Njoroge ((Suing as the Legal Representative of the Estate of Patrick Njua Njuguna - Deceased)) v Comply Industries Limited & another (Civil Suit E565 of 2022) [2025] KEMC 49 (KLR) (11 March 2025) (Judgment)

Neutral citation: [2025] KEMC 49 (KLR)

REPUBLIC OF KENYA

IN THE NAKURU LAW COURTS

CIVIL SUIT E565 OF 2022

PA NDEGE, SPM

MARCH 11, 2025

BETWEEN

JOYCE WAMBUI NJOROGE ..... PLAINTIFF

(SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF PATRICK NJUA NJUGUNA - DECEASED)

AND

COMPLY INDUSTRIES LIMITED ..... 1ST DEFENDANT

EZEKIEL CHERUIYOT KOSGEY ..... 2ND DEFENDANT

JUDGMENT

1. The plaintiff herein, a widow, instituted this suit before this court on behalf of the estate of Patrick Njua Njuguna, her deceased husband. According to the plaint, on or about 5th May, 2021, the deceased herein was a lawful passenger in motor vehicle reg. no. GKA 065F Isuzu Lorry which was being driven along Nakuru – Eldoret road at Ex- Margaret area when the 2nd Defendant, so carelessly and/or negligently drove, managed and/or controlled motor vehicle registration number KBB 390A Nissan Lorry that he left it stationery and caused it to be hit from behind by motor vehicle registration number GKA. The particulars of negligence, injuries and special damages are itemized.

2. The plaintiff, testifying as PW1, relied on her statement in which she stated that she was the wife of the deceased. That she received a call from a member of National Youth Service (NYS), Gilgil using her late husband's phone. That the caller informed her that the deceased had been involved in a road accident at Salgaa along Eldoret- Nakuru road and that her husband was injured and rushed to Nakuru Mediheal Hospital for treatment. That on 06th, May, the following day, she travelled to Nakuru and went to the hospital where she found him admitted for further analysis and treatment. That the deceased was however discharge after around 4 days. That a few days after being discharged,

his condition deteriorated and was then rushed to AIC Kijabe where he underwent a surgery and was admitted. That on 25th May, 2021, he however succumbed to the injuries while undergoing treatment at the hospital. They then commenced burial arrangements till he was laid to rest on 03rd June, 2021 at their home in Komothai, Githunguri. She testified further that the deceased died at the age of 59 years as an NYS officer based in Gilgil. That he was survived by the following dependants: -

i. Joyce Wambui Njoroge - Widow

ii. Francis Muiruri Njua - Son

iii. Edwin Kangethe Njua - Son

iv. Winnie Nunga Njua - Daughter

3. In cross-examination, she confirmed that their children with the deceased are all adults. That she did not know the deceased's colleague who called her on phone, but that she could still look for him and call him as a witness herein. The plaintiff stated that she was not present when the accident occurred and only relied on hearsay evidence.

4. PW2, No. 229537 CPL Dominic Mageto, a traffic police officer from Salgaa Police Station stated that Motor Vehicle Registration Number KBB 390A Nissan Lorry was at the time of the accident wrongly stalled on the road and which led to motor vehicle registration number GKA 065F Isuzu Lorry, ramming into it from the rear. That as a result of the accident, the Deceased herein suffered fatal injuries. He stated that investigations were conducted and that they concluded with the 2nd Defendant herein being charged in court for causing the accident as confirmed by the police abstract which he produced herein as PEXH. No. 2.

5. In cross-examination, he testified that two motor vehicles were involved in the accident and the driver of KBB 390A Nissan Lorry was charged and convicted of the offence of Causing Death by Dangerous Driving and fined. That the accident happened at 2.30am. It was therefore his evidence that the driver of KBB 390A was to blame for the accident and not the driver of GKA 065 Isuzu lorry. He however had no traffic court proceedings to confirm the conviction of the driver of the trailer. He did not also have the sketch maps of the scene, despite him confirming that they are vital evidence in a case such as the instant one.

