



**Kamau v Osiemo (Suing as the Wife and Legal Representative of the Estate of Benard Gesora Bundi (Deceased) & 2 others (Civil Appeal E808 of 2022) [2024] KEHC 13912 (KLR) (Civ) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13912 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E808 OF 2022**

**BK NJOROGE, J**

**OCTOBER 17, 2024**

**BETWEEN**

**PETER KAMAU ..... APPELLANT**

**AND**

**TRUSLAH KEMUNTO OSIEMO (SUING AS THE WIFE AND LEGAL REPRESENTATIVE OF THE ESTATE OF BENARD GESORA BUNDI (DECEASED) ..... 1<sup>ST</sup> RESPONDENT**

**REUBEN ONGORO ..... 2<sup>ND</sup> RESPONDENT**

**BARNABAS N OTACHI ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the Judgment of Hon. H.M. Nyaberi CM) delivered on the 8th of September, 2022 in Milimani Commercial Magistrate Court Nairobi MCCCC/1257/2017)*

**JUDGMENT**

1. This is an Appeal against the decision of Honourable H.M. Nyaberi (CM) delivered on the 8<sup>th</sup> September, 2022 in Milimani Commercial Magistrates Court MCCC No. 1257 of 2017. The Appellant was the original 1<sup>st</sup> Defendant before the Trial Court. The 1<sup>st</sup> Respondent was the Plaintiff before the Trial Court. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were sued as the 2nd and 3rd Defendants before the Trial Court.
2. The Trial Court made the following award in general damages, arising out of a fatal accident case.

Judgment for the Plaintiff against the 1<sup>st</sup> and 3<sup>rd</sup> Defendants jointly and severally as follows;



		KSHS.
i.	Liability 50:50%	
ii.	Pain of suffering	100,000.00
iii.	Loss of expectation of life	150,000.00
iv.	Loss of depending	2,602,160.00
	Sub-total	2,852,160.00
	Less 50% contribute	1,426,080.00
		1,426,080.00
v.	Add spent damages	192,500,00
	Total	1,618,580.00

3. The successful 1<sup>st</sup> Defendant as the Plaintiff was also awarded costs of the suit and interests.

### **Background facts**

4. The 1<sup>st</sup> Respondent is the widow of Bernard Gesora Bundi (deceased). On or about 18<sup>th</sup> June, 2015, the deceased was employed as a driver of motor vehicle KBY 846X belonging to the 3<sup>rd</sup> Respondent. It is this motor vehicle that had a head on collision with motor vehicle KBP 717A belonging to the Appellant. The Appellant's motor vehicle was being driven by the 2<sup>nd</sup> Respondent. As a result of the head on collision, the 2<sup>nd</sup> Respondent died immediately. Bernard Gesora Bundi died 8 days later. His wife brought this suit seeking compensation for the death of her husband, It is a running down claim based on fatal injuries.
5. The 1<sup>st</sup> Respondent testified and also called a police officer to produce the police abstract. None of the Defendants before the trial Court testified. Parties filed their written submissions.
6. The Trial Court after retiring to consider the facts returned a verdict. It found that both drivers of the two motor vehicles were culpable in negligence. It therefor proceeded to assess liability at 50%:50% against both drivers. It found the Appellant vicariously liable as the employer of the 2<sup>nd</sup> Respondent. It then proceeded to award damages as stated afore. It is this decision that has trigged this Appeal.
7. This matter was flagged down for the Rapid Results Initiative (RRI) for the month of June 2024. The appeal by way of written submissions. The Court notes the Appeal has been duly admitted.
8. The Court has seen and perused the Appellants written submissions dated 6/6/2024 with the authorities attached. The Court has equally read the 1<sup>st</sup> Respondent's submissions dated 30/5/2024. The Court notes that the 3<sup>rd</sup> Respondent has not filed any submissions.



9. The Appellant has filed a Memorandum of Appeal that consists of 6 grounds. The Court has keenly looked at the 6 grounds. They all challenge the issue of liability. Indeed, in the Appellant’s own written submissions, he has narrowed down his Appeal to the issue of liability.

