



REPUBLIC OF KENYA



KENYA LAW
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**Olunga v Komen & another (Civil Appeal 26 of 2022)
[2025] KEHC 5526 (KLR) (30 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5526 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CIVIL APPEAL 26 OF 2022**

RK LIMO, J

APRIL 30, 2025

BETWEEN

RICHARD OSUNDWA OLUNGA APPELLANT

AND

JANE KOMEN 1ST RESPONDENT

DOROTHY JERUTO 2ND RESPONDENT

JUDGMENT

1. This is an appeal against the judgment of Hon. M.I.G Moranga Senior Principal Magistrate delivered on 22/8/2022 vide Kitale CMCC No.41 of 2019. In that case the appellant was sued by the respondents who were personal representatives of the estate of the late Allan Tumwet Cherop (herein after to be referred to as deceased). The cause of action arose from a fatal road accident that occurred on 1/2/2010 along Kitale-Webuye road at around 8pm when the appellant's motor vehicle Reg No.KCJ 899N (herein after to be referred to as the suit motor vehicle for ease of reference), hit the deceased a pedestrian while trying to cross the road.
2. The respondents blamed the appellant for negligence and for causing the accident while the appellant laid blame on the deceased for jumping onto the road while intoxicated and causing the accident.
3. The trial court evaluated the evidence tendered by both the respondents and the appellant and concluded that the appellant was negligent by over speeding at a shopping centre where the speed limit was 50K.P.H. and was held 100% liable as the court found no contributory negligence from the deceased.
4. On quantum, the trial court made the following award;
 - i. Pain and suffering – Kshs.100,000/-
 - ii. Loss of expectation of life - Kshs.100,000/-



iii. Loss of dependency - Kshs.11,696,608/-

iv. Special damages - Kshs.551,600/-

Total -Kshs.12,438,200/-

5. The appellant felt aggrieved and filed this appeal which appeal is only on liability. The appellant faults the trial court for finding that he was 100% liable for the accident contrary to the weight of evidence on record.
6. In his written submissions dated 5/5/2023, the appellant urges this court to re-evaluate the evidence tendered at the subordinate court with a view to satisfying itself whether the trial court's decision was well founded.
7. The appellant submits that the evidence at the trial as per the record demonstrates that he was not to blame for causing the accident. He points out that the 1st respondent's (PW1) evidence in respect to liability was not positive because she did not know who caused the accident.
8. According to the appellant the deceased caused the accident due to intoxication. He relies on the medical evidence (DExhibit 4) which indicated that the deceased at the time of accident was drunk and therefore failed to have a better judgment of the road and his duty of care arguing that the duty of care applies to both on the pedestrian as well as a motorist on the road. In that regard, he relies on Njenga -vs- David Maina Mbugua (2019)eKLR.
9. The appellant submits that the post mortem on the body of the deceased after the accident revealed that the deceased had liver cirrhosis.
10. The appellant submits that the investigating officer PC Vincent Nyakundi Nyamari (PW4) testified in chief that he blamed the driver for driving at 70KM/h in a shopping centre but later in the traffic case he blamed the pedestrian. He submits that he was acquitted in the traffic case and wants this court to consider the traffic case in evaluating the evidence tendered.
11. According to the appellant, he was driving carefully when someone suddenly jumped onto the road after Chalicha market. He submits that he tried to swerve but due to an oncoming vehicle he hit the deceased and took him to hospital.
12. He maintains that the accident happened after shopping centre at Chalicha junction and that the accident occurred due to lack of fair judgment on the road by the deceased.
13. He faults the trial court for relying on the evidence of a single witness (PW5) who saw the deceased alighting from a Nissan Matatu. He contends that the evidence of PW4 did not corroborate the evidence of PW5 with respect to the scene of the accident being well lit at the time.
14. The appellant further faults the trial court for not visiting the scene of the accident to ascertain if the accident occurred at the junction or whether there are nearby shops.
15. He further faults the trial court for not considering the fact that the deceased was intoxicated at the material time. He contends that the deceased was incoherent when he tried to speak as he was being rushed to hospital and that the incoherence indicates that he was drunk at the time.
16. The respondents have opposed this appeal through written submissions dated 29/1/24 done through their learned counsel Kiboi & Co Advocates.
17. The respondents point out that after the accident the DPP recommended an inquest which was done vide Kitale CMC Inquest No.6 of 2019. They submit that after the inquest, the court recommended



that the appellant be charged with a traffic offence which was done vide Kitale CMC Traffic Case No.E564/21.

