



REPUBLIC OF KENYA



**KENYA LAW**  
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**Guardian Coach Limited & another v Omeny ((Suing as legal representative of the Estate of Kevin Otieno Nyawanga – Deceased)) (Civil Appeal E039 of 2022) [2024] KEHC 5579 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5579 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CIVIL APPEAL E039 OF 2022  
DO OGEMBO, J  
MAY 9, 2024**

**BETWEEN**

**GUARDIAN COACH LIMITED ..... 1<sup>ST</sup> APPELLANT**

**NYAMIRA LUXURY EXPRESS CO LTD ..... 2<sup>ND</sup> APPELLANT**

**AND**

**SAMWEL OMOLO OMENY ..... RESPONDENT**

**(SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF KEVIN OTIENO NYAWANGA – DECEASED)**

*(Being an Appeal emanating from the Judgment of the Hon. S. W. Mathenge, RM, in PM's Court Bondo, Civil Suit No. 148 of 2019) dated 3/8/2022)*

**JUDGMENT**

1. This Appeal challenges the Judgment rendered by the learned Resident Magistrate Bondo, in PMCC No. 148 of 2019 (Hon. S. W. Mathenge). In the said case, Samwel Omolo Omeny, suing as legal representative of the estate of Kevin Otieno Nyamwanga (deceased), had sued, the two Appellants for general damages, costs of the suit, funeral expenses and interests at court rates. In the judgment of the court, the court awarded as follows:-
  - i. Pain and suffering Ksh100,000/=
  - ii. Loss of Expectation of life Ksh.100,000/=
  - iii. Loss of dependency Ksh.679,999/=Total Ksh.879,999/=
2. Liability was determined at 50:50 against the Appellants (Defendants) and respondent.



3. Aggrieved, the Appellants have appealed to this court. In the Memorandum of Appeal dated 25/8/2022, the appellants have listed the following grounds.
  1. That the learned trial magistrate erred in fact and in law by failing to dismiss suit and apportioning 50 % liability to the Defendant without considering the circumstances of the case.
  2. That the learned trial magistrate erred in law and in fact in finding in favour of the Respondent (Plaintiff) against the Appellant (Defendant) when there was totally no credible evidence or proof of negligence on the part of the Appellant.
  3. That the learned trial magistrate erred in fact and in law in failing to consider the Applicant's submissions on liability by completely disregarding the submissions and authorities of the Appellant and as a result arrived in unjustified decision on liability.
4. The Appellants plead that this Appeal be allowed and that the court be pleased to reassess the award on liability in view of the evidence tendered and dismiss the suit against the Appellants. The Respondent opposes this appeal.
5. From the Appellants' side, it was submitted that the suit emanated from a road traffic accident which occurred on 5/5/2018 when the Plaintiff was lawfully riding motor cycle Reg. No. KMEC 126 along Bondo – Kisumu Road when motor vehicle Registration No. KBW 510P, negligently, carelessly and or recklessly, made a sudden turn and or lost control and hit the Plaintiff who sustained injuries from which he later died. That this appeal is only on liability.
6. Relying on *Selle and Ano. -vs- Associated Motor Boat Co. Ltd and Others* [1968] EA 123, it was submitted that being a first appeal, the duty of this court is to re-evaluate, re-assess and reconsider the evidence adduced and come up with its own conclusions bearing in mind that the Appellate court did not have the opportunity to hear the witnesses testifying in the first instance before the subordinate court.
7. Reference was made to the effect that PW1, though called as an eye witness, did not record any statement. That PW3, Pc Sebastian Maloba, produced a police abstract showing that the matter was still pending under investigations. That in the evidence of the witness, the Respondent was to blame for the accident as he was overtaking when he collided with the bus. And that the motor vehicle inspection report showed that the front side bumper extensively damaged, front corner panel damaged, front grill damaged at off side, off side front side step bent/buckled, windscreen smashed, off side front door buckled/dented/scratched/misaligned, off side front wheel arch damaged.
8. It appears the same witness again gave evidence as DW1, in which he testified that from the investigations, the Respondent was riding from the opposite direction overtaking a lorry when he hit the front side of the bus. That the rider, the deceased was to blame for the accident. That the same evidence was given by the bus driver, DW2. The submissions were that the cyclist was 100 % to blame for the accident.
9. On the other hand, the Respondent submitted that the only issue is whether the court was right in apportioning liability at 50:50. That the same police officer gave evidence as PW2 and DW1 and gave conflicting evidence. That as PW2, the officer indicated that he did not know the circumstances of the accident as he was not the investigating officer, and the matter was still pending under investigations. While as DW2, he blamed the rider for causing the accident. That the trial court duly considered the evidence as stated by the witnesses (paragraph 2 of page 4). It was pleaded that his appeal lacks merit and same should be dismissed.



