



Onyancha v Kaesa & another (Suing as personal representative of the Estate of John Mutisya Kaesa (Deceased)) (Civil Appeal E20 of 2020) [2023] KEHC 19331 (KLR) (21 June 2023) (Ruling)

Neutral citation: [2023] KEHC 19331 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E20 OF 2020**

**FR OLEL, J
JUNE 21, 2023**

BETWEEN

STANLEY MORARA ONYANCHA APPELLANT

AND

WILFRED MBULA KISANGAU 1ST RESPONDENT

MONICA NDUNGWA KAESA 2ND RESPONDENT

**SUING AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN
MUTISYA KAESA (DECEASED)**

*(Being an appeal against judgment decree of Principal Magistrate court
at Mavoko Honourable C.C Oluoch (CM) but read from her by Hon. R.W
Gitau (RM) on 29th January 2020 in Mavoko SPMCC no 568 of 2018)*

RULING

1. The Respondents herein, Monica Ndungwa Kaesa and Winfred Mbula Kisangau by a plaint dated 6th December 2018, sued the appellant Stanely Morara Onyancha claiming general damage under *fatal accident Act* and *law Reform Act*, special damage of Ksh.24,950 plus costs and interest of the suit.
2. It was alleged in the plaint that the appellant herein was the registered and/or beneficial owner of motor vehicle KCD 872M -TATA LORRY (hereinafter referred to as the suit motor vehicle) and was at all times in control and possession thereof. On or about 22nd June 2018, the deceased was lawfully walking off the road along Mombasa quarry within Athi river, when the appellant's driver servant and/or agent while in the cause of their employment recklessly, carelessly and negligently drove the suit motor vehicle permitted it to veer off the road and knocked the deceased thereby causing him fatal injuries.
3. The appellant on his part did file a statement of defence where he denied owning the suit motor vehicle as well as the facts relating to the occurrence of the accident. The appellant further denied all the



- particulars of negligence, carelessness and recklessness attributed to him and/or his servant employee or agents and stated in the alternative that if indeed an accident occurred, it was substantially contributed too by the deceased negligence which were particularized. The appellant also denied that the deceased estate suffered any loss and prayed for the suit to be dismissed.
4. Testifying as PW1, the 2nd Respondent Winfred Mbula Kisangua did rely on his witness statement and adopted it as part of her evidence in chief. She testified that she knew the deceased John Mutisya Kaesa, who was her husband. He had been involved in a road accident on 22.6.2018 and sustained fatal injuries. At the time of his death, the deceased was aged 30 years. PW1 produced various claim supporting documents and they were adopted as exhibits, apart from the police abstract. She further stated that they were blessed with three children and the deceased was a trained masonry who earned Ksh.2,500 daily and would send her Ksh.6000/= every Saturday to maintain the children and also supported his parent and other siblings. She prayed for compensation.
 5. In cross examination, she confirmed that she did not witness the accident and while her husband was a trained masonry, she had no documents to proof that he earned Ksh.2,500/= daily or Ksh.75,000/= monthly. Further she did not have Mpesa statement to prove she would get Ksh.6,000/= weekly from the deceased for family upkeep and upkeep of deceased's mother Ksh.3,000/=.
 6. PW2 David Mutisya Mutuku testified that he does construction work. He adopted his witness statement as part of his evidence. He recalled on 22/6/2018 at about 5.00pm, he was at a construction site at Nora school within Athi River near JMC city. They had finished work and was walking with the deceased along Mombasa road at quarry area. As they were walking, they came across a herd of Masaai cows along the way, which cows (around 50 of them) were coming from the opposite direction. They decided to give way by moving further off the road to allow the cows to pass. The road was a rough road and there was a lot of dust. In the process of giving way, he suddenly noticed the suit motor vehicle coming from behind them. He tried to alert his friend (the deceased) but it was too late. The suit lorry hit the deceased from behind and did not stop. The suit motor vehicle was being driven off the road and was trying to avoid hitting the cows, when it knocked down the deceased while he (PW2) jumped off just in a nick of time.
 7. The suit motor vehicle did not stop after the accident, he ran after the motor vehicle to enable him see the registration number as there was a lot of dust. Thereafter he came back to where the deceased had fallen. He was still breathing, PW2 frantically called for help from motor cyclists who came to assist but unfortunately the deceased succumbed to the injuries sustained. The suit motor vehicle registration number was KCB 782M. PW2 blamed the driver of the suit motor vehicle for the accident as he failed to slow down, he did not hoot and knocked the deceased off the road while avoiding cows which were on the middle of the road.
 8. In cross examination PW2 stated that the road surface was rough and it was not tarmacked. The suit motor vehicle was being driven at high speed and knocked the deceased off the road where they were walking. The suit motor vehicle was a lorry and they saw it when it was already close behind them and the point of impact was at the side of the road. In re-examination PW2 stated that he witnessed the accident and that is why he recorded his statement with the police. Immediately after the accident he ran after the suit motor vehicle and noted its registration number. The front left side of the lorry came into contact with the deceased and the accident happened off the road. They saw the suit motor vehicle when it was near and it had left the road to give way to the cows.
 9. PW3 Cpl Wilfred Mburugu testified that he was based at Athi river traffic base and had OB no.53/22/6/18. It concerned a fatal traffic accident reported to Cpl Too which accident had occurred along quarry - Mombasa road. It involved the suit motor vehicle driven by John Kamotho Wambugu