6. There was no evidence tendered for the defendant. Parties however filed, and I do believe, exchanged their written submissions. Learned counsel for the plaintiff submitted that the defendant never called any witness to lead evidence in support of their case during the defence hearing. That the fact therefore remains that the 2nd Defendant, being the driver of the offending motor vehicle, was negligent in his trade, as a consequence of which the accident herein occurred and a life was lost. That the onus was on the defendant to rebut the evidence tendered by the plaintiff to the required standard and that they failed to do that, thereby leaving a lot of question and that in extension, their statement of defence remains mere statements of fact that have not been substantiated. Learned counsel urged the court to apply the doctrine of Res Ipsa Loquitor in the suit at hand and urged the court to find that the defendants owed the deceased a duty of care and that the same was breached when the 2nd Defendant caused the accident in question. That the 2nd Defendant be held fully liable for enabling the same, while the 1st Defendant be held vicariously liable for actions of their driver and/or employee.

7. For the Defendants, it was submitted that the accident was not occasioned by their personal or agent's negligence in control of motor vehicle registration KBB 390A. Further that the plaintiff has failed completely to establish their negligence or that of their driver in control of motor vehicle registration KBB 390A at the time of the accident, by submitting as follows: -

i. No single proof has been tendered to lend credence to the Plaintiff's allegations that the deceased was a passenger aboard the suit motor vehicle. That the plaintiff has therefore not proved that the deceased was owed a duty of care by the 2nd Defendant's driver in control of motor vehicle registration number KBB 390A.

ii. Save for the plaintiff's testimony in court, there is no evidence on record showing that the 2nd Defendant was to blame for the accident. That the plaintiff's evidence was however hearsay and should be rendered inadmissible as she did not witness the accident and was therefore not in a position to testify on how the accident occurred.

iii. The investigating officer was called as a witness but failed to give evidence on how the accident occurred. That the officer only reiterated the facial contents of the police abstract which he was tasked to produce.

8. Learned counsel for the defendant further submitted that the allegation of negligence and the particulars thereof contained in the Plaint and attributed on the defendants have all been refuted by the Defendants. That failure to call a witness to a case does not mean that the burden of proving a case on a balance of probabilities is automatically shifted from the plaintiff to the Defendants where the Defendant adduces no evidence to controvert the evidence adduced by the plaintiff. That furthermore, none of the particulars of negligence on the part of the defendants has been proved and as such no liability ought to be attached to the defendants. That the plaintiff has completely failed to prove her case against the defendants and as such the only proper and just outcome of the suit herein is to have the same dismissed with costs. In the alternative, learned counsel for the defendant submitted that given that the evidence relating to the traffic accident herein is insufficient to establish negligence of any party, this court must find the parties equally to blame.

Determination

9. In this case, it is clear that the determination of this case revolves around the question whether the plaintiff has proved her case on the balance of probabilities. That the burden of proof was on the plaintiff to prove her case is not in doubt. In Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR it was held that:

> As a general preposition 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(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 desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge 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.

10. The question then is what amounts to proof on a balance of probabilities. 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 opposing party is said to have established his case on a balance

of probabilities. He has established that it is probable than not that the allegations that he made occurred.

11. In Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR, the judges of Appeal held that:

> 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 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 both parties...are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

12. Therefore, the Plaintiff had the duty of proving the facts constituting negligence on the part of the defendants even if the defendants chose to remain silent. In this case there was no eye witness to the accident. That there was a lorry that was packed or stalled on the road ahead of the GK lorry in which the deceased was travelling in is however neither in dispute nor controverted. In Masembe vs. Sugar Corporation and Another [2002] 2 EA 434, it was held that:

> Negligence is not actionable per se but is only actionable where it has caused damage and in that regard the primary task of the court in a trial of a negligence suit is to consider whether the act or acts of negligence caused the damage or injury complained of; and where the damage was caused by the negligent acts of different persons, to assess the degree of their respective responsibility and blameworthiness, and apportion liability between or among them accordingly...There is no act or omission that has static blameworthiness and therefore each case must be assessed on its own circumstances and the apportionment ought to be a result of comparing the negligent conduct of the tortfeasors, to determine the degree to which each one was in fault, both in regard to causation of the wrong and unreasonableness of conduct.

