REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI
CIVIL APPEAL NO. E642 OF 2024

JOHN MBUGUA KARUKU
(suing as the legal representative and administrator of the estate of ANN NJOKI MBUGUA)……..…….APPELLANT

VERSUS

ALI AHMED ABDIKARIM……1ST RESPONDENT
CHARLES NYAIRO ABISI……2ND RESPONDENT

(Appeal from judgement and decree by Hon. SA Opande, Principal Magistrate, PM, of 9th September 2024, in Milimani MCCC No. 9612 of 2019)

JUDGEMENT

1. The suit, at the primary court, was by the appellant, against the respondents. The appellant had sought compensation in general and special damages, for pain and loss that the deceased had suffered on account of a road traffic accident, that happened on 30th March 2017, along the Uhuru Highway, Nairobi, involving motor vehicle registration mark and number KBN 970F, belonging to or controlled by the respondents, and the deceased, who was a pedestrian. He alleged that the driver of KBN 970F negligently drove that vehicle, hence it hit the deceased, fatally injuring her.

2. The respondents resisted the claim; through a defence they filed, dated 27th July 2020. They denied everything pleaded in the plaint. In the alternative, they averred that the accident, in question, was caused by the sole negligence on the part of the deceased, or that she substantially contributed to it.

3. A trial was conducted. The appellant presented 2 witnesses, while the respondents did not present any. Judgement was delivered, on 29th April 2024. The court was unable to attribute liability on the respondents. It opined, if liability were to be apportioned to the respondents, that Kshs. 50,000.00 could be awarded for pain and suffering; Kshs. 100,000.00 for loss of expectation of life; Kshs. 2,000,000.00 for loss of dependency; and Kshs. 50,000.00 for special damages.

4. The appellant was dissatisfied by the terms of that judgement, and filed the instant appeal. The appeal is grounded solely on liability.

5. Directions were taken, on 4th April 2025, before the Deputy Registrar, for canvassing of the appeal by way of written submissions. I have seen and read written submissions by the appellant.

6. On liability, the appellant called a police officer, given that he himself did not witness the collision. That police witness did not himself investigate the accident, and it would appear that he was called for the sole purpose of producing the police abstract. He testified that he did not visit the scene, and all he could tell the court was that the driver of the accident vehicle was charged in court with some traffic offence.

7. Faced with that, the trial court found that the appellant had not proved his case, as alleged in his plaint, that the respondents were liable in negligence. I agree. The burden was on the appellant, to prove negligence. The evidential burden could only shift to the respondents upon the appellant adducing adequate evidence on negligence. He did not adduce adequate evidence on negligence, to trigger such

a shift. He was not himself privy to the accident; and, therefore, he could not help the court.

8. His witness, the police officer, did not help either. He did not investigate the accident. He did not visit the scene of the accident. He did not appear to have had with him the investigation file, and he only presented himself in court to produce the police abstract.

9. The police abstract serves only 1 purpose, and that is proof that an accident happened. I have seen the police abstract, that that police witness produced. There is no indication on its face about liability for the accident. There is indication that the driver of the accident vehicle, the 2nd respondent herein, was charged with the offence of causing death, by dangerous driving, but that of itself is not proof of negligence. The traffic proceedings could be useful evidence, on how the accident happened, and could provide material for apportionment of liability. A conviction would even be better.

10. But the proceedings in the traffic court, in that case against the 2nd respondent, were not produced. The police witness said that the said proceedings were still going on, as at the time he was testifying. It could have helped the appellant, if he had waited for the traffic proceedings to be concluded, before prosecuting his case, so that he could mine evidence from those proceedings.

11. The appellant has made a lot of play, about the respondents not testifying, which he interprets to mean that the respondents did not present evidence to absolve themselves, and the testimony, that he and his witness, presented was uncontroverted. That presents a complete misapprehension on burden and standard of proof.

