Luliendo & another v Amukota (Suing as the Legal Representative and Administrator of the Estate of Edgar Wafula Amukota DCD) (Civil Appeal E003 of 2024) [2025] KEHC 18214 (KLR) (3 December 2025) (Judgment)

Neutral citation: [2025] KEHC 18214 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CIVIL APPEAL E003 OF 2024

PJO OTIENO, J

DECEMBER 3, 2025

BETWEEN

NICK WANJALA LULIENDO ..... 1ST APPELLANT

LAH ABIGAEL OKWARO ..... 2ND APPELLANT

AND

SUSAN NASAMBU AMUKOTA (SUING AS THE LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF EDGAR WAFULA AMUKOTA DCD) ..... RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. A. Kassim (RM) delivered on 20th November 2023 in Kitale CMCC No. E254 of 2022)

JUDGMENT

1. This is an Appeal against the finding on liability arising from the Judgment delivered in Kitale Chief Magistrate's Court, Civil Suit No. E254 of 2022 on 20th November, 2023. It was alleged that on the 2/11/2021, the deceased Edgar Wafula was a lawful pillion passenger along Kiminini-Saboat road, aboard motor cycle registration No. KMFN 766P, when the Appellant's driver carelessly/negligently Motor Tractor Registration No. KTCB 874M causing it to veer off the road and run over the deceased, sustaining fatal injuries.

2. The claim was predicated on the alleged negligence of the 1st Appellant as the driver of the involved motor vehicle while the 2nd Appellant was vicariously sued of the actions of the 1st Appellant as his employer and in whose favour the said motor vehicle was registered. The particulars of negligence, dependency and damages were then set out.

3. The Appellants on being served filed a statement of defence and denied liability in their Statement of Defence, claiming the accident was inevitable and was solely, overwhelmingly, and substantially caused or contributed to by the deceased and the motor cycle rider. Negligence was the pleaded against the deceased and the rider and strict proof of the allegations by the respondent invited. In the alternative, the Appellant's pleaded that if any accident did occur, it was wholly or substantially caused by the contributory caused by the negligence of the Respondent, thus denying the applicability of the doctrine of Res Ipsa Loquitur.

4. The matter proceeded to full trial with the respondent calling two witnesses while the Appellants relied on the sole testimony of the 1st Appellant.

5. PW1 was a police officer, though not the investigating officer. She produced the police abstract and post-mortem report. She testified that a Notice of Intended Prosecution (NIP) had been prepared for the tractor driver and concluded that the driver was to blame for the accident. On being cross examined he told the court that it was the statement of the tractor driver which laid bare the circumstances of the accident and that Notice of Intended prosecution was issued as a matter of course.

6. PW2, the deceased's widow confirmed that the deceased, aged 35 years, was a farmer with an approximate income of Kshs. 25,000/= per month and was survived by herself and four minor children. She adopted her witness statement but confirmed under cross-examination that she did not witness the accident.

7. The 2nd Appellant and the driver of the involved tractor was the only eyewitness called by the Defence. He adopted his statement and provided a detailed account, stating that he was driving on his correct lane heading toward Kiminini at a slow speed of 40 km/hr when the motorcycle approached from the opposite direction at a high speed and crossed into his lane. He claimed he swerved to his extreme left to avoid a head-on collision, but the motorcyclist hit the rear tire of the tractor, causing the accident.

8. The Trial Court, having considered the evidence before it, determined that the Appellants were 100% vicariously liable for the accident. The court subsequently awarded the Respondent a total sum of Kshs. 1,907,560/=.

9. Aggrieved by judgement of the trial court, the appellants lodged the instant appeal vide Memorandum of Appeal dated 31st January 2024. The appeal is premised on five primary grounds, all aimed at demonstrating that the Trial Magistrate misapplied the law regarding evidence and the burden of proof, resulting in an erroneous finding of 100% liability against the Appellants.

Appellant's Submissions

10. The Appellants submitted that the Trial Court's findings were demonstrably wrong because they were based on a misapprehension of the evidence and application of incorrect legal principles. Their core argument is that the trial Court erroneously held that the Plaintiff discharged the burden of proof under Section 107 of the *Evidence Act* when the evidence from PW1 and PW2 concerning the circumstances of the collision was hearsay and inadmissible, as neither witnessed the event.

