



**Maruka & another v Ndolo (Suing as the Legal Representative
of the Estate of John Obwaka Oude-Deceased) (Civil Appeal
E083 of 2021) [2023] KEHC 1500 (KLR) (7 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1500 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL E083 OF 2021
KW KIARIE, J
MARCH 7, 2023**

BETWEEN

NEWTON OUMA MARUKA 1ST APPELLANT

KHISHI MOTORS LIMITED 2ND APPELLANT

AND

**NICANOR OUDE NDOLO (SUING AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF JOHN OBWAKA OUDE-DECEASED) RESPONDENT**

*(Being an Appeal from the judgment in Oyugis Senior Principal Magistrate's
SPMCC No. 173 of 2019 by Hon. B. Omwansa–Senior Principal Magistrate)*

JUDGMENT

1. Newton Ouma Maruka and Khishi Motors Limited, the appellants herein, were defendants in Oyugis Senior Principal Magistrate's SPMCC No 173 of 2019. This was a claim that arose from a road traffic accident that involved motor vehicles registration number KCQ 845C and the motor cycle which the respondent was riding. The learned trial magistrate delivered judgment dated July 27, 2021. He apportioned liability at 20:80 in favour of the respondent.
2. The learned trial magistrate made an award of Kshs 980,000.00 in general damages and special damages Kshs 95,000.00 in favour of the respondent before factoring liability.
3. The appellant was aggrieved by the said judgment and filed this appeal through the firm of Kimondo Gachoka & Company Advocates. The following grounds of appeal were raised:
 - a. The learned magistrate erred in law and in fact and misdirected himself when he failed to consider the appellants' submissions on points of law and facts on quantum.



- b. The learned magistrate erred in law and fact by relying on the sole testimony of the deceased's wife as proof of the deceased occupation and earnings.
 - c. The Learned trial magistrate erred in law and in fact in awarding general damages of Kshs 860,000/- an amount that was excessive and unjust in the circumstances considering the evidence adduced before court and principles of law.
 - d. The learned trial magistrate erred in law and facts and his decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law which have occasioned a miscarriage of justice.
 - e. The learned magistrate erred in law and in fact in unduly disregarding the judicial authorities cited by the appellants and by instead relying on the authorities cited by the respondent which were excessive in the circumstances.
4. The respondent was represented by the firm of Nyatundo & Company Advocates. He opposed the appeal on the following grounds:
 - a. That the learned trial magistrate applied the correct principal in awarding general damages; and
 - b. That the general damages were reasonable in the circumstances.
 5. This court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of *Selle v Associated Motor Boat Co. Ltd.* [1965] E.A. 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.
 6. The respondent called PC Cheplang Cheboi (PW1) as a witness. This officer testified that he was among the police officers who went to the scene. His evidence was not clear as to who between the motor cyclist and the driver of motor vehicle registration number KCQ 845C was to blame. He said he was not in a position to indicate the point of impact. According to this witness, the driver of motor vehicles registration number KCQ 845C blamed the deceased for joining the road when he was too close to avoid the accident.
 7. Ogunda Kevin Otieno was the driver of motor vehicles registration number KCQ 845C at the time of the complained of accident. He did not testify. It was therefore not clear who the author of the accident was. There was no sufficient evidence to hold the appellants 100% liable. In the case of *Baker v Market Harborough Industrial Co-Operative Society Ltd* [1953] 1 WLR 1472 at 1476, Denning, LJ (as he then was) observed *inter alia* as follows:

Every day, proof of collision is held to be sufficient to call on the defendant for an answer. Never do they both escape liability. One or the other is held to blame, and sometimes both. If each of the drivers were alive and neither chose to give evidence, the court would unhesitatingly hold that both were to blame. They would not escape liability simply because the court had nothing by which to draw any distinction between them...
 8. In the instant case, the learned trial magistrate erred to find the appellants 100% liable. I set aside the finding on liability and substitute it with a finding of 50:50 liability.



9. It is trite law that an appellate court will only interfere with an award of the trial court if certain circumstances are satisfied. In *Butt v Khan* [1981] KLR 349 at page 356 Law JA stated:

...an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived a figure which was either inordinately high or low.

10. The appellants complained that the award of Kshs980, 000.00 was inordinately high. They however concede that this award is sufficient at paragraph 18 of their submissions. I therefore have no reason to interfere with the said award except in liability as indicated hereinabove.

11. Since the appeal has partially succeeded, the appellants will have half costs of this appeal.

DELIVERED AND SIGNED AT HOMA BAY THIS 7TH DAY OF MARCH, 2023

KIARIE WAWERU KIARIE

JUDGE

