



REPUBLIC OF KENYA



**Awich v Okello & another (Civil Appeal E009 of 2022)
[2023] KEHC 2779 (KLR) (22 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2779 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL APPEAL E009 OF 2022
RE ABURILI, J
MARCH 22, 2023**

BETWEEN

DOMINIC OTIENO AWICH APPELLANT

AND

DALMAS OTENDO OKELLO 1ST RESPONDENT

JULIET MAGANYA AKINYI 2ND RESPONDENT

*(An appeal arising out of the judgement and decree of the Honourable
Muthoni Mwangi in the Chief Magistrate's Court at Siaya
delivered on the 11th January 2022 in Siaya CMCC No. 96 of 2019)*

JUDGMENT

Introduction

1. In the lower court, the appellant herein Dominic Otiemo Awich was the plaintiff. He filed suit against the defendants who are the respondents herein Dalmás Otiemo Okello and Juliet Maganya Akinyo seeking damages under the *Fatal Accidents Act* and *Law Reform Act* as well as special damages of Kshs. 253,600 and interest on the said damages as well as costs of the suit.
2. It was the appellant's case that on the 12/4/2018 the 1st respondent while driving motor vehicle registration number KCN 315E so negligently drove, managed and controlled the said motor vehicle causing it to collide with motor cycle registration number KMED 289P on which the deceased was a pillion passenger.
3. Despite summons to enter appearance dated 11th September 2019 that were served upon the respondent, the respondents failed to enter appearance and/or file any defense in the matter and the matter proceeded as an undefended cause after interlocutory judgment was entered against the defendants in favour of the plaintiff now appellant on 24th October, 2019.



4. In her determination, after hearing the plaintiff's case against the defendant, the trial magistrate found that the appellant failed to discharge his burden of proof as required and proceeded to dismiss the suit with no orders as to cost.
5. The appellant was aggrieved by the decision of the Trial Court and he filed a Memorandum of Appeal dated 27th January 2022, raising the following grounds of appeal:
 - i. That the learned trial magistrate erred in law and in fact in not finding that the proceeding in the traffic case and the judgement thereto which was not appealed against was conclusive and un rebutted evidence in overwhelming support of the appellant's case.
 - ii. That the learned trial magistrate erred in law and in fact in not giving weight to material evidence before her but rather highlighting diversionary issues that were irrelevant to the matter before her and therefore introducing extraneous matters.
6. The appeal herein was canvassed by way of written submissions. Only the appellant complied as the respondents never appeared.

The Appellant's Submissions

7. The appellant submitted on the evidence adduced in Bondo Traffic Case No. 86 of 2018 where the 1st respondent was the accused and had been charged with the offence of causing the death of Truphena Akello by dangerous driving. The appellant submitted that the accused driver was convicted and fined Kshs. 50,000 and in default to serve 18 months imprisonment and that there was no evidence that the 1st respondent successfully appealed against his conviction and sentence.
8. It was submitted that the appellant proved that the deceased was his mother, a point that was not controverted by the respondents as was evidenced by the limited grant which he submitted that formed part of the exhibits and which grant clothed him with authority to approach any court and file suit on behalf of the estate of the deceased and thus there was no need for the appellant to produce any birth certificate or a letter from the chief to prove that he had any relationship with the deceased. The appellant submitted that at the stage of formal proof, it was not necessary.
9. The appellant submitted that there was an error on the date of death on the certificate of death which error was negligible because the post-mortem report indicated the date of death as 12.4.2018. It was submitted that the post-mortem report has the same evidentiary weight as the certificate of death and was even more detailed.
10. The appellant submitted that the decision of the trial court was made against the weight of clear and un rebutted evidence and thus this court ought to interfere with the judgement.

Analysis and Determination

11. I have perused the trial court record and the grounds of appeal and considered the submissions by counsel for the appellant. There is only one issue for determination in this suit namely; Whether the trial court erred in dismissing the appellant's case.
12. This being the first appeal, it is this court's duty Under section 78 of the *Civil Procedure Act* to re-evaluate the evidence tendered before the trial court and come to its own independent conclusion taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as



they testified. This principle of law was well settled in the case of *Selle v Associated Motor Boat Co. Ltd* [1968] EA 123 cited by the appellants where Sir Clement De Lestang (V.P) stated that:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally”.

