



**Ndegwa & another (Suing as the Legal Representatives of the Estate of Lawrence Tsimba - Deceased) v Multiple Hauliers (EA) Limited (Civil Appeal E080 of 2023) [2024] KEHC 16747 (KLR) (22 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 16747 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E080 OF 2023  
NIO ADAGI, J  
OCTOBER 22, 2024**

**BETWEEN**

**LUVUMO CHIMERA NDEGWA ..... 1<sup>ST</sup> APPELLANT  
RAPHAEL RURUMO MWACHILUNGO ..... 2<sup>ND</sup> APPELLANT  
SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF LAWRENCE  
TSIMBA - DECEASED**

**AND**

**MULTIPLE HAULIERS (EA) LIMITED ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon. Stephen Jalang'o  
(SPM) in Mavoko CMCC. No. 766 of 2021 delivered on 13/04/2023)*

**JUDGMENT**

**Background of the case.**

1. The Appellant in a Plaint dated 21<sup>st</sup> September, 2020 instituted suit No.766 of 2020 at Mavoko Chief Magistrate's court claiming general under Fatal Accidents Act and the Law Reform Act and special damages on behalf of the Estate of Lawrence Tsimba Mwachilungo (deceased).
2. The Appellant pleaded that on or about 23rd January, 2018, the deceased was lawfully driving motor vehicle registration number KBQ 112Y along Lukenya-Nairobi highway when upon reaching Daystar area, rammed into motor vehicle registration number KBN 448V being drive by the 1st Defendant's/ Appellant's driver, servant and/or agent where the deceased sustained fatal injuries.
3. The Respondent on the other hand denied the occurrence of the accident and in the alternative pleaded that if any accident occurred which was denied then the Appellant was the sole author of the accident by inter alia ramming into the rear of his motor vehicle.



4. This matter proceeded to full trial, the Appellant testified and also summoned a police officer and two other witnesses.
5. The Respondent's witness on the other hand was the driver of motor vehicle registration number KBN 440V trailing trailer ZD 5346 at the time of the alleged accident.
6. The Appellant's evidence.

PW1- Police Officer

Zephania Ambani Police Constable No. 68XX8 testified that there were two motor vehicles involved in the said accident namely motor vehicle Registration Number KBQ 112Y-ZD 3529-Trailer and KBN 448V-ZD 5346-Trailer.

He stated that the accident occurred on 23.01.2018 at about 1300hrs booked by PC Nangil.

The same was reported and a Police Abstract issued dated 27.01.2018 and signed on 29.01.2018 by the Base Commander.

He produced the said Police Abstract in evidence.

He further told the Honourable Court that the status of the Investigation are still pending under investigation as the produced police abstract.

The officer further told the Court that he did not come with the Occurrence Book to Court.

During cross examination the police officer informed the trial court that he was not best suited to answer as regards the questions surrounding the accident since he was not the Investigating officer.

He still told Court that he is not aware of the circumstances leading to the occurrence of the subject accident but he was duly called to produce the police abstract as he has done.

PW2- Raphael Rurumo Mwachilungo

This witness introduced himself and said that he is a senior Chief and that he knew the deceased, Lawrence Tsimba who died in a road accident at the age of 43 years old.

He stated that he knows that he had a family and he was a driver.

He went ahead to adopt his witness statement undated but filed on 09.09.2021 and documents filed alongside the suit dated on 21.09.2020 produced as Exhibit 1 to 16 and he prays that the family be compensated and costs of the suit.

During cross examination the witness said that he was not at the scene of the accident, as he was in Kwale when the accident occurred.

PW3- Saaid Mwachiti Lugo

The witness told the Court that he works with the Department of Interior Employees and that he knew Lawrence Tsimba Mwachilungo and that they were colleagues at Bluejay Transporters.

The witness stated that he knew that the deceased was a Truck Driver and he confirmed that he died through a road traffic accident.

During cross examination the witness said that he received a call from one Simeon Mkala although his written statement says Charles Muturi who informed him of the said accident then he proceeded to the police station, he further went ahead and talked to other people, the driver and the turn boy who confirmed that the deceased died in that tragic accident.

