

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL APPEAL NO. E077 OF 2023

MULTI OPTIONS LINKZ LIMITED.....
.....APPELLANT

-VERSUS-

MILLICENT RABERA & JAMES OMBONGI (*Suing as legal representatives of the estate of KEEFA OMBESE (Deceased)*)...
.....RESPONDENTS

[Being an Appeal from the Judgment of the Chief Magistrates' Court at Mavoko Hon. S. Jalang'o dated 16th March 2022, in Mavoko CMCC No. E798 of 2011]

JUDGEMENT

Brief Facts

On the 22n/05/2021, the deceased was lawfully a pedestrian beside the road along Nairobi-Mombasa Road at Syokimau area when the Appellant's motor vehicle lost control and veered off the road knocking him down that it caused an accident thereby occasioning the deceased fatal injuries.

As a result of the accident the Respondent sued the Appellant vide a Plaint a dated 4/10/2021for:-

- a) General Damages
- b) Special Damages of Kshs.47,785/=
- c) Cost of the suit
- d) Interest
- e) Any other relief deemed fit to grant by this honourable court

The Appellant filed a Statement of Defence dated 26/10/2021 basically denying the claim and praying that the suit be dismissed with costs.

The suit was set down for hearing when the Respondent called 2 witnesses whilst the Appellant called 1 witness to testify in support of their respective cases.

PW1 CPL Zephania Andenyi of Athi River police station told the court that the deceased Keffa Ombese was involved in an accident on 22/05/2021 at 9.00pm at Syokimau area along Nairobi-Mombasa

Road. The accident involved motor vehicle registration number KBY 205K Toyota Fielder driven by Josphat Ambrose from Nairobi heading towards Mlolongo. On reaching the said location it knocked down a male pedestrian crossing the road from left to right facing Machakos direction from Nairobi.

The scene was attended by CPL Rotich and PC Mulwa who took the deceased's body to the mortuary. The family was issued with a police abstract which was produced as PExt.5.

PW2 was Millicent Rabera Obondi, wife to the deceased testified that the deceased was involved in a road traffic accident on 22/05/2021. It was her evidence that her husband went missing on the material day and they found him after two weeks at Athi River Shalom Community Hospital where they were informed that he was hit by a moving vehicle at Syokimau and died instantly. She reported the accident. According to her, the deceased worked as a casual worker and left her with five children.

In response to the above, DW1 Japheth Ambundo stated that on the material day he was coming from town heading to Athi River. He was in the inner lane of Mombasa Road. He stated that there was a lorry on the outer lane. On reaching Lucan petrol station, a lorry hit the deceased and threw him on his bonnet. It was his evidence that the deceased tried to avoid being hit by the lorry driver on the outer lane of the road and was knocked and landed on his bonnet. He stated that he tried to apply emergency brakes but he lost control and landed on a ditch. It was his evidence that the lorry never stopped. He called the police who towed his vehicle to the petrol station.

It was further his evidence that he was not driving in a slow speed. That if he drove in a zig zag manner he would have knocked the lorry. He finally stated that the matter was pending under investigation and that he had never been summoned over the issue.

Upon considering the Parties' pleadings and evidence adduced, the trial court delivered judgement in favour of the Respondent as against the Appellant.

On liability the trial court held that upon considering the evidence, he found that the Respondent had proved that the Appellant was liable for the accident. PW1 testified that the Appellant on reaching the point of the accident knocked down a pedestrian. On his part the Appellant admitted his vehicle knocked a pedestrian after he was thrown on his bonnet by another vehicle which never stopped at the scene. In the trial court's view, the account by the Appellant was not

backed by any evidence. There was no indication that the deceased contributed to the occurrence of the accident hence the Appellant was held 100% liable for the accident. The final findings were as follows:-

a) Liability	100%	
b) Pain and Suffering		Ksh. 20,000/=
c) Loss of expectation of life		Ksh. 100,000/=
d) Loss of dependency		Ksh.2,278,432/=
e) Special Damages		<u>Ksh. 47,785/=</u>
Total		Ksh.2,446,217/

The Respondents were also awarded the costs and interest of the suit. Interest on special damages was awarded from the date of filing suit.

