Mukasa v Oduory (Suing as a Legal Representative of and on Behalf of the Estate of Lucas Omondi Oduor - Deceased) (Civil Appeal E014 of 2022) [2024] KEHC 10527 (KLR) (3 September 2024) (Judgment)

Neutral citation: [2024] KEHC 10527 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CIVIL APPEAL E014 OF 2022

WM MUSYOKA, J

SEPTEMBER 3, 2024

BETWEEN

ADOLF KHAIMA MUKASA ..... APPELLANT

AND

JOSEPH WABWILE ODUORY (SUING AS A LEGAL REPRESENTATIVE OF AND ON BEHALF OF THE ESTATE OF LUCAS OMONDI ODUOR - DECEASED) ..... RESPONDENT

(Appeal from judgment and decree of Hon. PA Olengo, Senior Principal Magistrate, SPM, in Busia CMCCC No. 327 of 2019, of 1st April 2022)

JUDGMENT

1. The appellant had been sued by the respondent, at the primary court, for compensation arising out of the death of Lucas Omondi Oduor, to be referred hereafter as the deceased, following a road traffic accident on 24th March 2019, along Bunyala-Funyula road. The deceased was a motorcyclist on the said road, and was involved in an accident with motor vehicle registration mark and number KBM 932G, said to have belonged to the appellant, and liability was attributed on the appellant on account of negligence. The appellant filed a defence, denying everything else pleaded in the plaint, and, in the alternative pleading contribution on the part of the deceased.

2. A trial was conducted. 3 witnesses testified for the respondent, while 2 testified for the appellant. Judgment was delivered on 1st April 2022. On liability, the court held the appellant 100% liable. On quantum, the court awarded Kshs. 20,000.00 for pain and suffering and Kshs. 100,000.00 for loss of expectation of life; Kshs. 1,668,000.00 for loss of dependency; and Kshs. 128,650.00 being special damages; all totalling Kshs. 1,916,650.00.

3. The appellant was aggrieved, hence the instant appeal. The appeal has raised several grounds, all revolving around liability.

4. The appeal was canvassed by way of written submissions. Only the appellant filed written submissions. It is submitted that the respondent had not established negligence on the part of the appellant, for the recorded evidence pointed to the deceased, as the one who caused the accident by hitting a stationary vehicle at the rear. The decisions, in Hussein Omar Farah vs. Lento Agencies [2006] eKLR (Omolo, Tunoi & Githinji, JJA), Matunda Fruits Bus Services Ltd vs. Moses Wangila & another [2018] eKLR (J. Ngugi, J) and Eliud Papoi Papa vs. Jigneskumar Rameshbhai Patel & another [2017] eKLR (Meoli, J), are relied upon.

5. It will be noted that the deceased person, on whose behalf the suit was brought, died after the accident, and before the suit was heard. He was not available to tell his side of the story. The respondent presented an eyewitness, PW2, to recount to the court the events as he saw them. He stated that he was standing along the road, when the accident vehicle overtook the deceased motorcyclist, then applied emergency brakes and stopped, and then the motorcyclist ran into it. He stated that he was the person who took the deceased to hospital. DW1, the appellant, conceded the collision. He stated that he was the driver of the accident vehicle. He said that his motor vehicle was stationary, for he had stopped to drop a passenger, when the motorcycle hit his vehicle, and then he fell on the road.

6. The accident was conceded by the appellant. There was an incident which involved the deceased and a vehicle belonging to the appellant. There was police evidence of the occurrence of the accident, no doubt, based on the reports made by the parties. The only issue is on negligence. Who was liable for it? The duty was on the respondent, by dint of sections 107 and 108 of the *Evidence Act*, Cap 80, Laws of Kenya, to establish that that incident was wholly or partially caused by the appellant. The evidence presented by the respondent was that the deceased motorcyclist hit the vehicle from the rear. Under normal circumstances, such a hit, by dint of Multiple Hauliers (EA) Ltd vs. Justus Mutua Malundu & 2 others [2017] eKLR (PJ Otieno, J), would point to negligence on the part of the driver of the vehicle hitting the other, on the basis that there is a general "presumption that he who hits another from behind is ipso facto negligent." The question then to ask is whether the facts of the instant case pointed to negligence on the part of the deceased.

7. The position stated in Multiple Hauliers (EA) Ltd vs. Justus Mutua Malundu & 2 others [2017] eKLR (PJ Otieno, J), is in the nature of a presumption, which can be displaced by evidence to the contrary. According to the respondent, the accident happened when the appellant suddenly stopped his motor vehicle in front of the deceased's moving motorcycle, causing the deceased to crash into the motor vehicle. His case appears to be that, although the deceased hit the appellant's motor vehicle from the rear, the deceased was not to blame for the collision, for the appellant caused the accident by suddenly stopping his motor vehicle in front of the moving motorcycle. The case by the appellant is that he indeed stopped his motor vehicle ahead of the deceased, but he said that he had given an indication of his intention to stop, and put the vehicle aside. He added that another motorcycle, that was ahead of the deceased, passed without incident, but the deceased crashed into the car. Both sides called police witnesses, both of whom had not investigated the accident. One of them produced a police abstract report of the accident, while the other produced an abstract from the police occurrence book. According to DW2, the police officer called by the appellant, the report of the accident was made by the appellant, to effect that he had stopped his motor car and the motorcycle rammed into the vehicle. The witness could not, however, tell the point of impact, from the report that he had.