The witness was not present during the occurrence of the accident.



PW4- Simeone Mkala.

He produced and adopted his statement undated but filed on 09.09.2021

During cross examination he admitted that there was no letter or anything of proof of employment as a turnboy.

He admitted that the driver ought to have been slower at a bend.

He further agreed that since the accident happened at 2.00 P.M. visibility and or vision was clear and that at that time, it's possible to see and tell a stationery vehicle from a distance as 2.00P.M.

He confirmed that not even the Police Abstract mentioned that the deceased was a Turn Boy

7. Respondent's evidence.

The Respondent's driver in his evidence stated that on 3/8/218 he was driving motor vehicle registration number KBT 214N along Kitui road from Syokisnga katangi.

He arrived at his designation safely and parked his motor vehicle at the Defendant's Machakos office.

On 7/8/2018 he received a call from Police officers at Machakos Traffic base who informed him that he had hit a pedestrian but failed to stop.

The driver took the motor vehicle for inspection and also recorded his statement with the Police.

8. Summary of the trial court's judgment.

Upon considering the pleadings and the evidence adduced by the parties, the trial court noted that it was not in contention that an accident occurred on 23rd January, 2018 involving motor vehicle registration number KBQ 112Y and motor vehicle registration number KBN 448V and that as a result of the accident the deceased lost his life.

The only controversy was who was to blame for the occurrence of the accident.

The trial court noted that the Appellant blamed the Respondent for the occurrence of the accident and that according to the Appellant, the Respondent's motor vehicle had stalled whilst hauling a trailer ZD 5346. The Respondent's driver on the other hand indicated that he had slowed down because the vehicle ahead of him had stopped to allow some cattle to cross the road.

The trial court found that the deceased driver of motor vehicle registration number KBQ 113Y was to blame for occurrence of the accident as he failed to keep a safe distance as per the basic rules of the road and rammed into rear of the Respondent's vehicle registration number KBN 448V.

The trial court noted that a prudent driver ought to have kept a safe distance and/or control of his motor vehicle. The deceased however failed to keep safe distance and /or control of his motor vehicle and thus rammed into the rear of the motor vehicle that was ahead of him.

The trial court was of the view that there was nothing that the Respondent would have done to avoid the occurrence of the accident and as a result found the deceased 100% liable for the accident and dismissed his suit with costs to the Respondent.

9. Being aggrieved by the said judgment, the Appellant filed a Memorandum of Appeal dated 13th April, 2023 and the Record of Appeal. In the said Memorandum of Appeal, the Appellant raised two grounds of appeal being;

- a) The learned magistrate erred in law and in fact in finding that the Deceased was wholly liable for the accident.



- b) The learned Magistrate ignored all the evidence presented by the Appellants and thereby arrived at an erroneous conclusion that the appellants failed to prove their case on a balance of probability and thereby dismissed the Appellant's case.
10. The appeal centres on the issue of liability and whether or not the learned magistrate erred in law and in fact in finding that the Deceased was wholly liable for the accident which this court is invited to determine.
11. This being a first appeal, this court is reminded of the primary role as a first appellate court namely, to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in *Selle & another v Associated Motor Boat Co. Ltd. & others* and in *Peters v Sunday Post Limited* {1968} EA 123. {1958} E.A. page 424.
12. In the case of *Mursal & another v Manese* (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) (6 April 2022), the court held that:-
- A first appellate court has jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it.
13. A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section 78 of *Civil Procedure Act*, a court of first appeal can appreciate the entire evidence and come to a different conclusion.
14. I have perused the Record of Appeal, considered and weighed the rival submissions on the appeal and also taken into consideration the judicial decisions cited and attached.
15. The burden of proof in civil cases is on a balance of probability.
- Section 107 of *Evidence Act* defines Burden of Proof as— of essence the burden of proof is proving the matter in court. subsection (2) Refers to the legal burden of proof.
16. Section 109 of the *Evidence Act* exemplifies the Rule in Section 107 on proof of a particular fact. It is to the effect that, the burden of proof as to any particular fact, lies on the person who wishes to rely on its existence. Whoever has the obligation to convince the court is the person said to bear the burden of proof. Thus, if one does not discharge the burden of proof then one will not succeed in as far as that fact is concerned.



