



Edmond & another v Ondeyo & another (Suing as the administrators of the Estate of the Late Gregory Ochieng Odieny - Deceased) (Civil Appeal 85 of 2018) [2024] KEHC 1005 (KLR) (Civ) (8 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1005 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 85 OF 2018

JN MULWA, J

FEBRUARY 8, 2024

BETWEEN

MWANGI EDMOND 1ST APPELLANT

FELIX MWANGI 2ND APPELLANT

AND

PATRICIA ODERA ONDEYO & ALPHY OWUOR ODIENY (SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE GREGORY OCHIENG ODIENY - DECEASED) RESPONDENT

(PATRICIA ODERA ONDEYO & ALPHY OWUOR ODIENY (suing as the Administrators of the Estate of the Late GREGORY OCHIENG Odieny) Deceased)..... RESPONDENTS)

JUDGMENT

1. The Respondents sued the Appellants for damages that arose from a road traffic accident that occurred on 29/03/2015 along Kangundo Road involving the deceased’s motorcycle Registration No. KMCA 112D and motor vehicle Registration No. KBY 675K. Upon conclusion of the case, the trial Magistrate found the Appellants wholly to blame for the accident and proceeded to award the Respondents Kshs. 3,221,035/- on damages plus costs and interest.

Being aggrieved by the trial court’s findings both in liability and the award of damages, this appeal was lodged by a Memorandum of Appeal dated 12/2/2018 upon grounds that: -

1. The trial Magistrate erred in law and fact by the finding on liability that was against the weight of evidence



2. The trial Magistrate erred both in law and fact in the assessment of damages that are too high and therefore an erroneous estimate of the loss suffered.
2. This court has been urged to allow the Appeal by setting aside the judgment dated 2/02/2018 and re-assess liability and the quantum of damages as well as the award on costs and interest.

Parties filed written submissions on the Appeal which this court has considered alongside the trial court's judgment and the evidence adduced before the trial court.

3. The Appellant's evidence was adduced by DW1 Felix Mwangi Macharia and DW2 Kelvin Kariuki Mwangombe. They had filed witness statements. DW1 was the driver of the accident motor vehicle and was driving along Kangundo Road. He testified that he saw the motorcycle a few meters ahead being driven in a zigzag manner and that he had little time to avoid hitting it. It was his further testimony that upon hitting it the car rolled and found the rider dead.

It was his further testimony that he was not charged for a traffic offense and there was no witness at the scene of the accident and the police visited the scene after one hour.

On cross examination DW1 testified that he tried to swerve to avoid hitting the motorcycle but he still knocked it down. The police blamed him for the accident.

4. DW2 Kelvin Kariuki relied wholly on his witness statement and added that he was riding at the back of the motor vehicle.

His witness statement is not filed with the Record of Appeal as the witness statement filed is for one Kelvin Kamau but the one who testified is stated as Kelvin Kariuki Wangombe. I therefore cannot consider the same.

5. The Respondents evidence was adduced by PW1 Julius Odiény Odeyo, PW2 Patrína Ondeyo and PW3, a Police Officer attached at Buruburu Police Station. His evidence was that he was a witness to the accident that occurred at night. He testified that he saw the vehicle pass him very fast, left its lane and hit the motorcycle that was ahead of him. In his estimation, it was carelessly being driven.

6. PW2's evidence was that the deceased was her husband and did not witness the accident. She testified that they had three children and he was making about Kshs. 45,000/- in a month from his motorcycle business but did not have any records or evidence to support. She also did not have the children's birth certificates.

7. PW3 was the Police Investigating Officer. He visited the scene of accident. His evidence was that the deceased died on the spot and made a finding that the motor vehicle was to blame for the accident and produced the police abstract and the sketch plan. He told the court that the vehicle lay in a ditch on the left side and that it was overtaking and swerving to the right as shown by the skid marks. He concluded that the motor vehicle was to blame for the accident.

Upon the above evidence, the parties' advocates filed written submissions which the trial court considered.

8. Issues for determination
 1. Whether the trial court Magistrate erred in law and fact in holding the Appellants wholly liable for the accident
 2. Whether the trial Magistrate Court erred in the assessment of damages.



Analysis and Determination.

