



**Njoroge & another (Suing as the Administrators of the Estate of Samuel Kinyanjui Koiya - Deceased) v New Kenya Creameries Cooperative Limited (Civil Suit 78 of 2010) [2022] KEHC 14014 (KLR) (19 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14014 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CIVIL SUIT 78 OF 2010  
JN NJAGI, J  
OCTOBER 19, 2022**

**BETWEEN**

**ANNE NJERI NJOROGE ..... 1<sup>ST</sup> PLAINTIFF**

**CHARLES NJOROGE KINYANJUI ..... 2<sup>ND</sup> PLAINTIFF**

**SUING AS THE ADMINISTRATORS OF THE ESTATE OF SAMUEL  
KINYANJUI KOIYA - DECEASED**

**AND**

**NEW KENYA CREAMERIES COOPERATIVE LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The plaintiffs herein sued the defendant in their capacity as administrators of the estate of the late Charles Njoroge Kinyanjui seeking general and special damages after the deceased met his death in a road traffic accident involving his vehicle and that of the defendant along Kenol/Nyeri highway. Parties in the case agreed on a settlement on damages but could not agree on liability. This court has been asked to deliver a judgment on liability based on the evidence adduced by the parties.

**Case for Plaintiffs-**

2. The plaintiffs did not witness the accident but called two material witnesses touching on liability -Peter Mungai PW2 and Anderson Muthengi PW3. It was the evidence of Anderson Muthengi that on the evening of May 14, 2009 at around 5 pm he was travelling in a public service vehicle (matatu) from Kakuzi to Thika town. He was seated at the front cabin next to the driver. Some kilometres before reaching Kenol town there was a car driving ahead of them. He then saw a milk tanker truck coming from the opposite direction. Suddenly the truck lost control. Its tank snapped and disconnected from the vehicle. The tank was thrown off the vehicle and fell off the road to its left side. The driver's cabin went to the right side of the road. It hit the car that was ahead of them which as a result turned and



faced the direction they were coming from. The lorry blocked the lane from Nyeri side. The driver of the matatu stopped and they rushed to the car. They found its driver injured and unconscious. They removed him from the car. A good Samaritan in a motor vehicle offered to take him to hospital. He, PW3, accompanied the good Samaritan to Thika Level Five Hospital where a doctor pronounced him dead. They searched his pockets and found Ksh 8,000/= which they handed over to the hospital administration.

3. The witness further said that he later saw the deceased in the obituary of a newspaper. He located the deceased's relatives in Nairobi and informed them that he had witnessed the accident.
4. PW3 said in cross-examination that the accident took place on the left lane as one faces Nairobi from Makuyu side. He denied that the deceased's car was overtaking when the accident occurred.
5. The other witness for the plaintiffs Peter Mungai, PW2, testified that he is a health records officer at Thika Referral Hospital. That on May 14, 2009 an accident victim was brought to their hospital by two good Samaritans. He was received by doctors at the casualty but he succumbed to death. At the casualty the nurses took the details of the good Samaritans in a register, including their names and telephone numbers. One of the persons was noted in the register to be Anderson Muthengi. PW2 produced the casualty register as exhibit, Pexh 18.
6. The defence called two witnesses – the driver of the accident tanker, Boaz Kirwa DW1 and a police officer from Makuyu police station DW2. The driver of the truck testified that he was on the material day driving from Dandora in Nairobi on the way to Kiganjo. That on reaching Kenol he met with a convoy of vehicles from Nyeri direction. He saw a saloon car overtaking a canter vehicle that was ahead of it. He went off the road to avoid it. The saloon car followed him and hit his front wheel tyre as a result of which he lost control. The impact of the accident made the tanker to disconnect from the vehicle and went off the trailer to the left. The cabin went to the right. The car stopped on the middle of the road. He said that the collision took place on his side of the road. He blamed the driver of the car for occasioning the accident.
7. The police officer DW2 testified that a report of the said accident was made at Makuyu police station. The scene was visited by police officers who thereafter recorded the scene visit in an Occurrence Book. According to the OB report the accident occurred when the driver of the car was overtaking another vehicle.

