



**Kutswa & another (Suing as the Legal Representatives of the Estate
of John Shitandi Mumachi (Deceased)) v Okeka (Civil Appeal
E036 of 2023) [2025] KEHC 7125 (KLR) (29 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7125 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E036 OF 2023
PJO OTIENO, J
MAY 29, 2025**

BETWEEN

BENARD MUMACHI KUTSWA 1ST APPELLANT

WELE MANGO 2ND APPELLANT

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF JOHN
SHITANDI MUMACHI (DECEASED)**

AND

PASCAL WABUKO OKEKA RESPONDENT

*(Being an appeal from the Judgment of Hon. M.A.Onyango (SRM) in
Mumias SPMC Civil Suit No. 12 of 2020 delivered on 2nd March, 2023)*

JUDGMENT

Background of the Appeal

1. By way of a plaint dated 2nd March, 2020, the appellants sued the respondent for general damages, special damages, costs of the suit and interest. The appellant's case was that on 29th July, 2018, the deceased was lawfully riding Motor Cycle Registration Number KMDC 021R along Sabatia Khumsalaba road when on reaching Shikunga area, Motor Vehicle Registration Number KAK 013E registered in the name of the respondent was negligently and recklessly driven thus knocking the deceased as a result of which he sustained fatal injuries. The plaint set out the particulars of negligence, particulars of dependants as well as the particulars of special damages.
2. In a statement of defence dated 6th April, 2021, the respondent denied the appellants' entire claim. He denied being the registered owner of the alleged offending motor vehicle, that an accident occurred



as pleaded and on the alleged date together with the particulars of negligence, dependants and special damages then invited strict proof from the appellant.

3. It was then pleaded in the alternative that if any accident ever occurred as alleged in the plaint, then the same was solely caused by or substantially contributed to by the deceased who was negligent in the manner he drove and managed motor cycle reg. no. KMDC 021R thereby permitting it to collide with or ram onto the respondent's motor vehicle. The particulars of negligence were then elaborately set out. It was then pleaded that the no notice before action was served and that the suit was incurably defective, incompetent and unmaintainable for failure to comply with mandatory dictates of the law and thus deserved being dismissed with costs
4. In a reserved judgment of the trial court delivered on 2nd March 2023, the court found and held that the appellant had failed to prove that fatal injuries occasioned on the deceased were as a result of the respondent's negligence and proceeded to dismiss the suit but ordered that each party bears their own costs.
5. That decision aggrieved the appellants who then lodged a memorandum of appeal dated 13th March 2023 seeking to have the appeal allowed with costs and the entire judgment of the trial court set aside and, in its place substituted a judgment allowing the suit with costs. The appeal faults the lower court on grounds that: -
 - a. That the learned magistrate erred in law and in fact by finding that the appellants had not proved their case on a balance of probability.
 - b. That the learned magistrate erred in law and in fact in her failure to appreciate that in civil matters proof is to be on a balance of probability and by her judgment raised the bar to that of proof beyond reasonable doubt.
 - c. That the learned magistrate erred in law and in fact in finding that the appellants failed to prove negligence on the part of the defendant.
 - d. That the learned magistrate erred in law and in fact by failing to appreciate the appellants' written submissions.
 - e. That the learned magistrate erred both in law and in fact by not granting the prayers sought when the plaint had merit.
 - f. That the learned magistrate erred in law and in fact in not considering contributory negligence as claimed by the defendant.
 - g. That the learned magistrate erred in law and in fact by failing to appreciate that there was no eye witness to the accident yet there was ample evidence to show that the accident involved the respondent's motor vehicle and the deceased, therefore would have awarded parties 50:50% on liability.
 - h. That the learned magistrate erred in law and in fact in not considering all facts and circumstances of the case.
 - i. That the learned magistrate erred in law and in fact by relying on wrong principles of law to arrive at the judgment.
6. For the faults, the appellant prays that the appeal be allowed, the judgment of the lower court set aside and, in its place substituted a judgment in favour of the appellant and awarding general damages, special damages and costs.



