



**Muhoro & Sons v Kimanthi & 4 others (Civil Appeal E070 of 2021)
[2024] KEHC 8205 (KLR) (26 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 8205 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E070 OF 2021
JK NG'ARNG'AR, J
JUNE 26, 2024**

BETWEEN

GACHANJA MUHORO & SONS APPELLANT

AND

YVONNE DAMARIS KIMANTHI 1ST RESPONDENT

**LINCOLN KARWINGO NJERU (SUING IN THEIR CAPACITY AS THE
ADMINISTRATORS OF THE ESTATE OF NEWTON MUGENDI NJERU -
DECEASED) 2ND RESPONDENT**

KENYA COMMERCIAL BANK LIMITED 3RD RESPONDENT

METRO LOGISTICS LIMITED 4TH RESPONDENT

PATHOLOGISTICS LANCET KENYA LIMITED 5TH RESPONDENT

*(n appeal from the judgment and decree of the Chief Magistrate's Court at Thika
(M.W. Wanjala, SPM.) delivered on 25th March 2021 in CMCC No. 537 of 2016)*

JUDGMENT

1. The appellant was the 1st third party in Thika CMCC No. 537 of 2016. By further amended plaint dated 5th February 2020, the 1st and 2nd respondents sued the 3rd respondent as the registered owner of motor vehicle registration number KAH XXXX and in its possession thereof. In similar position, the 4th respondent was sued in respect to motor vehicle registration number KBW XXXX. The appellant and the 5th respondents were enjoined in the proceedings as third parties.
2. On 24th February 2015, the deceased was a pillion aboard motor cycle registration number KMCN XXXX along the Thika – Makongeni road in Thika sub-county. It was here that the suit vehicles were driven so negligently as a result of which the deceased was thrown onto the tarmac road and ran over



causing fatal injuries. The 1st and 2nd respondents thus claimed for general damages under the Law Reform Act and the Fatal Accidents Act, special damages of Kshs. 225,980.00, costs of the suit and interest..

3. In its judgment dated 25th March 2021, the trial court found that the appellant was 100% liable for the accident. The trial court thus awarded general damages for loss of expectation of life at Kshs. 100,000.00, loss of dependency at Kshs. 5,520,000.00, pain and suffering Kshs. 20,000.00, special damages Kshs. 195,530.00 together costs and interest. The suit against the 3rd, 4th and 5th respondents was dismissed with costs.
4. Dissatisfied with the findings of the learned magistrate, the appellant filed its memorandum of appeal dated 22nd April 2021. It raised a prolix 14 grounds challenging the findings of the trial court. I have taken the liberty to summarize those grounds as follows: that the trial court erred in apportioning 100% liability to the appellant yet the evidence did not support this finding; that the evidence on record suggested that all the parties herein were liable for the accident and as such, liability ought to have been apportioned to each one of the parties; that the earnings of Kshs. 30,000.00 were not supported by any evidence; that the learned magistrate took into account extraneous matters that ought not to have been taken into account in the award of general damages; that the multiplier of 23 years applied failed to consider the vicissitudes of life and the benefit of lump sum payment; that the documentary evidence was not part of exhibits marked for identification and finally that his submissions were not considered.
5. In view of the foregoing, the appellant prayed that the appeal be allowed by setting aside the findings on liability. It further prayed that the findings against it be dismissed with costs. Without any prejudice to the foregoing, the appellant prayed that liability be apportioned equally between the appellant and the respondents. Setting aside the award on quantum, it urged this court to assess proper damages payable to the 1st and 2nd respondents. It further prayed for costs of the suit.
6. The appeal was canvassed by way of written submissions. As at the time of writing this judgment, I was not in receipt of the 3rd respondent's submissions. The appellant in its written submissions dated 29th September 2023 argued that the trial court misconstrued the evidence and as a result arrived at an erroneous decision. In its view, the 4th respondent was responsible for the accident as it failed to give way to the motorcyclist. It also blamed the motorcyclist rider for stopping. On quantum, the appellant opined that the trial court ought to have applied the multiplicand of Kshs. 23,163.00 and a multiplier of 13 years to award loss of dependency at Kshs. 2,184,000.00. It prayed that its appeal be allowed.
7. The 1st and 2nd respondents filed their joint written submissions dated 24th November 2023. They submitted that the findings of the trial court were proper and absent any fault. They found that the appeal was lacking in merit and urged this court to dismiss the same with costs.
8. The 4th respondent filed its written submissions dated 9th November 2023. It submitted that from the record, the trial court rightfully found the appellant liable on grounds that its motor vehicle registration number KAH XXXX was behind motorcycle registration number KMCN XXXX and failed to keep a safe distance. Noting that the driver of motor vehicle registration number KAH XXXX was charged with causing death by dangerous driving, it could not apportion liability against KBW XXXX because the driver of KAH XXXX threw the deceased under motor vehicle registration number KBW XXXX. It also noted that the appellant failed to call any witnesses and as such, the averments in its pleadings were mere allegations. On quantum, the 4th respondent rehashed the submissions at trial filed on 4th March, 2021.
9. The 5th respondent's filed its written submissions together with its list and bundle of authorities both dated 14th December 2023. It submitted that the appellant was properly found 100% liable for the