and a pedestrian known as Mutisya Kaesa. The suit motor vehicle was moving from Mombasa road towards quarry when it knocked down the pedestrian who died. The scene was visited and body moved to Shalom hospital. The driver of the suit motor vehicle was not charged. The witness produced the police abstract as Exhibit P2.

10. In cross examination PW3 stated that he was not the investigating officer and also did not have the occurrence book. The police investigating officer must have visited the scene and drawn accident sketch plans. No further investigations were ever conducted and he was relying on information on the OB and police abstract.
11. DW1 John Kamotho Wambugu testified that he was a driver of the suit motor vehicle and adopted his witness statement as part of his evidence in chief. He testified that he was driving the suit motor vehicle KCD 782M- Tata lorry, ferrying garbage to the dumping site. He did not see any cow on the road while returning some people stopped him and claimed he had knocked down a pedestrian. Several cyclists came in large numbers. DW1 denied hitting the deceased and traffic policemen were called to the scene. The suit motor vehicle too did not have any dent. Motor vehicle inspection was carried out and the suit motor vehicle released. He was not charged in court. He further confirmed that the road was rough and had potholes. There were cows in the vicinity, but he did not cause the accident.
12. In cross examination DW1 confirmed he was the driver of the suit motor vehicle. After he had been stopped by the motor cyclists, he had been shown the deceased body and the cows were before the body. In the said area there were usually maasai's herding cows. DW1 also confirmed that the road was dusty and they would usually stop to let the cows pass. He also confirmed that there were cows on the road. He was stopped and accused of hitting a pedestrian after offloading garbage. Several motor cyclists had followed him and tried to get him off lorry cabin claiming he had hit a pedestrian. The suit motor vehicle was inspected and he was released on cash bail and was not charged in court. In re-examination DW1 stated that he had to run away as his life was in danger. He denied hitting a pedestrian and also did to have a copy of the inspection report.
13. DW2 John Mburu Mukulu testified that he was the conductor/turn boy of the suit motor vehicle and adopted his witness statement as part of his evidence in chief. He stated that he was seated in the lorry cabin and that the suit motor vehicle did not hit any pedestrian. The road was marram, had potholes and he did not see any cows ahead of the lorry. They had dumped waste and, on the way back, they met a group of people who claimed they had hit and killed a pedestrian. They were mob by a crowd and they drove to the yard. Later police officers came. In cross examination DW2 admitted that cows used the road, but on that day, he did not see them ahead of the suit motor vehicle. He also denied witnessing any accident, but admitted that cows usually caused a lot of dust on the said road. The driver was expected to drive slowly on seeing the cows. In re-examination DW2 stated that on the material day there was no dust and no accident occurred.
14. The trial magistrate did consider the entire evidence tendered and in her considered judgment placed liability at 80-20 in favour of the respondents and award them damages as follows;

Pain and suffering Ksh.20,000/=

Loss of expectation Ksh.100,000/=

Loss of dependency Ksh.2,03,520/=

Special damages Ksh.24,951/=

Total Ksh.2,148,470

Less 20% Ksh.1,718,770/=



Plus cost and interest.