Being aggrieved with the aforementioned judgment, the Appellant preferred this appeal and put forward 5 grounds of appeal basically challenging liability:-

The appeal was canvassed by way of written submissions and it is necessary to summarize the same as hereunder.

Appellant's Submissions

The appellant went on to summarize grounds of its Memorandum of Appeal and submitted on two issues as follows;

i) Whether the Learned Magistrate erred in law and fact in finding the Appellant wholly liable for the accident.

ii) Whether the Respondents discharged his duty in proving that the Appellant was liable for his fatal injuries

On the first issue, the Appellant submitted that at the trial court, the Respondents called two (2) witnesses in support of their case, **PW1- Corporal Andenyi and PW2- Millicent Rabera.**

PW1- Corporal Andenyi, the police officer was not the Investigating Officer, it was important for them to reiterate the flaws in the testimony of PW1 that the trial court failed to take note of the fact that PW1- Corporal Andenyi; ***Did not*** visit the alleged scene of the accident; ***Did not*** record a single Witness Statement(s) of the alleged accident; ***Did not*** have or produce a copy of the Investigation Report of the alleged accident; ***Did not*** produce any photographs to confirm that the alleged accident took place.

The Appellant submitted that the testimony of the police officer (**PW1**) did not discharge the basic prerequisites of admissibility on relevance, materiality and probative value to prove a fact that is at issue. That, the testimony of **PW1** only could have added probative value to the Respondents' case *if he was* the Investigating Officer or could clearly layout the circumstances leading to the deceased person's fatal injuries which the officer failed to do. Reliance was placed on the case of **Pesa Hamisi v P. N. Mashru Limited [2020] eKLR** where Justice R. Nyakundi noted that;

"It is at least desirable that the evidence of a police officer be the one to link in the chain objects of relevance at all times on the events in issue establishing the proximate cause of the accident. To my mind these utterances by the witness are not statements of facts. For such statements of fact to qualify as competent testimonial evidence it has to meet the following conditions as stipulated in the Evidence Act.

a)

b) *Here she must have personal knowledge about the subject matter of his testimony, in other words, the witness must have perceived something with his senses that is relevant to the case.*

c) *He or she must remember what he or she perceived.*

d) *He or she must be able to communicate what he or she perceived to the trier of facts*

The Appellant further submitted that **PW1** was only called to produce Police Abstract which is not evidence of wrongdoing by the Respondents. In fact, the Police Abstract does not place any blame on

the part of the Respondents. That the place of a Police Abstract has been discussed severally in Court as was in **Peter Kanithi Kimunya Vs. Aden Guyo Haro [2014] eKLR** where it was stated:

“A police abstract is not proof of occurrence of an accident but of the fact that following an accident, the occurrence thereof was ‘reported’ at a particular police station.”

The Appellants argued that by failing to call the actual Investigating Officer, failing to produce the police file and/or a sketch map to explain to the court how the accident occurred, the testimony of **PW1** should and must be disregarded. Reference was made to the holding of the court in **Wanjohi V Ngigi (Civil Appeal E189 of 2023) [2024] which cited with approval in Benter Atieno Obonyo v Anne Nganga & Another (2021) eKLR** where the court opined that;-

“PW2 a police officer attached to Nakuru police station testified that she was not the investigating officer and produced a police abstract which indicated that the accident was pending under investigations. The investigating officer was not called to testify and give the court a clear picture of how the accident occurred and who was to blame for the accident. No police file and /or sketch map was produced to explain to the court how the accident occurred.”

Reference was also made to the case of **Wanjohi V Ngigi (supra)** where the Court concluded its decision by holding that;

“In this case there is no credible evidence on which negligence can be inferred on the part of the 1st Respondents or the 2nd Respondents herein. Being guided by the case above the investigating officer never testified nor produced any sketch maps. The Respondents did not prove her case on the balance of probabilities. The appeal succeeds and I set aside the judgement of the lower court.

Thus, the testimony of **PW1** fails on the test of established jurisprudence. That the testimony of **PW1** did not in any way, manner or form assist the Respondents or this court, and should be disregarded.

