportioned liability in the ratio 50:50 noting that had the respondent's driver slowed down or stopped and similarly the deceased not been on the wrong side of the road approaching the respondent's driver head on then the accident would have not occurred.
4. On quantum, the trial court awarded as follows:
 - Pain and suffering Kshs. 10,000
 - Loss of expectation of life Kshs. 100,000
 - Loss of dependency Kshs. 2,103,302.40
 - Special damages Kshs. 51,400
 - Total Kshs. 2,264,702.40
 - Less loss of expectation of life Kshs. 100,000
 - Kshs. 2,164,702.40
 - Less 50% contribution Kshs. 1,082,351.20
 - Grand Total Kshs. 1,082,351.20
5. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 27th April 2022 setting out the following grounds of appeal:
 - a. That the learned trial magistrate erred in law and fact in finding the appellant 50% liable for the accident whereas the deceased did not contribute to the accident at all.
 - b. That the learned trial magistrate erred in law and in fact by failing to exonerate the appellant from any negligence in view of the evidenced actions of the respondent.
 - c. That the learned trial magistrate misdirected herself and based her findings on liability as against the appellant on wrong considerations.
 - d. That the learned trial magistrate failed to consider the appellants evidence and submissions on liability thereby arriving at a wrong decision.
 - e. That the learned trial magistrate erred in law and in fact in predicting her judgement on liability upon theories and hypothesis that were not supported by any evidence.
 - f. That the learned trial magistrate erred in law and in fact in making a deduction of the award made under loss of expectation of life.
 - g. That the learned trial magistrate misdirected herself in fact and in law in making the award for special damages contrary to evidence adduced by the appellant.
6. The parties canvassed the appeal by way of written submissions.

The Appellants' Submissions

7. On liability the appellant submitted that the trial court erred in apportioning liability equally between the deceased and the respondent's driver taking into consideration the testimony placed before her.



The appellants submitted that evidence of PW2 PC G. Ndiema that the point of impact on the respondent's vehicle was on the right side facing Kisumu which evidence inferred negligence on the respondent's driver and as this testimony was not controverted or challenged in cross –examination, the burden shifted to the respondent to offer any logical explanation for veering onto the deceased's lawful path which he failed to do.

8. It was further submitted that the respondent's driver was driving at a high speed as was evident from the fatal injuries sustained by the deceased and that the driver had a duty of care to maintain safe and or legal speed which would have allowed him to effectively and safely stop or swerve the vehicle and avert the accident.
9. The appellants further submitted that if the respondent's driver was going to Kondele Police Station as he alleged in his testimony, then as the accident occurred at the gate of the police station, the driver would have turned left rather than right as he did and ended up knocking down the deceased and further, that it was not clear why if he was running away from irate bodaboda riders, then why was he speeding and why did he not go to the police station first rather than going home and coming back to report the incident.
10. As regards the deduction of the award on loss of expectation of life, the appellants submitted that this was a misapprehension of the law as the authority it relied on, *Asal v Muge* [2001] KLR had been overturned by the Court of Appeal *Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited* [2015] eKLR, where it explained that duplication occurs only if the beneficiaries of the deceased's estate under the *Law Reform Act* and dependants under the *Fatal Accidents Act* are the same and therefore awards for loss of dependency and lost years go to the same beneficiaries.

The Respondent's Submissions

11. On liability, it was submitted that the court ought not to interfere with the apportionment of liability made by the trial court since it had not been demonstrated that the trial magistrate exercised her discretion wrongly, or that her apportionment was based on no evidence or was on the application of a wrong principle.
12. Further, it was submitted that the Appellants had not demonstrated, in their submissions, the error that the trial Court committed in apportioning liability whereas there was evidence to show that both the deceased and the Respondent were negligent.
13. The respondent submitted that the degree of each driver's liability was not clear and thus in the circumstances, the trial Court was right in apportioning liability equally as was held in the case of *W.K (Minor Suing Through Next Friend and Mother L. K v Ghalib Khan & another* [2011] eKLR.
14. On the deduction of the award of loss of expectation of life, the respondent conceded that this was an error by the trial court as the issue of duplication or double benefit did not arise. Reliance was placed on the Court of Appeal case of *Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited* [2015] eKLR, where the Court of Appeal explained that duplication occurs only if the beneficiaries of the deceased's estate under the *Law Reform Act* and dependants under the *Fatal Accidents Act* are the same and therefore awards for loss of dependency and lost years go to the same beneficiaries.
15. The respondent thus submitted that the appeal against liability be dismissed and the appeal against the deduction of the sum under the *Law Reform Act* be allowed after which this Court do order that each party bears its own costs of the appeal.



