



Mwaniki v Shamola & Karanja (Suing as legal representatives of the Estate of Jane Khavali) & 3 others (Civil Appeal E006 of 2023) [2024] KEHC 11487 (KLR) (23 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11487 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CIVIL APPEAL E006 OF 2023
JN KAMAU, J
SEPTEMBER 23, 2024**

BETWEEN

EZEKIEL MWANIKI APPELLANT

AND

**JACKLINE MBALIZI SHAMOLA & KENNETH KHALMA KARANJA
(SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF JANE
KHAVALI) 1ST RESPONDENT
MALANG KOTIK BUSINESS MERCHANTS 2ND RESPONDENT
KELVIN RUTO 3RD RESPONDENT
WILLIAM KOMEN SOMOKWO 4TH RESPONDENT**

(Being an appeal from the Judgment and Decree of Hon R. Ndombi (PM) delivered at Vihiga in Principal Magistrate’s Court Case No 185 of 2016 on 17th March 2023)

JUDGMENT

Introduction

1. In her decision of 17th March 2023, the Learned Trial Magistrate, Hon R. Ndombi, Principal Magistrate, found the Appellant fifty (50%) and the 2nd, 3rd and 4th Respondents also fifty (50%) per cent liable for the death of Jane Kavali (hereinafter referred to as “the deceased”). She entered Judgment in favour of the 1st Respondent herein against the Appellant and the 2nd, 3rd and 4th Respondents as follows:-

Loss of dependency Kshs 420,782/=

$2/3 \times 5844 \times 9 \times 12$

Loss of expectation of life Kshs 100,000/=



Pain and suffering Kshs 10,000/=

Special Damages Kshs 15,980/=

Kshs 546,762/=

Plus costs and interest of the suit

2. Being aggrieved by the said decision, on 14th April 2023, the Appellant filed a Memorandum of Appeal dated 13th April 2023. He relied on five (5) grounds of appeal. He also filed a Supplementary Record of Appeal dated 2nd February 2024 on 12th February 2024.
3. His Written Submissions were dated 21st March 2024 and filed on 22nd March 2024. The 1st Respondent's Written Submissions were dated 25th March 2024 and filed on 15th April 2024 while those of the 2nd, 3rd and 4th Respondents were dated 8th April 2024 and filed on 11th April 2024. The Judgment herein is based on the said Written Submissions which the parties relied upon in their entirety.

Legal Analysis

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
5. This was aptly stated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.
6. Having looked at the grounds of Appeal and the respective parties' Written Submissions, it appeared to this court that the only issue that had been placed before it for determination was whether or not the Trial Court erred in apportioning liability equally against the Appellant and the 4th Respondent warranting interference by this court.
7. The Appellant reproduced the evidence that was tendered during trial. He submitted that this being a first appeal, this court had the duty to re-evaluate, re-asses and re-consider the evidence adduced and come up with its own conclusions bearing in mind that it did not have the opportunity to hear the witnesses testify in the first instance before the subordinate court as was held in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* (Supra).
8. He placed reliance on the case of *Swan Carriers Ltd vs Damaris Wambui* (Suing as the legal representative to the estate of the late Maritim Mwangi Ngirigasha [2019] eKLR where it was held that the police abstracts lifted the contents of the occurrence book. He also referred to the case of *George Ndiritu Kariamburi vs Joseph Kiprono Ropkoi & Another Civil Appeal No 345 of 2000* (eKLR citation not given) where it was held that the police visited the scene and entirely blamed the respondent's driver for the accident.
9. He submitted that it was necessary that sketch maps be produced to aid the court to make a determination on the apportionment of liability. He also relied on the case of *Caroline Ann Njoki Mwangi vs Paul Ndungú Muroki* [2004] eKLR. He, however, did not expound on the proposition that he was relying upon.



