



**Kithuka & another (Suing as the administrators of the Estate of the Late Charles Kilonzo Mwanzi - Deceased) v Sinohydro Corporation Ltd (Civil Appeal E036 of 2023) [2024] KEHC 9141 (KLR) (23 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9141 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITUI  
CIVIL APPEAL E036 OF 2023**

**RK LIMO, J  
JULY 23, 2024**

**BETWEEN**

**VERONICA MUGWEE KITHUKA & MARY NDAINA MWANZI (SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE CHARLES KILONZO MWANZI - DECEASED) ..... APPELLANT**

**AND**

**SINOHYDRO CORPORATION LTD ..... RESPONDENT**

**JUDGMENT**

1. This is an Appeal from the Judgment of Hon. J. W Wang'ang'a delivered on 3<sup>rd</sup> May 2023 in Mutomo PM's court Civil Case No E015 of 2022.
2. The Appellants sued the Respondent in the lower court for tort of negligence. The Appellants cause of action was based on a road traffic accident involving Motor Vehicle Registration KCP 446A owned by the Respondent and Motor Cycle Registration No. KMES 908Y ridden by the deceased (Charles Kilonzo Mwanzi) along Kitui – Mutomo road on 27<sup>th</sup> June 2021.
3. The Appellants while suing as personal representative of the deceased and blamed the Respondent's driver for causing the accident pleading that its driver was speeding and was reckless.
4. The Respondent on the other hand blamed the deceased for riding his motorcycle carelessly and riding without a valid riding license.
5. The following is the evidence tendered at the trial. In respect to the Appellants' case, Mary Ndinda Mwanzi (PW1) gave evidence that the deceased was her son and that he was involved on a traffic road accident on 27<sup>th</sup> June 2021. She stated that she received news of the accident from an unknown caller who informed her that the deceased had been rushed to Ikanga Health Centre for treatment. She stated that she went to the health centre from where they were referred to Kitui County Hospital. That the



- deceased was attended to at the county hospital but they were informed that his injuries were serious and referred for further treatment at Kenyatta National Hospital. That they proceeded to Kenyatta National Hospital but the deceased was pronounced dead on arrival. It was her testimony that the deceased was 27 years old at the time of his death and was working as a teacher and the sole bread winner of their family. She produced bundle of documents marked as PEXH 2-13.
6. Ben Mwalimu Mueni (PW2) told the court that he was an eye witness. He stated that he was standing outside a shop at Ikanga when he saw a motorcyclist along Kitui-Mutomo road who was keeping to his lane. He stated that the rider had a helmet and reflector jacket on. That he then saw the subject motor vehicle which he stated was being driven recklessly as the driver was over speeding. That the driver of the vehicle lost control and knocked down the deceased. He stated that he went to the scene and found the deceased bleeding from his mouth, nose and ears. He blamed the driver of the vehicle for the accident.
  7. In cross-examination, the witness maintained that he saw the subject motor vehicle hitting the deceased's motor cycle. In one instance he stated that the vehicle and the motor cycle were both on the left side headed in the same direction but changed his testimony and stated that they were going in the opposite direction. That the vehicle hit the rider from the left side.
  8. Inspector Galcha Dida (PW3) stated that he was the Investigating Officer in the traffic case. He stated that on receipt of the report about the accident he proceeded to the scene and found the deceased & driver of the Motor Vehicle at the scene both with injuries. He stated that the deceased who was the cyclist was trying to turn to the right at Ikanga Trading Centre when he was knocked down by the driver of the subject Motor Vehicle.
  9. He stated that the driver did not slow down to 50km/h when approaching a Trading Centre and that, that was the basis upon which he was charged with an offence of causing death by dangerous driving. He however, stated that the driver was later acquitted of the offence. He rendered Police Abstract as PEX 1.
  10. The Respondent on its part called Wilhelm Mwandau Mwakio (DW1) the driver of the subject motor vehicle he stated that he was driving headed to Kitui on the material day at a speed of about 60km/hr when upon reaching Ikanga market he saw the motor cycle approaching him from the opposite lane. His testimony was that the rider did not have any safety gear or helmet on. He stated that the rider suddenly crossed over to his lane which forced him to swerve to the right in an attempt to avoid a collision. That despite his efforts the rider hit his vehicle on the left wing and landed on the left shoulder of the road sustaining serious injuries and was rushed to hospital. That officers arrived at the scene and took his particulars but the deceased did not have insurance or a rider's license. The witness blamed the deceased for the accident.
  11. At the conclusion of the trial, the trial Magistrate found that the deceased was largely to blame for the accident for failing to be cautious on the road. The court also found that the driver of the subject motor vehicle was speeding but indicated that he could not have avoided the collision as the deceased made an abrupt turn the vehicle's path. The court cited the testimony of PW2 to the effect that the deceased encroached into DW1's rightful lane. The court proceeded to apportion liability at 80:20 in favour of the respondent. On quantum, the trial Magistrate awarded Kshs.150,000/- for loss of expectation of life, Kshs 50,000/- for pain and suffering, Kshs 2,376,000/- for loss of dependency and Kshs 25,250/- for special damages total 2,600,000/- less 80% contribution. The appellants were also awarded costs of the suit and interest.
  12. The Appellants dissatisfied with the judgment on liability and quantum and filed this appeal raising the following grounds;