accident. That the deceased was a pillion passenger and could therefore not be found accountable for causing the accident. It submitted that the driver of motorcycle registration number KMCN XXXX could not be blamed for giving caution when giving way to motor vehicle registration number KBW XXXX. That the 5th respondent's driver was knocked together with the deceased by motor vehicle registration number KAH XXXX who had failed to keep a safe distance. That since it was not originally sued, then it ought not to be blamed for the accident. It submitted that though other parties herein adduced evidence, the appellant failed to call any evidence. It thus had no basis to warrant this court's interference with the findings of the learned magistrate. On quantum, the 5th respondent submitted that the arrival at the figures was proper. It prayed that the appeal be dismissed with costs.

10. I have considered the record of appeal and the parties' submissions, examined the evidence and analyzed the law. This being a first appeal, I am reminded of my primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and give reasons either way. [See *Abok James Odera t/a A.J Odera & Associates v. John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR].
11. The main issues in this appeal are whether the learned magistrate arrived at the correct conclusion on liability. Secondly, whether the learned magistrate applied the correct principles in awarding quantum.
12. On liability, the 1st and 2nd respondent's evidence was as follows: PW1, the 1st respondent testified that the deceased was her husband. He died in a road traffic accident on 24th February 2015. Her evidence was that she was informed of the deceased's death at 1:00 a.m. the following day. PW1 had been notified by PW2, the 2nd respondent, who testified that at around 4:00 p.m., that his brother informed him that the deceased had passed on. PW3 PC Charles Mwandime produced the police abstract which was marked PExh.8. His evidence was that on 24th February 2015, an accident occurred along the Thika – Garissa Road at Makongeni road at around 4:30 p.m. The accident involved motorcycle registration number KMCN XXXX (owned by the 5th respondent), KAH XXXX (owned by the appellant) and KBW XXXX, owned by the 4th respondent. One Onesmus Kihoho Mwaniki, driving the appellant's car, was charged with causing death by dangerous driving. In my view, the evidence of the 1st and 2nd respondent did not shed much light on the circumstances leading up to the accident. It is trite law that a police abstract does not establish liability, regardless of whether or not a person has been charged with a traffic offence. However, it confirmed that indeed an accident had occurred involving the parties herein.
13. The 3rd respondent called DW1 Mary Kahinga a transport manager working at the said bank. Her uncontroverted evidence was that motor vehicle registration number KAH XXXX was sold before the year 2015 to the appellant. The trial court carefully observed her demeanor and saw no reason to cast doubt as to the veracity of her claims. Although the motor vehicle search dated 26th June 2015 marked PExh.7 revealed that the 3rd respondent was the registered owner and hence sued in the lower court, the trial court was satisfied by the 3rd respondent's witness that the vehicle had since been sold. I therefore find that the trial magistrate's determination that the 3rd respondent was not a party to this suit as proper. It cannot be held liable whatsoever for the accident. It may have been the reason that informed them not to file any submissions before this court.
14. DW2 Fatuma Asman Sunusi HR officer working for the 5th respondent confirmed that the deceased was their employee and had passed on in the line of duty. DW3 Hezron Kamau Waweru testified that they received a call from St. Mulumba Hospital on that fateful day requesting for a sample collection. DW3 left together the deceased. He was the rider of the motorcycle registration number KMCN



XXXX while the deceased was seated behind him as a pillion passenger. They had both worn safety gear. They had also attached reflecting stickers on the sample box.

