



**Muli & another (Suing as the Administrators of the Estate of John Muli Malandi - Deceased) v Astral Industries Ltd & another (Civil Appeal E130 of 2018) [2023] KEHC 22416 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22416 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E130 OF 2018  
FROO OLEL, J  
SEPTEMBER 21, 2023**

**BETWEEN**

**MARY MWITHI MULI & JAMES KANIA MALANDI (SUING AS THE ADMINISTRATORS OF THE ESTATE OF JOHN MULI MALANDI - DECEASED) ..... APPELLANT**

**AND**

**ASTRAL INDUSTRIES LTD ..... 1<sup>ST</sup> RESPONDENT  
GEORGE KIANDA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal against judgment decree of Honourable Senior Resident Magistrate Y.A SHIKANDA delivered in Macabakos CMCC 460 of 2016 on 5th October 2017)*

**JUDGMENT**

**Background**

1. The appellants herein by a plaint dated 12<sup>th</sup> July 2016, sued the Respondents claiming general damage under fatal accident Act and *law Reform Act*, special damage of Ksh.31,300/= plus costs and interest of the suit. The claim arose from a fatal accident which occurred on 4<sup>th</sup> March 2016 involving the deceased, who was driving motor cycle KMCX 208Q and the Respondents motor vehicle registration Number KBP 208Q TATA LORRY (hereinafter referred to as the suit motor vehicle.)
2. It was alleged in the plaint that on the 4<sup>th</sup> March 2016, the deceased was lawfully riding his motor cycle registration Number KMCX 781L along Kathiani – Machakos road, when the 2<sup>nd</sup> respondent, who was the lawful driver, servant and/or agent of the 1<sup>st</sup> respondent while driving in the normal cause of his employment recklessly, carelessly and negligently drove the suit motor vehicle permitted it to veer off the road and violently knocked down the deceased while riding his motor cycle which burst into flames and caused the deceased to suffer fatal injuries.



3. The Respondent's on their part did file a statement of defence where they denied owning the suit motor vehicle as well as the facts relating to the occurrence of the accident. The appellants 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. The trial court upon considering the evidence tendered did find as a fact that indeed an accident occurred, but the appellants did not prove negligence on the part of the respondents. Quantum was assessed as follows;
  - a. Damages for pain and suffering Kshs 50,000/=
  - b. Loss of Expectation of life Kshs 100,000/=
  - c. Loss of Dependency Kshs 960,000/=
  - d. Funeral and related expenses Kshs 30,800/=
  - e. Special damages Kshs 500/=Plus costs and interest. But since negligence was not proved, the suit was dismissed with costs to the Respondents.
5. Being wholly aggrieved and dissatisfied by the said judgment the Appellants did file their Memorandum of Appeal dated 4<sup>th</sup> October 2010 and raised several grounds of Appeal namely that;
  - a. The learned trial Magistrate erred in law and fact and misdirected himself when he disregarded the uncontroverted evidence of PW2 on the circumstances of the accident.
  - b. The learned trial magistrate erred in law and fact and misdirected himself when he found and held that PW2 did not have a police file and only relied on the occurrence book despite the fact that the police file was presented in court.
  - c. The learned trial Magistrate erred in law and fact and misdirected himself by disregarding the fact that the 2<sup>nd</sup> respondent did not testify and as such PW2's evidence in the circumstances of the accident was unrebutted.
  - d. The learned trial Magistrate erred in law and fact and misdirected himself in failing to make a finding of liability against the defendants.
  - e. The learned trial Magistrate erred in law and fact and misdirected himself in finding and holding that the plaintiffs had not established liability against the defendants.
  - f. The learned trial Magistrate erred in law and fact and misdirected himself in finding that PW2's Evidence on the circumstances of the accident was hearsay.
  - g. The learned trial Magistrate erred in law and fact and misdirected himself in failing to find and hold that PW2's testimony on the circumstances of the accident was not challenged in cross examination and thus stands uncontroverted.



6. The appellants prayed that the judgment of the trial court be set aside and the issue of liability be determined afresh by this court.

