



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL APPEAL NO. E078 OF 2023

FAITH CHELANG'AT & KENNETH KIPKOECH NG'ENO
(Suing as the Legal Representative of the Estate of
SIMON KIPROB NG'ENO (deceased)
..... **APELLANTS**

-VERSUS-

KENYA HORTICULTURAL EXPORTERS (1977)
LIMITED **1ST**
RESPONDENT
PETER MWANGI MATHENGE **2ND**
RESPONDENT

*{(Being an Appeal from the Judgement of the Chief Magistrate's
court at Nakuru (Hon. P. W. Nyotah - SRM) in CMCC No. E305 of
2020, delivered on 31.03.2023)}*

JUDGEMENT

Grounds of appeal and reliefs sought

1. The Appeal before me is against the trial court's Judgement on liability for the claim in which the court apportioned responsibility for the tortious act from which the cause of action arose equally in the ratio of 50% to 50% among the parties.
2. Aggrieved by the Judgement, the Appellants, the Plaintiffs in the suit, filed a Memorandum of Appeal dated 28.04.2023 upon two grounds, namely,
 1. ***THAT the Learned Trial Magistrate erred in law and fact by determining contributory negligence of 50% by the Appellants against the weight of evidence.***
 2. ***THAT the learned trial magistrate erred in law and fact by failing to consider a sketch plan produced by the Appellants.***
3. It is proposed to ask the court to allow the Appeal; set aside the trial court's Judgement on liability and and substitute it with its own Judgement finding the Respondents wholly liable, and that the costs of the Appeal be provided for.

Guiding legal Principles

4. This being a first appeal I am required to reconsider the evidence adduced, evaluate it and draw my own conclusions bearing in mind that I did not hear and see the witnesses who testified{ (see **Selle & Another vs Associated Motor Boat Company Ltd & Others [1968] EA 123** }. The Court of Appeal for East Africa in **Peters vs Sunday Post Limited [1958] EA 424** underscored the same principles delivering itself thus:

“i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

ii. 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 her; and

iii. 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.”

Background to the Appeal

4 As noted hereinabove, the Appellants are challenging the trial court's Judgement on liability for the claim only. The suit in the lower court arises from a road traffic accident that allegedly occurred on 24.09.2020 on the Nakuru-Njoro-Mau Narok road at Mauche area when the 1st Respondent's motor vehicle registration number KCE 508 Y driven by the 2nd Respondent allegedly lost control due to negligent driving thereby knocking down the deceased who suffered fatal injuries. The Appellants lodged the claim in the lower court praying for general damages under both the **Fatal Accidents Act and the Law Reform Act**, special damages of Kshs. 176,525 and the costs of the suit and interest.

5 The Respondents jointly entered appearance and filed defence to the suit. While admitting occurrence of the accident they traversed the claim of negligence attributed to them, putting the Appellants to strict proof. The Respondents instead averred that the

deceased was wholly to blame for carelessly crossing the road. The trial court was therefore urged to dismiss the suit with costs.

6 The Appellants underscored the averments in the suit through oral evidence of the 1st Appellant and 2 other witnesses.. The 1st Appellant adopted her undated statement recorded with her Advocates and filed in court as her evidence. She told the court that the deceased who was her husband was negligently knocked down as he rode on the motorcycle along the road. She didn't, however, witness the accident.

7 PW2 told the court that he witnessed the accident that occurred on the material date at 4 pm. He was behind the accident motor vehicle which he said was driving in high speed. The vehicle knocked the deceased at Mauche Trading Centre and stopped on the side of oncoming vehicles. Accordig to PW2 the deceased died on the spot.

8 A police officer (PW3) attached to Njoro Police Station tendered a police abstract report of the accident issued

to the victim's relatives. The witness informed the court that he was the accident's Investigating Officer and had visited the scene. He found the accident vehicle parked on the lane of oncoming vehicles. The victim's body lay 88.6 meters from the vehicle.. There were no visible skid marks at the scene, suggesting that there was no attempt to avoid hitting the scene by applying brakes, added the witness. Police investigations are therefore said to have shown that the vehicle caused the accident. By consent of the Parties a sketch plan of the scene prepared by the Officer was produced in evidence.