7. The court directed that the appeal be canvassed by way of written submissions and both sides did comply with those direction. Herein below is a summary of the respective submissions.
8. In his submissions, the appellant identifies two issues for determination by this court to be; who is to blame for the accident, and what is the quantum of damages payable.
9. On the first issue, who is to blame for the accident, the appellants submit that there was adduced evidence by an eye witness who testified that the driver of Motor Vehicle Registration Number KAK 013E, suddenly turned right to join a feeder road, without indicating and paving way for the deceased who was just behind him to pass, thus causing the deceased's motorcycle to ram into the said motor vehicle. The submission ties that evidence to that by the respondent in its testimony that the deceased was riding his motorcycle close to 30 meters behind her and therefore it was prudent for the respondent not to take a turn.
10. It is added that although there was inconsistency on the dates of the accident from the eye witness, the same is not necessarily fatal to the case. The decision in *Akamba Bus Services Ltd v Daniel Mutune Njuguna* (2010) eKLR is relied upon where the court held that a discrepancy on the date when an accident occurred from a witness does not necessarily mean that the witness did not speak the truth about what actually transpired.
11. On the quantum of damages, the appellant reiterates having sought for compensation under both the *Law Reform Act* and under the Fatal Accident Act. Under the *Law Reform Act*, the claim made is for damages for pain and suffering in the sum of Kshs. 100,000/- since the deceased died a day after the accident. The decision *Naivasha HCCA No. 32 of 2017 Chen Wembo & another v IKK and HMM* (suing as the legal representative and administrators of the estate of CRK(Deceased)) is cited in that regard.
12. On loss of dependency, it is that the deceased was aged 30 years old, married with three children and that his parents depended on him. It is added that the deceased was a motor cyclist earning a monthly income of Kshs. 17,000/- but because no receipts were produced, it is proposed that the court adopts the minimum wage of Kshs. 15,120/- with the application of a dependency ration of 2/3. For this proposition, reliance is place on the case of *Wycliffe Justus Amalele* (suing as a dependant and/or personal representative of the estate of *Varrine Phelasia Amalele v IMA Hauliers Ltds & Another* (2016) eKLR where such multiplier and dependency ratio was applied.
13. With such yardstick, it is proposed that the damages under the heading be calculated thus: -
$$15,120 \times 12 \times 30 \times 2/3 = \text{Kshs. } 3,646,944/-$$
14. On damages for loss of expectation life they argue that the deceased led a healthy life with no signs of ill health and by sudden death, his life expectancy was unduly shortened and for that they propose a figure of Kshs. 300,000/ while citing the decision in *Daniel Kuria v Nairobi City Council* (2013) eKLR where a similar sum was awarded.
15. Under the Fatal Accident Act a claim of the sum of Kshs. 3,646,944/- is made. Not much is said on what head and how the sum calculates, but from the workings the court understands it to be a claim under the heading loss of earnings or loss of earning capacity.
16. There are lastly made a claim for funeral expenses in the sum of Kshs 200,000/- and special damages of Kshs 44,870/-.
17. For the respondent it is submitted that the eye witness was untruthful and unreliable because while the accident occurred on 29/7/2018, the witness stated that the accident occurred on 19/7/2021 in



his statement, his evidence in chief and twice in cross examination. He further questions the reliability of this witness by stating that he was only eye witness yet he failed to record a statement with the police only to record his statement almost five years later with the appellants' advocates. It was further pointed out that it was the testimony of PW2 that the deceased's motorcycle hit the passenger's side of the respondent's car to imply that the motorcycle was oncoming and not overtaking yet the motor vehicle test and examination report produced as DEXH 3 showed that it was the front outside wing panel and mirror of the vehicle that was dented and detached. He claims that had the deceased been careful, he ought to have seen the motor vehicle in front of him turning and taken measures to slow down and proceed only when it was safe.