13. Revisiting the evidence adduced before the lower court, PW1, the appellant, testified that the deceased was his mother who died on 12/4/2018 following a road traffic accident along Misori – Bondo road. He testified that the deceased was a pillion passenger aboard motor-cycle registration number KMED 289D that was knocked down by motor vehicle registration number KCN 315E.
14. PW1 testified that there was a traffic case in Bondo Law Court against the 1st respondent driver of the accident motor vehicle that ended with the 1st respondent’s conviction. PW1 testified that he blamed the 1st respondent who was the driver of the motor vehicle registration number KCN 315E for the fatal accident involving the appellant’s mother.
15. It was his testimony that the deceased used to sell fish and do peasant farming prior to her death and would earn 1,000 per day. He further testified that the deceased had grandchildren who were dependent on her.
16. The appellant faulted the trial court for dismissing his suit whereas he adduced evidence which was contained in exhibits PEx 5,6 & 7 which were the judgement in Bondo Traffic Case No. 86 of 2018, ruling in Bondo traffic case no. 86 of 2018 and copy of proceedings in Bondo Traffic case 86 of 2018.
17. Having reviewed the evidence, it is not in dispute that the 1st respondent was charged with the offence of causing death by dangerous driving and was convicted and fined. It is trite that the court hearing the civil case was not bound by the judgment of the criminal court. The civil court was duty bound to evaluate the evidence of the witnesses including the proceedings of the traffic case before it before reaching a conclusion whether the plaintiff proved his case on a balance of the probabilities. This was explained by Nambuye J., (as she then was) in *Kenya Power and Lighting Co., Ltd v Zakayo Saitoti Naingola and Another* NRB HCCA No. 522 of 2004 [2008] eKLR as follows:

“The legal effect and or bearing of the acquittal of the 4th defendant in the traffic proceedings, to this proceedings, is that the acquittal did not give the 4th defendant clean bill of unblameworthiness. This is so because the traffic court, was exercising criminal jurisdiction whose standard of proof was different from the one applicable to civil proceeding. The one in the traffic proceedings was one beyond reasonable doubt. Whereas the one in civil proceedings is one of a balance of probability. Further this court has judicial notice of the fact that since the two courts were exercising different jurisdictions the court seized of the civil proceedings was not to be bound by the decision of the court exercising criminal jurisdiction. It was duty bound as it did, to re-evaluate the evidence on the record and arrive at its own conclusion. Likewise, this court, as an appellate court, is not bound by the findings



of the lower court. It has a duty to re-evaluate the evidence on the record and then arrive at its own conclusion on the matter.”

18. However, it should not be forgotten that a lower court is a competent court of law and its decision, just like a decision of a superior court, is a lawful decision of a court of law and must be respected. This is more so in this country where lower courts are presided over by Magistrates as senior as Senior Resident Magistrates up to Chief Magistrates. Bondo Traffic Case No.86 of 2018 in question in this suit was heard by a principal Magistrate although the judgment was delivered by a Resident Magistrate
19. As stated earlier, the trial magistrate carefully considered evidence adduced by the appellant and the prosecution witnesses and found no contributory negligence on the part of the Deceased meaning the Accused was 100% negligent. There is no evidence that that finding by the trial court in the traffic case at Bondo was subsequently overturned and section 47A of the Evidence Act therefore comes into play. The said section provides that:

“ A final judgment of a competed court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.”
20. The aforementioned Traffic court in Bondo found that there was no contributory negligence in that case where the Accused, the 1st respondent herein, had the opportunity to adduce evidence and did adduce evidence in his defence.
21. The respondents herein did not bother defending the civil suit before the lower court. In the circumstances, I find the respondents liable to the appellant in negligence at 100%.
22. What about the appellant’s claim under the Law Reform Act and the Fatal Accidents Act?
23. It must be remembered that it was the appellant’s duty to prove his claim against the respondents as he who alleges must prove. Even if the case proceeds by way of formal proof, the plaintiff is expected to adduce evidence to prove his or her case on a balance of probability. In the case of GNN & another v Geoffrey Gichobi Njeri [2019] eKLR the learned Judge relied on the observations of Emukule, J in the case of Samson S. Maitai & Anor v African Safari Club Ltd & anor [2010] eKLR, where Emukule, J observed thus;

“ ... I have not seen judicial definition of the phrase "Formal Proof". "Formal" in its ordinary Dictionary meanings - refers to being "methodical" according to rules (of evidence). On the other hand, according to Halsbury's Laws of England, Vol. 15, para, 260, "proof" is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption.

