Kesian Hardware Limited v Runji (Civil Appeal E533 of 2024)
[2025] KEHC 18197 (KLR) (Civ) (5 December 2025) (Judgment)

Neutral citation: [2025] KEHC 18197 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E533 OF 2024

WM MUSYOKA, J

DECEMBER 5, 2025

BETWEEN

KESIAN HARDWARE LIMITED ..... APPELLANT

AND

EUNICE NYAGA RUNJI ..... RESPONDENT

(Appeal from the judgement and decree, of Hon. W Micheni, Chief Magistrate, CM, of 22nd March 2024, in Milimani CMCCC No. E395 of 2023)

JUDGMENT

1. The claim, at the trial court, was by the respondent, against the appellant. It was a fatal injury claim, arising from an accident which had occurred on 6th October 2016, involving the deceased and a motor vehicle owned by the appellant. Negligence was attributed on the appellant. The claim was resisted by the appellant, who denied liability, and attributed negligence, solely on the deceased.

2. A trial was conducted. The respondent called 2 witnesses. The appellant did not call any. Judgement was delivered on 22nd March 2024. Liability was assessed at 100% against the appellant; loss of dependency at Kshs. 2,000,000.00; pain and suffering at Kshs. 100,000.00; loss of expectation of life at Kshs. 100,000.00; special damages at Kshs. 1,524,635.00; plus, costs and interests.

3. The appellant was aggrieved, hence the instant appeal. The grounds revolve around finding the contents of the police abstract report as conclusive proof of negligence; the respondents were not eye witnesses to the accident; no evidence being presented, to establish that the driver of the appellant, had been convicted of a traffic offence, arising from the accident, the subject of the claim; and in finding that the respondent had established a case on a balance of probability.

4. Directions were taken, on 2nd May 2025, for disposal of the appeal by way of written submissions.

5. In his written submissions, the appellant addresses only 2 issues: proof that its driver was convicted, and proof of negligence against it. It is submitted that the respondent did not adduce any evidence to establish that its driver was charged, convicted and sentenced. On the second issue, it is submitted that the respondent was not at the scene of the accident, and was not possessed of the facts relating to how the accident occurred, and she did not call an eyewitness, or a person privy to those facts. It is submitted that the alleged negligence of the appellant was not proved to the required standard.

6. The submissions by the respondent support the finding by the trial court. On liability, it is submitted that the appellant did not adduce evidence.

7. The appeal herein only turns on liability, for none of the grounds of appeal, in the memorandum of appeal, dated 22nd April 2024, turn on quantum.

8. Did the respondent adduce evidence that established that the appellant was liable for the death of the deceased? I do not think so.

9. The claim herein arises from a fatal motor accident, wherein the deceased died. The accident involved 2 motor vehicles, one driven by the deceased and another vehicle, allegedly driven by an employee of the appellant. The respondent was not with the deceased, when the accident happened, nor was she at the scene of the accident at the material time, neither did she visit the accident scene after the occurrence of the accident. She could not, therefore, provide a firsthand or eyewitness account of how the accident happened, or the circumstances around the occurrence, to enable the court assess liability. She could only rely on the testimonies of other persons, who were either eye witnesses to the collision, or who conducted investigations into the occurrence.

10. The respondent did not call eyewitnesses to testify on her behalf, that is individuals who witnessed the occurrence of the accident, or who visited the scene thereafter, who could provide a background to the circumstances of the occurrence of the accident, and thereby feed the court with material from which it could assess liability, for the collision, as between the deceased and the other driver. She did not call the police either, to provide or produce the traffic investigation file, or sketches of the accident scene, which could provide a basis for the trial court to draw conclusions on liability.

11. The respondent was the sole witness on liability. Yet, she was not at the scene of the accident. She did not witness the accident. She did not visit the scene of the accident. She could not give circumstances of it. She relied on hearsay evidence, of what she was informed by some anonymous caller, and material that she collected from the police. She did not call the anonymous caller, nor the police, to give to the court the firsthand eyewitness account of what transpired, nor provide material, from the police, of what was gathered at the scene, by way of investigations.

12. The respondent relied on a police abstract of the accident. It is trite that a police abstract is not adequate proof of negligence. It merely establishes that an accident happened, it is not evidence of who was responsible for it. The police abstract on record, other than establishing that there was an accident, does not suggest who might have been responsible for it, although it does indicate that the other driver was to be charged with causing death by dangerous driving. However, that of itself is not adequate proof of negligence. It merely expresses an intention to prefer charges, and that would be all.

13. She also relied on an allegation that the other driver was, indeed, charged with a traffic offence, was tried, convicted and sentenced. Yet, she produced no documents to establish that. The traffic charge sheet was not produced. No certified copies of the traffic proceedings were produced, to establish the conviction and sentence. That left the whole affair of the said charges, conviction and sentence in the realm of allegation, which the respondent had an obligation to prove, but did not.