10. He blamed the 4th Respondent for the accident and pointed out that the sketch maps ought to have been produced as they were integral in aiding the court to determine the issue of liability. He asserted that the Amended Plaintiff and the evidence from Vihiga Police Station squarely blamed Motor Vehicle Registration Number KBJ 603D (sic). He was emphatic that all the witnesses blamed the 4th Respondent herein for the accident herein.
11. He placed reliance on the case of *Equator Distributors vs Joel Muriu & 3 Others* [2018] eKLR where it was held that the map had a probative value as it showed the relative positions of the two (2) motor vehicles immediately after the accident. He also cited the case of *Caroline Ann Njoki Mwangi vs Paul Ndungu Muroki*[2004]eKLR but did not highlight the holding that he was relying upon.
12. He submitted that it was trite law that parties were bound by their pleadings. To buttress his point, he relied on the case of *David Sirona Ole Tukai vs Francis Arap Muge & 2 Others* [2014] eKLR where it was held that it was for the purposes of certainty and finality, each party was bound by its own pleadings.
13. He blamed the Trial Court for having failed to consider his submissions leading it to arrive at a speculative decision which was against the evidence that was adduced during trial which pointed to the 4th Respondent as having been negligent. He was emphatic that he was blameless and that the 1st Respondent did not establish his case on a balance of probabilities or offer much to persuade the Trial Court that he was negligent.
14. He was categorical that the point of impact and resting place of the vehicles after the accident and/or skid marks would have assisted the court have a clearer view of the scene. He thus faulted the Trial Court for holding that the 4th Respondent was to blame at fifty (50%) per cent liable and urged this court to allow his Appeal with costs.
15. On her part, the 1st Respondent also relied on the case of *Selle vs Associated Motor Boat Co* (Supra) and submitted that she proved her case against the Appellant, 2nd, 3rd and 4th Respondents on a balance of probabilities as was required in civil cases. She placed reliance on the cases of *Kanyungu Njogu vs Daniel Kimani Maingi* [2000] eKLR and *Kirugi & Another vs Kabiya & 3 Others* [1987] KLR 347 where the common thread was that the burden of proof was always on a balance of probability.
16. She asserted that the question of liability in road traffic cases was discussed by the Court of Appeal in the case of *Michael Hubert Kloss & Another vs David Seroney & 5 Others* [2009] eKLR where it was held that the determination of liability was not a scientific affair but an application of common sense to the facts of each particular case.
17. She reproduced the evidence tendered by Collins Muthambi Siusa (hereinafter referred to “PW 4”) and Benard Kalei, Private Investigator (hereinafter referred to as “DW 1”). She pointed out that PW 4 who was a witness blamed the driver of Motor Vehicle Registration Number KAS 427 M that was owned by the Appellant herein for driving too fast in the circumstances and for failing to take evasive action so as to avoid the accident.
18. She asserted that DW 1’s evidence contained hearsay information as he did not witness the accident but instead obtained information from persons who may or may not have been present at the scene of the accident. He cast doubts as to the veracity or truthfulness of that evidence which could not be taken as gospel truth as to how the accident occurred. She added that DW 1’s only job was to exonerate the Appellant from any form of liability.
19. She further submitted that No 238027 IP Pauline Letangule (hereinafter referred to as “DW 3”) did not witness the accident and/or produce the statements of the independent witnesses she interviewed