9 The 2nd Respondent and an employee of the 1st Respondent as Turnboy (DW2) also offered evidence in the lower court. The former denied responsibility for the accident. He refuted the evidence that PW 2 witnessed the accident saying that he never saw him at the scene at the material time, but that he had appeared much later. According to the 2nd Respondent it was someone else who witnessed the accident. He further denied that there was a Market Centre or School at the scene of the

accident, telling the court that he had already passed them when the accident occurred. The 2nd Respondent claims to have only seen the deceased when he was in the middle of the road carelessly crossing from the left side to the right. He tried to swerve to avoid colliding with him but was unsuccessful.

10 DW 2 fully supported his testimony.

11 In apportioning liability for occurrence of the accident in the ratio of 50%:50% against the Respondents, the learned trial magistrate observed *inter alia* that all the witnesses appeared to give credible evidence as to how the accident occurred. From the evidence of the witnesses, the trial court thought that it was not possible to tell which part of the vehicle pulled the deceased to the middle of the road and how he was run over by the vehicle's tyre. The learned trial magistrate further noted that a sketch plan of the scene purportedly drawn up by PW 3 was not exhibited in support of the Appellants' case.

Analysis and determination

10. I have perused the record and considered the parties' submissions in the lower court and in this Appeal. The Appellants submit that the issue of liability was not determined according to the applicable standard of proof on a balance of probability.
11. In the case of **Kanyangu Njogu vs Daniel Kimani Maingi (2000) eKLR** and **William Kabogo Gitau vs George Thuo & 2 Others (2010) 1 KLR 526** it was opined that where the court is to decide between two probabilities a balance of probability is shown if there is evidence that one probability is more probable than not. The same legal position was taken in the case of **Palace Investments Ltd vs Geoffrey Kariuki Mwenda & Another (2007) eKLR**.
12. The judicial determination in **Naftaly Muiruri Macharia vs Samuel Maina & Another (2018) eKLR** and **Janerose Auma Ochumba vs John Nyangi & Another (2021) eKLR** is also relevant and reiterates the same principle.

13. The court is further guided by the case of **Ribiru vs Ndung'u (suing on behalf of the Estate the Late Joram Ndung'u Mwaniki) & 2 Others (Civil Appeal No. 37 of 2023) (2024) KEHC 339 (KLR) (25 January 2024) (Judgement)** wherein it was observed that interference with a trial court's Judgement on liability for a claim can only happen in exceptional circumstances, as in instances where wrong principles are invoked or proper legal principles are not taken into account.

Determination

14. I agree with the Appellant's evidence and submissions on the authorities cited that the Appellants proved the Respondents' liability on a balance of probability. PW3's evidence corroborates that of PW2. The finding by the trial court that the sketch plan of the scene of the accident was not tendered is not borne out by the record. That sketch plan was in fact produced by consent on 25/1/2023. There is therefore no basis on the

evidence and in the circumstances of the case on which to ascribe blameworthiness on the deceased.

15. The upshot is that the Appeal is allowed. The lower court's judgement apportioning liability among the parties in the stated ratio of 50:50 is set aside and substituted with this court's Judgment adjudging the Respondents wholly liable, jointly and severally, for the tortious act that caused the road accident from which the cause of action arose. The Appellants are granted the costs of the Appeal.
16. Judgement accordingly.

**J.M NANG'EA,
JUDGE.**

Judgement delivered virtually this 8th day of May, 2026.

In the presence of:

The Appellants' Advocate, Ms Oganga for Ms Sitati.

The Respondents' Advocate, Ms Lang'at.

The Court Assistant, Jeniffer.

**J.M NANG'EA,
JUDGE.**

Original