Can hearing therefore, by formal proof, be similar to a full hearing." According to the observations of Emukule, J, in a formal hearing, all rules of evidence and procedure are observed and the party to a suit has to adduce evidence sufficient to sustain the suit. In adducing this evidence, the party has to raise a presumption that whatever is claimed is true and this therefore goes to the merits of the case. The Court considering a full hearing,



to determine the matter based on the evidence that is presented before it by parties. In contrast, at a formal proof hearing, if the party with the onus of adducing evidence fails to satisfy the truth threshold, the matter would stand to be dismissed on the basis that it was unmeritorious and did not raise sufficient proof of any issues of fact or law. It would be heard and determined on its merits.”

24. What proof then was placed before the trial court? The appellant who testified as PW1 did not witness the accident. However, he testified that his mother died an hour later at Bondo District Hospital and that he took her body to the mortuary. The appellant produced the certificate of death for his mother as Exhibit 2.
25. The appellant submitted that in proving that he was related to the deceased, the grant ad litem in succession cause No. 3 of 2018 produced as exhibit 3 was more than sufficient evidence that the deceased was his mother
26. In my view the appellant did enough to prove on a balance of probability that the deceased was his mother and that she died as a result of the fatal accident.

Damages under the Law Reform Act

27. On pain and suffering, there is no dispute that the Deceased suffered fatal injuries. The testimony of the appellant was that she died an hour after the accident at Bondo District Hospital.
28. In the case of *Sukari Industries Limited v Clyde Machimbo Juma* [2016] eKLR where the deceased had died immediately after the accident and the trial court had awarded Kshs. 50,000/= for pain and suffering, Majanja J. stated as follows:

“(5) On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased’s estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs 10,000 to Kshs 100,000 over the last 20 years hence I cannot say that that the sum of Kshs 50,000 awarded under this head is unreasonable.”

29. In view of the foregoing I am inclined to find that the deceased must have experienced a lot of pain from her injuries prior to her death and thus an award of Kshs. 80,000 is sufficient in the circumstances.
30. On the issue of loss of expectation of life, in the case of *Mercy Muriuki & Another v Samuel Mwangi Nduati & Another (Suing as the legal Administrator of the Estate of the late Robert Mwangi)* (2019) eKLR, the Court observed that:

“The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs. 100,000/- while for pain and suffering the awards range from Kshs. 10,000/= to Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.”

31. I thus award the appellant Kshs. 100,000 for loss of expectation of life.



Damages under the Fatal Accidents Act

32. On the age of the deceased, the appellant submitted that there was an error on the date of death in the certificate of death which error was negligible because the post-mortem report indicated the date of death as 12.4.2018. It was submitted that the post-mortem report has the same evidentiary weight as the certificate of death and was even more detailed.
33. However, the post-mortem report was not produced before the trial court and thus the trial court was not in a position to confirm the same. I have however perused the proceedings and judgment in the traffic case file and the evidence therein including the police abstract show that the deceased died on 12/4/2018.
34. The appellant further pleaded before the trial court that the deceased's family depended on her for support and that by her death they had lost the means of support. PW1 did not produce birth certificates regarding the deceased's children nor did she even produce the baptismal certificates showing that there were specific dependants. The appellant did not also show or adduce evidence of how the deceased was assisting the said dependents. As a result, I agree with the trial magistrate that the claim for loss of dependency is not tenable and therefore the same is dismissed.

Special damages

35. The appellant pleaded before the trial court special damages of Kshs. 328,600 that included funeral expenses, police abstract and other ancillary costs.
36. Special damages are those damages which are ascertainable and quantifiable at the date of the action. in Hahn v Singh, Civil Appeal No. 42 of 1983 [185] KLR 716, the Court of Appeal held that:

“Special damages must not only be specifically claimed (pleaded) but also strictly proved... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”
37. The appellant herein did not produce any receipts to back up his claims for special damages. This claim is thus not established and is hereby disallowed.
38. In the end, I find the appellant only proved his claim against the respondents on a balance of probabilities on liability at 100% and under the Law Reform Act to a tune of Kshs. 180,000 which is hereby allowed. The judgment of the lower court on liability is therefore set aside and substituted with judgment for the appellant on liability at 100% and general damages assessed at Kshs 180,000. This sum will attract interest at Court rates from the date of judgment in the lower court until payment in full. The appellant shall also have costs of the suit in the lower court.
39. Each party shall bear their own costs of this appeal.
40. This file is closed.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 22ND DAY OF MARCH, 2023

R.E. ABURILI

JUDGE

