

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT THIKA

CIVIL APPEAL NO. 360 OF 2023

**STEPHEN MUGO MWANGI &
MARY WANJIRU MUGO (Suing on their own behalf
and as the administrators of the Estate of
MOSES MWANGI MUGO.....
.....APPELLANTS**

VERSUS

**BONIFACE KIARIE NJOROGE.....
RESPONDENT**

**(Being an Appeal from the Judgment and Decree of Hon.
V. Asiyo (PM) delivered on 7th September 2023 in Thika
CMCC No. 571 of 2022)**

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Thika Principal Magistrate in CMCC No. 571 of 2022 in a suit that arose from a motor vehicle accident whereby the trial court apportioned liability at the ratio of 50%:50% between the parties. The appellants were awarded general damages for pain and suffering at Kshs. 20,000/-, loss of expectation of life at Kshs. 100,000/-, loss of dependency at Kshs. 1,560,684/- and special damages at Kshs. 28,350/-.

2. Dissatisfied with the court's decision, the appellants lodged this appeal citing 5 grounds summarized as follows:-

a) The learned trial magistrate erred in law and in fact by apportioning liability at 50% against the plaintiffs and 50% against the defendant.

3. Parties put in written submissions.

The Appellants' Submissions

4. The appellants submit that three witnesses testified on how the accident occurred including PW2, the eye witness whereas the respondent did not call any witness. PW2 testified that on the material day, he and the deceased were heading home walking off the road when motor vehicle KBT 881U being driven by the respondent was over speeding, veered off the road knocking down the deceased. The witness blamed the driver of the said motor vehicle for the occurrence of the accident. The appellants argue that the eye witness testimony was not controverted.

5. The appellants submit that in apportioning liability at the ratio of 50%:50% the learned magistrate held that the eye witness was not listed as a witness in the police abstract which was the sole reason relied upon by the learned magistrate in apportioning equal liability. The appellants refer to the cases of **Abok James Odera t/a Odera &**

Associates vs John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR and **Unleek Electrical Company Ltd** (no citation given) and submit that the lower court should have considered the probative value of PW2's testimony because it is not

in all cases that all witnesses are listed in the police abstract. Furthermore PW2 in his sworn evidence confirmed that he recorded

a statement at the police station after the accident. Relying on the cases of **Joel Muga Opija vs East Africa Sea Food Limited [2013] eKLR** and **Jared Odhiambo Abano vs Francis Kiberenge Bondeva [2016] eKLR**, the appellants submit that the mere fact the eye witness was not listed as a witness in the abstract cannot lessen the weight of his evidence.

The Respondent's Submissions

6. The respondent refers to the decision in **Statpack Industries vs James Mbithi Munyao [2005] eKLR** and submits that the evidence presented by the appellants was insufficient to place full blame on him. The respondent further submits that the trial court evaluated the testimonies of the appellants' witnesses and found them unreliable. PW1, the father of the deceased testified only about the aftermath of the accident, PW2 claimed to have witnessed the accident but his credibility was called

into question and PW3, the police officer confirmed that PW2 was not listed as a witness and that the driver was not charged with any offence. The learned magistrate explicitly stated that it had doubts as to whether PW2 actually witnessed the accident noting that his name was not captured in the police abstract and that his appearance as a witness appeared orchestrated to support the family's claim. The lower court further indicated that PW3 did not produce an extract of the occurrence book to confirm whether PW2 was listed as a witness.

Further, PW3 was neither the visiting officer or the investigating officer and he testified that the report was based on information obtained from third parties whose identities were never disclosed.

7. Relying on the case of **Karauri vs Ncheche [1997] eKLR**, the respondent argues that the appellants failed to discharge the burden of proof. The respondent submits that he did not call any witness but that did not absolve the appellants from discharging the legal burden of proof. The respondent refers to the decision in **Ann Wambui Ndiritu vs Josphat Mwangi [2015] eKLR** and submits that the appellants' case must stand or fall on the strength of their own evidence.

Issue for determination.

8. The main issue for determination is whether the trial court erred in apportioning liability at 50:50 between the appellants and the respondent.