- and/or call them to testify during trial. She blamed her for having failed to produce the police file which contained all the information regarding how the accident occurred, the type of investigation conducted, the outcome and the persons to be blamed for the accident.
20. She further contended that as parties were bound by their pleadings, her Amended Plaintiff and submissions clearly depicted the facts of the case which the Trial Court took into account and found that the Appellant to have been fifty (50%) per cent liable for the accident. She was emphatic that the Trial Court also considered the Appellant's submissions before arriving at its Judgment. She thus urged the court to uphold the Trial Court's finding that the Appellant was fifty (50%) per cent liable as it was justified and reasonable in the circumstances and dismiss the Appeal herein with costs.
 21. On their part, the 2nd, 3rd and 4th Respondents also relied on the case of *Selle vs Associated Motor Boat Co (Supra)* among other cases in pointing out the duty of an appellate court. It was their case that the Trial Court was correct in its apportionment of liability as it was undisputed that the two (2) vehicles collided head on. They asserted that both vehicles were being driven on a narrow road and that PW 4 blamed both drivers for negligence as the lorry was going downhill while the matatu was going uphill.
 22. They were categorical that the evidence of PW 3, PW 4 and DW 1 were full of gaps and inconsistency and did not show exactly how the accident happened but that it was clear that there was a collision. They thus submitted that the Trial Court was right to hold that both drivers were equally to blame for the accident herein.
 23. They were categorical that apportionment of liability was an exercise of discretion by a court and could not be interfered with unless there was no evidence to support the apportionment. They urged the court not to interfere with the Trial Court's finding on apportionment of liability as there was no demonstration that this was an exceptional case or that there was existence of an error in principle. They submitted that it had not been shown that the apportionment of liability was not based on any evidence.
 24. To support their argument, they placed reliance on the cases of *Bash Hauliers Limited vs Anastacia Ndinda Kimonye*[2020] eKLR in which the cases of *Khambi & Another vs Mahithi & Another*[1968]EA 70 and *Zarina Akbarali Sharriff and Another vs Noshir Pirosetha Sethna & Others* [1963] EA 239 were cited. The common thread therein was that a trial court's finding on apportionment of liability would not be interfered with save in exceptional cases.
 25. They further submitted that it was established in law that where a collision occurred and it was not possible to determine and/or establish from the evidence that was adduced in court who was to blame for the accident, then the two (2) drivers should be held equally liable. In this regard, they relied on the cases of *Husein Omar Farah vs LentoAgencies*[2016]eKLR, *Haji vs Marair Freight Agencies Ltd*[1984] KLR 139 and *South Nyanza Sugar Co Ltd vs Jane Adoyo Orendo (Suing as the Administratrix of the Estate of Leonard Oluoch Katieno (Deceased))*[2018]eKLR where a similar conclusion was arrived at.
 26. It was not in dispute that the deceased died as a result of the accident that occurred on 21st April 2016 along Kapsabet-Chavakali Road at Shaviringa Bridge. At the time, she was a fare paying passenger in the Appellant's Motor Vehicle registration number KAS 427M Toyota Matatu (hereinafter referred to as the "first subject Motor Vehicle").
 27. The 4th Respondent was the driver of Motor Vehicle Registration Number KBJ 603 D Mitsubishi Lorry (hereinafter referred to as "the second subject Motor Vehicle") that was owned by both the 2nd and 3rd Respondents. He lost control of the second subject Motor Vehicle while coming from



- the opposite direction causing it to move in a zigzag manner and collide with the first subject Motor Vehicle.
28. No 231059 O.I Julius Ithambo Stima, Traffic Officer and Base Commander, Vihiga County (hereinafter referred to as “PW 3”) produced Police Abstract Report. He stated that as per the records, the 4th Respondent was blamed for having caused death by dangerous driving. He confirmed that there was an Investigation Diary and a Sketch plan in the police file that was drawn by DW 3 and assisted by PC Bett. His further testimony was that the second subject Motor Vehicle was inspected and found to have been unroadworthy as the speed governor had been tampered with.
 29. PW 4 testified that on the material day, he was from work going home when he boarded the first subject Motor Vehicle. He stated that he was seated on the second last seat at the window. While they were going uphill at Musara, a lorry was going downhill. He said that he heard screams and stretched to see what was happening but he could not see anything.
 30. During cross-examination, he stated that he found himself unconscious and did not see how the collision occurred. He added that he could not tell how the scene was after the accident. He blamed the 4th Respondent but also added that the driver of the first subject Motor Vehicle was also not driving slowly.
 31. DW 1 produced the Investigation Report as exhibit. He stated that he visited the scene and carried out independent enquiries. He concluded that the second subject Motor Vehicle was at fault.
 32. Joseph Kerangwa Wanjeru (hereinafter referred to as “DW 2”) testified that he was a conductor of the first subject Motor Vehicle and at the time was seating on the conductor’s seat. He asserted that he was able to see what happened during the accident. He informed the Trial Court that there was slight darkness, distraction of a crowd on the road and the said road was narrow. He further stated that the point of impact was on the first subject Motor Vehicle’s lane. He also blamed the 4th Respondent herein for the accident.
 33. DW 3 was the investigating officer. She blamed the second subject Motor Vehicle for having encroached the opposite lane thus causing the accident.
 34. Notably, the 1st Respondents only sued the owner of the second subject Motor Vehicle. Unfortunately, the driver of the first subject Motor Vehicle died. PW 4 and DW 2 were the eye witnesses travelling in the first subject Motor Vehicle. Their evidence tried to explain how the accident occurred. From the proceedings of the lower court, it appeared that the driver of the second subject Motor Vehicle was never charged with any traffic offence.
 35. It was not clear from PW 4’s evidence when he lost consciousness. Be that as it may, he did not explain what exactly transpired. He merely stated that he heard screams and stretched to see what was happening but he could not see anything. DW 2 stated that although it was slightly dark, he could see what actually happened. He, however, did not also explain how the collision occurred. The Trial Court observed that both defendants blamed each other. It therefore attributed fifty (50%) per cent contribution to both drivers.
 36. In the absence of any evidence of an independent eye witness to shed light as to what really transpired on the material date, this court could only defer to the Police Abstract Report which blamed the driver of the second subject Motor Vehicle for the said accident.
 37. This court had due regard to the decision of the Court of Appeal in Hussein Omar Farah Versus Lento Agencies [2006] eKLR where both drivers were found to have been equally to blame as it was



not reasonably possible to ascertain who was to blame for the accident based on the evidence of the witnesses who testified on both sides.

