



Matunda (Fruits) Services Limited v Anzara (Suing as the Legal Representative of the Estate of Felix Anzara Omido (Deceased)) (Civil Appeal E168 of 2024) [2025] KEHC 11229 (KLR) (30 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11229 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E168 OF 2024
A MABEYA, J
JULY 30, 2025**

BETWEEN

MATUNDA (FRUITS) SERVICES LIMITED APPELLANT

AND

DENNIS ADWENYA ANZARA RESPONDENT

SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF FELIX ANZARA OMIDO (DECEASED)

(Being an appeal from the judgment/decree of the Honourable F. Rashid (PM) delivered on 27/3/2024 in Kisumu CMCC No. 282 of 2019 pursuant to the leave granted on 23/5/2024)

JUDGMENT

1. By an amended Plaintiff dated 21/1/2020, the respondent sued the appellant claiming general damages under the Law Reform Act and Fatal Accident Act, funeral expenses and costs of the suit.
2. The plaintiff alleged how his brother Felix Anzara Omido ('the deceased') was involved in a road traffic accident on 23/3/2018 with motor vehicle registration No. xxx belonging to the appellant along Kisumu-Nairobi road near Oil Libya Petrol Station Kisumu. That the deceased succumbed to the injuries at (JOOTRH) Jaramogi Oginga Odinga Teaching and Referral Hospital. He blamed the driver of KHC 319N for the accident.
3. The appellant denied liability for the accident. By a defence dated 24/7/2019, it contended that the accident was caused solely and/or contributed to by the deceased's own negligence. Both parties pleaded several particulars of negligence against each other.



4. The trial ensued and a total of 5 witnesses testified. By a judgment made on 27/3/2024, the trial court found in favour of the respondent on liability at 80% - 20%. It awarded a total of Kshs.1,287,437/- after contribution.
5. Aggrieved by the said decision, the appellant preferred this appeal vide a Memorandum of Appeal dated 23/5/2024. It set out 3 grounds of appeal which can be summarized as “that the trial court erred in finding for the respondent and apportioning liability at 80% - 20% when the respondent did not prove his case.”
6. This being a first appellate court, it is its duty to re-assess, re-evaluate and analyse the evidence afresh and come to its own independent conclusions and findings but at all times having in mind that it did not see the witnesses testify. See *Selles & Another –vs- Associated Motor Boat & Co. Ltd & Others* (1968) EA.
7. The plaintiff called three witnesses. Pw 1 – Dennis Adwenya Anzara testified that on the material day, he was informed that his brother, the deceased, had been involved in a road traffic accident and passed on after 4 hours at JOOTRH. He produced various documents in support of his testimony. In cross-examination, he told the Court that he did not witness the accident. That the deceased was in good health, a casual labourer and was taking care of his mother.
8. Pw 2 No. 81420 PC Wesley Mwenda produced the police abstract for the accident. He did not investigate the case as the same was still pending. He could not attribute blame to any of the parties. Pw 3 Kenneth Okoth was an eye witness. He told the Court that the deceased was walking ahead of him along the Kisumu-Nairobi road when the subject vehicle lost control and hit the deceased. He later died in hospital at JOOTRH. He blamed the driver of the vehicle for the accident. In cross-examination, he denied that the deceased was attempting to board the bus which was in motion.
9. Dw 1 No. 86557 PC Joshua Otieno produced the OB Report No. 33/23/3/2018 that was entered by PC Rono who had since been transferred from Kisumu Central Police Station to Nairobi. The report indicated that the deceased was trying to steal a ride when he fell down while trying to board the bus and was injured. Dw 2 Richard Amalanda, the driver of the subject bus told the Court that he was driving the bus at the material time when the deceased jumped into the road. All the doors were closed. In cross-examination, he stated that he saw the deceased jump into the vehicle using the side mirror.
10. It is on the foregoing evidence that the trial court found the appellant liable at 80% for the occurrence of the accident. It awarded the respondent a total of Kshs. 1,609,296/- which when subjected to contribution, amounted to Kshs.1,287,437/-.
11. As already stated, the grounds of appeal have been summarized to one; that the respondent did not prove his case to warrant the judgment made by the trial court.
12. The trial court was persuaded to hold in favour of the respondent by the evidence of the driver of the vehicle. The driver himself admitted that the deceased was a pedestrian. Indeed, the Court quoted verbatim the driver’s witness statement filed in court on 5/8/2019 as follows: -

“That I do recall very well on the said date and I was travelling when ferrying fare paying passengers on board then abruptly I saw a pedestrian trying to cross the road I did swerve to avoid the accident.”
13. This was a statement that was filed in Court on 5/8/2019. When he testified in Court on 24/1/2024, he did not recount or disclaim it. He adopted it. The attempt to give a different version that the deceased tried to steal a ride or jump into a moving bus was but an afterthought.



14. The defence evidence could not displace the testimony of Pw 3 who was an eye witness. His testimony was firm that he was waiting to board a vehicle to Ahero when he saw the vehicle lose control and hit the deceased in front of him. That testimony was not challenged. The OB report cannot be relied on as there is no evidence to show who made the report to the police. It was only recorded by PC Rono from a non-disclosed reportee. Its veracity cannot displace the tested testimony of Pw 3 Kenneth Okoth. The reportee was never produced to be cross-examined on the same. Accordingly, the testimony of PW 3 was superior to that of the appellant's witnesses. It was consistent in cross-examination and credible. It was safe to be relied on.
15. On liability, in *Haybour Hill –vs- Young (1942) 2 ALL ER 396*, the Court held: -
- “The duty is not to the world at large it must be tested by asking with reference to each several complainants was a duty held to him or her. If no one of them was in such a position that direct physical injury could reasonably be anticipated to them or other relations or flames, normally I thin no duty would be owed...
- Then to whom is duty owed? To persons so placed that they may reasonably expected to be injured by the omission to take such care. The duty to take care is the duty to avoid doing or omitting to do that which may have as it is reasonable and probable consequence cause injury to others and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed.”
16. In the present case, the trial court relied on the decision of the High Court in *Masembe –vs- Sugar Corporation & Another [2002] 2 EA 434* to apportion greater liability against the driver of the vehicle. The Court quite rightly quoted the said decision wherein it was held that: -
- “When a man drives a motor vehicle along the road, he is bound to anticipate that there may be things and people or animals in the way and he is bound not to go faster that will permit his car at any time to avoid anything he sees after he has seen it. The driver should take reasonable steps to avoid hitting or colliding with the object.”
17. In the present case, the driver's own testimony as adopted in his witness statement was that, he saw the “pedestrian trying to cross the road.” This means that the pedestrian was ahead of him as testified by Pw
18. 3 Kenneth Okoth. The latter told the Court that he saw the vehicle lose control and hit the deceased. To this Court's mind, the driver owed a greater duty of care as he was in control of a lethal object.
19. Accordingly, this Court finds that the trial court did not err. The evidence adduced by the plaintiff proved the case to the required standard and the damages awarded were reasonable.
20. The appeal is without merit and the same is hereby dismissed with costs to the respondent.
- It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF JULY, 2025.

A. MABEYA, FCI Arb

JUDGE