8. How did the trial court handle that evidence? The court believed PW2, the eyewitness, on the basis that he was outside, walking along the road, and must have had a clearer view of what happened. It was

noted that he was not interested in the matter in anyway, in terms of giving a self-serving statement. It was noted that the appellant, DW1, was inside the vehicle, there was no guarantee that he saw what was happening outside. It was noted that DW2 testified that the appellant overtook the deceased, and suddenly stopped at an undesignated stage, he had failed to indicate his intention to stop, and the rider had no opportunity of avoiding hitting the motor vehicle in question. The trial court had the benefit of seeing and hearing the witnesses testify, and was better placed, compared with the appellate court, to assess their demeanour, and to pass judgment on their credibility.

9. However, the handling of the testimony of DW2 is a little unsettling, for the analysis, in the judgment, of the purport of his testimony is not in sync with the recorded evidence. What is stated in the analysis is at variance with what is recorded as having been said by the witness.

10. In the analysis, the trial court states:

> " DW2 clearly indicated how the driver overtook and suddenly stopped to drop a passenger at an undesignated stage. He failed to indicate, he further said that the deceased had an opportunity to avoid hitting the motor vehicle in question."

11. When DW2 testified, the trial court recorded him as saying:

> " ... The accident involved motor vehicle KBM 932G Toyota Probox and motor cycle KMDM 634A. They were heading the same direction. The motorcycle rammed into the same motorcycle and died on the spot. The pillion passenger got some slight injuries ... I am not the investigating officer. The investigating officer was Sgt. Towei. He was based at Funyula Police Station. I was not based at Funyula Police Station. It was reported by the driver of the motor vehicle. He said that he stopped the motor vehicle and the motorcycle rammed into it. It is not clear whether he stopped off or on the road. I can't tell whether it was off or on the road ... The driver stopped to drop somebody. Always they drop somebody off the road."

12. There is a sense in which the analysis put words into the mouth of DW2. However, I agree with the assessment by the court, that DW1 was the interested party, and between him and PW2, PW2 was more believable, being a disinterested party. Both witnesses were on common ground, that the car stopped in front of the deceased, whether that happened suddenly, or it had given time and space to the deceased, to manoeuvre to avoid the collision, was what was in dispute. The trial court believed PW2, and held DW1 wholly liable.

13. However, whereas I agree with the court on the assessment of the evidence on the collision, I am not persuaded that the appellant was wholly to blame. It was negligent of the appellant to overtake the motorcycle, and then, shortly thereafter, brake and stop right in front of it. However, the motorcyclist was expected to keep a proper lookout, to avoid any mishap, such as the prospect of a negligent driver stopping their vehicle suddenly before him. PW2 did not testify on what the deceased did with his motorcycle, upon DW1 stopping his vehicle suddenly before him, other than saying that the motorcycle rammed into the car. There was no statement nor evidence as to whether the deceased made any attempt to swerve or to brake to avoid the collision. See Stanley Ogutu Attai vs. Peter Chege Mbugua [2019] eKLR (Ng'etich, J).

14. There was evidence of a collision, but there is inadequate evidence of how the collision occurred. The way to go, in such cases, is not to excuse everyone of liability, or to hold only one party accountable, for one or both parties must have contributed to the collision. As it is not possible to assign responsibility, as between the 2, the way out should be to hold both parties liable for the collision. See Platinum Car Hire Limited vs. Samuel Arasa Nyamesi & another [2019] eKLR (Majanja, J). There is a plethora of

cases, such as Welch vs. Standard Bank Limited [1970] EA 115 (Madan, J), Lakhamshi vs. Attorney General [1971] EA 118 (Spry VP, Lutta & Mustafa, JJA), Domitila Wangui Karugu & another vs. Dagu Hidris Haide [2020] eKLR (Majanja, J), Kahindi Kifaru Chengo (legal representative of the deceased of the Estate Baraka Kahindi Kifaru (Deceased) vs. Auto Industries Limited & another [2020] eKLR (Nyakundi, J), Amani Kazungu Karema vs. Jackmash Auto Ltd & another [2021] eKLR (Nyakundi, J) and Ndatho vs. Chebet [2022] KEHC 346 (KLR)(Gitari, J), where that principle is stated. It should be of application here. A collision happened between the deceased and the vehicle belonging to the appellant, something conceded by the appellant, in the evidence he adduced in court. The evidence adduced by both sides was not conclusive on who was to blame, and, in such case, the trial court should have concluded that both parties were equally to blame for it, and assessed liability at 50%:50%.

15. In the end, I find merit in the appeal, to the limited extent discussed in paragraph *14* hereabove, and I hereby allow it, to that limited extent. The effect shall be that the judgment of the trial court, on liability, at 100% against the appellant, is hereby set aside, and substituted with an order that the 2 sides share liability at 50%:50%. The appeal is disposed of in those terms. The other aspects of the judgment of the trial court shall remain intact. Each party shall bear their own costs.

DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA THIS 3RD DAY OF SEPTEMBER 2024.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant, Busia.

Ms. Eva Adhiambo, Legal Researcher.

Advocates

Ms. Tesot, instructed by Kimondo Gachoka & Company, Advocates for the appellant.

Mr. Omondi, instructed by Omondi & Company, Advocates for the respondent.