15. The appellant being aggrieved by the said judgement filed their memorandum of appeal dated 21/2/20202 and raised the following grounds of appeal namely;
- a. That the learned magistrate erred in law and in fact in failing to find that the Respondents had not proved their case on involvement of the Appellants vehicle in the accident and thereby liability against the appellant to the required standard of balance of probability.
 - b. That the learned trial magistrate erred in law and in fact in failing to find that the respondents did not produce any evidence and/or sufficient evidence linking the appellant's motor vehicle to the accident.
 - c. That the learned trial magistrate erred in law and fact in failing to find that there was total lack of any evidence linking the appellant's vehicle to the accident.
 - d. That the learned trial magistrate erred in law and in fact in arriving at an erroneous judgment on involvement of the appellant's vehicle and liability and thereby holding the appellant liable for the occurring of the accident.
 - e. That the learned trial magistrate erred in law and in fact by misapprehension of the evidence placed before it on the involvement of the appellant's vehicle and thereby on the issue of liability thereby arriving at an erroneous finding on liability.
 - f. That the learned trial magistrate erred in law and in fact in failing to find that by the police officer failing to avail the police file, there was no evidence placed before the court to verify the authenticity of evidence of the alleged eye witness and his presence at the scene of the accident and thereby reaching a finding that his evidence cannot be relied upon.
 - g. That further the trial magistrate failed to find that by the police file not being availed, the police officers evidence was mere hearsay and was not of any evidential or probative value in regard to the involvement of the appellant's vehicle and thereby absolve the appellant from the matter.
 - h. That the learned trial magistrate erred in law and in fact by failing to find that the failure of the Respondents to avail the police file there was no way to verify the occurrence of the accident involving the appellant's vehicle with the deceased.
 - i. That the learned trial magistrate erred in law and in fact in failing to address the evidence and the submission tendered by the appellant and therefore failed to take into account relevant facts on involvement of the appellant's vehicle and on liability.
 - j. That the learned trial magistrate erred in law and in fact in disregarding the appellant's submissions and the authorities cited there at thereby arrived at an erroneous decision on liability.
 - k. That the learned trial magistrate erred in law and in fact in failing to dismiss the Respondents case against the appellant for lack of proof of involvement of the appellant's vehicle in the accident.

Appellant's Submission

16. The appellants submitted that PW3 Cpl Wilfred Mburugu stated that the incident was still pending under investigation and liability was not proved to the required standard of balance of probability. Both DW1 and DW2 denied knocking down the deceased and the suit motor vehicle was not found at



the scene, nor was DW1 charged before any court of law with causing death by dangerous driving. Both defence witnesses also denied seeing any cows blocking the road. PW2 David Mutisya Mutuku alleged to have witnessed the accident and recorded his statement with the police but as per the police abstract he was not named as a witness. There was then no independent evidence to help the court verify which version of the parties was correct as to how the accident occurred and thus the Respondent's did not prove their case on a balance of probability. Reliance was placed on Civil Appeal no.85 of 2013 Lochat brothers limited and another versus Johana Kipkosgei Yegon.

17. The appellant further submitted that the post mortem form Exhibit 10 by Dr. Ndegwa PM showed that the deceased injuries could have been caused by being knocked or a fall from a moving vehicle. There was high probability that the deceased fell from a motor vehicle and was not hit by any motor vehicle and that would explain why DW1 and DW2 denied knocking down anybody. It was also possible that the deceased was hanging at the rear of the suit motor vehicle without the knowledge of the driver and his turn boy and fell off as the attempted to alight while the lorry was in motion. The trial magistrate erred in disregarding the evidence and submissions of the appellant and therefore arrived at a wrong decision. The appellant prayed that this appeal be allowed in its entirety with costs.