13. In that case the court further found that:

> When a man drives a motor car along the road, he is bound to anticipate that there may be things and people or animals in the way at any moment, and he is bound not to go faster than will permit his course at any time to avoid anything he sees after he has seen it...A reasonable person driving a motor vehicle on a highway with due care and attention, does not hit every stationary object on his way, merely because the object is wrongfully there. He takes reasonable steps to avoid hitting or colliding with the object...Whereas a driver is not to foresee every extremity of folly which occurs on the road, equally he is not certainly entitled to drive on the footing that other users of the road, either drivers or pedestrians, will exercise reasonable care. He is bound to anticipate any act which is reasonably foreseeable, that is to say anything which the experience of the road users teaches them that people do albeit negligently... There may be occasions when criminal or traffic offences are committed without giving rise to civil liability.

14. That was the position in Tart vs. Chitty and co (1931) ALL ER Pages 828 — 829 where Rowlat, J had this to say.

It seems to me that if a man drives a motor car along the road he is bound to anticipate that there may be in things and people and animals in the way at any moment and he is bound to go not faster than will permit his stopping or deflecting his course at any time to avoid any thing he sees after he has seen it.

15. In Karisa and Another vs. Solanki and Another [1969] EA 318 it was held that:

> The car driver, driving at a speed of about 65 mph which was not in itself negligent, when he saw the oncoming bus, whose presence on the road reduced the area available to take evasive action should any emergency occur and whose lights to some extent impaired the area of vision provided by its own lights, only reduced his speed to about 60 mph. This action was one which a reasonably careful driver, and the duty which the car driver owed to the plaintiff was that of being a reasonably careful driver, would not have taken, as the speed in those circumstances enormously increased the potential danger of an accident. While, therefore, a speed of 60 mph is not negligence, it is that speed in the particular circumstances which constitutes negligence; and the Judge was wrong in considering the question of speed separate from the other circumstances of the case...We are not satisfied that the car driver could not and should not as a reasonably careful driver, keeping a particular keen look-out, have seen the lorry in time to have swung to the left on the verge, no matter how uncertain his knowledge of the precise terrain there, rather than run straight into the stationary lorry... Looking at the facts of the case as a whole, the Judge tended to consider the two main circumstances of speed and a proper look-out separately and not part of a comprehensive whole, and it was this failure to look at the facts as a whole which led him into the manifest error of coming to the conclusion that there was no negligence on the part of the car driver. He was clearly wrong in failing to find negligence on the part of the car driver. Consequently the car driver found to have contributed to the accident to the extent of 20 per cent.

16. In this case the plaintiff is heavily relying on police investigations. As regards the relevancy of the police investigations to civil proceedings, it must always be remembered that the decision of who to charge where a collision occurs rests on the police and the parties have no control over that decision. Therefore, the fact that the police decide to charge one driver and not the other or no one at all cannot be taken to be conclusive evidence of who between the two drivers is culpable. This was the position adopted by the Court of Appeal in Calistus Ochien'g Oyalo & Others vs. Mr. & Mrs. Aoko Civil Appeal No. 130 of 1996, where it was held that police do conduct their investigations for their purpose and a party cannot be expected to direct them on how to do it.

17. In Masembe vs. Sugar Corporation and Another [2002] 2 EA 434, it was held that:

> It is trite and rudimentary that proceedings in a criminal case cannot be used to prove a cause of action in a civil suit although the record can be used for certain purposes, for instance, to contradict a witness by facing him with what the witness had stated in the trial of the criminal case. But the proceedings and the result of the criminal trial cannot be made the basis for proof of a civil claim...

18. In Jimnah Munene Macharia vs. John Kamau Erera Civil Appeal No. 218 of 1998, it was held by the Court of Appeal that:

> Admitting in evidence the record of previous proceedings does not mean that all the contents of those proceedings automatically become evidence in the subsequent

> proceedings as it is always open to the advocates in a civil suit to agree upon facts as to which no evidence is called, or to agree to accept a statement by a witness in other proceedings as being a true statement of the facts deposed to therein, although the witness is not called as a witness in the civil suit, provided the agreement is clear and unambiguous...It is not for the Judge to read proceedings in the traffic case as if the evidence recorded there was the final position in the case. Not only is it notorious that different aspects of the evidence emerge during a civil case, while not disturbing a conviction, but it is also well known that both parties to an accident might have driven carelessly and each could be convicted of careless driving for their respective types of carelessness...Equally the contents of a police file in respect of police investigations in the accident cannot become evidence in a civil suit even if such file is put in evidence by consent and tendering the police file as an exhibit is a short cut which advocates should avoid and call the police officer who drew the sketch map for cross-examination.

