

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CIVIL APPEAL NO. E135 OF 2024

ROSEMARY ATIENO ANGUGO.....
.....APPELLANT

VERSUS

MENENGAI OIL REFINERIES LTD.....
RESPONDENT

**(Being an appeal from the Judgment and Decree of Hon. J.Ndeng’eri (SRM)
in Naivasha MCCC No. 316 of 2020 delivered on 5th November, 2024)**

JUDGMENT

Background of the Appeal

1. By a Complaint dated 25th June 2020, the Appellant, in her capacity as the legal administrator of the estate of the late Philimon Okuku Angugu, instituted a suit against the Respondent seeking general damages under the Fatal Accidents Act and the Law Reform Act, special damages of Kshs. 371,925/-, costs of the suit, and interest thereon.
2. The Appellant’s case was that on 5th April 2020, the deceased was walking off the road along the Naivasha-Mai Mahiu Road when the Respondent, by itself, its servant, agent and/or employee, negligently drove motor vehicle registration number KCM 234S/Z E 8050, thereby knocking down the deceased and occasioning his

death. In the Plaintiff, the Respondent was described as the registered owner of the said motor vehicle.

3. In a Statement of Defence dated 7th December 2020, the Respondent denied the occurrence of the accident as described by the Appellant and averred that, if the accident did occur, the same was solely and/or substantially contributed to by the negligence of the deceased.
4. The matter proceeded to trial by viva voce evidence and in a judgment delivered on 5th November 2024, the learned Trial Magistrate dismissed the Appellant's case on the ground that she had failed to prove her case on a balance of probabilities.
5. Aggrieved by the said decision, the Appellant lodged the present appeal vide a Memorandum of Appeal dated 11th November 2024, seeking orders that the Judgment and Decree of the Trial Court be set aside, that the Respondent be found liable for the accident, that this court do assess the damages payable to the Appellant, and that the costs of the appeal be awarded accordingly.
6. The appeal is premised on the following grounds:

a) THAT the learned trial magistrate erred in fact and in law in failing to find that the Appellant had not proved her case on a balance of probabilities despite there being overwhelming evidence.

b) THAT the learned trial magistrate erred in fact and in law in disregarding the Appellant's testimony and in disregarding the evidence tendered by the Appellant during the hearing of the above suit.

c) THAT the learned trial magistrate erred in fact and in law in dismissing the Appellant's suit despite there being overwhelming evidence to hold the Respondent 100% liable.

7. Parties have canvassed the appeal by way of written submissions. Their respective submissions may be summarized as hereinunder;

Appellant's Submissions

8. The Appellant has made submissions on the issue of liability. She recounts that PW2 testified that, on the material date, he was aboard a matatu travelling from Karagita to Naivasha. Upon reaching the Maili Mbili area near the new KWS junction along the Mai Mahiu-Naivasha Road, he observed that ahead of the vehicle he was travelling in was the suit motor vehicle, which was in the process of overtaking. As a result, it allegedly lost control and knocked down a pedestrian who sustained severe injuries. It was his further testimony that, together with other passengers, they stopped and assisted the deceased, who was well known to him, to Naivasha Hospital, from where he was later referred to Nakuru Level 5 Hospital, where he succumbed to his injuries.

9. The Appellant also refers to the testimony of PW3, who produced the Police Abstract as PEXH 10. PW3 testified that the driver of the suit motor vehicle was travelling from the Mai Mahiu direction towards Naivasha town and, upon reaching the scene of the accident, struck a pedestrian who was crossing the road from the left to the right side.
10. The Appellant further refers the court to the testimonies of the Respondent's witnesses. DW1 stated that on the material day and time, he was driving the suit motor vehicle on his left lane as one faces Naivasha town, when suddenly a person rushed onto the road from the right side towards the left, and he hit him on the tank of the vehicle. The Appellant submits that DW1 further testified that he alighted to check what had happened and found people slaughtering a zebra with a sword and carrying away its meat. He also stated that the deceased and other pedestrians were running away from a KWS motor vehicle. DW2, on the other hand, testified that he carried out investigations into the accident eight months after its occurrence.
11. The Appellant contends that DW1 indicated that at the time of the accident he was travelling from Mombasa towards Nakuru and therefore ought to have been driving on the left side of the road as one faces Nakuru. However, on cross-examination, he affirmed that the accident occurred on the right side of the road as one faces

Naivasha, thereby suggesting that he was driving on the wrong lane. The Appellant submits that this corroborates the evidence of PW2.