### **Issues for submissions**

10. Having perused the Record of Appeal as well as the submissions, the Court is of the considered view, that the appeal can be disposed of by two issues.
- a. Whether liability was proved against the Plaintiff to the required standards?
  - b. What orders ought to issue in this Appeal?

### **Analysis**

This is a first Appeal. The Court reminds itself that it has a duty to relook, re-evaluate and re-analyse the evidence presented before the Trial Court. It should then arrive at its own independent conclusion while doing so. This Court should remind itself that it neither heard nor saw the witnesses who testified. It should therefore give some allowances to the Trial Court for that. See *Selle & Another -vs- Associated Motor Boat Co. Ltd & others* [1968] E.A. 123.

11. At the very onset, the Court notes that interlocutory judgment was entered against the 2<sup>nd</sup> Defendant. This is in default of entry of an appearance and filing of a defence.
12. The 2<sup>nd</sup> Defendant/Respondent is impleaded as a driver, employee or agent of the Appellant.
13. The evidence presented before the trial Court by PW2 is that both drivers of the vehicles that were involved in the accident died. To this Court, a suit ought not to have been sustained against the 2<sup>nd</sup> Respondent. He could not have been sued in the Trial Court as he was already dead. A suit could only have been maintained as against his legal representatives. As no judgment was entered against the 2<sup>nd</sup> Respondent, nothing much turns on this.
14. The Court now turns to the two issues framed and proceeds to dispose of them in seriatim.

#### **a. Whether liability was proved against the Plaintiff to the required standards?**

15. The standard of proof in civil cases has not changed. It remains on a balance of probabilities.
16. In the case of *Raila Amolo Odinga & Another vs. IEBC & 2 Others* (2017) eKLR the Court pronounced itself on how in an adversarial system, a party is to prove his/her case on the standard.

“(132) Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant through a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.

(133) It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other



words, while the petitioner bears an evidentiary burden to adduce ‘factual’ evidence to prove his/her allegations of breach, then the burden shifts and it behooves the respondent to adduce evidence to prove compliance with the law.....”

17. Simply put, two parties appear before a Court, Each Party gives its best version of facts or events, in a bid to prove certain facts. The party that is able to present facts that win over the Court’s mind, wins the case. It has also been reduced into a simple mathematical formula of 50+1. The one who tilts the scales in his/her favour wins.

18. As to who bears the burden to prove certain facts, it is always the party who alleges, Section 107 of the Evidence Act states as follows;

“ 107.

(1) 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.”

19. In the case before the Court, the cause of action arise in tort. In our Kenyan legal system, there can be no liability without fault.

20. Simply put, for the 1<sup>st</sup> Respondent to succeed in her case against the Appellant and the 3<sup>rd</sup> Respondents, she had to prove some form of fault or wrong doing on their part.

21. In the Amended Complaint amended on 20/4/2017 she pleaded 7 particulars of negligence, limited only to the 1<sup>st</sup> Defendant (Appellant) and to the 2<sup>nd</sup> Defendant (2<sup>nd</sup> Respondent). The Court does not see any particulars of negligence attributed to the 3<sup>rd</sup> Defendant (3<sup>rd</sup> Respondent).

22. These particulars of negligence are a pointer as to the fault or wrong doing that the 1<sup>st</sup> Respondent attributed to the Appellant.

23. They can be summarized in brief to say that the 1<sup>st</sup> Respondent alleged that the Appellant’s driver was careless or negligent in driving that he caused the accident.

24. At the trial, the 1<sup>st</sup> Respondent as the wife of the deceased testified as PW1. She was not an eye witness to the accident. She could not lead any evidence as to how the accident occurred. Any information relayed to her by any other person (not a witness in Court) is hearsay. The Court disregards any evidence that PW1 did not perceive of her own senses.