19. Accordingly, in Ochieng vs. Ayieko [1985] KLR 494, O'kubasu, J (as he then was) held that:

> Looking at the evidence before it, the court is entitled to make its own independent evaluation and come to its own conclusion. It does not mean that since the defendant was acquitted in the traffic case by the Resident Magistrate's Court then he is not liable. The Court has to look at the evidence as a whole and reach its own conclusion. The fact that the defendant was acquitted in the traffic case is certainly significant and cannot be ignored.

20. Mwera, J (as he then was) in Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007 was of the opinion that:

> Much as other court proceedings can be placed before a trial court as an exhibit, the trial court is bound to proceed and determine a dispute before it on the evidence of witnesses who appear before it... Admitting in evidence by consent a record of previous proceedings does not mean that all the contents of those proceedings automatically become evidence in the subsequent proceedings. It is always open to advocates in a civil suit to agree upon facts as to which no evidence is called, or to agree to accept a statement by a witness in other proceedings as being a true statement of facts deposed to therein, although the witness is not called as a witness in the civil suit, provided this agreement is absolutely clear and unambiguous. It is not for the Judge to read proceedings in traffic case as if the evidence recorded there was the final position in the case. Not only is it notorious that different aspects of the evidence emerge during a civil case, but it is also well-known that both parties to an accident might have driven carelessly for their respective types of carelessness. If the contents of a record of traffic proceedings arising out of a motor accident cannot become evidence in a civil suit arising out of that accident, equally the contents of a police file in respect of police investigations in the accident cannot become evidence in a civil suit even if such file is put in evidence by consent...The practice by advocates, not to call the relevant witnesses but opt to produce as exhibits proceedings like in the traffic case or police investigation files is to be deprecated. Therefore the learned trial Magistrate was not bound to accept the evidence of the eyewitness in the traffic case, as final in the civil case before him.

21. In this case, the complete failure by the driver of the GKA vehicle to see the defendants' lorry while approaching it can only lead to the conclusion that driver of the GKA vehicle did not exercise due attention expected of him. There is no proof that single act of leaving the stalled or parked lorry belonging to the defendants was negligent. There was no proof herein that the lorry was left unlighted or without any warning sign or life saver. There was no evidence from the plaintiff that the defendants'

lorry was left on the road in the manner as particularized in Paragraph 7 of the Plaint. The police simply stated that the driver of the stationery lorry was to be charged with Causing Death by Careless Driving, but there was no elaboration on the reasons or grounds for the charge and whether the same amounted to negligence as pleaded by the plaintiff.

22. In Eliyaforo Hosea vs. Fraeli Kimaryo Arusha HCCA No. 2 of 1967 it was held that 'leaving an unlighted, stationary vehicle in a road at night is prima facie evidence of negligence.' I however do not find any evidence herein that the leaving of the vehicle on the road per se contributed in any way to the accident herein as it was more of the responsibility of the driver of the GK vehicle in which the deceased was travelling in to exercise due care and attention while driving on the said road. In fact he owed a more duty of care to the deceased who was his passenger. It has not been proved herein that he did not see the vehicle, and any reason why he could not notice the stationery vehicle on time somas to avert the accident herein.

23. In the premises, I do agree with the learned counsel for the defendant that this case fails on the single issue of liability. Had the plaintiff succeeded in his case, I would have would have awarded him damages as submitted by the learned counsel for the plaintiff. This suit however fails for want of proof of negligence on the part of the defendants and the same is hereby dismissed with costs to the defendants.

DATED, SIGNED AND DELIVERED AT NAKURU IN OPEN COURT THIS 11th DAY OF MARCH, 2025.

ALOYCE-PETER-NDEGE

SENIOR PRINCIPAL MAGISTRATE

In the presence of;

Plaintiff's Counsel: Cheruiyot

Defendants' Counsel: Odhiambo

Plaintiff:

1st Defendant:

2nd Defendant: