



**Nyole & another (Suing as Administrators of the Estate of Josephat Kiio Kasuva (Deceased)) v
Musyoki (Civil Appeal E019 of 2020) [2023] KEHC 17322 (KLR) (11 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17322 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL E019 OF 2020**

**GMA DULU, J
MAY 11, 2023**

BETWEEN

**ROSE NDUNGE NYOLE 1ST APPELLANT
FAITH KATIWA KASUVA 2ND APPELLANT
SUING AS ADMINISTRATORS OF THE ESTATE OF JOSEPHAT KIIO KASUVA
(DECEASED)**

AND

ANGELINA SILA MUSYOKI RESPONDENT

*(From the judgment of Hon. Sagero (SRM) delivered
on 24th November, 2020 in Makueni CC 14 of 2018)*

JUDGMENT

1. In a judgment delivered on 24th November, 2020 the trial court found that the Plaintiff (now Appellant) had failed to prove their claim on the balance of probabilities and dismissed the case. The trial court also directed that each party bear their own costs.
2. Dissatisfied with the decision of the trial court, the Appellants who were the Plaintiff in the trial court, have come to this court on appeal through Counsel Makau & Mulei Advocates on the following grounds:
 1. The learned trial Magistrate erred in law and fact and misdirected himself when he placed excessive weight on the defence testimony which was not plausible at all.
 2. The learned Magistrate erred in law and fact and misdirected himself by failing to consider both the Appellant and Respondent's submissions and authorities cited therein.



3. The learned trial judge (should be magistrate) erred in law and fact and misdirected himself by apportioning liability at 100% which was inappropriate in the circumstances.
 4. The learned trial magistrate erred in law and fact and misdirected himself when he failed to award any amount for general damages under the [Law Reform Act](#) and [Fatal Accidents Act](#) and proceeded to dismiss the Plaintiff's suit.
3. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by O. N. Makau & Mulei Advocates for the Appellant as well as the submissions filed by Gladys Gichuki & Associates Advocates for the Respondent.
 4. This is a first appeal. As Counsel on both sides have correctly stated in their submissions, this court has a duty to re-examine the evidence on record and come to its own independent conclusions. I am guided in stating so by what was stated in the case of [Peter Kanithi Kimunya v Aden Guyo Haro](#) (2014) eKLR as follows:-

‘I am mindful of my duty as an appellate court which duty is grounded in Section 78 of the [Civil Procedure Act](#) to evaluate and consider the evidence and the law and exercise as nearly as may be the power and duties of the court of original jurisdiction and come to my own conclusions but in doing so, I must give allowance of the fact that I neither saw nor heard the witnesses as they testified – see *Selle v Associated Motor Boat Company Limited* (1968) EA 123. In addition, as the appellate court, I will only interfere with the lower court's judgment if the same is founded on wrong principles of fact and or law as guided by the Court of Appeal in *Nkube v Nyamiso* (1983) KLR 403.’

5. Having evaluated the evidence on record, I note that in support of their case, the appellant who were the Plaintiffs in the trial court called two (2) witnesses. 1st appellant testified as PW1 that she was the wife of the deceased Joseph Kiio Kasuva. She called one other witness PW2 PC David Chebu a Police Officer who produced the police abstract report.
6. On the other hand, the Respondent testified as DW1. She was the owner of the tractor which was driven by the deceased when the accident occurred. She called DW2 Luke Kamau Nzioki who was the turn boy of the deceased at the time of the accident. DW2 was an eye witness to the accident. She also called DW3 Kisabuli Maingi, who owns a bar, and claimed to have sold the deceased alcohol before the accident on same day. According to DW3 the deceased left the bar at 5p.m.
7. It is trite that the burden was on the Plaintiff to prove the allegations in the plaint. This burden is anchored in statute under Section 107(1) of the [Evidence Act](#) (Cap 80) which provides 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.

8. This position is supported further by Section 109 of the [Evidence Act](#), which states as follows:-

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.



9. This being a civil case, the standard of proof was on the balance of probabilities. Thus the Appellants were required to prove that their allegations were more probable to have occurred than not; in order to win the case.
10. In our present case, the only issue on proof of liability is what caused the accident or how the accident occurred. This is because the ownership of the tractor by the Respondent is not denied. That the tractor was driven by the deceased is not contested. That the accident occurred at a slope of a river is also not disputed. Even the time the accident occurred is not disputed.
11. I note that under paragraph 5 of the plaint, the Appellant alleged that the accident was caused by defective brakes of the tractor. In support of this allegation, the 1st appellant Rose Ndunge Kyole testified as PW1 and stated that the accident was caused by brake failure of the tractor. The Respondent and her two witnesses on the other hand denied this in their defence testimony. Did the Appellant prove on the balance of probabilities that the accident which resulted in the death of 1st appellant's husband was caused by defective brakes or brake failure of the tractor?
12. In my view, from the evidence on record, the appellants did not do so. Though PW1 testified that the deceased said so, there is no evidence from any other witness to support this. In this regard also, the appellant did not produce any technical report showing that the tractor brakes were defective, nor any other type of report indicating the condition of the tractor before or after the accident. In addition, the 1st appellant was not an eye witness to the accident and could not testify to how it occurred.
13. The only eye witness DW2 Luke Kamau Nzioki was emphatic that the deceased let the tractor move on free gear downhill and then panicked and jumped off the tractor, thus hitting a rock. There is also evidence from DW3 Kisabuli Maingi that the deceased took alcohol and departed from a bar shortly before the incident. Though no medical report was tendered in evidence on whether the deceased took alcohol that day, the evidence of alcohol intake by the deceased was consistent between DW2 and DW3 and is thus believable.
14. In my view therefore, the Appellant did not prove on the balance of probabilities that the tractor accident was caused by defective brakes.
15. On whether the Respondent could be liable in negligence for the accident and to what extent, in my view the Respondent was not liable in negligence. This is because firstly, there was no proof that her tractor was defective. Secondly, the deceased was neither the respondent's employee nor was he instructed or asked by her to go to the river nor to use that route. Thirdly, the deceased was in full control of the tractor as its driver and took actions on his own volition, thus any misjudgment could not be blamed on any other person but himself.
16. Thus in my view, the Respondent bears no liability in negligence to any extent with regard to the accident herein. The appeal herein therefore is for dismissal.
17. The only issue which remains for my decision is with regard to costs. In this regard, I note that the trial court ordered each party to bear their respective costs of the trial. The Appellant have however opted to come to this court on appeal, guided by Counsel.
18. In my view, it will be unjust in the circumstances of this case, if I do not award costs of appeal to the Respondent. I will thus award the costs of the appeal to the Respondent.
19. Consequently and for the above reasons I order as follows:-
 - i. I dismiss the appeal herein.



ii. I award the costs of appeal to the Respondent payable by the Appellants.

DATED, SIGNED AND DELIVERED THIS 11TH DAY OF MAY, 2023 VIRTUALLY FROM VOI.

GEORGE DULU

JUDGE

In the presence of:-

Ms. Kyalo for the appellants

No appearance for respondent

Mr. Otolu court assistant

