



REPUBLIC OF KENYA



**KENYA LAW**

THE NATIONAL COUNCIL FOR LAW REPORTING

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**Mogere (Suing as the Legal Representative of the Estate of Janet Mongina Momanyi - Deceased)  
v Mwangi (Civil Appeal 182 of 2022) [2024] KEHC 2174 (KLR) (6 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2174 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CIVIL APPEAL 182 OF 2022**

**PN GICHOHI, J**

**MARCH 6, 2024**

**BETWEEN**

**SAMWEL MOMANYI MOGERE (SUING AS THE LEGAL REPRESENTATIVE  
OF THE ESTATE OF JANET MONGINA MOMANYI -  
DECEASED) ..... APPELLANT**

**AND**

**FRANCIS NJOGU MWANGI ..... RESPONDENT**

*(Appeal from the judgment /Decree of Hon. Khatambi Principal Magistrate Nakuru delivered  
on 30th day of November 2022 in Nakuru Chief Magistrate's Court Civil Case No. 84 of 2020)*

**JUDGMENT**

1. The background of this matter is that vide a plaint dated 21<sup>st</sup> January 2020, the Appellant herein sued the Respondent seeking judgment against the Defendant for:-
  - a. General damages under the *Fatal Accidents Act* and the *Law Reform Act*.
  - b. Special damages of Kshs. 98,850/=.
  - c. Costs and interest on (a) , (b) and (c).
2. The Appellant brought that suit his capacity as the father of the deceased aged 22 years at the time she was involved in a fatal road accident on 1<sup>st</sup> September 2019. The dependants were listed as Samuel Momanyi Mogere (Father), Beatrice Mokeira Momanyi (Mother) and David Momanyi (Minor).
3. The Respondent denied the claim vide a statement of Defence dated 7<sup>th</sup> July 2021.
4. The Appellant's case was advanced by evidence of two witnesses while the Respondent did not call any.



5. In its judgment delivered on 30<sup>th</sup> November, 2022, the trial held:-

“I find that the plaintiff has failed to prove negligence on the part of the defendant. Liability has not been proved.

It then follows that the plaintiff failed to prove its case on a balance of probabilities as a consequence the plaintiff’s suit is dismissed...each party to bear own costs.”
6. The trial court otherwise stated that had the Appellant’s claim succeeded , it would have awarded the Appellant:-Kshs. 50,000/- for Pain and SufferingKshs. 150,000/- for Loss of expectation of life.Kshs. 1, 628, 748 for Loss of dependency.
7. The trial court also held:-

“Special damages pleaded were Kshs. 98,850. Receipts for Kshs. 61,050 were produced in evidence. A sum of Kshs. 61,050. will suffice.”
8. Aggrieved by the said judgment, the Appellant filed a Memorandum of Appeal on 15/12/2022 on both liability and quantum. He prayed that:-
  1. The appeal be allowed with costs.
  2. The trial court’s judgment be set aside and or varied and this Court its finding on both liability and damages or in the alternative contributory negligence be provided for.
  3. The Court finds the Respondent liable for the accident and or in any event, apportion liability as appropriate.
  4. Costs of the appeal and in the trial court be awarded to the Appellant.

### **Submissions**

9. In his submissions dated 07/08/2023, the Appellant submitted that the trial court failed to appreciate that the Respondent who did not give evidence before the court was in control of a lethal machine and therefore owed a higher duty of care to the deceased who was a pedestrian.
10. The Appellant therefore urged the Court to reevaluate the case and make a finding on both liability and quantum.
11. In their submissions dated 27/09/2023, the Respondent submitted that the Appellant’s witness (PW2) was not the investigating officer and knew nothing about the police abstract. He only came to court to produce the abstract. That no sketch map was produced and the Appellant was not at the scene of the accident but was only been told of the accident by his nephew who was also not at the scene of the accident.
12. While relying on several cases including the case of *Benter Atieno Obonyo v Anne Nganga & Another* [2021] eKLR, the Respondent submitted that it was incumbent upon the Appellant to call the Investigating Officer who investigated the accident but failed to do so. They further submitted that it was also confirmed that the matter according to the police abstract was pending under investigation and that no traffic charges were ever passed against the Defendant/ Respondent.
13. He therefore urged the Court to find that there was sufficient evidence to hold the Respondent liable. In conclusion, he urged the Court find that the Appellant had failed to prove his case on liability against the Respondent on a balance of probabilities and therefore dismiss the appeal with costs.