### **Evidence at Trial**

7. PW1 Mary Mwithi Muli testified that the deceased was her husband and she had obtained grant of representation to administer his estate. Her husband was involved in a fatal accident on 4<sup>th</sup> March 2016. He was riding his motor cycle KMCX 781L, which collided with the suit lorry KBP 208Q owned by the 1<sup>st</sup> respondent and driven by his driver the 2<sup>nd</sup> respondent. As a result of the said accident the 2<sup>nd</sup> respondent was charged in court with the offence of causing death by dangerous driving. PW1 further testified that they were blessed with two (2) children and the deceased estate had suffered as a result of his untimely death. She produced various documents as Exhibits 1 to 10 in support of her case and prayed for compensation.
8. In cross examination PW1 stated that she did not have records of the deceased earnings and did not witness the accident. She was informed that the deceased died on the spot and at the time of his death the deceased was 46 years old and was in good health. In re examination she confirmed that she was informed of the circumstances under which the accident occurred and the police abstract did indicate that it was the respondents to blame for the accident. The chief's letter also indicated that their daughter was called Elizabeth and as per the death certificate, the deceased was 45 years.
9. DW1 Constable Robert Tomno stated that he was based at traffic base Machakos and was charged with keeping accident records and also undertook other general duties. On 4<sup>th</sup> March 2016, they received a report that an accident had occurred at Kingatwani along Machakos – Kithiani road and some fatalities occurred.
10. The report received was that accident involved Motor vehicle KBP 208Q TATA Lorry and motor cycle KMCX 781L and KMDP 324V Motor cycles. The suit lorry was being driven by the 2<sup>nd</sup> respondent and was heading from Machakos direction heading towards Kathiani direction. The lorry driver lost control while negotiating a corner and veered to the right lane/opposite lane. In the process the suit lorry hit two motor cyclists, the deceased being one of them and dragged him underneath the said lorry. The motor cycle caught fire and burnt the rider John Mulandi (the deceased herein) and the pillion passenger. They both died on the spot.
11. The accident was investigated by PC Kanyugi, who had since been transferred, but upon his investigations he concluded that the 2<sup>nd</sup> respondent was to blame for the accident and charged him with the offence of causing death by dangerous driving. The Traffic case was No 249 of 2016 and the said case was still pending determination. The appellants were thereafter issued with a police abstract.
12. In cross examination, PW2 stated that he did not witness the accident but the account he had given was based on information extracted from the OB and the police file. The said record was compiled by PC Kanyugo who visited the scene after the accident. In re examination the said witness reiterated that the circumstances of the accident were recorded by PC Kanyugo who visited the scene and interviewed eye witnesses and that formed the basis of his initial report. After completion of his investigations the 2<sup>nd</sup> respondent was charged in court.
13. The respondent did not call any witness and opted to close their case. The Appellants filed submissions in support of this appeal. The Respondent did not file any submissions to oppose this appeal



## Appellants Submissions

14. The Appellants did file their written submissions on 7<sup>th</sup> February 2023. They submitted that the respondents did not call any evidence at trial nor did they produce any documentary proof to substantiate their case. In cases where only the plaintiff had testified and tendered evidence in support of his/her case, the court had to believe the evidence of the plaintiffs as the allegations made by the defendant in their defence did not amount to evidence. Reliance was placed on *Edward Muriga suing through Stanley Muriga Vs Nathaniel D, Schuler Civil Appeal No 23 of 1997*.
15. The appellant further submitted that the trial court erred, when it relied on the respondents' written submissions in determining the case, yet submissions could not be treated as evidence or take place of evidence. Reliance was placed on *John Katua Mwalula Kivula Vs Daniel Ibulu Muketi (2021) eKLR*, *Erastus Wade Opande Vs Kenya Revenue Authority & Ano Kisumu HCCA 46 of 2007*, *Nancy Wambui Gatheru Vs Peter W Wanjere Ngugi Nairobi HCCA No 36 of 1993* & *Daniel Toroitich Arap Moi Vs Mwangi Stephen Muriithi & Ano (2014) eKLR*.
16. The appellants further faulted the learned magistrate as he erred in his finding that no material evidence was placed before him to support the finding of the investigating officer that the 2<sup>nd</sup> respondent was to blame. The investigating officer did investigate and determined that it was the 2<sup>nd</sup> Respondent who was to blame for the accident and charged him in court with the offence of causing death by dangerous driving. The appellants had discharged the burden of proof and the evidential burden shifted to the respondents to explain such facts as were particularly within his knowledge as expected under provisions of Section 109 and 112 of the *Evidence Act*, Cap 80.
17. The appellant's evidence raised a prima facie inference that an accident occurred and it was caused by the negligence of the Respondents. No evidence was adduced to displace the said inference. The appellants reiterated that the respondents could not displace the said evidence based on written submissions filed. The Appellants prayed that this appeal be allowed with costs.

## Analysis and Determination

18. I have considered the pleadings, evidence presented and submissions of the parties before the trial court and the respondent's submissions filed in this appeal. This court first and foremost is enjoined to subject the whole proceedings to fresh scrutiny and make its own conclusions.
19. 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*.
20. 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 Kerala 316*.