- i. That the learned magistrate erred in law and in fact in apportioning liability in the ratio of 80:20 in favour of the respondents and against the appellant.
  - ii. That the learned magistrate erred in law and in fact by not fully considering and/or appreciating all the facts presented before him by the appellants.
  - iii. That the learned magistrate erred in law and in fact holding the appellant to blame for the subject accident to the extent of 80% without taking into account the circumstances of the accident and the fact that the driver was blamed in the police abstract for causing death by dangerous driving.
  - iv. That trial magistrate erred in law and in fact ignoring the appellants' pleadings, evidence and submissions before him in respect of the issue of liability
  - v. That the learned magistrate erred in law and in fact in relying on issues not in parity with the facts of the instant case before him.
13. The Appellants in their written submissions through counsel fault the trial court for apportioning liability to the deceased at 80%.
  14. The appellants have placed reliance on the eye witness testimony by PW2 who testified that he was standing at a shop at Ikanga when he saw a motor cyclist along Kitui-Mutomo road keeping to his lane and had a reflector jacket on when the subject motor vehicle which was speeding lost control, veered off the road and knocked down the rider. The appellants have also placed reliance on the evidence of PW3, the investigating officer who testified that the driver of the accident vehicle was blamed and charged for causing death by dangerous driving. The appellants contend that the respondent's driver admitted to driving at a speed of 60km/hr at a market place where the speed limit is set at 50km/hr. They submit that the driver was largely to blame for the accident and that the trial court erred in apportionment of liability. They submit that the respondent ought to have been held to be 100% liable.
  15. The Respondent on the other hand supports the trial court's finding on liability and submit that the deceased breached his own duty of care by operating an uninsured motorcycle, and riding unlicensed with no protective gear. It submits the appellant failed to prove particulars of negligence levelled against its driver. The respondent points out that the Investigating Officer failed to produce corroborative documents such as sketch maps, photographs of the scene or comprehensive investigative report to establish negligence against the respondent. It submits that police abstract alone is not proof of negligence and that the appellant failed to discharge their burden of proof outlined under Section 107 of the *Evidence Act*. The respondent cites the case of *Cadama Builders Limited vs Mutamba (suing as the administrators of the Estate of Philip Musie Ndolo) (deceased) (2022) KEHC 11029 (KLR)* in support of the submission that a plaintiff is required to prove negligence against a defendant where a claim is based on negligence.
  16. This court has outlined the Appellants' case as well as the Respondent's case. This is a first appeal and the role of this court is to re-evaluate and reconsider the evidence tendered at the trial and draw own conclusions. This appeal is only on liability. Both parties have no issue with the award on damages by the trial court.
  17. The only issue for determination in this appeal is whether the Appellants discharged their burden of proving that the Respondent's driver was 100% to blame.