12. The Appellant submits that only PW2 and the driver of the suit motor vehicle witnessed the accident, and that they gave conflicting accounts of how it occurred. She relies on the decision in **Matunda Fruits Bus Services Ltd v Moses Wangila Wangila & another [2018] eKLR** for the proposition that where there are two rival accounts of how an accident occurred; liability should be apportioned equally.

13. The Appellant further contends that liability between a driver in control of a potentially lethal machine and a pedestrian ought not to be equally apportioned. She relies on the decision in **Onyancha (Suing as the Personal Representative and Legal Administrator of the Estate of Beatrice Kerubo Nyakundi alias Kwamboka (Deceased)) v Makini (Civil Appeal Suit E048 of 2021) [2022] KEHC 9826 (KLR)**, where the Court held:

“Having said so, the court ought to consider which parties are involved in an accident. The liability between a driver of a Motor Vehicle and a pedestrian cannot be equated unless it is so crystal clear that a pedestrian put himself or herself in a position that a driver could not be anticipated such as when a pedestrian jumps into a road on a suicide mission...Taking all

the circumstances of the accident into consideration, this court found and held that both the deceased and the Respondent were negligent but because the Respondent was in charge of a motor vehicle which could be deemed to have been a lethal weapon, this court found and held that apportionment of liability at 65%-35% against the Respondent and the deceased respectively was appropriate as the point of impact was not discernible from the evidence that was adduced in court. The fact that the deceased landed in the middle of the road suggested that she was not on the side of the road. If the accident occurred off the road, the deceased would probably have landed on the side of the road.”

14. The Appellant submits that should this court finds that the deceased contributed to the occurrence of the accident, such contribution ought to be assessed at 20%, with the Respondent bearing 80% liability.
15. On quantum, the Appellant submits that the award proposed by the trial court, had the suit succeeded, was fair and reasonable and should be upheld.

Respondent's Submissions

16. The Respondent contends that the Appellant failed to prove her case on a balance of probabilities. It asserts that, based on the totality of the evidence and as observed by the Trial Court, the

deceased was crossing the road while running away from Kenya Wildlife Service (KWS) officers after allegedly poaching zebra meat, and in the process rammed into the Respondent's motor vehicle.

17. On the issue of whether the Trial Court disregarded the evidence tendered by the Appellant, the Respondent submits that the Court properly evaluated the testimony of PW2 and found it questionable. In particular, PW2 stated that he was travelling in a matatu behind a trailer when the said trailer allegedly overtook another vehicle and knocked down the deceased. The Respondent submits that the Trial Court rightly questioned how PW2 could have witnessed the accident clearly, given that a trailer is a long vehicle that would likely have obstructed his view.
18. The Respondent further argues that there was no overwhelming evidence to warrant a finding of 100% liability against it. It points out that PW3 stated on cross-examination that the point of impact was in the middle of the road. The Respondent also contends that, contrary to the Appellant's submissions, DW1 testified that the accident occurred on the right side of the road as one faces Naivasha, and that this testimony does not corroborate the evidence of PW2.
19. The Respondent therefore urges this Court to uphold the findings and decision of the Trial Court.

Issues, Analysis and Determination

20. Having carefully considered the Record of Appeal and the rival submissions filed by the parties, it is evident that the gravamen of this appeal turns principally on the issue of whether the appellants case was proved on a balance of probabilities on liability against the respondent.

21. This being a first appeal, the court is guided by the well-settled principles enunciated in **Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123**, where it was held:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, this court must reconsider the evidence, evaluate it independently 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...”