21. The only issue the court is being called upon to determine whether the trial magistrate arrived at the proper finding with regard to the question of liability.
22. 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.”
23. In *Stephen Obure Onkanga Vs Njuca consolidated limited* (2013) eKLR which was cited with approval in the case of *Mathew Thuku Vs Cyrus Ndungu* (2021) eKLR the court stated that;

“General apportionment of liability is an exercise of discretion by the judge. This court can only interfere with apportionment of liability made by the superior court where it is satisfied that the same was based on no evidence or on wrong principle and is, therefore, wrong,”
24. 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.
25. However, the Court of Appeal in *Micheal Hubert Kloss & Another vs. David Seroney & 5 Others* [2009] eKLR also stated that:

“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...”
26. There is no doubt that an accident did occur between the appellants motor vehicle KBP 208Q TATA LORRY and two motor cyclists KMCX 781L and KMDP 342V. The suit lorry also knocked down a pedestrian. The deceased was riding motor cycle KMCX 781L and due to the collusion, he was drugged underneath the suit lorry and the motor cycle caught fire and burnt the deceased herein John Mulandi and his pillion passenger. They both died on the spot.



27. The trial magistrate in his judgment did find that PW2 did not investigate the case and that there was no eye witness who testified as to how the accident occurred and therefore on a balance of probability negligence of the respondents had not been established and proceeded to dismiss the suit.

### **Determination**

28. 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.”

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.”

29. I also refer to The Halsbury's laws of England, 4<sup>th</sup> 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.

{16} 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.”

30. I also refer to *Palace Investments Ltd Vs Geoffrey Kariuki Mwenda & 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 are 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 lose because the requisite standard will not have been obtained.”



31. As held in Eastern Produce {k} Limited Vs Chrisopher Atiado Osiro {2006} eKLR

“it is trite law that the onus of proof is on he who alleges and in matters where negligence is alleged the position was well laid in the case of Kiema Mutuku Vs Kenya Cargo Hauling services Ltd (1991) 2KAR 258, Where it was held that “ there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence”.

I have in mind the description of negligence as is to be found in salmond and Houston on the law of torts 19<sup>th</sup> Edition. Where it is described as “conduct, not a state of mind-conduct which involves an unreasonably great risk of causing damages..... negligence is the omission to do something much as a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something, which a prudent and reasonable man would not do. The position is laid more clearly as “in strict legal analysis, negligence means more than needless or careless conduct, whether in omission or commission; it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty is owing.”(lord wrigur in lochgelly iron and coal co Vs M’Mullan {1934} A.C. 25)

32. The appellants’ evidence was not rebutted in any manner and the respondents never called any witness to testify and rebut the same. It remains basic law that the only forum where the same could have been challenged was at trial and a party cannot use the back door and challenge the said evidence by his written submissions unless on issue of law. Since the respondents failed to call any witness the appellants’ evidence was remained uncontroverted and unchallenged.

33. In Motrex Knitwear Vs Gopitex Knit wear Mills Ltd Nairobi (Millimani )HCCC NO 834 OF 2002 Lessit J citing the case of Autar Singh Bahra & Another Vs Raju Govindji, HCCC NO 548 OF 1998 it was appreciated that;

“ Although the defendant has denied liability in the amended defence and counter claim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1<sup>st</sup> plaintiff case stands unchallenged but also that the claims made by the defendant in his defence are unsubstantiated. In the circumstances, the counter claim must fail.”

34. In the case of Shaneebal limited Vs County Government of Machakos ( 2018) eKlr , Odunga J relied on the case of Trust Bank Ltd Vs Paramount Universal Bank Ltd & 2 others Nairobi ( Millimani) HCCC No 1243 OF 2001 where it was held that;

“ it is trite that where a party fails to call evidence in support of its case, that parties pleadings remain mere statements of fact since in doing do the party fails to substantiate its pleadings and in the same vein the failure to adduce evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged”

35. Both PW1 and PW2 both testified and indeed proved that an accident did occur and the deceased sustained fatal injuries as a result of the said accident. The trial magistrate finding that there was no eye witness who testified and therefore liability was not proved is an obvious misdirection as it was based on error in principle that is manifestly erroneous.