15. At Engen junction, a trailer negotiated a corner to join the highway. For that reason, they stooped to give way. Suddenly, DW3 and the deceased were hit from behind by a canter, later identified as that belonging to the appellant. The impact of the hit caused the two persons to land under the aforementioned trailer, later identified as the vehicle belonging to the 4th respondent, next to the wheels. DW3 instantaneously lost consciousness.
16. The appellant elected to close its case for the reasons that it intended not to call any witness. The 4th respondent on its part called the driver of its motor vehicle driven on that fateful day DW4 one Benjamin Maina Kahoro. He recalled that the accident occurred at around 3:00 p.m. His evidence was that he was joining the highway from a feeder road. Upon reaching the junction, he checked the road on both sides and established that it was clear. He then proceeded for a few meters to turn right heading to the direction of the depot. He was able to see the 5th respondent's motorcycle.
17. During the process of turning to the direction of the depot, DW4 heard people yelling stating that there was someone under the trailer. Some sand sellers, who were nearby, helped remove the persons stuck under the trailer. He concurred that indeed the motorcyclist gave him way as he was turning into the highway.
18. The above evidence in my view shed more light as to the circumstances of the accident. In my view, the evidence leads to the fact that the driver of the appellant's motor vehicle was to blame for the accident for the following reasons: Firstly, the deceased was hit from behind. He could not be blamed for an accident when he was lawfully ahead of the vehicle that hit him. Secondly, the deceased was hit after the 5th respondent's rider reasonably and rationally, in the circumstances, slowed down and/or stopped to pave way for the joining of the 4th respondent onto the road. Thirdly, the appellant's vehicle was moving in the same direction as that of the deceased and the 4th respondent. It is this vehicle that resultantly hit the deceased. Fourthly, the appellant's vehicle was the last vehicle. It was incumbent on its driver to be on the lookout and keep a safe distance. Fifthly, I also find that the rider of the 5th respondent's vehicle took reasonable steps and caution to avoid an accident with the car in front of him. Suffice to add that the deceased was a pillion passenger and could not have been held accountable for any wrongdoing. In addition, the appellant's vehicle uncontrovertibly caused the deceased person to be knocked off the motorcycle and land under the trailer. Had the appellant not hit the vehicle, I find that the accident would not have occurred. Finally, in his evidence, the appellant failed to challenge the evidence that was adduced specifically by the 1st and 2nd respondents on one part and the 4th respondent's on the other part. He cannot now come cry foul.
19. The trial court was right in finding that the appellant was wholly to blame for the causation of the said accident. The appellant had been called upon, as the beneficial owner of the suit vehicle, to keep a safe distance between itself and the 5th respondent. It failed to do so. The evidence of the 1st, 2nd and 4th respondents justifies this conclusion. For this reason, I find that the appeal against trial court's finding on liability lacks merit. It is hereby dismissed.
20. On quantum, this court shall be guided by the decision of the Court of Appeal in *Gitobu Imanyara & 2 Others v. Attorney General* [2016] eKLR, which jealously guards against the interference with an award of the trial court. The court pronounced itself as follows as the yardstick of this court:

“...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial



Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in *Rook v Rairrie* [1941] 1 All ER 297. It was echoed with approval by this Court in *Butt v. Khan* [1981] KLR 349 when it held as per Law, J.A that:

‘An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.’

21. The trial court awarded general damages for pain and suffering at Kshs. 20,000.00 and loss of expectation of life in the sum of Kshs. 100,000.00 under the *Law Reform Act*. I find that the trial court’s assessment of the awards under this heads were proper and in line with general principles in award of damages. It is noted that according to the post mortem report marked PExh.2, the deceased died on the spot. As a matter of law and principle, nominal damages are to be awarded under these two heads if the death followed immediately after the accident. This is because such damages are intended to compensate the fact of suffering and pain owing to the injuries sustained before the deceased’s death.
22. Taking into account the award of damages under the *Law Reform Act*, I shall now consider the damages under the *Fatal Accidents Act*. In damages under this head, courts are implored to take either one of these two approaches: the multiplier approach or the global sum approach. In determining which of the two approaches best fits the facts and circumstances of the dispute, the Court of Appeal in Board of Governors of *Kangubiri Girls High School & Another v. Jane Wanjiku* [2014] eKLR pronounced itself as follows:

“The choice of a multiplier is a matter of the courts discretion which discretion has to be exercised judiciously with a reason... The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can and must be abandoned where facts do not facilitate its application. It is plain that it is useful and practical method where factors such as age of the deceased, the amount or annual or monthly independency and the expected length of the dependency are known or are knowable without undue speculation, where that is not possible to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a court of justice should never do”
23. In my view, the facts and circumstances of this case supported a multiplier approach. This is because there was sufficient evidence to determine the deceased’s salary, life expectancy as well as age bereft conjectures. Thus, on the claim for lost years, PW1 testified that she was the deceased’s wife married under customary law. The aspect of marriage was corroborated by the evidence of PW2, the deceased’s brother, who attended the ceremony. PW1 further adduced 2 copies of birth certificates (PExh.10) of the children the deceased had with the 1st respondent. As at the time of the deceased’s death, the two minors had not attained the age of majority. According to the death certificate marked PExh.3, the deceased was a lab technician. I therefore find that the dependency ratio of the deceased was 2/3.
24. On the multiplicand, evidence was led to establish that the deceased was employed by the 5th respondent. This was confirmed from the oral testimony of PW1, PW2 and DW2, DW2, a human resource office working for the 5th respondent produced pay slips dated 31st October 2012, 31st October 2014 and 28th February 2015 as well as a letter of appointment dated 1st March 2012, both belonging to the deceased. The pay slip indicated that the deceased was earning 84,575.00, which emoluments



were paid until his untimely death. However, I seem not to trace these documents as exhibits from the record. PW1 on the other hand relied on the deceased's confirmation letter dated 18th April 2012 (PEXh.12) and pay slip which indicated a net salary of Kshs. 25,163.56 marked PEXh.11. The fact that the trial court rounded off the sum to Kshs. 30,000.00 is what this court does not agree with. It was not backed by any evidence or law. In my view, the court ought to have constrained itself to the net earned salary of Kshs. 25,163.56.

25. On the multiplier, the deceased was 37 years old at the time of his death. According to the autopsy report, he was of good health. As such, he would have lived and worked for another 23 years before his retirement. As such, the multiplier of 23 years, as found by the trial court, was reasonable and proper.
26. In light of the foregoing, general damages for loss of dependency is interfered with, in line with reasons stated above as follows: $25,163.56 \times 12 \times 23 \times 2/3 = \text{Kshs. } 4,630,095.04$.
27. On special damages, I find that a sum of Kshs. 34,890.00 was expended towards medical care, Kshs. 15,000.00 towards consultation of PW4's services, Kshs. 4,000.00 for the post mortem fee, Kshs. 29,400.00 towards obituary charges and Kshs. 48,500.00 towards funeral charges towards purchasing flowers. The receipts from Emika Enterprises and Bejoca Traders did not comply with the Stamp Duty Act and are thus dismissed. There were no receipts for proof of fees on obtaining the grant, search at the motor vehicles and the police abstract. This court operates from documentary evidence and the principle of he who alleges must prove. They cannot be assumed as was done by the trial court and are thus dismissed. Thus taking view of my calculations, I find that the award on special damages is reviewed at Kshs. 131,790.00.
28. In view of the above, I find that the appeal partially succeeds in the following terms:
 - i. The trial court's award on loss of dependency is hereby set aside and substituted with an award of Kshs. 4,630,095.04;
 - ii. The trial court's award on special is hereby set aside and substituted with an award of Kshs. 131,790.00;
 - iii. The other determinations by the trial court are hereby upheld;
 - iv. As this appeal partially succeeds, each party shall bear its own costs.

It is so ordered.

DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26TH DAY OF JUNE, 2024.

J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of:-

Mahugu for the Appellant

Njeri for the Respondent

Court Assistant- Peter Ong'idi

Further Order;

30 days stay granted.

J.K. NG'ARNG'AR, HSC

JUDGE