11. It was asserted that holding an unproduced Notice of Intended Prosecution (NIP) as conclusive proof of blameworthiness, while simultaneously dismissing the sworn, direct account of the only eyewitness (DW1) as a mere denial, constituted a serious error of law and principle. They stressed that liability must be based on proven fault citing the case of Kiema Mutuku v Kenya Hauliers Service Limited. The Appellants maintained that DW1's first-hand account of the accident was neither rebutted nor challenged by any other evidence from the Plaintiff, meaning the finding of 100% liability was reached without a factual basis.

Respondent's Submissions

12. The Respondent on the other hand argued while submitting that the Trial Court's finding of 100% liability, while potentially debatable on the evidential weight of the NIP, was fundamentally correct based on the legal status of the deceased and the Appellants' procedural defaults. The counter-arguments were that the deceased was an innocent pillion passenger who had no control over the manner of driving of the motorcycle and therefore could not be penalized or found contributorily negligent. They cited the case of Boniface Waiti & Another Vs Michael Kariuki Kamau, [2007] eKLR in which it was held that a passenger has no control over the manner of control of the motor vehicle and cannot be held liable for accident resulting from the motor vehicle colliding with another.

13. While pointing out the Appellant's consistent blame the motorcycle rider, who was not a party to the suit, the respondent submitted that despite having the opportunity, the Appellants failed to use the mechanism established under Order 1 Rule 15 of the Civil Procedure Rules to join the rider as a Third Party for contribution or indemnity. Citing Margaret Waithera Maina v Michael K. Kimaru [2015] KECA 5 (KLR), the Respondent emphasized that the failure to institute third-party proceedings means the Appellants forfeited their right to seek apportionment against the rider within this suit. They urge the court to uphold the finding of 100% liability against the Appellants by the Trial Court.

Issues, Analysis and Determination

14. Having considered the evidence tendered at the trial court and the submissions herein, this Court has distilled only one issue for its determination of this appeal. That issue is whether the Trial Magistrate misapplied the law regarding evidence and the burden of proof, resulting in an erroneous finding of 100% liability against the Appellants.

15. This Honourable court, as a first appellate court, is mandated to subject the evidence presented before the subordinate court to a fresh scrutiny, re-evaluate the testimony, and make its own independent conclusions, while remembering that it did not have the opportunity to observe the demeanour of the witnesses. Interference with the factual findings of the Trial Court is warranted only if it is established that the finding was based on no evidence, on a misapprehension of the evidence, or if the trial court acted on wrong principles in reaching its conclusion. That position is now trite but is remember for having been succinctly enunciated in Selle and Another -vs- Associated Motor Boat Company Ltd & Others [1968] 1. E. A 123 where it was stated: -

> "...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind [the fact] 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 that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence."

16. The Appellants' faults the Trial Magistrate's findings particularly concerning the weight afforded to police documentation versus the 1st Appellant's sworn testimony. The Trial Magistrate held that because PW1 testified that a Notice of Intended Prosecution (NIP) was issued to the driver, this constituted prima facie evidence of liability, thereby dismissing DW1's detailed explanation as a mere denial.

17. Under the law of evidence governing civil litigation, documents generated by the police on a road traffic accident investigation; including abstracts and, by extension, notices of intended prosecution

are generally considered documentary evidence that an accident occurred and was reported, but they are not conclusive proof of negligence or fault. The determination of blameworthiness is a court's responsibility that requires the application of the standard of proof on a balance of probabilities, not reliance on an administrative police assessment. This position was affirmed in the case of Kasaam Hauliers Limited & another v Shreeji Enterprises [2025] KEHC 12039 (KLR) where the court stated that:

> " Production of a police abstract by any police officer in the relevant police station is not in issue. A police abstract shows that an accident was reported in a certain police station and its contents must be substantiated. In this case there was no eye witness. The IO did not testify. The circumstances of the accident as recorded in the abstract unless conceded required the evidence of the plaintiff/or the plaintiff's witness in the absence of which, they were not proved."

18. The legal burden of proving negligence rests squarely upon the Plaintiff in every suit. Section 107 of the *Evidence Act* confirms that the party desiring the court to give judgment as to a legal right or liability must prove the existence of the facts asserted. Since PW2 was not an eyewitness, her account of the mechanics of the accident was purely hearsay. To rely on the Notice of Intended prosecution, which was in any case never produced, as the only evidence to prove negligence to override the evidence of the only eye-witness is to greatly err in principle and the duty of the court to adequately and deeply analyse the evidence led by the parties.

19. The court notes that DW1, the driver, provided the only direct evidence regarding the speed and positioning of the vehicles, claiming the motorcycle was speeding and hit the rear of the tractor. While that could have been self-serving, his testimony provided a specific the only version of events and which the court was mandated to analyse on the merits against the evidence of the Plaintiff and only discount it if the court was satisfied on the totality of the evidence that he was not forthright or just lied.