22. A first appellate court will only interfere with findings of fact where it is demonstrated that the trial court acted on a misapprehension of the evidence, failed to consider relevant factors, or where the findings are plainly inconsistent with the weight of the evidence on record. **See Mbogo & Another v Shah [1969] EA 93.**

23. In the present matter, the trial court dismissed the Appellant’s claim on the ground that liability had not been established on a

balance of probabilities. It is trite that in civil proceedings the standard of proof is on a balance of probabilities. In **James Muniu Mucheru v National Bank of Kenya Ltd, Civil Appeal No. 365 of 2017 [2019] eKLR**, the court stated that the duty of the court is to determine which of the competing versions is more probable. A proof on a balance of probabilities is achieved when the court gets satisfied that the occurrence of an event was more likely than not.¹

24. In the instant case, the only eyewitnesses to the accident were PW2 and DW1. PW2 testified that he was a passenger in a matatu travelling towards Naivasha town and was seated in the front seat. According to him, there was a Toyota Fielder ahead of their matatu. He stated that at Maili Mbili stage, a trailer attempted to overtake the said Toyota Fielder and, in the course of that maneuver, allegedly lost control and struck a pedestrian who was on the right side of the road. The trial court expressed doubt as to how PW2 was able to clearly observe the occurrence of the accident despite another vehicle being ahead of the matatu in which he was travelling.

25. On his part, DW1 testified that he was driving the suit motor vehicle on the left side of the road from Nakuru towards Mombasa. This aspect of his testimony corroborates PW2's evidence that the vehicle was travelling on the left side of the road. During cross-

¹ See **Re H and Others (Minors) [1996] AC 563**

examination, DW1 further testified that the deceased crossed the road from the right-side heading to the left. He explained that the deceased suddenly emerged from behind a vehicle that was approaching from the opposite direction, jumped onto the road and collided with the tank of the suit motor vehicle. This account agrees with the evidence by PW3, who testified that the deceased was running across the road from the right to the left when he collided with the suit motor vehicle.

26. DW1 also testified that the deceased was carrying a zebra carcass and a sword, and that shortly after the accident he observed officers from the Kenya Wildlife Service (KWS) in the vicinity, leading him to conclude that the deceased might have been fleeing from them. PW2 similarly acknowledged during cross-examination that KWS officers were near the scene, although he later stated that they did not approach the scene of the accident.

27. If indeed the driver of the suit motor vehicle had been overtaking, as suggested by PW2, and the deceased struck himself on the trunk of the vehicle, his body could have been thrown off the road on the right. That he hit himself against the trunk of a vehicle on its lane on the left explains the resting of the deceased body on the right-hand side of the road as one faces Naivasha.

28. The trial court believed the defence evidence more because than that of PW2 was materially inconsistent on the critical aspects

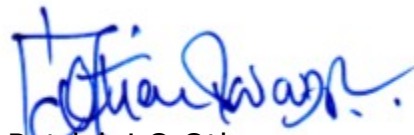
of how the collision occurred. While he, PW2, initially stated during cross-examination that the deceased was hit while outside the road where KWS officers were nearby, he later stated during re-examination that the deceased was struck on the right side of the road. These inconsistencies weaken the assertion that the suit motor vehicle was overtaking at the time of the accident.

29. The evidence on record more plausibly suggests that the deceased abruptly attempted to cross the road from the right side to the left, possibly while being pursued by the Kenya Wildlife rangers, and did so without exercising due care or maintaining a proper lookout, and in the process collided with the tank of the suit motor vehicle, which was travelling on its correct side of the road. This would explain why the body of the deceased was found on the right side of the road, as indicated by PW2 during re-examination.

30. In the circumstances, the court is not satisfied that negligence on the part of DW1 was established on a balance of probabilities by the appellant. The appellant simply failed to discharge his burden of proof with the consequence that he invited the fate of failure for the suit. On that basis, the finding of the trial court cannot be faulted.

31. Accordingly, the appeal lacks merit and is hereby dismissed with costs.

Dated, signed and delivered at Lodwar this 6th day of March 2026



Patrick J O Otieno

Judge