Respondent's Submissions

18. The Respondent's did file their written submissions on 28/3/2023. They did submit that PW2 David Mutisya and PW3 Cpl Wilfred Mbururu sufficiently proved that indeed an accident occurred involving the suit motor vehicle and the deceased. The evidence of PW2 was cogent, clear and undoubtful as he explained exactly what transpired on the material day.
19. PW2 evidence was clear that despite the road being dusty, the appellant's driver only flashed his light once and never hooted to give them time to give way yet they were off the road. DW1 action was negligent and not in consonance with action of a prudent driver. DW1 also admitted having met several Maasai cows but denied knocking down the deceased which was insincere as the deceased was knocked down where the cows were. Both evidence of DW1 and DW2 thus ought to be treated with a pinch of salt as both witnesses were untruthful and untrustworthy. The finding on liability by the trial court was soft as the appellant should have been held 100% liable.
20. On quantum the Respondent's submitted that the trial court was right and justified to have arrived at the said quantum, on pain and suffering, loss of expectation and loss of dependency. Special damage was also pleaded and proved. Reliance was placed on *Jacob Ayiga Marivya and another versus Simeon obeay* C.A Civil Appeal No. 167 pf 2002 (2005)eKLR, *Gachoki Gathuri (suing as legal Representation of the Estate of James Kinua Gachoka (deceased) versus John Ndiga Njagi Tomothy and 2 others* (2015) eKLR and *Kenfro Africa Ltd T/A Meru Express Services and another* (1987) KLR 30.
21. The Respondent's prayed that this appeal be dismissed with costs.

Analysis and Determination

22. I have considered the pleadings, evidence presented and submissions of the parties in this appeal, this court first and foremost is enjoined to subject the whole proceedings to fresh scrutiny and make its own conclusions.
23. A first appeal offers a valuable right to the parties and unless restricted by law, the whole case therein is open for rehearing both on the question of fact and law. The judgment of the appellate court must therefore reflect its conscious application of mind and record the findings supported by reasons, on all 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 appellate court had discharged the duty expected of it. See *Santosh Hazari Vs Purushottam Tiwari (Deceased)* by L.Rs (2001) 3 SCC 179.

24. A first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the *civil procedure Act* a court of first appeal can appreciate the entire evidence and come to a different conclusion. See *Kurian Chacko Vs Varkey Joseph* AIR 1969 Keral 316

25. Section 107 (1) of the *Evidence Act* provides that;

“ 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.”

26. Section 108 of the *Evidence Act* further provides that ;

“ The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given by the other side.”

27. I also refer to *The Halsbury’s laws of England*, 4th Edition, Volume 17 at para 13 and 14 where it states that;

“ The legal burden is the burden of proof which remains constant through a trial; it is the burden of establishing the facts and contentions which will support the parties’ 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 essential to his case. There may therefore be separate burdens in a case with separate issues.

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 legal and evidential burden initially rests upon the appellant, the evidential burden may shift in the course of trial depending on the evidence adduced. As to 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.”

28. The Question then is what amounts to proof on a balance of probabilities was discussed by Kimaru J in *William Kabogo Gitau Vs George Thuo & 2 others* (2010) 1 klr 526 stated that;

“ In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposite party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegation that he made has occurred.



29. I also refer to *Palace Investments Ltd Vs Geoffrey Kariuki Mwendwa & Another* (2015) Eklr , Where the judges of Appeal referred to “*Denning J in Miller Vs Minister of Pensions* (1947) 2 ALL ER 372 discussing the burden of proof had this to say;

“That degree is well settled, it must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it is more probable than not; the burden is discharged, but if the probability is equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where the parties.....are equally (un)convincing, the party bearing the burden of proof will loose because the requisite standard will not have been obtained.”

30. However, as also held by the Court of Appeal in *Micheal Hubert Kloss & Another vs. David Seroney & 5 Others* [2009] eKLR:

“The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in *Stapley vs. Gypsum Mines Ltd* (2) (1953) A.C. 663 at p. 681 as follows:

‘ To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it... The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally...’”

31. The issue in this appeal is whether the driver of the suit motor vehicle ought to have been found 80% liable. The court is being called upon to interfere with the trial court’s finding of liability. In *Khambi and Another vs. Mahithi and Another* [1968] EA 70, It was held that;

“It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.”