Analysis and Determination

16. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep bear in mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In [*Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates*](#) [2013] eKLR, the court stated as follows-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”
17. Therefore, an appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in [*Mkuba v Nyamuro*](#) [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that-

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”
18. Having considered the Appellants’ Grounds of Appeal and the parties’ written submissions as well as the concession on the issue of deduction of the award on loss of expectation of life, which is now well settled in law, the only issue for determination before this court is whether the trial court erred in apportionment of liability equally between the deceased and the respondent’s driver.
19. In *Khambi and another v Mahithi and another* [1968] EA 70, it was held that:

“It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.”
20. This was reiterated in [*Isabella Wanjiru Karangu v Washington Malele*](#) Civil Appeal No. 50 of 1981 [1983] KLR 142 and [*Mabendra M Malde v George M Angira*](#) Civil Appeal No. 12 of 1981, where it was held that apportionment of blame represents an exercise of a discretion with which the appellate court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle.
21. Under section 107 of the [*Evidence Act*](#), the burden of proof lies on he who alleges. The question therefore is whether the appellants herein discharged the burden of proof that the respondent’s driver was wholly liable in negligence for the occurrence of the accident wherein the plaintiff minor was allegedly injured.
22. Examining the evidence before the trial court, PW1, the deceased’s mother did not witness the accident. PW2 No. 50139 PC Geoffrey Ndiema testified that he visited the accident scene on the material day along Kakamega – Kisumu road opposite Kondele Police Station gate. It was his testimony that both the deceased’s motorcycle and the respondent’s vehicle were heading towards Kisumu. He testified that the point of impact was on the right hand side while facing Kisumu and that the vehicle did not stop



- as it entered the police station in fear of the mob. PW2 testified that it was unclear who was to blame for the road traffic accident.
23. In cross-examination, PW2 testified that one Jactone Otieno did not record a statement with the police. He testified that both the motorcycle and motor vehicle had no pre-accident defects. He testified that he learnt that the respondent's vehicle had earlier knocked down a person at Tumaini area.
 24. PW3 Judatone Otieno testified that he witnessed the accident. He adopted his witness statement filed on May 8, 2017. In cross-examination, PW3 stated that on that night he saw many motorcycles but that they were not pursuing a vehicle. It was his testimony that both the pick-up and the deceased's motorcycle were heading in the same direction. He stated that there were no street lights, that the pick-up was behind him when he heard a big bang. He testified that he heard the deceased hoot but that the respondent's driver did not hoot. He testified that he went back to the scene after the accident.
 25. DW1 George Adfada Nyogoa, the driver of the respondent's motor vehicle testified that he was fleeing a minor accident and was being chased by motor cyclists. He testified that he was rushing to take refuge at Kondele Police Station when the deceased who was coming from town jumped into his lane to block him and so, the deceased hit his windscreen. DW1 blamed the deceased for the accident.
 26. In cross-examination DW1 testified that he was driving at a speed of between 50 – 100kph. He stated that he had reached the police station when he saw the deceased and that after the accident he ran to his home at Tom Mboya estate near National Oil and that later he walked to the police station. He further stated that had he not fled the scene of the 1st accident the accident would not have occurred and further that had he engaged his brakes he would have achieved a halt of 2m after skidding.
 27. I have considered the testimonies aforementioned. The respondent's driver's testimony raises some questions. Firstly, if the respondent's driver was going to Kondele Police Station as he alleged in his testimony, then as the accident occurred at the gate of the Police Station, the driver would have turned left rather than right as he did and ended up knocking down the deceased and further, it was not clear why, if he was running away from irate bodaboda riders, then why was he speeding and why did he not go the Police Station first rather than going home and coming back to report the incident.
 28. On the other hand, the testimony of PW3 who alleged to have witnessed the accident, also raises the question as to whether he witnessed it or he went to the scene after the accident, as he admitted that he was in front of the pick-up, that the deceased and the respondent's driver were heading in the same direction and that he heard the deceased hooting. He also stated that there were many motor cycles and he does not state at what stage he saw and identified the deceased motorcyclist who was among many yet it was dark and there were no street lights.
 29. PW2 testified that the point of impact was on the right hand side while facing Kisumu and that the vehicle did not stop as it entered the police station in fear of the mob. This is contradicted by DW1's own testimony that he left the car on the road as it stalled and ran to his home. PW2 still testified that it was unclear who was to blame for the road traffic accident.
 30. However, DW1 admitted that he was speeding, as is evident from his testimony that he was driving between 50 – 100kph and that even if he braked he would have achieved a brake after 2m. He also stated that motor cyclists were pursuing him after the first accident hence he had to escape and that is how the second accident occurred.
 31. From the above testimonies, it is evident that as a result of the first accident, DW1 was now speeding trying to get away from that scene. He admitted as much. The evidence on record further shows that the deceased and DW1 were heading in the same direction. This remains uncontroverted. Further, the point of impact was on the right side. What the court must reconcile is why having arrived at the gate