18. The respondents point out that the investigating officer, CPL Vincent Nyakundi testified on three occasions regarding the outcome of his investigations about the same accident to wit;
 - a. In Kitale CMC Inquest No.6/2019.
 - b. Kitale CMCC NO.41 of 2019 and
 - c. Kitale CMC Traffic Case No.E564/21.

The respondents submit that in the inquest and civil matter, the said investigating officer was consistent and emphasized that the appellant was to blame for the accident but in the traffic case, the respondents submit that the same investigating officer made an about turn and blamed the deceased for causing the accident.

19. The respondents submit that the investigating officer (PW4) was estopped under Section 120 of the Evidence Act from giving evidence in the traffic case that was inconsistent and at variance with the evidence he earlier tendered on oath adding that the about turn borders on criminality in light of Section 11 of Oaths and Statutory Declaration Act which outlaws a person from giving false evidence on oath.
20. The respondents blame the appellant for colluding with the investigating officer to defeat justice pointing out that the medical evidence was changed as an afterthought. They submit that the evidence given by Dr. Dennis Nanyingi in both the inquest and civil case showed that the cause of death of the deceased was hemorrhage secondary to severe pelvic injury and closed fracture femur. They contend that the doctor testified that “No toxicology specimen from the body was taken”.
21. They further contend that in Traffic Case, a different doctor to wit Dr. Alex Barasa testified and gave what the respondents consider contradictory evidence by indicating that the cause of death was alcohol related. They fault the doctor for relying on hearsay evidence with respect to report that the deceased had come from a drinking spree.
22. The respondents fault Dr. Barasa for going outside his purview by giving his opinion on who was to blame for the accident when he did not witness the accident.
23. The respondents submit that the evidence of Dr. Barasa and the investigating officer during the traffic case proceedings should be treated with caution adding that the appellant got acquitted in the traffic case because of the evidence of the investigating officer and a different doctor testified rather than the author of the medical documents. They contend that the same led to miscarriage of justice.
24. It is the respondents’ case that the inconsistencies and contradictions apparent in the traffic case shows that the appellant’s case is not credible. They rely on *Sate Ride Limited –vs- James Anyega (2010)eKLR* where the court found that so long as contradictions and inconsistencies of testimonies tendered in a case do not go into the root of a case or credibility they are tolerable. In their view the contradictions cited above goes into the root of the appellant’s case.
25. They submit that the trial court made a positive finding in its judgment that the deceased died of massive internal hemorrhage due to severe injuries caused by the road traffic accident and the trial court found further that the appellant was speeding going by the evidence of the investigating officer that the appellant driving in a shopping centre ought to have been doing 50 K.P.H or below.
26. They submit that the appellant as the driver had the duty of care to other road users and responsibility to have proper look-out for any pedestrian who may cross the road unexpectedly. They rely on *Zarina*



Akbarali Shariff and another –vs- Noshir Pirosetha Sethna and Others (1963) E.A 239 where the court held inter alia that it is not correct that drivers are entitled to drive on the assumption that other road users whether drivers or pedestrians would behave with reasonable care and that is common experience that many do not and every driver should anticipate that. They further rely on Masembe –vs- Sugar Corporation & Anor (2002) 2 EA 434 where the Supreme Court of Uganda held a similar view. They have further cited the following authorities to buttress their positions:

- a. Mutua –vs- Mwariki (193)KLR
 - b. Mwadime –vs- Yamani & Anor (1975)E.A 246
 - c. Augustine Muriungi –vs- Moffat Mwandiki (2019)eKLR
 - d. Livingstone Otundo –vs- Naima Mohammed (a minor suing through next friend Mohammoud Ali (1990) eKLR.
 - e. PW –vs- Peter Muriithi Ngari (2017) eKLR where the court held that both the drivers and pedestrians owe each other duty of care.
27. The respondents submit that just because the appellant was acquitted in the traffic case does not automatically mean that he cannot be held liable in a civil suit and seeking a remedy. On this score they rely on the case of Geoffrey Mwangi Muya –vs- David Mutahi Wachira.
 28. They further rely on the case of the Supreme Court of India in Maharashtra State Road Transport Corporation –vs- Dilip Uttam Jayabhay (2022) where the court held that an acquittal in a criminal trial has no bearing or relevance on the disciplinary proceedings as standard of proof in both cases are different and the proceedings operate in different fields and with different objectives.
 29. The respondents have also submitted on quantum of damages but the issue is not relevant in this appeal as the appeal is basically on liability only.
 30. They contend that the trial court exercised its discretion properly by apportioning liability at 100% against the appellant and that this court should not interfere with the same because it has not been demonstrated that there was an error in principle or that the apportionment was manifestly excessive in the circumstances.
 31. This court has set out the appellant’s case as well as the respondents’ response. As observed above this appeal is only on liability and the only issue for determination is whether the trial court was properly directed when it found the appellant 100% liable for the accident.
 32. This court will first re-examine the circumstances surrounding the accident by re-evaluating the evidence tendered with a view to determining what or who caused the accident and who was to blame and to what extent.
 33. The record from the trial in this matter shows that there was one eye witness to the accident. This was one Johnstone Wafula (PW6) who stated that he was a boda boda rider based at Chalicha Stage. He told the trial court that he saw the deceased whom he referred to as “Daktari Allan Cherop’ alight from a Matatu and that he was in the process of crossing the road when an ‘Over speeding’ vehicle, (according to him) coming from Kitale direction toward Webuye, knocked him down. He stated that the driver stopped approximately 30 metres from the point of impact and went back to where the deceased was lying.
 34. The other witness whose evidence was relied upon by the trial court was the investigating officer PC Vincent Nyakundi Nyamari who stated that he visited the scene of accident and noted that the scene



was at Chalicha Junction which was a shopping centre. He stated that he interviewed the driver who told him he was driving at 70KM/h when a pedestrian suddenly emerged from the left side attempting to cross to the right side and due to close proximity he knocked down the pedestrian. The investigating officer blamed the driver for exceeding 50KM/h which is the speed limit of driving through or near a shopping centre.

35. The appellant's version of the events is that the accident occurred at around 8pm a few metres after Chalicha market at Chalicha junction. He told the trial court that the pedestrian (deceased) jumped onto the road from the left and that since there was an on-coming lorry he could not swerve to the right and knocked down the deceased. He stated that after knocking the deceased he stopped and parked the car and went back to check and found the deceased injured on the right hand, right head and had leg injuries.
36. He confirmed that he was driving at 70 KM/h and according to him he had passed the shops by about 20 metres. He stated that he stopped 10-15 metres from the point of impact.
37. The appellant laid blame on the deceased on account of being drunk and that he staggered onto the road. In this appeal the appellant has submitted extensively on that point and has relied on traffic proceedings that were a subject of additional evidence adduced in this appeal. The traffic proceedings in Kitale CMCC Traffic Case No.E564/21 were not tendered at the trial in the subordinate court but were adduced in this appeal after the appellant successfully applied to be allowed to adduce them.
38. This court has perused through those traffic proceedings and in summary what can be deduced is that the appellant was acquitted for a traffic offence on 14/2/23. It is not certain to tell from the proceedings what the nature of the traffic charge was preferred against the appellant but what is certain is that the charge was preferred after the court vide Kitale CM's Court Inquest No.6 of 2019 recommended that the appellant be charged with a traffic offence in relation to the incident where the deceased was knocked down by the appellant.
39. The appellant in this appeal has ridden on the traffic proceedings to fault the finding by the trial court that found him 100% to blame. But the fact that one is acquitted in a traffic case does not automatically mean that he cannot be found liable in civil suit over the same accident. This is because the threshold required in a criminal case is quite different from the threshold required in civil suits. In traffic cases just like any other criminal case, the standard is beyond reasonable doubt while in a civil suit the standard is on a balance of probabilities. The cited Indian decision in the Supreme Court of India in Maharashtra State Road Transport Corporation –vs- Dilip Uttam Jayabhay (2022) as well as Geoffrey Mwangi Muya's case (supra) is explicit on that score.
40. The appellant has also brought out the issue of intoxication of the deceased as a factor that in his view contributed to the accident. While I agree with the appellant that intoxication can impair one's judgment including assessing potential for danger/risk, it is imperative that a person alleging must show the nexus between level of intoxication and the causation of an accident. In this case, the appellant has gone some length in establishing that the deceased was intoxicated and that he smelled alcohol and incoherent when he was rushing him to hospital. But the level of alcohol in his system was not established and even in the traffic proceedings the doctor who testified did not give any indication on the level of intoxication of the deceased. There were no tests done to establish that fact and it would be speculative to find that just because the deceased had taken some alcohol he was to blame for the accident. The appellant needed to adduce more evidence to persuade the trial court that owing to the drunken state, the deceased was unable to have proper judgment or have any situational awareness of the risk he faced crossing the road.