The Appellants submitted that **PW-2**, the wife of the Deceased person, on cross-examination, testified that;

a) She **did not** witness the accident. That her husband body was found at a Mortuary in Shalom after two (2) weeks.

b) She **did not** have any evidence in support of her claim that the Appellant's Motor Vehicle was driven in at an excessive speed and thus it caused the death of the deceased person.

Thus, the trial court could also not have relied on the testimony of PW2. That it is clear that the Respondents did not in any way prove their case against the Appellants.

That without an eyewitness providing direct evidence of how the alleged incident occurred. This is the only form of evidence that would carry greater weight. Anything other than that was purely fictional.

That the only testimony that has remained uncontroverted was that of the Appellant.

On whether the Respondents discharged their duty in proving that the Appellant was liable for his fatal injuries, the Appellant submitted that it is trite law 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 purport of **Section 107 (1) of the Evidence Act (Chapter 80 of the Law of Kenya)**, which provides:

"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..."

The Appellant argued that causation is not a mere theoretical concept that can be easily overlooked by this court. It is a legal requirement that must be established. The Appellant contends that the Respondents failed to demonstrate that the accident occurred as a result of any actions or omissions of the Appellant.

That it is important to point out that the Respondents did not call a single eye witness to support their case or to demonstrate that the

accident occurred as a result of any acts or omissions of the Appellant. That being the case, the Appellant questioned how the trial court reasonably accepted the facts as presented by Respondents.

The Appellant contends that without an eyewitness providing direct evidence of how the alleged incident occurred, the circumstances surrounding the accident should be regarded as purely fictional.

The Appellant relied on the Court of Appeal decision in **Hussein Omar Farar -V- Lento Agencies C.A Nairobi, Civil Appeal No.34/2005 [2006] eKLR** which observed that-

“In our view it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs, the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.”

It is the Appellants position that the trial court erred in law and in case by holding the Appellant **100%** liable for the accident in the absence of;

- a) any eye witness called by the Respondents;*
- b) testimony from the Investigation Officer;*
- c) the Investigation Report of the alleged accident; or*
- d) any sketches or drawings on/around the scene of the accident,*

The Appellant invited this court to hold liability at **50:50** in view of the above weakness in the Respondents' case, guided by the dictum in **Hussein Omar Farar (supra)**.

Respondent's Submissions

In opposing the appeal, the Respondent submitted on whether the Learned Magistrate erred in apportioning liability at 100%.

It was submitted that the Respondent who is the legal representative of the estate of the deceased one KEFFAN OMBESE testified during trial that on 22.05.2021 the deceased was a pedestrian along Nairobi —Machakos Road at Syokimau area when he was hit by motor vehicle registration number KBY 205K Toyota Station Wagon which was being driven carelessly and at a very high speed as a result of which the deceased sustained fatal injuries.

It was submitted that it was the Respondent's evidence that the Appellant was wholly liable for causing the accident as he was driving at a very high speed to the extent of inability to control the vehicle so as avoid the accident. The Respondent's evidence was corroborated by the police officer PW1 (CPL Zephaniah Andenyi) who confirmed the occurrence of the accident and that the Appellant herein was to blame for the accident.

That during trial the Appellant called one witness who was the driver at the time of the accident. It was his evidence that he was driving at a very high speed and as a result he was unable to control the vehicle.

That, taking into account all the evidence adduced during trial it is clear that the trial court applied the facts, law and proper reasoning to arrive at the conclusion that the appellant failed to adduce evidence on a balance of probabilities.

The Respondent submitted that during trial, both Parties called their witnesses and presented their evidence, which the trial court considered and delivered judgment. Therefore, the Appellant's claim that the trial court did not consider their submissions does not hold any weight as submissions simply concretize and focus on each side's case with a view to win the court's decision their way and they are not evidence on which a case is decided.

The Respondent submitted that it is clear the trial court's findings were based on the evidence supplied by the parties and therefore urged this court to disregard the Appellant's claim that their submissions were not considered.

