



**Gitimu v Dhido & another (Suing as the Legal Representatives
of the Estate of Hasna Hussein Dido - Deceased) (Civil Appeal
E074 of 2022) [2024] KEHC 5643 (KLR) (22 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5643 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E074 OF 2022
DAS MAJANJA & OA SEWE, JJ
MAY 22, 2024**

BETWEEN

PATRICK KUIRIA GITIMU APPELLANT

AND

YUSUF HUSSEIN DHIDO 1ST RESPONDENT

HUSSEIN GESIYO OMARC 2ND RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF HASNA
HUSSEIN DIDO - DECEASED**

*(Being an appeal from the Judgment and Decree of Hon. E. Muchoki, RM dated
27th April 2022 at the Magistrates Court at Mombasa in Civil Case No.120 of 2021)*

JUDGMENT

Introduction and Background

1. Before the court for determination is an appeal by the Appellant against the Subordinate Court's findings of liability in a judgment dated 27.04.2022 stemming from a suit in respect of an accident that occurred on 07.10.2020 involving the Appellant's motor vehicle registration number KAU *F ("the motor vehicle") and the Deceased who was a pedestrian along Port Rietz Road. In their plaint, the Respondents claimed that the motor vehicle, which was owned by the Appellant, was being carelessly driven that it knocked down the Deceased thereby occasioning her multiple fatal injuries. The Respondents thus sought general and special damages together with interest and costs of the suit.
2. While the Appellant generally denied the claims in the plaint, he proffered that the said accident was wholly caused or substantially contributed to by the Deceased's negligence. He urged the Subordinate Court to dismiss the suit.



3. When the matter was set down for hearing the Respondents testified as PW2 and PW3 and they also called PC Anami Swaleh (PW1) from Changamwe Police Station. The Appellant neither called any witnesses nor produced any evidence. The Subordinate Court rendered the judgment where it inter alia found the Appellant 100% liable for the accident hence the present appeal which I now turn to determine below.

Analysis and Determination

4. In determining this appeal, the court is guided by the principle that it is its duty to re-evaluate the evidence independently and reach its own conclusion as to whether to uphold the judgment. In doing so, the court must make an allowance for the fact that it neither heard nor saw the witnesses testify (see *Selle v Associated Motor Boat Co. Ltd* (1968) EA 123).
5. Even though the Appellant raises 5 grounds in its memorandum of appeal, he has condensed the issue for determination in his submissions to that of liability. A court's finding on liability is dependent on the facts and evidence available and in assessing the same, the court considers causation and blameworthiness (see *Wanjiru Karanja v Washington Malele* [1983] eKLR). Proof in such cases is on a balance of probability and that the burden of proof is on the party alleging the existence of a fact which he wants the Court to believe. This is anchored in section 107 (1) and (2) of the *Evidence Act* which provides that "whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist" and that "When a person is bound to prove the existence of any fact it is said that he burden of proof lies on that person". The Court of Appeal in *James Muniu Mucheru v National Bank of Kenya Ltd* [2019] eKLR simply put it that 'Courts will make a finding based on which party's version of the story is more believable.'
6. Even though the Appellant filed a defence, he did not call any witnesses or produce any evidence. The Subordinate Court was right to state that the effect of a defendant filing a defence but not calling evidence to challenge a Plaintiff's testimony renders not only the defence unsubstantiated but also leaves the plaintiff's case unchallenged (see *Autar Singh Babra and another v Raju Govindji*, HCCC No 548 of 1998 (UR) and *Motex Knitwear Limited v Gopitex Knitwear Mills Limited* [2009]eKLR). However, even though the Appellant failed to support his defence by evidence, the Respondents still had a duty to prove their case on a balance of probabilities as is required by law. This was held by the Court of Appeal in *Kirugi and another v Kabiya & 3 others* [1987] KLR 347 where it was stated that, "The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof". Likewise, failure by a defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard hence in *Gichinga Kibutha v Caroline Nduku* [2018] eKLR the Court held that, "It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest."
7. The trial magistrate therefore fell in error when he automatically allowed the Respondents' case to succeed simply because the Appellant did not produce evidence. In any case and as I have stated above, as the first appellate court, I can reprise the evidence and come to my own independent conclusion on whether the subordinate court's conclusion on liability was sound. PW1 testified much on the occurrence of the accident. He admitted that the police abstract issued was premature as the accident was still pending investigations and that it was not clear who was to blame for the accident. He also stated that there was no sketch map, that the road in which the accident occurred was dualled and that there was no footpath. He stated that no one is supposed to cross a dual carriage and that care ought to have been exercised by both motorists and pedestrians. From this evidence, it can be stated that it was not clear who was to be blamed for the accident. The Deceased crossed the road in an undesignated



spot and there was no evidence that both the Deceased or the Appellant were properly looking out and exercising caution as they used the road at the time. As the Court of Appeal in *Isabella Wanjiru Karanja v Washington Malele* (*supra*) held, “... there can be no excuse for the driver’s complete failure to see the pedestrian, or for the pedestrian’s complete failure to see the car”. Thus, I would be inclined to blame both the Deceased and the Appellant for the accident and find that both of them were careless in the manner they used the road thereby occasioning the accident. I thus apportion blame on a 50:50 basis.

Disposition

8. The Appellant’s appeal therefore succeeds but only to the extent that the finding on liability by the Subordinate Court is set aside and substituted with an apportionment of 50:50 as between the Appellant and the Respondents. The Appellant should also have costs of the appeal assessed at Kshs 20,000.00.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT MOMBASA THIS 22ND DAY OF MAY 2024.

OLGA SEWE

JUDGE

