



**Makokha & another v Maliba (Suing as the legal and personal representative of Antony Gisiye - Deceased) (Civil Appeal E010 of 2022) [2023] KEHC 20597 (KLR) (21 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20597 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CIVIL APPEAL E010 OF 2022  
WM MUSYOKA, J  
JULY 21, 2023**

**BETWEEN**

**STEPHEN WESONGA MAKOKHA ..... 1<sup>ST</sup> APPELLANT**

**MOSES ADEPA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**IGNATIUS OPEMA MALIBA (SUING AS THE LEGAL AND PERSONAL REPRESENTATIVE OF ANTONY GISIYE - DECEASED) ..... RESPONDENT**

*(Appeal from judgment and decree of Hon. F. Nyakundi, Resident Magistrate, RM, in Mumias RMCCC No. 188 of 2016, of 15th April 2019)*

**JUDGMENT**

1. The appellants had been sued by the respondent, at the primary court, for compensation, on behalf of the estate of the deceased, who died, following a traffic road accident on July 10, 2014, along Mumias-Busia road. The deceased was a rider of bicycle, which was in a collision with vehicle registration mark and number KAL 792Q, said to have belonged to the appellants, and liability was attributed to the appellants, on account of negligence. The appellants filed a defence, denying the accident, and everything else pleaded in the plaint. In the alternative, the appellants pleaded that, if any accident occurred, it must have been due to negligence on the part of the deceased, or he contributed to it.
2. A trial was conducted. Both sides presented witnesses. On liability, the court held the appellant 100% liable. On quantum, the court assessed damages at Kshs. 50, 000.00 for pain and suffering, Kshs. 1, 000, 000.00 for loss of dependency, and Kshs. 65, 000.00 special damages, making a grand total of Kshs.1, 115, 955.00.
3. The appellants were aggrieved, hence the appeal. 6 grounds are listed, around the issue of liability and quantum.



4. The appeal was canvassed by way of written submissions, and it turns on only 2 issues, liability and quantum.
5. The accident was a collision between two vehicles, a bicycle and a car. Where 2 vehicles collide on a road, while both in motion, the issue of contributory negligence naturally arises. In this case, both the pedal cyclist the driver of the vehicle were in motion. There was no evidence that the car went out of its way and knocked down the cyclist, neither is there evidence that the cyclist was necessarily reckless in the manner that he handled his bicycle at the material time. From the evidence recorded, there is no blatant blameworthiness attributable to either of the 2 persons in control of the vehicles involved. The appellants said that they noted that someone had been knocked down after they had passed the cyclists, suggesting that they had not realized that they had hit the deceased. The respondent adduced evidence which merely showed that the deceased was knocked down by the vehicle belonging to the appellants, without necessarily pointing out exactly why he considered the appellants to have been negligent. He only relied on the traffic proceedings, as evidence of the negligence, but there was an acquittal. That would point to equal contribution by the 2 sides, going by the principle that where it is difficult to apportion total negligence to either side, the court ought to apportion negligence equally. That is what the trial court ought to have done. Liability should have been apportioned at 50:50.
6. On quantum, the applicants raise issue with the global award, saying it was excessive, and submit that the same is excessive. The cite *Chen Wembo & 2 others v IKK 7 another* [2017] eKLR (Meoli, J), where Kshs. 600, 000.00 was awarded. The decision is, however, a little dated now. I am persuaded that the award made was adequate compensation, and was not based on wrong principle.
7. I find merit in the appeal herein, with respect to liability, but not on quantum. The judgment of the trial court in Mumias RMCCC No. 188 of 2016, of April 15, 2019, is set aside on liability, and the finding that the appellants were 100% liable shall be substituted with a finding and holding that liability is apportioned at 50:50. The findings and holdings on damages shall remain intact. Each party shall bear their own costs.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 21<sup>ST</sup> DAY OF JULY 2023**

**W MUSYOKA**

**JUDGE**

Mr. Erick Zalo, Court Assistant.

**Appearances**

Mr. Menezes, instructed by LG Menezes & Company, Advocates for the appellants.

Mr. Makali, instructed by JO Makali & Company, Advocates for the respondent.