32. That seems to have been the position in *Isabella Wanjiru Karangu vs. Washington Malele* Civil Appeal No. 50 of 1981 [1983] KLR 142 and *Mahendra M Malde vs. George M Angira* Civil Appeal No. 12 of 1981, where it was held that apportionment of blame represents an exercise of a discretion with which the appellate court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle.

33. There is no doubt that an accident did occur on 22nd June 2018, along Mombasa road, quarry area, where the deceased was knocked down by a motor vehicle and sustained fatal injuries. PW2 David



- Mutisya testified that they were walking with the deceased off the road and trying to avoid a herd of Maasai cattle (about 50 of them) that were walking towards them from the opposite direction and which cows had occupied the entire road, when the suit motor vehicle which was approaching from behind them, suddenly swerved to avoid the cows and violently knocked down the appellant, who sustained fatal injuries and died at the scene.PW2 blamed the driver of the suit motor vehicle as he did not slow down to let the cows pass nor did he hoot. The driver just flashed his headlights once, and was driving off the road where he knocked down the deceased.
34. PW3 Cpl Wilfred Mburugu from Athi River traffic base, also confirmed that the accident was reported as having occurred along quarry Mombasa road involving the suit motor vehicle driven by John Kamotho Wambugu and a pedestrian Mutisya Kaesa. The suit motor vehicle was being driven from Mombasa road towards the quarry, when it knocked down the deceased. He produced the police abstract, though he confirmed that he was not the investigating officer who had been transferred.
 35. DW1 and DW2, the driver of the suit motor vehicle denied knocking down the deceased and were categorical that no accident happened. They were surprised when, on the way back from the quarry they were stopped by motor cyclists who claimed that he had knocked down somebody. DW1 in cross examination admitted that there were cows on the road and he was required to stop to let them pass. He also confirmed that he needed to switch on his lights so as to see clearly as the road was dusty. He further confirmed that there were cows on the road.DW2 on the other hand not only denied the occurrence of the accident, but also completely denied ever seeing any cows on the road on the material day.
 36. The trial magistrate did consider the entire evidence and found as a fact that DW1 evidence tallied and agreed with the evidence of PW2's. They had both confirmed that the road in question was busy, dusty and there was a herd of cattle on the road, a fact disputed by DW2. Further DW1 in cross examination did admit that the cows were before the deceased body, which evidence tallies with the evidence of PW2, who testified that there was a herd of cattle, which were oncoming and they moved away to give them way. Having considered all the evidence adduced, I do totally agree with the accurate analysis of the trial magistrate that indeed the evidence of DW1, corroborated the evidence of PW2 in all particular's, even to the extent, when he stated that he need to switch his lights on so as to see clearly. PW2 also alluded to the fact that the lorry driver flashed his lights on once before knocking down the appellant.
 37. There is therefore no basis upon which the finding of liability can be faulted as the deceased was made to shoulder 20% liability for failure to keep a proper look out for the motor vehicles using the said road and failing to exercise due care. The court also took into consideration the fact that the suit motor vehicle knocked him down (the deceased) from behind and caused him fatal injuries.
 38. All the grounds of appeal on liability thus fail, as it has not been shown, which error in principle or the apportionment made by the trial court was manifestly erroneous to enable this court interfere with the same.
 39. The appellants' appeal entirely challenged the finding of the trial court on liability. Also having read through the appellants submission file in court on 21st March 2023, the appellant only submitted at length challenged the trial courts finding on liability. That being the case the award on quantum as determined by the trial court remains unchallenged.

Disposition

40. Taking all relevant factors into consideration I do find that this appeal is wholly unmerited and the same is dismissed with costs to the Respondent.



41. The costs are hereby assessed at Ksh.170,000/= all inclusive.

42. It is so ordered.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 21ST DAY OF JUNE 2023.

RAYOLA FRANCIS OLEL

JUDGE

JUDGMENT ON THE VIRTUAL PLATFORM, TEAMS THIS 21ST DAY OF JUNE, 2023.

In the presence of;

.....for Appellant

.....for Respondent

.....Court Assistant