36. Though it is trite that in action for negligence, that the burden of proof rests upon the plaintiff alleging it to establish the element of tort, negligence can be inferred in the absence of any either plausible explanation on how the accident occurred or in the absence of an eye witness. This the rationale behind the doctrine of *res ipsa loquitor*.
37. In the case of *Sally Kibiii and Another versus Francis Ogaro* [2012] eKLR, the court was faced with such a scenario and noted the following: -
- “The Plaintiff in the trial only produced two witnesses who admitted that they did not witness the accident and could not tell how it happened. The police abstract showed that the accident was caused by collusion of two vehicles and investigation were underway. The failure of the police to determine from the scene of the accident which motor vehicle was to blame and the absence of an eye witness diminishes the appellant’s chance to prove a case of negligence against the defendant....to successfully apply this doctrine (*res ipsa loquitor*) there must be proof of facts that are consistent with negligence on the part of the defendant as against any other cause..... The plaintiff must prove fact which give rise to what may be called *res-ipsa loquitor* situation.”
38. The court of Appeal in *Fred Ben Okoth versus Equator Bottlers Ltd* [2015] held in the relevant part as follows: -“Proof of causation is crucial to the success of most of the action in tort, except in instances where the doctrine of “*res ipsa*” is applicable.”
39. The Evidence present by PW2 was not hearsay evidence and he clearly stated that he got his information from the OB and police file. The said police file obviously had witness statements were recorded by P.C Kanyugo, who was the investigating officer and visited the scene of the accident. Upon conclusion of his investigation he did prefer charges as against the 2<sup>nd</sup> respondent.
40. To the extent that PW2 used evidence and facts born out of the police file and OB, which evidence was gathered and/or were recorded by the investigating officer, the said evidence (adduced from the statements recorded) constituted evidence got from public documents kept under proper custody by a public officer. It should be noted that the said PW2 had confirmed that he was in-charge of accident records at Machakos traffic base and was therefore the proper witness to refer to the said evidence and produce the police abstract.
41. Further the evidence adduced before the trial court too was not controverted in any manner. The facts were that the suit lorry veered off its lane and knocked down two motor cyclists and a pedestrian walking off the road. Unfortunately for the deceased and his pillion passenger, they were dragged under the lorry for 50 meters. The said motor cycle burst into flames burnt the deceased who unfortunately died on the scene.
42. Based on the evidence presented at trial, the doctrine of *res ipsa loquitor* could be implied as the facts adduced in evidence showed negligence on the part of the respondents and indeed the same were proved given the extent and nature of the accident. The suit lorry lost control and knocked two cyclists and a pedestrian, while off its lane, clearly imputed some high level of negligence on the part of the 2<sup>nd</sup> respondent who was driving the said lorry.
43. Further the appellant having discharged the burden of proof placed upon him, it was upon the respondent to discharge the evidential burden that had been cast upon him based on section 108 of the *evidence Act*. They failed to do so and it was the respondent case that would fail if no explanation was not offered



44. In the case of Evans Nyakwana Vs Cleophas Rwana ongaro ( 2015) eKLR it was held that ;

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purpose of section 107(i) of the *Evidence Act*, Chapter 80 laws of Kenya. Furthermore, the evidential burden..... is cast upon any party, the burden of proving any particular fact which he desired the court to believe in its existence. That is captured in section 109 and 112 of the law that proof of that fact shall lie on any particular person..... The appellant discharged that burden and as section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side.”

45. Thus the finding by the trial magistrate that liability was not proved was manifestly erroneous and an error in principle which this court must interfere with

### **Disposition**

46. Taking all relevant factors into consideration I do find that this appeal is merited. The judgment and/or order of Honourable Y.A Shikanda (SRM) dated 5<sup>th</sup> October 2017 with respect to liability is hereby set aside and liability is apportioned as against the respondents herein at 100%

47. The appellants did not appeal as against the proposed quantum as awarded by the trial court and the same is maintained as previously awarded. Quantum is thus assessed as follows;

- f. Damages for pain and suffering Kshs 50,000/=
- g. Loss of Expectation of life Kshs 100,000/=
- h. Loss of Dependency Kshs 960,000/=
- i. Funeral and related expenses Kshs 30,800/=
- j. Special damages Kshs 500/=

48. Interest on this sum is awarded from the date of judgment being 5<sup>th</sup> October 2017, but interest on special damages is awarded from date of filing the primary suit.

49. The appellants are awarded cost of this appeal and the costs of the primary suit. The costs herein are hereby assessed at Ksh.150,000/= all inclusive.

50. It is so ordered.

**JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 21<sup>ST</sup> DAY OF SEPTEMBER, 2023.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

**DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 21<sup>ST</sup> DAY OF SEPTEMBER, 2023.**

**In the presence of:**

.....for Appellant

.....for Respondent

.....Court Assistant