10. I have considered the proceedings of lower court and the judgment appealed from. I have also considered the 2 sets of submissions filed by the two sides. As already observed above, this appeal is only on liability.
11. The duty of this court as a first appellate court is well settled ie. To re-evaluate, re-assess, and reconsider the evidence adduced before the trial court and to come up with its own conclusions (*Selle And Ano -v- Associated Motor Boat Co. Ltd and Others* (1968) EA 123.
12. From the proceedings of the lower court, two witnesses gave evidence on the issue of liability or causation of the accident. According to PW1, Samwel Omollo, he witnessed the accident. That the motor vehicle KBW 510 P which was coming from the opposite direction, suddenly turned and hit the cyclist, who died on the spot.
13. The second witness to give evidence on the issue of causation of the accident was Sebastian Maloba. He first gave evidence as PW2 in which he stated that he was not the investigating officer, and that he did not know the circumstances of the accident. He turned to blame the rider because the rider had been overtaking when he collided with the bus. This witness did not produce any sketch maps for the accident.
14. The same witness later again gave evidence for the defence, DW1. As defence witness, he stated that the motor cycle had been overtaking a lorry when it hit the body of the bus. He now blamed the rider for the accident.
15. It is clear from the evidence of these two witnesses that the court was treated two conflicting pieces of evidence while giving evidence for the Plaintiff, this witness was clear that since he was not the investigating officer, he did not know the circumstances of the accident and that the matter was still pending under investigations. As a witness for the defence, his evidence was that it is the rider (deceased) who was to blame since he had been overtaking a lorry when he collided with the bus.
16. The one piece of evidence which comes out clearly is that the collision between the motor cycle and the bus was on the road. This fact is confirmed by the fact that the point of impact on the bus was on the front right side. No sketch map or drawing of the scene was produced in evidence to show to this court the exact spot on the road where the collision occurred. The bus may have moved past the middle yellow line only to hit the deceased on the other side of the road. The rider could possibly have moved to the right side of the road on the way of the bus.
17. Regarding the evidence of PW1, that the bus made a turn ahead of the rider, the same lacked any corroboration. The points of impact on the bus do not also support this claim. It is also inconceivable why a bus on the high way to Nairobi would make such a sudden turn. This evidence of PW1 was therefore simply unbelievable.
18. The trial magistrate grappled with this issue and even noted that the same police officer testified for the two sides and even produced two police abstracts with different conclusions. One that the case is still pending under investigations. And the other, that the rider was to blame for the accident. The court even went on to rely on the case of *Domitila Wangui Karugu & Ano -vs- Dagu Hidris Haide* (2020) eKLR, in which Majanja J. dealing with a similar situation ruled in equal apportionment of liability.
19. The binding authority of the Court of Appeal of *Hussein Omar Farah -vs- Lento Agencies* Nairobi Court Of Appeal, Civil Appeal 34 (2005 (2006) eKLR, on which the court also relied found;

In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides, as to who is to blame for the accident. In this state of affairs the



question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between the two drivers, both should be held equally to blame.”

20. As observed above, the evidence of both the Plaintiff and Defendant sides were not concrete as to enable this court determine who between the deceased and the bus driver was to blame for this accident. I therefore find the two cases relied on by the trial court to be directly applicable in this case ie the cases of *Domitila Wangui Karugu & Another*, and the *Hussein Omar Fara* Case Cited Above).
21. With respect, I find that the trial magistrate analyzed the evidence presented before her well and arrived at the right determination, as I hereby do, that liability between the Plaintiff and the Defendant be shared equally at 50:50. This appeal of the Appellants, seeking that the finding of the lower court on liability be overturned, and that the deceased (rider) be held wholly liable, does not have any basis at all and lacks any merit. I so find and dismiss this appeal wholly. Costs of this appeal are awarded to the Respondent.

**DATED, SIGNED AND DELIVERED THIS 9<sup>TH</sup> DAY OF MAY, 2024.**

**D. O. OGEMBO**

**JUDGE**

**9/5/2024**

Court

Read out in court in presence of Ms. Turgutt for the Appellant and Ms. Nyakongo for Respondent.

**D. O. OGEMBO**

**JUDGE**

**9/5/2024**

Ms. Turgutt

We pray for 30 days stay so as to pay.

Ms. Nyakongo

We do not oppose.

Court

There is hereby ordered 30 days Stay as prayed.

**D. O. OGEMBO**

**JUDGE**

**9/5/2024**