### **Submissions–**

8. The advocates for the plaintiffs, Gichuke Ribathi & Co Advocates, submitted that the narration by the good Samaritan PW3 indicates that he was an independent witness to the accident. That his evidence indicated that the accident car was about 40 meters ahead of them and that he had a clear view of the road. Counsel submitted that the witness was a credible witness as he volunteered to take the deceased to hospital. That the fact that he witnessed the accident is supported by the evidence in the hospital register where his name is recorded as one of the people who took the deceased to hospital. That the witness was trustworthy as he found money in the deceased's pockets and left it with the hospital administration.
9. It was submitted that the record in the hospital casualty register was made in the normal cause of duty by people who had no interest in the matter. That the record is therefore credible.
10. The advocates for the plaintiffs faulted the evidence by the driver of the truck that there was a convoy of vehicles from Sagana direction as none of the other vehicles in the convoy was involved in the accident.



11. It was submitted that the evidence in the Occurrence Book to the effect that it is the deceased driver who was overtaking at the time of the accident is not credible as the police officers who visited the scene and made the report were not called as witnesses in the case. That the evidence amounted to hearsay and should be disregarded. Counsel urged the court to find the defendant 100% liable for the accident.
12. The advocates for the defendant, JK Kibicho Co Advocates, on their part submitted that the burden of proving negligence was on the plaintiff. Counsel relied on the decision in the case of Jamal Ramadhan Yusuf & Another v Ruth Achieng Onditi & Another (2010)eKLR where Makhandia J (as he then was) held that:

"It is trite law that the mere fact that an accident occurs does not follow that a particular person has driven negligently and or negligence ipso facto must be inferred. So that it is always absolutely necessary and vital that a party who sues for damages on the basis of negligence must prove such negligence with cogent and credible evidence as he who asserts must prove. In this case the 1<sup>st</sup> respondent was minded to prove that the accident was caused by the negligence of the appellants, or 2<sup>nd</sup> respondent and or both."

13. It was submitted that the driver of the truck DW1 was able to prove that it is the deceased driver who was to blame for occasioning the accident for overtaking when it was not safe to do so. That that fact was supported by the evidence of the police officer DW2 who indicated that it is the deceased driver who was overtaking carelessly at the time of the accident. That the evidence of the police officer is reliable as it is from public record of the policemen who visited the scene. That the evidence is not hearsay as it is admissible under the provisions of section 38 of the Evidence Act that states that:

38. "Entries in public records

An entry in any public or other official book, register or record, stating a fact in issue or a relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself admissible."

14. It was submitted that the driver of the defendant was not charged with any traffic offence even after investigations. That this can only be because the police believed that it is the deceased driver who was to blame for the accident. That this proves that the deceased driver was overtaking at the time of the accident.
15. It was submitted that the evidence of the witness for the plaintiff PW3 was not credible as he could not explain the exact occurrence of the accident. That there was no explanation as to why the point of impact was on the lane for the defendant's driver. That this proves that the deceased driver was overtaking at the time of the accident.

### **Analysis and Determination–**

16. This being a first appeal the court is guided by principles that were re-stated by the Court of Appeal in Thomas Nyawade v Richard Sule Odongo & 4 others (2015) eKLR that:

"The principles guiding the determination of appeals are now well settled. In a first appeal like this one, the appellate court is obliged to take the appeal as a re-trial. As such, it is required to re-evaluate the evidence on record and come to its own conclusions – Selle & Another - Vs- Associated Motor Boat Co Ltd & others [1968] EA 123. In doing so, however,



the first appellate court should give allowance for the fact that as the trial court had the advantage of seeing and hearing the witnesses testify, it was better placed to observe their demeanour and assess their credibility. In the circumstances, the appellate court should be slow to overturn the trial court's decision unless the trial court's decision is perverse or is not based on the evidence or is based on a misapprehension of the evidence on record. *Mwanasokoni Vs Kenya Bus Services Ltd*, [1985] KLR 931."

17. The elementary principle of law is that he who alleges must prove. Section 107 of the *Evidence Act* provides thus:

“(1) whoever desires any court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2). When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

18. In *Treadsetters Tyres Ltd v John Wekesa Wepukhulu* (2010) eKLR, Ibrahim J (as he then was) considered the question of burden of proof and stated as follows: -

"On question of proof, and burden thereof, it is stated in Charlesworth & Percy On Negligence, 9<sup>th</sup> edition at P 387:

“In an action for negligence, as in every other action, the burden of proof falls upon the plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, (1) whether on that evidence, negligence may be reasonably inferior (?) and (2) whether, assuming it may be reasonably inferred, negligence is in fact inferred.”