14. It was the respondent who went to court alleging that the negligence of the driver of the appellant's vehicle was responsible for the death of her husband, and, on that account, she and his estate were entitled to recompense. The obligation was to prove that alleged negligence, to unlock assessment and award of compensation. She did produce the police abstract report, which merely established that there was an accident, without proving who was responsible for the accident. There was no evidence presented on how the accident happened, from which the trial court could assess whether the driver of the appellant was solely to blame; or the deceased was solely to blame for the accident; or both the deceased and the other driver were to blame. Without that evidence, there was no basis for attributing liability or negligence on either of them, and to apportion liability as between them.

15. The accident was not self-involving, in a circumstance where the deceased was a passenger in the accident vehicle, which crashed, without colliding with another vehicle. It was a collision of 2 motor vehicles, one driven by the deceased and the other by an agent of the appellant. In such a circumstance, the evidential burden would be higher on the claimant, to establish how the accident occurred, for the purpose of the court apportioning liability between the 2 drivers involved. It could be that 1 of the drivers was solely to blame, or both were to blame, or none of them was to blame.

16. Would the principle of res ipsa loquitar help the respondent? I do not think so. That principle only applies where the negligence is self-explanatory, from the circumstances of the accident. It would still require some evidence on the occurrence of the accident, for the court to draw a conclusion that the accident was self-explanatory, and negligence could be presumed from the circumstances. Evidence from eyewitnesses, or from police investigations. That would make sense in a self-involving accident, but not in a collision involve 2 or more vehicles. It would be of little utility in the case of a collision of motor vehicles.

17. Would the principle, stated in Hussein Omar Farah vs. Lento Agencies [2016] eKLR (Omolo, Tunoi & Githinji, JJA), that liability would be assessed at 50:50, where there is no concrete evidence to determine who is to blame, apply here? I do not think so. That position presupposes that both sides have adduced evidence, on the occurrence of the accident, from which the court is unable to determine the blameworthiness of either side, in which event both sides would be found and held to be equally to blame. None of the parties adduced evidence on how the accident happened, so the trial court had no material upon which it could assess liability, between both sides.

18. The respondent made a lot of play about the appellant not adducing evidence, suggesting that her evidence was uncontroverted. The burden of proof rested with the respondent, in the first place. She was the one making the allegations. The burden could only shift to the appellant, upon the respondent discharging it in the first place. That is trite, under the provisions of the *Evidence Act*. She never discharged the burden. The burden never shifted. That would explain why the appellant very wisely chose not to adduce evidence, lest it salvaged the ill-fated suit. The appellant was not obliged to adduce any evidence, as the burden did not shift to it, to counter what the respondent was alleging. She did not prove negligence on the part of the appellant; hence the appellant did not have a burden to explain itself, or absolve itself, or seek to adduce some evidence to apportion negligence on the part of the deceased.

19. The respondent appears to confuse giving a testimony with adducing evidence. Giving an oral narrative or account in court, by way of testimony, does not, of itself, amount to evidence. What matters is the content or substance of that narrative or testimony. The testimony or narrative may be of little substance or content, evidentially, in terms of proof of the facts or allegations, upon which the case is built. The mere fact that a party has testified in court does not mean that they have proved their case. It could be that the testimony was hollow. The testimony, from the respondent, did not prove her case, as she was not an eyewitness to the occurrence of the accident. Her testimony was of little value, in terms

of establishing liability. There was nothing, in her testimony, to be controverted by the appellant. She needed to call other witnesses, who had either witnessed the accident or investigated it, to bolster her testimony, for without that other evidence, her testimony was otherwise useless.

20. The failure or omission, on the part of the appellant, to adduce evidence was not fatal, for no burden had shifted to it. Indeed, no obligation was placed on it, to adduce evidence, as the respondent did not place, before the court, material that would have required the appellant to adduce evidence to counter it. The obligation, to adduce evidence, would have arisen only if the burden of proof had shifted.

21. In view of everything discussed above, it would be my conclusion that the appeal herein has merit. I hereby allow it, with the consequence that the orders, made in the judgement of the trial court, delivered on 22nd March 2024, assessing liability at 100% against the appellant, and awarding costs in favour of the respondent, are hereby set aside, and substituted with an order dismissing the claim at the trial court. Each party shall bear their own costs.

DELIVERED, VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, ON THIS 5TH DAY OF DECEMBER 2025.

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant, Busia.

Mr. Michael Onyango, Court Assistant, Milimani, Nairobi.

Advocates

Ms. Njoroge, instructed by Eboso & Company, Advocates for the appellant.

Ms. Amondi, instructed by Wanyonyi & Muhia, Advocates for the respondent.