18. On the issue of quantum, it is contended that the appeal has not contested the awards proposed by the trial court and therefore there was no need for submissions on the awards. They agree with the damages that were proposed by the trial court save for the multiplicand/income which they contend that the deceased died on 29/7/2018 and since there was no evidence that he lived in a municipality, the Regulation of Wages (General Amendment) Order, 2018, which came into force on 1st May, 2018 ought to apply setting the minimum wage for rural areas at Kshs. 7,240.95.
19. The respondent equally challenges the award of funeral expenses arguing that the appellants did not plead any sum under this head being special damages and did not also tender any proof on the same. Reliance was thus placed on the case of Grace Njoki Gakuru & another (suing as the legal representative of the estate of Francis Ritho Mugo (Deceased) v Joseph N. Wanjiku (2014) eKLR where the court observed that funeral expenses is a special claim that ought to be specifically pleaded.

Issue, Analysis and Determination

20. The court in its duty on first appeal considered the grounds of appeal, the proceedings of the lower court and the submissions by both the appellants and the respondent and discerns the issues for determination to be whether the appellants proved their case on a balance of probabilities? The court discerns that as the only issue because none of the grounds of appeal attack the quantum of damages as awarded

Analysis

21. In an action for negligence, like all civil actions, it is trite law that the burden of proof rests with the plaintiff, primarily, to establish that the defendant failed to act reasonably and thus injured him. See Nickson Muthoka Mutavi v Kenya Agricultural Research Institute (2016) eKLR quoting Halsbury's Laws of England, 4th Edition at paragraph 662 at page 476 where the author states:

“The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the prove of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of a causal connection must be established.”

22. The unwavering duty of a plaintiff to prove his case, so as to succeed, is called the legal burden coded in section 107 of the *Evidence Act*. The burden is that it is upon he who invokes the aid of the law and asserts an issue affirmatively to convince the court in that regard. See the Court of Appeal in Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334.
23. In this matter, the evidence recorded from the appellant and respondent leave no doubt that indeed an accident occurred on the 29.07.2018. both sides give own account how the collision occurred. The



version given by the appellant is that he was at the scene when the accident occurred. His statement and that of the respondent do not differ much save for the date of the accident. On that basis the trial court disregarded the evidence and excluded it from consideration for purposes of the judgment.

24. Having so excluded that evidence, the court remained with the evidence of the respondent as the sole evidence of an eye witness. That evidence was itself cogent that the respondent saw the cyclist trailing him about 30 meters. He then checked in front and was satisfied that the road was clear before he set on turning right. To the respondent he crossed onto the path of the deceased while so aware. The court finds that act by the respondent unreasonable and not expected of a reasonable driver. 30 meters for a motorized vehicle like a motor cycle is too close to cross the path of another. It was negligent of the respondent in turning as he did without regard to the approach by the deceased. He did contribute to the accident and should not have been absolved by the trial court.
25. On the other hand, the deceased also had a duty to be on the lookout and to exercise care of himself by taking evasive acts like braking, swerving or just stopping in time to avoid the collision. Even though the turn by the respondent could have been sudden and giving to him limited space for manoeuvre, there was evidence that remained uncontroverted that the respondent indicated intention to make the turn. The deceased ought to have yielded to the indication and even swerved left. He failed to do so and thus acted negligently.
26. It is therefore the finding of the court that both the deceased and the respondent contributed to the collision and the liability between them is thus due for apportionment. In executing that task, the court notes that had the respondent given way to the cyclist, the collision would have been avoided. The cyclist was already on his lane and had a right of way from the respondent who was intent on changing lanes and ultimately crossing the road. The court find the respondent more to blame and assigns to him 60% of the liability. That leaves the deceased with 40% to bear.
27. Flowing from the above discussions and conclusions, the court finds the appeal meritorious and allows it. The judgment of the trial court dismissing the suit is hereby set aside and, in its place substituted with a judgment apportioning liability at 60:40% in favour of the appellant. There having been no challenge to the award of damages, the sum assessed remains
28. The apportionment shall apply to both damages and costs, both here and in the court below. The costs of the suit and this appeal go to the appellant as the successful party.

DATED AND SIGNED THIS 29TH DAY OF MAY, 2025.

PATRICK J O OTIENO

JUDGE

DATED, SIGNED AND DELIVERED AT KAKAMEGA, THIS 29TH DAY OF MAY, 2025.

S. MBUGI

JUDGE

In the presence of:

No appearance for the parties

C/A: Agong'a