18. The legal burden of proof as provided for under Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that;
- “Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.”
19. Sections 109 & 112 of the *Evidence Act* further provides as follows;
- “109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.
112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.”
20. In Civil Cases the standard of proof is on a balance of probability therefore the burden stipulated above should be discharged on a balance of probabilities. This means the Plaintiff is required to demonstrate or establish that it is more probable than not, that the allegations that he made occurred.
21. The Court of Appeal’s position on the standard of proof in accident cases was stated in the case of *Nadwa -vs- Kenya Kazi Ltd (1988) eKLR*, where the observed as follows;
- “In an action for negligence the burden is always on the plaintiffs to prove that the accident was caused by the negligence of the defendant. However, if in the course of trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendant the issue will be decided in the plaintiff’s favour unless the defendant’s evidence provides some answer adequate to displace that inference.”
22. The uncontested facts in this instance are that the deceased was fatally injured by motor vehicle registration number KCP 446A which was being driven by the respondent’s driver or agent at the material time when riding his motor cycle registration number KMES 908Y. What is in dispute is who was to blame for the accident. PW2’s testimony was that he witnessed the accident but on cross examination he stated that he was inside a shop when he heard an impact and he went out to investigate, he saw the subject vehicle having hit the deceased. Although he insisted that he saw the accident occur, his testimony did not include an account of how the accident actually happened. His position was that he saw the deceased after the accident. He stated that the subject vehicle was on the left side headed to Kitui from Mutomo and the motor cycle was also on the left side though the two were headed in opposite directions and that the vehicle was damaged on the left side. According to PW2 both vehicle and motorcycle were on the left lane.
23. It is apparent that owing to the contradictions PW2 was not reliable because if he was inside the shop when he accident occurred, there is no way he could have witnessed how the accident occurred and who was to blame.
24. DW1’s on the other hand stated he saw the motorcycle approaching him from the opposite lane and without warning, the rider crossed over to his side forcing him to swerve to the right in an attempt to avoid a collision but that the rider was hit by the left side of the vehicle and landed on the left shoulder of the road.



25. The Investigating Officer stated that he went to the scene and his reason was that the deceased was off the road and was hit when he attempted to turn right. He stated that he preferred charges against the Respondent's driver because of exceeding the speed limit of 50km/h given that the accident occurred along a trading Centre.
26. The trial court's finding on liability was as follows;
- “After considering the two versions of the story, I find that the deceased is largely to blame for what befell him on the material day. He was not cautious or careful on the road and he abruptly turned to the right to exit the tarmac without ensuring there was no incoming traffic. This ultimately resulted him to coming into contact with DW1 who had very little options to evade the collision. The much DW1 tried doing was swerve to the right to avoid maximum impact but this did not help avoiding the accident.
- Even though PW3 blamed DW1 for exceeding a speed limit of 50 km/h in a market place, this could however not avoided a collision since the rider took an abrupt turn. There was also no sketch map produced by him to show the point of impact was off the tarmac. PW2 infact confirmed the rider turned right on DW1 rightful lane.”
27. The trial court's determination that the deceased was largely to blame was premised on the finding that he turned right abruptly and gave little chance to the Respondent's driver to avoid the accident. The same was correct to some extent.
28. In my re-evaluation, this court find that based on the evidence tendered, the Appellant really did not tender sufficient evidence to show where the point of impact was. It was necessary for the Appellants' counsel to ensure that the Investigating Officer (PW3) tendered the sketch maps unless of course they found the same adverse to their case.
29. The Appellant's witnesses in my view failed to discharge the burden of proof that the Respondent was 100% liable for the accident. The only fact established was the fact that the Respondent's driver was driving at 60km/h instead of 50km/h allowed in that section (Trading Centre) where the accident occurred.
30. However, on the other hand, the admission by the Respondent that he was driving at 60km/h along a Trading Centre in my view established that to some extent he was also responsible for the accident though the deceased also contributed more to the same by abruptly turning without warning. This court on evaluation finds that the trial court apportioned only 20% liability to the Respondent but he bore more than 20%. Given that it was not very clear how the accident actually happened, the doctrine of res ipsa loquitur applies. In that respect, I find that both the deceased and Respondent's driver were both to blame. The Respondent was 40% liable because of exceeding speed limit at a Trading Centre while the deceased was 60% liable for abruptly turning into the Respondent's lane. In the premises, this appeal partly succeeds the trial court's finding on liability is set aside. The Respondent was 40% liable to blame while the deceased bore 60% liability. The finding on quantum is upheld. The Respondent will therefore pay Kshs. 2,600,000/= less 60%. The Appellant will have 40% costs in this appeal and also in the lower court.

**DATED, SIGNED AND DELIVERED AT KITUI THIS 23<sup>RD</sup> DAY OF JULY 2024.**

**HON. JUSTICE R. LIMO**

**JUDGE**

