



Ochieng & another v Odongo (Suing as Administrators and Legal Representatives of the Estate of John Onyango Ochie I- Deceased) (Civil Appeal E034 of 2023) [2024] KEHC 13997 (KLR) (12 November 2024) (Judgment)

Neutral citation: [2024] KEHC 13997 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL E034 OF 2023
KW KIARIE, J
NOVEMBER 12, 2024**

BETWEEN

DANCAN ODHIAMBO OCHIENG 1ST APPELLANT

ERICK AKOMO AKUKU 2ND APPELLANT

AND

SMITH OCHIENG ODONGO RESPONDENT

SUING AS ADMINISTRATORS AND LEGAL REPRESENTATIVES OF THE ESTATE OF JOHN ONYANGO OCHIE L- DECEASED

(Being an Appeal from the judgment and decree in Homa Bay Chief Magistrate's CMCC No. 102 of 2021 by Hon. J.S. Wesonga – Principal Magistrate)

JUDGMENT

1. Dancan Odhiambo Ochieng and Erick Akomo Akuku, the appellants, were the defendants in Homa Bay Chief Magistrate's CMCC No. 102 of 2021. They had been sued for a claim of general damages and special damages following a road traffic accident involving motor vehicle KCR 211C and the motorcycle registration number KMFN 026Q on which the deceased was riding. As a result of the collision, the deceased sustained fatal injuries. The learned trial magistrate held both parties equally liable. The respondent was awarded Kshs. 1,250,00.00 in general damages before factoring in contributory negligence.
2. The appellant was aggrieved by the judgment and filed this appeal through Kimondo Gachoka & Company Advocates. He raised the following grounds of appeal:
 - a. The learned trial magistrate erred in law and, in fact, by holding the appellant 50% liable for the accident and failing to dismiss the suit with costs contrary to the evidence on record.



- b. The learned trial magistrate erred in fact and in law in relying on extraneous circumstances not supported by the evidence on record.
 - c. The learned trial magistrate erred in law and fact by overly relying on the respondents' irrelevant submissions and failing to consider the appellants' failed submissions, thereby arriving at an erroneous estimate of damages.
3. The respondents opposed the appeal through H. Obach & Partners, Advocates firm and contended that it lacked merits.
 4. This Court is the first appellate court. I am aware of my duty to evaluate all the evidence on record, bearing in mind that I had no advantage of seeing the witnesses testify and watching their demeanour. I will be guided by the pronouncements in the case of *Selle v Associated Motor Boat Co. Ltd.* [1965] EA 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 conclusions in the matter.
 5. At the time of the accident, according to the evidence of Kenneth Walumbe (DW2), both the motor vehicle and the motorcycle were being driven in the same direction. Motor vehicle KCR 211C collided with the motorcycle registration number KMFN 026Q from the rear.
 6. It is trite law that no liability can be apportioned without fault. The Court of Appeal in *Kiema Mutuku v Kenya Cargo Hauling Services Ltd* [1991] 2KAR 258 stated 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.

7. There was, therefore, no sufficient evidence as to who was at fault between the deceased and the driver of Motor vehicle KCR 211C. In *Baker v Market Harborough Industrial Co-Operative Society Ltd* [1953] 1 WLR 1472 at 1476, Denning L.J. (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...

I have not been persuaded that apportionment of liability was erroneous. The learned trial magistrate, therefore, arrived at the correct conclusion on liability.

8. The appellants contended that the learned trial magistrate erred in law and fact by overly relying on the respondents' irrelevant submissions and failing to consider the appellants' failed submissions, thereby arriving at an erroneous estimate of damages. Before an appellate court can interfere with an award of damages, it must be satisfied that the applied a wrong principle of the law, considered some irrelevant factors or left out some relevant ones or that the award is so inordinately low or so inordinately high. These principles were laid down by the Privy Council in *Nance v British Columbia Electric Railways Co. Ltd.* [1951]AC 601 at page 613, where it held:

The principles which apply under this head are not in doubt. Whether the assessment of damages is by a judge or jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that



the judge, in assessing the damages, applied a wrong principle of the law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages (*Flint v Lovell* [1935] 1KB 354) approved by the House of Lords in *Davis v Powell Duffryn Associated Collieries Ltd.* [1941]AC 601.

In this case, the appellants have not convinced this court that the award was erroneous.

9. From the analysis of the evidence on record, there is no merit in this appeal. The appeal is dismissed with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 12TH DAY OF NOVEMBER 2024

KIARIE WAWERU KIARIE

JUDGE