41. This court is persuaded by the respondents' contention that the doctor who testified in the traffic case went beyond his call of duty by stating that the deceased had come from "a drinking spree and was staggering". There was no corroboration or evidence to support the doctor's factual opinion.
42. Another issue that has cropped up in this appeal particularly with the additional evidence, is the evidence of investigating officer one PC Vincent Nyakundi Nyamari. The said officer testified as PW4 at the hearing of civil case giving rise to this appeal. He also testified in the inquest case vide Kitale Inquest No.6 of 2019 and in the Traffic Case vide Kitale CM's Court Traffic Case No.E564/21. I have perused through the testimonies of the said officer on the three occasions and if there if there is a witness to be described as a "witness for hire" the investigating officer through his conduct perfectly fits the bill because how else can one explain a witness, no less a police officer at that, who takes a particular position in a case, particularly as to who was culpable for causing the accident, then take a diametrically the opposite direction in another forum over the same case and set of circumstances?
43. While many things can be attributed to such drama or conduct by police officers or any other witness for that matter, what is certainly clear is that credibility of such a witness is punctured beyond redemption. This is because of the awkwardness of the situation. Which side of his story is believable now? He was clear at the trial in the subordinate court in the civil matter herein that, according to the investigations he carried out, the appellant was to blame for causing the accident. This is what he said in examination in chief;
- "After my investigations I blame the driver for causing death but when it went to ODPP they proposed an inquest be opened".
- He proceeded thus.....
- ".....Chalicha junction is a shopping centre expected speed is 50KM/h. He (appellant) reported he was at 70 KM/h. The driver was to blame. I considered it was trading centre..... I found the driver to have caused the accident".
44. The same officer tendered in the traffic case as PW5 and this is what he said in part;
- "....The person to be blamed for accident was the pedestrian. The pedestrian did not take due care. I blame the pedestrian. He was crossing without due regard to other road users.....the pedestrian was also drunk from the medical evidence".
45. When the discredited officer testified in the Traffic Case, on 4/1/23 the trial court had no idea about the testimony he had earlier given on 13/9/2021 in the civil matter and the inquest.
46. In light of the above dramatic inconsistency and contradiction by the investigating officer this court finds that the said investigating officer lacked any credibility and his evidence in both the civil and the traffic case lacked any probative value to either the appellant or the respondents herein. His evidence therefore is disregarded by this court in determining this appeal.
47. The respondents' case at the trial in so far as liability is concerned hinged on the evidence of an eye witness and the now discredited investigating officer. The eye witness was one Johnstone Wafula (PW6) who stated that he was a boda boda rider based at the scene of the accident and that he witnessed the deceased alight from a matatu before crossing the road and that as he was crossing he was hit by



speeding vehicle which was heading to Webuye direction. To his credit, the witness gave exactly the same testimony in the traffic case. In the civil matter this is what he said under cross-examination;

“.....it was almost 8pm. It was dark. I saw what happened. The stage has lights. I did not see the deceased stagger on the road. He did not jump onto the road suddenly. He alighted from a Nissan.....the driver of the other vehicle from the other direction was at high speed.....”

In the traffic case, he testified as PW2 and this is what he said in chief;

“.....I was waiting for a customer.....I was able to see a black Nissan drop a medical officer Allan (dcd).....as he crossed a black vehicle came from behindthe vehicle was on high speed.....it hit the deceased. It stopped then came back.....he took the deceased to hospital. I assisted to put the deceased in the vehicle.....”

48. When one compares the testimony of the eye witness (PW1) with the appellant’s own testimony you get the hint that there was credibility on what he stated. The appellant stated in part;

“I was driving my car.....from Kiminini towards Webuye. I was a few metres from Chalicha market..... few minutes to 8pm.....someone jumped onto the road. I swerved to my right but there was an oncoming lorry. I unfortunately hit him. I parked on the side of the road. I went back and found he was bleeding..... with members of the public I put him in the vehicle.....we took him to Kitale County Hospital”.

When cross-examined the appellant stated thus;

“I was driving at 70 KM/hthe accident took place at Chalicha Junction. A few metres after the Chalicha junction”.