## Determination

14. From the material before this Court, it is clear that this appeal is on liability only.
15. This being the first appellate court, its duty is to re-evaluate the evidence and come up with its own conclusions bearing in mind that it did not have an opportunity to see or hear the witnesses testify - see *Selle & Another v Associated Motor Boat Co. Ltd* (1968) EA 123.
16. In his witness statement filed on 07/01/2020 and which was adopted as evidence by the Appellant (PW1), he was only informed by his nephew that the deceased had been involved in an accident along Nakuru -Nairobi Highway and rushed to PGH Nakuru.
17. There is no dispute that he did not witness the accident. However, there is no doubt that the accident did occur involving the deceased as a pedestrian and motor vehicle registration number KCV 543 A. There was no challenge on the police abstract produced by the police officer No. 69679 PC Samson Okello.
18. The Copy of records showed that the said motor vehicle belonged to the Respondent herein as at the time of the accident. That document was also not challenged.
19. The post mortem report produced as evidence showed that the cause of death was head injury due to blunt head trauma due to motor vehicle accident.
20. This is a civil case and therefore, the Appellant only needed to prove his case on a balance of probabilities. It is not pegged on a driver of an accident motor vehicle being charged with a traffic offence in regard to the accident. Further, the facts in *Benter Atieno Obonyo* (supra) were different from the facts in this case. The deceased Joseph Mwangari was a pillion passenger aboard motor cycle when he was involved in an accident with tuktuk registration number KTWA 536E and motor vehicle KBP 224F owned by the 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively.
21. The evidential burden in this case shifted to the driver of the said accident but he was not able through cross-examination of witness in the Appellant's case or by testimony on the part of the Respondent. In regard to evidential burden of proof, the Court of Appeal in *Mbuthia Macharia v Annah Mutua & Another* [2017] eKLR had this to say:-
  - “(16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the Appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced.”
22. In its judgment the trial court had this say on liability:-

“I have considered the evidence on record and the authorities presented by the parties. I note that the Plaintiff witnesses never presented evidence to demonstrate that the defendant was negligent. I make this observation because while noting that the only issue proved was that the accident occurred and the pedestrian was hit. It is not clear whether if the point of impact was on the road or off the road . It is not clear whether the vehicle was driven at excessive speed or not. There is no indication whether the deceased was on the lookout for the oncoming vehicles or she crossed the road suddenly without due care to oncoming



vehicles. In the absence of the aforementioned information, I find that the plaintiff failed to prove negligence on the part of the defendant . Liability has not been proved.”

23. This Court is satisfied that the trial court failed to consider the principle on evidential burden and therefore fell into error in the above finding. This was a case where liability ought to have been apportioned between both parties.
24. It was upon the driver of the accident vehicle to testify as to how the accident happened. Vehicles do not just go knocking pedestrians whether they are walking off the road or crossing the road.
25. The driver is expected to drive with due care and attention and should an accident occur, and he is alive like in this case, then it would be expected that he also gives his version as to how the accident did occur . It is not enough for him to boldly deny the occurrence of the accident and plead that in the alternative and without prejudice, that he denies that the accident was substantially contributed to by the negligence of the deceased.
26. In light of the above analysis, the Court finds that the trial erred in dismissing the Appellants claim on liability.
27. In the circumstances the Appeal succeeds. Judgment on liability is therefore set aside and substituted with a finding that liability is shared between the Appellant and the Respondent at the ratio of 50:50.
28. On quantum, this Court has considered the reasoning by the trial court leading to the awards. There being no issue on quantum, there is no basis for interference by this court.
29. In conclusion, the Appeal succeeds partially and the Court makes the following orders:-
  1. The trial magistrate’s judgment on liability is set aside and substituted with judgment this Court that liability shall be shared as between the Appellant and the Respondent in the ratio of 50:50.
  2. The trial magistrates assessment on general damages being a total of Kshs. 1,828,748.00 is upheld but the same be subjected to liability.
  3. The Special damages of Kshs. 61,050.00 is upheld.
  4. The Appellant is awarded half costs of this appeal .

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 6<sup>TH</sup> MARCH, 2024.**

**PATRICIA GICHOHI**

**JUDGE**

In the presence of:

Ms Ntabo for Appellants

N/A for Respondent

Ruto Court Assistant