Liability

9. Whenever two or more vehicles collide, it has been held in judicial decisions that when there is not enough evidence as to which of the drivers is to blame, none of them can escape liability. The court of Appeal in *Caroline Ann Njoki Mwangi v. Paul Ngungu Muroki* [2014] eKLR held that, in the above circumstances both must be held to have contributed to the accident equally when occurrence of the collision is not denied.
10. Upon analysis of the evidence adduced by both parties at the trial court, it is not clear as to which of the two, the motor vehicle driver and the deceased motor cycle rider caused the accident as no witness was at the scene. I discount the evidence of DW2 who claims to have been a witness yet, other witnesses including the Police Investigating Officer who stated that there was no witness at about 12.30 am when the accident occurred. This aspect was well captured by the trial Magistrate when she cast doubts on the evidence of the said DW2.
11. The Investigating Officer took a sketch plan of the accident scene which showed skid marks of the vehicle at the time of the accident, and the motorcycle and the deceased's body lying on the side of the road with the vehicle in a ditch on the same left side. That evidence is the only one that shows how the accident may have happened.
12. The driver of the motor vehicle (DW2) testified to have seen the motorcycle being driven in a zigzag manner ahead of him and that it hit his vehicle while it was on its lane and further that he tried to swerve to avoid hitting the motorcycle. This evidence is in itself contradictory. If the motorcycle was ahead of his vehicle, it cannot be that it hit his vehicle that was behind the motorcycle. The only logical conclusion is that the vehicle hit the motorcycle and both veered to the left side of the road, with the vehicle landing in a ditch.
13. In the case of *Bundi Makube v. Joseph Onkoba Nyamuro* [1982-88] IKAR 108 it was held that: -

“a Court on Appeal will not normally interfere with a finding of fact by the trial court unless, it is based on no evidence or on a misapprehension of the evidence of the judge is shown demonstrably to have acted on wrong principles in making the findings he did”
14. The 1st Appellant who was the driver of the accident vehicle had a duty to explain how the accident occurred as the cyclist died from the collision. This in my view he failed to, leaving the court to pick up pieces from his evidence so as to find out the probable cause of the accident. Without a doubt, such a driver would try to shed negligence off his shoulders more so when there was no eye witness like was the case in this Appeal.
15. As captured in the evidence of DW1 (driver) and by the trial court, this driver saw the rider ahead before the accident or collision occurred. As a prudent driver it was his duty to take steps to avoid hitting the rider. He had a duty to adduce direct evidence to establish the facts without making any inferences, in order to connect the evidence to the facts without needing to reasoning or thinking or consideration. In my view the driver being the only witness he failed to meet the above requirements, to a greater extent.
16. For the above reasoning, I find that the trial Magistrate erred by failing to analyze the evidence adduced before her to find that the said evidence was not sufficient to hold the motor vehicle driver wholly to blame for the collision, there having no witness to support the driver's evidence. I therefore reject



the trial courts' findings of fact and apportion liability against the deceased at 20% and against the Appellants at 80%.

Quantum of Damages

a. Law Reform Act

17. This court finds no reasons to interfere with the trial courts awards made under this subhead. The awards are upheld.

b. Fatal accidents' Act

18. On income, no evidence of earnings was adduced. It is however safe to hold that the deceased then 37 years old was a motorcyclist from which business he used to earn a living with which he took care of his family of four.

In my view, a motorcyclist could easily be compared to a taxi driver, and recently the said industry being very vibrant, such motor cyclists could make more than Kshs. 1,000/= per day especially in Nairobi and its environs. I do not want to go the way of Petronilla Muli V. Richard Muindi Savi & Catherine Mwendu Mwindu [2021] eKLR where Limo J. compared a motorcyclist to a mechanic. With respect, this authority is only persuasive, and not binding on me. In the absence of a "wages guidelines" for motorcycle riders as a full blown business, I shall adopt an income of Kshs. 20,000/= per month as found by the trial court.

c. Multiplicand.

19. There is no doubt that the deceased left behind a family of young children and a wife. I do agree with the Appellants submissions that the trial court's adoption of 2/3 should not be disturbed.

d. Multiplier.

20. The trial court adopted 18 years which the appellants deem to be high, and proposed 15 years. I have considered the nature of the business. No doubt it is a risky business and accidents do occur every so often, but a careful driver and or rider in busy areas must be careful on the roads. The multiplier adopted by the trial court in my view is not too high as to persuade me to interfere with the court's discretion as stated in Butt v Khan (supra). I uphold 18 years as the Multiplier. It is upheld.

Loss of dependency is therefore calculated as hereunder:

$$20,000 \times 12 \times 18 \times 2/3 = 2,880,000/=$$

Summary of the awards in quantum of damages are as hereunder: -

Liability – 80:20 in favour of the Respondents

1. Pain and suffering - 50,000/=
2. Loss of expectation of life - 150,000/=
3. Loss of dependency - 2,880,000/=
4. Special damages - 141,035/=

Total - 3,221,035/=

Less 20% - 644,207/=

80% To Respondent – KSHS. 2,576,828



The above amount shall attract interest at court rates from the date of the trial court's judgment.

21. The appeal having been partially successful, each party shall bear own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF FEBRUARY, 2024.

J. N. MULWA

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