12. The burden of proof, in civil cases, is on the plaintiff, to establish that which he alleges in his plaint. Once he establishes his claim, the burden shifts to the defendant, to establish his case, as set out in his defence. The evidential burden is on the plaintiff, in the first instance, to establish the claim advanced in his plaint, and once he does so, to the required standard, the evidential burden then shifts to the defence, to disprove the case established by the plaintiff.

13. The burden was on the plaintiff, to prove that the respondents were liable in negligence. Did he prove negligence? No, he did not. He was not an eyewitness to the accident. His testimony could be of no use to the court, so far as liability is concerned. His police witness did not help either. He did not investigate the accident. He never visited the scene. He did not present a report of the investigations conducted, if at all the accident was investigated. He produced no sketches of the accident scene. He simply did not have any material which could assist the court understand how the accident happened, from which it could then assess liability, and, perhaps, apportion contributory negligence.

14. The only material presented only proved or established that an accident had happened, which involved the deceased, and a vehicle owned or controlled by the respondents. As there was no material presented on how the accident occurred, there was nothing that the trial court could analyse, to assist it assess liability, in terms of determining who was to blame for the collision. Either side could be 100% to blame for the collision, or both sides could have contributed to the accident to some degree.

15. As no evidence was presented, to establish negligence or liability on the part of the respondents, the evidential burden was not discharged. If it had been discharged, the

burden would have shifted to the respondents, to adduce counterevidence. It never shifted, and there was no obligation on the respondents to lead counterevidence, as there was nothing to counter.

16. The appellant could, perhaps, be confusing between the case of an interlocutory judgement, where there is a judgement in default of defence, and a case where the defendants have filed a defence, but lead no evidence. An interlocutory judgement would be a judgment on liability. A plaintiff who obtains such a judgement, would not be required to adduce evidence to prove negligence. He would have no burden to prove negligence or liability. Even when required to formally prove the case, the burden would be to lead evidence that would assist the court assess quantum of damages, and not liability.

17. An interlocutory judgement benefits or advantages a plaintiff, in the sense that he gets to have a judgement on liability, even in a case where he would not have proved negligence, or liability, for lack of the requisite witnesses, or evidence to prove it. He would get away with it, for he would have no burden to prove anything, so far as liability is concerned.

18. However, once a defence is filed, the plaintiff incurs a burden of proof, to establish liability or negligence. That burden remains, even where the defendant fails to adduce evidence. The plaintiff would still be obliged, to establish a case, evidentially, to the threshold of balance of probability. If the case presented would not reach that threshold, then the claim would be lost, irrespective of the defence not adducing evidence. The defence would only incur a burden to adduce evidence, upon the plaintiff discharging his burden of proof, or upon him presenting evidence which reaches the required threshold. The failure, by the defence, to adduce evidence, should not be treated as giving the

plaintiff a walk-over. There would still be a burden, on the part of the plaintiff, to adduce evidence, to meet the required threshold.

19. There is the principle, stated in such cases, as *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. Would that apply here? I do not think so. That principle would apply where there is some material on how the accident happened. The challenge would be that, from that material, the court would still be unable to tell, as between the 2 sides, the degree of contribution to the liability of either of them. It would not apply where there is no evidence or material, at all or whatsoever, on liability, or on how the accident happened.

20. Based on what I have discussed above, it cannot be concluded that the trial court went wrong, in the manner that it evaluated the evidence, and arrived at a conclusion on liability. The appellant did not prove his case, on negligence, to the required standard. Negligence was not established, and the respondents were not liable. I shall find, as I hereby do, that the appeal herein has no merit, and I, accordingly, dismiss it, with no order as to costs. Orders accordingly.

DELIVERED, VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 22ND DAY OF DECEMBER 2025.

W MUSYOKA
JUDGE

Mr. Arthur Etyang, Court Assistant.
Mr. Maurice Onyango, Court Assistant, Milimani, Nairobi.

Advocates

Ms. Odero, instructed by Mugambi Mungania & Company, Advocates for the appellant.