38. This court also placed reliance on the case of Jimnah Munene Macharia vs John Kamau Erera NBI.C.A.C.A.NO.218/1998 (unreported) where in citing the cases of Barclays Steward Limited & Another vs Waiyaki (1982-88) KAR and Baker vs Harborough Industrial Co-operative Society Limited (1953) 1 WLR 1472, the Court of Appeal held that both drivers were equally to blame for the accident therein as it could not be deduced who was driving on his correct lane from the evidence that was adduced in court.
39. As could be seen in the aforementioned case of Hussein Omar Farah Versus Lento Agencies (Supra) and Jimnah Munene Macharia vs John Kamau Erera (Supra), liability could be apportioned equally between two (2) drivers if it was not possible to determine which of the two (2) had caused an accident. It was not so in this case. The driver of the second subject Motor Vehicle had been blamed for the accident.
40. The above notwithstanding, the deceased was a fare paying passenger in the first subject Motor Vehicle. There was no evidence that showed that she did anything to cause the said second subject Motor Vehicle to collide with the first subject Motor Vehicle. Accidents do not just happen. The Appellant did not present any evidence to show that the driver of the said first subject Motor Vehicle took any evasive action to avoid the said accident. He was under a duty to prove that he was blameless.
41. Notably, DW 3 testified that the road was narrow and had many pot holes and added that the driver of the second subject Motor Vehicle tried to avoid a pothole and collided with the first subject Motor Vehicle. The fact that the deceased among many others died as a result of the heavy impact evidenced high speed.
42. Both drivers of the first and second subject Motor Vehicles ought to have exercised due diligence in their driving bearing in mind that they were both in control of lethal machines. Notably, PW 4 testified that the driver of the first subject Motor Vehicle was also not driving slowly (sic).
43. There was no demonstration of what evasive action the driver of the first subject Motor Vehicle did to avoid colliding with the second subject Motor Vehicle. This court was therefore not persuaded that the Appellant and/or his driver and/or agent were blameless in the circumstances. They owed a duty of care to the passengers who were travelling in the first subject motor vehicle.
44. As the Appellant submitted, PW 3 did not produce the Investigation Diary and Sketch plans to assist this court ascertain where the impact the accident was. However, DW 3 who was a police officer who visited the scene testified that she had recommended that the driver of the second subject Motor Vehicle be charged with the offence of causing death by dangerous driving, this court thus came to the firm conclusion that Trial Court did not err when it found the Appellant to have been liable for the accident herein. However, the apportionment of fifty (50%) per cent against the Appellant was too harsh. It was the considered view of this court that the Appellant ought to bear thirty (30%) per cent liability while the 2nd, 3rd and 4th Respondents will bear seventy (70%) per cent liability.
45. In view of the fact that the Appellant did not indicate whether or not the award of damages was excessive warranting interference, this court therefore left the quantum that was awarded by the Trial Magistrate undisturbed

Disposition

46. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal dated 13th April 2023 and filed on 14th April 2023 was partially merited and the same be and is hereby allowed.



The effect of this decision is that the decision of the Learned Trial Magistrate, Hon R.M. Ndombi, SRM that was delivered in Vihiga in Principal Magistrate's Court Case No 185 of 2016, Jackline Mbalisi Shamola & Another vs Malang Kotik Business Merchants on 17th March 2023 on apportionment of liability be and is hereby set aside and/or varied and/or vacated and replaced with an order that liability be and is hereby apportioned at thirty (30%) per cent as against the Appellant while the 2nd, 3rd and 4th Respondents will bear seventy (70%) per cent of the liability.

47. To avoid further hardship to the parties herein, it is hereby directed that each party will bear its own costs of this Appeal.

48. Orders accordingly.

DATED AND DELIVERED AT VIHIGA THIS 23RD DAY OF SEPTEMBER 2024.

J. KAMAU

JUDGE