20. While is cannot be debatable that the deceased was a pillion passenger with no control over the manner both motorcycle and the tractor were controlled and managed, the duty to prove liability on the person chosen as the defendant remained with the respondent. The respondent chose to sue the tractor driver only and not the rider, he elected to forebear any benefit he would have derived from that rider. That rider having not been a party to the suit was permanently secured from any blameworthiness by the rules of natural justice.

21. It is of note that the Appellants in their defence sought to impute negligence directly upon the rider with an intimation that they would join him to the suit but no attempt was ever made at such joinder. The consequence is that no meaning purpose would have been served by the pleadings giving particulars such as failure to wear a helmet, standing, or jumping when the person so faulted was not a party to the suit.

22. In this matter, the appellants' defence, evidence and submissions maintained that the primary fault lay with the motorcycle rider, Wycliffe Mutebo, who was never enjoined in the suit as a third party or defendant. To the court no fault could be legally alleged, proved or held against a non-party to the suit unless the court was to set out to all the principles of natural justice.

23. While the court agrees with the respondent that the civil procedure Rules demands that where a defendant wishes to claim contribution or indemnity from a party, not already before the court, he must utilize the mechanism provided under Order 1 Rule 15 of the Civil Procedure Rules, that position does not relieve the plaintiff from suing every tortfeasor, however many, so that if there be contribution, all are netted. It equally does not relieve the plaintiff of the onus to prove his cause of

action or lessen such a duty. Contribution or indemnity to the defendant only arises where the plaintiff has proved his claim. It is never a matter of course.

24. Therefore, even though the failure to join a joint or concurrent tortfeasor by the defendant may have meant that the Appellant did not bring the alleged primary tortfeasor before the court to have the issue of contribution or indemnity determined within the main suit, that eventuality would only be detrimental or burdensome to the appellant if liability had been made out against him by the plaintiff.

25. The principle in Margaret Waithera Maina v Michael K. Kimaru [2015] KECA 5 (KLR) relied upon by the trial court is decisive in this context. It affirms that the procedural omission of a defendant to enjoin a co-tortfeasor cannot be allowed to prejudice the innocent Plaintiff's right to full recovery. Where the Defendant fails to secure contribution or indemnity through proper procedure, and a finding of liability even minimal, is sustained against the defendant, the defendant remains 100% liable to the plaintiff.

26. In the present case, a finding of liability was returned against the Appellants, on the sole basis that the issuance of a Notice of Intended Prosecution was evidence of liability. That is manifestly erroneous because as at the date of giving evidence, some fifteen months after the accident, no prosecution had been preferred. Moreover, mere preference of prosecution is itself no proof of liability as the same may end in an acquittal. More importantly, even clear conviction of the driver of a motor vehicle in a traffic offence does not preclude a finding of contribution on liability. As said earlier, the only direct evidence on how the collision occurred was offered by DW1. It was to the effect that he was on his lane when the cyclist veered off his lane onto the path and way of the witness and that despite evasive action by the witness of swerving to the extreme left, the motor cyclist followed him there and knocked the rear tyre of the tractor.

27. That evidence can only show that the accident occurred on the lane of the tractor and that the front of the tractor avoided collision with the cyclist who rammed onto the rear of the tractor. It also shows that the driver took the expected steps to avoid a collision on its lane but was knocked while there. The question the trial court was expected to pose and answer, but which it failed to pose and answer, is what is it that a reasonable man in the position and seat of the driver could have done that DW1 failed to do?

28. This court has posed the question to itself and has, on the basis of the record, determined that the defendants did all a reasonable man could have done to avoid the collision and was thus not negligent at all. Because there is no liability without fault, the court now determines that the finding on liability was against the weight and grain of the evidence and was thus plainly wrong thus deserving being interfered with by an order of setting aside. It is not a fault that the rider was never made a third party by the appellant. The fault was in failing to make the rider a defendant in the first instance. That fault was by the plaintiff from the onset.

29. In upshot, the court holds that the Appeal herein is wholly merited is allowed entirely. The judgment of the trial court is set aside and, in its place, substituted a judgment dismissing the suit with costs. Because the appellants have succeeded, the costs of the appeal go to them

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 3RD DAY OF DECEMBER, 2025

PATRICK J O OTIENO

JUDGE

In the presence of Mr. Mukabane for Respondent.

No appearance for the Appellant

Ms. Hannah Mbugua – Court Assistant