19. The issue for determination is as to who between the deceased driver and the driver of the defendant was to blame for occasioning the accident.

20. The eye witness for the plaintiffs PW3 testified that it is the defendant's driver DW1 who was to blame for occasioning the accident in that he lost control of his vehicle, moved out of his lane and hit the deceased's vehicle while the said vehicle was on its correct lane. DW1 on the other hand contends that it is the deceased driver who was to blame for occasioning the accident in that he was overtaking recklessly when the accident occurred. The witness for the plaintiff PW3 however denied that the deceased driver was overtaking when the accident occurred. He said that he had a clear view of the road ahead of him and that it is the truck that left its lane and hit the car. The question then is as to who between these two was telling the truth.

21. I have carefully considered the evidence adduced by the plaintiffs and by the defendant in this matter. The defendant relied on the report in the police occurrence book that was recorded by the police officers who visited the scene to the effect that the accident occurred when the driver of the car was overtaking vehicles that were ahead of him. In my view this evidence is not credible as the officers who visited the scene did not testify in the case. Their report does not disclose the source of their information that the deceased is the one who was to blame for the accident. Theirs was just the initial report after they visited the scene. There is no indication that they fully investigated the case and came to an independent conclusion that the deceased is the one who was at fault. The report can only be of help if the police officers testified in the case and defended their position. The report is not of the kind contemplated by section 38 of the *Evidence Act* since it is not an independent report from the



police officers but from sources they did not disclose. In view of the fact that the officers did not testify in the case, the report was no more than hearsay. I therefore dismiss the evidence as contained in the police Occurrence Book.

22. Having carefully considered the evidence adduced by the witness for the plaintiff PW3 and that of the witness for the defendant DW1 as to how the accident occurred, I am inclined to believe that it is PW3 who was telling the truth as to how the accident occurred. PW3 was an independent witness who from his evidence only happened to be at the scene by coincidence and not by design. The fact that he witnessed the accident is confirmed by the report contained in the Thika County Referral Hospital casualty register which recorded him to have been one of the good Samaritans who took the deceased to hospital. The register contained his personal details such as his name, identity card number and his cell phone number. There is no way that the hospital would have obtained such details if the evidence was not true. The fact that the witness found money in the pockets of the deceased and handed it over to the hospital administration shows that he is a trustworthy person.
23. It is clear from the evidence that PW3 had a clear view of the road when the accident occurred. He saw the milk truck losing control, the tanker disconnecting from the truck and the cabin moving into the lane of the car and hitting it. The witness was cross-examined at length by the defence and he stuck to his story. He denied that the car was overtaking when the accident occurred. There was no reason for the witness to lie on the issue. I find the evidence of the witness to be believable.
24. I do not believe that the accident occurred as stated by the driver of the truck, DW1. If it is the car that left its lane and hit the truck, the driver of the truck would most likely have been trying to avoid the accident by swerving to his left side. On impact the car would have pushed the truck towards that side. In these circumstances, there is no proper explanation why the truck's cabin pulled to the right side.
25. I also do not believe the evidence of the truck driver that there was a convoy of vehicles from the Nyeri side when the accident took place. If this were true, it is most likely that the truck would have hit the vehicles that were in the convoy when it moved to the lane from Nyeri side. The fact that no other vehicle was involved in the accident gives credence to the evidence of PW3 that his driver was keeping a distance of about 40 metres behind the accident car at the time when the accident occurred. The driver of the truck must have been lying that the deceased was overtaking when the accident occurred. He is the one who lost control of his vehicle and hit the deceased's car.
26. In the premises I find that it is the driver of the defendant who was wholly to blame for occasioning the accident. I therefore enter liability at 100% against the defendant with costs of the suit to the plaintiffs.

**SIGNED THIS 14<sup>TH</sup> DAY OF SEPTEMBER 2022.**

**J. N. NJAGI**

**JUDGE**

Delivered, dated and signed at NYERI this 19<sup>th</sup> day of October, 2022.

By:

HON. JUSTICE M. MUYA

JUDGE

In the presence of:

Gichuki: for Plaintiffs

Mrs Maina: for Defendant



Court Assistant: Kinyua