The Law

9. Being a first Appeal, the court relies on a number of principles as set out in **Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123:**

“.....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 into account of particular circumstances or probabilities materially to estimate the evidence.”

10. In **Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR** the Court of Appeal 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.

11. The foregoing cases set out the appropriate standard of review to be established can be stated in three complementary principles:-
- a) That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - b) That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
 - c) That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Whether the trial court erred in apportioning liability at 50:50 between the appellants and the respondent

12. The appellants seek to have the court substitute the trial court's findings of 50% liability against them with 100% liability upon the respondent. The appellants assert that the accident was substantially caused by the respondent who veered off the road and knocked down the deceased.

13. The principles guiding the appellate court's power to interfere with the trial court's finding on liability are well settled. In **Khambi & Another vs Mahithi & Another [1968] EA 70** it was held that:-

It is well settled that where a trial Judge has apportioned liability according to the fault of the parties, his apportionment should not be interfered with on appeal, save in exceptional circumstances, as where there is some error in principle or the apportionment is manifestly erroneous and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.

14. It is noted that, PW2 was the only eye witness to the accident. He testified that on the material day he was walking with the deceased at Kuraihia area along Thika Nairobi Superhighway when the respondent's motor vehicle registration number KBT 881U which was over speeding lost control and veered off the road knocking the deceased on the side of the road. The credibility of PW2 was questioned as the trial court was not convinced that he witnessed the accident. On further perusal of the evidence, it is noted that PW2

was a brother to the deceased. During cross examination of the witness, he stated that he recorded a statement with the police and further stated that he was at the scene when the police went to the scene. PW3, the police officer produced the police abstract in evidence and testified that

she was not the investigating officer. She further testified that the driver of the suit motor vehicle had not been charged with any traffic offence and the matter was still being investigated by traffic police officers in Juja. And finally, that the eye witness, PW2 was not listed as a witness as only two witnesses were named in the police abstract.

15. It is trite law that he who alleges must prove. **Section 107 (1) of the Evidence Act**, Cap 80 Laws of Kenya, provides that:-

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.

16. This degree of proof is well enunciated in the case of **Miller vs Minister of pensions [1947]** cited with approval in **D.T. Dobie Company (K) Limited vs Wanyonyi Wafula Chabukati [2014] eKLR** where the court stated:-

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', thus proof on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the

other which evidence to accept, where both parties' explanations are equally unconvincing the party bearing the burden of proof will lose, because the requisite standard will not have been attained.

17. On further perusal of the record, it is affirmed that PW2 was not listed as a witness in the police abstract. Furthermore, PW3 admitted during cross examination that PW2 was not listed as a witness. The police constable did not present their investigation findings and PW3 stated that she was not the investigating officer nor did she visit the scene of the accident. Furthermore, the police did not produce an extract of the occurrence book to confirm that PW2 was a witness. Additionally, the respondent did not testify or call any witness to tell the court how the accident occurred. This court further takes cognizance of the fact that it did not see or hear the witnesses during the hearing in the trial court. Considering the evidence on record in totality, it is not clear how the accident occurred or who was to blame for the accident. The absence of clear corroborated evidence on either side made it challenging for the trial magistrate to assign full liability on the respondent. In the Court of Appeal decision in **Stephen Obure Onkanga vs Njuca Consolidated Limited (2013) eKLR**, the court held:-

Accordingly, in the instant appeal, as there was no concrete evidence to distinguish between the

blameworthiness or otherwise of the appellant or respondent, both should be held equally to blame.

18. It is therefore, my considered view that the learned magistrate correctly apportioned liability at the ratio of 50:50 between the parties. The said apportionment was based on the evidence adduced by the parties. As such, I find no reason to disturb the finding on liability.

19. I find no merit in this appeal and it is hereby dismissed.

20. For the reason that the parties emerged equal in the lower court judgment, I hereby order that each party meet their own costs of the lower court suit.

21. In regard to the appeal, the respondent shall have the costs.

22. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 19TH DAY OF MARCH 2026.

F. MUCHEMI
JUDGE