of Kondele Police Station, DW1 did not turn left into the Police Station but rather as is evident from the point of impact, seemed to move right. Further, DW1 ran home instead of running into the police station for protection and to report both accident incidents. However, DW1 stated and it was not controverted that he was being chased by motorcyclists after he was involved in the first accident. In my view, this situation contributed to the occurrence of the accident as PW3 did not state that he knew the deceased not to have been among the riders who were pursuing and attempting to block DW1 hence the accident.

32. It is not lost to this court that motorcycle riders commonly known as bodaboda are in the habit of attacking and even killing or humiliating motorists who are involved in accidents on the road and especially where the victim is one of their own. This habit in my view must have scared the driver, DW1 who had to flee for his own life from the first scene of accident only for him to encounter the deceased.

33. In *Evans Nyakwana v Cleophas Bwana Ongaro* (2015) eKLR it was held that:

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107(i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person... The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side.”

34. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in *William Kabogo Gitau v George Thuo & 2 others* [2010] 1 KLR 526 as follows:

“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 to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

35. In *Palace Investment Ltd v Geoffrey Kariuki Mwenda & another* (2015) eKLR, the judges of Appeal held that:

“Denning J. in *Miller v Minister of Pensions* (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

36. From the evidence on record, I find that although there was evidence that the deceased was hit on the right part of the road facing Kisumu, the direction where both the motor vehicle and the deceased



were heading, I find that PW3 did not witness the accident and it cannot be ruled out that the deceased was among those riders who were blocking the motorist from fleeing from the scene of the accident thereby being knocked.

37. Based on the foregoing, I am satisfied that there was some level of contributory negligence on the part of the deceased and that the trial court did not err when it apportioned liability between the deceased and the motorist.
38. As to what percentage of contribution, I am unable to find that there was clear evidence of both having contributed to the accident in equal measure as the motorist moved more to the right of where the deceased was pursuing him from instead of going to the left, the Police Station,. I therefore find that the motorist contributed more to the extent of 70% while the deceased contributed 30%.
39. I set aside the judgment on liability as apportioned by the trial court and substitute with an order that the respondent contributed to the accident at 70% and the deceased 30%.
40. I thus find that the trial court erred in apportioning liability equally.
41. The upshot of the above is that the appeal herein succeeds partially to the extent stated above. Each party shall bear their own costs of the appeal as the respondent also conceded that the deduction on the loss of expectation of life was erroneous.
42. Final Orders:
 1. Liability.....70: 30 against the respondent in favour of the appellants
 2. Damages:
 - i. Pain and suffering Kshs. 10,000
 - ii. Loss of expectation of life Kshs. 100,000
 - iii. Loss of dependency Kshs. 2,103,302.40Total Kshs. 2,213,302.40
less 30% contribution Kshs 663,990.72
Balance Kshs.1,549,311.68
Add special damages: Kshs 51,400
Total Kshs 1,600,711.68
 3. Each party to bear their own costs of the appeal herein.
File closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 22ND DAY OF JANUARY, 2024

R.E ABURILI

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