49. It is apparent from the judgment of the subordinate court that the trial court took into consideration the evidence placed before it including the evidence of the now discredited investigating officer but by then, the trial court had no idea about the credibility of the investigating officer and what he was going to say in the traffic matter.
50. However even disregarding the evidence of the investigating officer for the afore-stated reasons, this court finds that the evidence tendered indicates that the appellant carried much of the blame for driving at a speed of 70 KM/h at the location or the vicinity of a shopping centre. On his own account he says he stopped at between 10-15 metres after knocking down the deceased. The eye witness estimated the distance to be about 30 metres. The distance between the point of impact and where the appellant stopped going by the appellant’s own account and the eye witness, (even disregarding the evidence of the discredited investigating officer) does indicate that the appellant was driving at a speed too high in the circumstances.
51. The appellant has strongly submitted that this court should evaluate the evidence of the trial court in the civil matter as well as the traffic matter but because the evidence of the discredited investigating officer was central in the traffic matter, this court finds that the traffic proceedings are not helpful in determining the critical question of liability in this appeal.
52. This court has perused through the evidence tendered at the trial court and upon re-evaluation of the same and in particular the post mortem report tendered as Exhibit 2, I find that the cause of death



was massive internal hemorrhage and severe pelvic injury and closed fracture femur. The injuries were caused by the accident no doubt.

53. I have also considered the scenario which must have unfolded at the scene from the evidence on record. The question arising is did the deceased also have a duty of care to himself and other road users? The answer to that is positive and I am well guided by a decision cited by the respondent in *Livingstone Otundo –vs- Waima Mohammed* (a minor suing through her next friend Mohammad Ali (19990)eKLR. the court made the following relevant observation to the above question;

“.....the appellant’s duty of care should have been judged by what ought reasonably to have anticipated in this regard and consider what next course of action he would have taken to ensure that no accident occurred.....”

54. The other reason why I find that a pedestrian should be also expected to have a level of duty to care for his own safety is because I am fully persuaded by the decision of *PW –vs- Peter Muriithi Ngari* (2017)eKLR where the court observed the following;

“The driver and pedestrian owe a duty of care to others as road users. The appellant should be vigilant enough to observe the wider view of the road including any intervention from both sides of the road, and the respondent to observe the old age traffic practice of “Look right, look left, then look right again before crossing the road”.

I subscribe to that old school adage basically for 2 reasons;

- i. In Kenya, the cardinal rule in respect to lanes is that drivers are required to keep to their left unless overtaking (when it is safe to do so) or swerving to avoid an accident.
 - ii. Because vehicles in Kenya keep to the left when a pedestrian intends to cross a road, he must for safety check at his right first because that is where an immediate risk can occur. The left side of the road involves vehicles traveling from the opposite direction and will invariably have a better chance to see a pedestrian crossing from their right rather than those from their left because of proximity.
55. It is therefore advisable and indeed expected that a diligent pedestrian will first look out for any approaching vehicle from his immediate right, then left then right again before crossing. If all pedestrians were to observe this golden rule, there would probably be few accidents caused as a result of attempts to cross the road.
56. This court finds that given the circumstances of how the accident happened and in particular the position of where the deceased was knocked down (on the left side of the road as one faces Webuye from Kiminini) it is apparent that the deceased may not have taken a precautionary measure after alighting from a matatu. Had he done so perhaps even a speeding motor vehicle in a shopping centre might not have knocked him down. It is to that extent that I find the trial court erred by not factoring that, in determination of liability.
57. This court upon re-evaluation finds that the appellant being in control of a potentially moving risk in form of a car, was expected to be more careful and mindful of other road users. In particular at that hour and place, it is expected that people are likely to cross from one end to the other because it was shopping centre. This court after taking everything into consideration finds that the appellant was 70% liable while the deceased shouldered 30% liability.
58. In the premises this court sets aside the finding of the trial court on liability. The appellant is held 70% liable while the deceased shoulders 30%. This appeal therefore succeeds only to that extent.



The appellant did not challenge the assessment of quantum of damages so the same is left undisturbed. The respondents will pay 30% costs in this appeal but the appellant will pay 70% costs in the lower court.

DELIVERED, DATED AND SIGNED AT KITALE THIS 30TH DAY OF APRIL, 2025.

HON JUSTICE R.K. LIMO

KITALE HIGH COURT

Judgment delivered in open court

In the presence of;

Abok for the appellant

Kiboi for the respondent

Court assistants – Duke/Chemosop