The Respondent invited this court uphold the Learned Magistrate's decision and dismiss the appeal with costs to the Respondent.

Analysis and Determination

I have perused the entire record of appeal and considered the submissions by counsel for both Parties and the single issue I frame for determination in this suit is whether the Respondents proved their case on a balance of probabilities.

This being the first appeal, it is this court's duty under **Section 78 of the Civil Procedure Act** to re-evaluate the evidence tendered before the trial court and come to its own independent conclusion taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of **Selle v Associated Motor Boat Co. Ltd (1968) EA 123** cited by the appellants where Sir Clement De Lestang (V.P) stated that:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally”.

Liability

First and foremost, there is no doubt that an accident occurred in which **Keffa Ombese (Deceased)**, the 1st Respondent's husband died. Hence, the only question is who caused the said accident?. The 1st Respondent, PW2, on cross examination testified that her husband was missing for 2 weeks and they found the body in a mortuary at Shalom. She thought the driver was careless. **Norman Ojoro** was a witness. She did not witness the accident.

The said **Norman Ojoro** was not called to testify as the eye witness.

PW1 a police officer attached to Athi River Police Station testified that she was not the investigating officer and produced a police abstract which indicated that the accident was pending under investigations. The investigating officer was not called to testify and give the court a clear picture of how the accident occurred and who was to blame for

the accident. No police file and /or sketch map was produced to explain to the court how the accident occurred.

However, this court has established from the evidence that the accident is said to have occurred at around **9.00pm** when the deceased was crossing the road. No evidence was given by DW1 who was the only person in the vicinity on the lighting at the time, whether there were street lights or other source of light and whether the place was designated for pedestrian crossing.

DW1 having admitted that he was not driving in a slow speed and could be that is why he was not able to apply emergency brakes and ended up in a ditch. In the circumstances, I find that both the deceased and the Appellant contributed to the occurrence of the accident, I will therefore interfere with the trial court's finding on liability and proceed to apportion liability at 30% against the deceased and 70% against the Appellant.

I place reliance on the case of **SAMWEL WANYOIKE KILU v DUNCAN WARURI KAMONI [2011] KEHC 3283 (KLR)**

“As I said in the earlier Appeal, the Defendant/Respondent should have been more watchful and if his headlights were on, he could have seen the Appellant in good time and the accident could have been avoided. I will therefore interfere with the apportionment of liability and adjust the same to 60:40 in favour of the Respondent instead of the 80:20 as apportioned by the learned trial magistrate.

This Appeal therefore succeeds only in part. I set aside the apportionment of liability of 80:20 and substitute thereof the ration of 60:40 in favour of the respondent. The Appellant will therefore get 40% damages instead of 20% as awarded by the trial court.

Quantum

Quantum was not challenged in the appeal, nevertheless having apportioned liability, the quantum by the trial court shall have to be altered to reflect the apportionment which I proceed to calculate as here under:-

a) Liability	30% : 70%
b) Pain and Suffering	Ksh. 20,000.00
c) Loss of expectation of life	Ksh. 100,000.00
d) Loss of dependency	<u>Ksh.2,278,432.00</u>
	Ksh.2,398,432.00

Less 30%	<u>Ksh. 719,529.60</u>
	Ksh.1,678,902.40
e) Special Damages	<u>Ksh. 47,785.00</u>
Total	Ksh.1,726,687.40

The above award is plus costs and interest as ordered by the trial court.

The special damages are not subject to apportionment. I am guided by the holding of the court in **Hashim Mohamed Said & Another v Lawrence Kibor Tuwei [2018] eKLR** where the court stated that special damages should not be subjected to the apportionment.

For the foregoing reasons, the appeal partly succeeds. Each party will bear their own costs of the appeal.

There shall be a stay of execution for 30 days.

It is so ordered.

JUDGMENT WRITTEN, SIGNED & DATED AT MACHAKOS THIS 2ND OCTOBER 2025

**NOEL I. ADAGI
JUDGE**

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 2ND OCTOBER 2025

In the presence of :

Mr. Mwaniki..... for Appellant

Ms. Nyaboke..... for Respondent

Milly Grace..... Court Assistant