17. In the case of Alice Wanjiru Ruhiru Vs Messaic Assembly of Yahweh [2021] eKLR the court had the opportunity to assert the principles by holding that;

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

(16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence”

18. The question therefore is, whether the Appellant herein discharged the burden of proof that the Respondent was liable in negligence for the occurrence of the accident wherein the Deceased was allegedly fatally injured?

19. The Pleadings Particulars of negligence as per the Appellant’s pleadings included;

- i. Failure to remove stalled vehicle from the road contrary to section 106 of the [Traffic Act, 403](#) Laws of Kenya.
- ii. Failure to mount triangles/life savers to warn oncoming traffic of stalled motor vehicle.
- iii. Driving dangerously and/or without due care and attention

20. In my re-evaluation and re-appraisals of the evidence adduced in the trial court this court notes that PW1, PW2 and PW3 did not witness the accident. PW4 testified that on 23rd January 2018 at around 2pm he was travelling in motor vehicle registration number KBQ 112Y as a turn boy in the company of Lawrence Tsimba (the deceased) who was driving the same. It was his evidence that when they reached Lukenya area, they noticed a truck a few meters ahead. They moved closer and noticed that the vehicle had stalled in the road but there was no hazard signs around. On the sides of the road there was cattle grazing while on the oncoming side there were other trucks. It was his evidence that Tsimba tried to manoeuvre but the distance was too short. He could not swerve on either side, or else he would have rammed into the cattle and people who were grazing on the left side of the road. There were oncoming trucks on the right side. It was his evidence that in the process, their truck rammed onto the rear of the stationary truck and that the side where Tsimba sat was extremely damaged. Him he managed to escape unhurt but Tsimba was badly injured and later succumbed to the injuries.

21. His testimony did not in any way prove any of the three particulars of negligence as pleaded and I am thus convinced that the Appellants failed to discharge their burden of proof.



22. In Susan Kanini Mwangangi & Another versus Patrick Mbithi Kavita [2019] eKLR the Court, with reference to the East African Court of Appeal's decision in Embu Public Road Services Ltd versus Riimi [1968] EA 22 stated thus: -

“The doctrine of res ipsa loquitur is one which a plaintiff, by proving that an accident occurred in circumstances in which an accident should not have occurred, thereby discharges, in the absence of any explanation by the defendant, the original burden of showing negligence on the part of the person who caused the accident. The plaintiff, in those circumstances does not have to show any specific negligence but merely shows that an accident of that nature should not have occurred in those circumstances, which leads to the inference, the only inference, that the only reason for the accident must therefore be the negligence of the defendant...The defendant can avoid liability if he can show either that there was no negligence on his part which contributed to the accident; or that there was a probable cause of the accident which does not connote negligence on his part; or that the accident was due to the circumstances not within his control.”

23. Having failed to prove negligence the entire case thus collapsed for want of evidence.
24. The failure by Lawrence Tsimba (deceased) to keep safe distance as per the basic rules of the road prompted him to ram on to the rear of motor vehicle registration No. KBN 448V. The accident allegedly occurred during broad day light at 2.00PM wherefore the deceased was able to see any vehicle in front of him whether with hazards in place or not and kept safe distance.
25. I agree with the trial court that there nothing the 1st Respondent's driver would have done to avoid the occurrence of the accident and thus finding the deceased 100% liable for the occurrence of the said accident.
26. This court is satisfied that the Appeal is thus without merit the same is dismissed with no orders as to costs.

Orders accordingly.

**DATED, SIGNED & DELIVERED VIRTUALLY AT MACHAKOS ON 22<sup>ND</sup> OCTOBER 2024.**

**BEFORE HON. LADY JUSTICE NOEL I. ADAGI**