25. PW2 is PC Fanfax Mashuride Shindani. His evidence is captured below;

“On 18/6/2015 at 18.30 hours along Jogoo Road Hamza Stage, a fatal road accident occurred involving motor vehicle registration KBY 846X and motor vehicle registration No. KBP 717A both Isuzu Bus. The same was visited by PC Eunice Odalo. The accident is booked vide OB14/18/6/205 Motor vehicles KPB 717 was driven by Reuben Ongoro and motor vehicle registration No. KBY 846Y was blamed for the accident. I wish to produce the police abstract as Pexhibit 5. Both drivers were fatally injured. I have been paid kshs.5000/- for my court attendance.”



26. On cross examination by Counsel Narangwi, the witness went further to state the following;
- “Motor vehicle registration No. KBY 846 was blamed. I am referring to the Occurrence Book and the police abstract. Motor vehicle KBY 846X jumped traffic lights and was avoiding hitting an emerging motor vehicle from Buruburu and swerved to the extreme right on the wrong side and as a result it met motor vehicle KBP 717 A which was on its lane toward town and it was involved on head on collision causing fatal injuries to both drivers.”
27. On cross-examination by M/s Gulenywa;
- “Motor vehicle KBY 846X was insured by Invesco vide policy cover which commenced on 8/5/2015 expire 7/5/2016. It was swerved on the wrong side of the lane causing the accident ... The deceased .... case was driving motor vehicle KBY 846X and was blamed for the accident.”
28. To this Court the 1<sup>st</sup> Respondent did not call any material eye witness to show how the accident happened.
29. Even the Police witness called by the 1<sup>st</sup> Respondent did not support her case. The police blamed her deceased husband for jumping traffic lights and while avoiding hitting an emerging vehicle he swerved to the extreme right. The extreme right was on the wrong side/lane of the road so it collided head on with the Appellant’s motor vehicle.
30. Faced with such kind of testimony, the blame for the accident seems to lie squarely upon the Bernard Gesora Bundi the deceased and not any other person.
31. The Trial Court’s finding at page 6 of its judgment found both drivers of the two motor vehicles culpable in negligence.;
32. The Court is unable to agree with such a finding.
33. As the 1<sup>st</sup> Respondent had not proved the issue of liability against the Appellant, the Appellant was entitled to close his case. The Appellant was entitled to take the position that upon review of the case, the Trial Court could find that liability had not been proved. None of the witnesses had heaped the blame on his door step or that of his driver, so to speak.
34. This Court is therefore persuaded to interfere and does interfere with the judgment of the trial Court on liability. The 1<sup>st</sup> Respondent did not prove the case to the required standards.

**b. What orders ought to issue in this Appeal?**

35. The Appellant has successfully challenged the 1<sup>st</sup> hurdle to be surmounted in a running down claim. The proof of liability. Having failed to prove liability, the Court needs not delve into issues of quantum and assessment of damages.
36. For the same reasons that the deceased driver was to blame for the accident, it is doubtful that any liability could attach against the 3<sup>rd</sup> Respondent. The 3<sup>rd</sup> Respondent was the deceased’s employer. He was not driving the motor vehicle in issue. How then could he be held liable in negligence by his own driver? No evidence was led as to mechanical faults of the motor vehicle in issue.
37. The Court is persuaded that the appeal is merited. The suit by the Plaintiff in the trial Court was not proved on a balance of probabilities.



38. On costs, the same should follow the event both in the Appeal and the trial Court.

**Determination**

39. The Appeal is merited and the Court makes the following orders.

- a. The Judgment of the Trial Court dated on 5/9/2022 is hereby set aside. It is replaced with a decree dismissing the Plaintiff's suit with costs to the 1<sup>st</sup> and 3<sup>rd</sup> Defendants.
- b. The Appellant is also awarded the costs of the Appeal.

40. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF OCTOBER, 2024.**

**NJOROGE BENJAMIN. K**

**JUDGE**

In the presence of: -

..... for the Appellant

..... for the Respondent

Court Assistant - .....

