



**Manguya & another (Both suing as the administrators of the Estate of the Late Betty Barthlemew Wani - Deceased) v Wanjiku & another (Civil Appeal E302 of 2022) [2024] KEHC 9876 (KLR) (30 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9876 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL E302 OF 2022  
HI ONG'UDI, J  
JULY 30, 2024**

**BETWEEN**

**JOHNSON BARASA MANGUYA ..... 1<sup>ST</sup> APPELLANT  
LOKUYU GOMBURA EMMANUEL COSMOS ..... 2<sup>ND</sup> APPELLANT  
BOTH SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE  
BETTY BARTHLEMEW WANI - DECEASED**

**AND**

**SIMON MAINA WANJIKU ..... 1<sup>ST</sup> RESPONDENT  
CAPTAIN MOTORCYCLE MANUFACTURING CO LTD ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgment by Hon. S. N Muchungi (Mrs.) Chief Magistrate in Nairobi CMCC No. E5047 of 2020 delivered on 6th May, 2022)*

**JUDGMENT**

1. The appellants who were the plaintiffs in the lower court sued the respondents seeking general damages under the *Fatal Accidents Act* and *Law Reform Act*, plus special damages costs and interest arising out of a fatal road accident which claimed the life of Betty Kasapa Barthlemew Wani. The appellants sued on behalf of the estate of the deceased. The respondents in their defence denied the claim and the matter proceeded to full hearing. Thereafter the trial court delivered Judgment on 6<sup>th</sup> May, 2022 dismissing the appellants suit with no orders as to costs.
2. Being aggrieved by the Judgment the appellants filed this appeal citing the following grounds:
  - i. The learned magistrate erred by dismissing the appellants suit.



- ii. The learned magistrate misunderstood or misapplied or misconstrued Section 2 of the *Law Reform Act* Chapter 26 Laws of Kenya.
  - iii. The learned magistrate erred by basing her decision on an unpleaded issue or on an issue she identified without inviting the parties submissions thereon or hearing the parties on the same.
  - iv. The learned magistrate's award of Shs.500,000/= was too low or did not take into account relevant factors or the principles of assessment of damages.
  - v. The trial court erred by failing to make an award for special damages,
3. The Appeal was canvassed by way of written submissions.

### **Appellants' submissions**

4. These were filed by Nelson Kaburu & Company Advocates and are dated 6<sup>th</sup> September, 2023. Counsel submitted that the learned magistrate misconstrued Section 2 of the *Law Reform Act* and also erred by applying sub section 3 thereof.
5. Counsel submitted that subsection 3 only applies to suits that have survived against the deceased's estate. He argued that there is a contradistinction to a cause of action which survives for the benefit of a deceased's estate. He added that Section 2(1) is about survival of all causes of action against, or for the benefit of a deceased's estate.
6. He argued that the 1<sup>st</sup> respondent was not dead when he was sued and thus the issue of his representation could not arise. Counsel relied on the case of *Sera Mussa V Manjis Ltd & Others (1964) EA 654 to 658* and submitted that there was a fine distinction and that the trial court fell into error.
7. He submitted that the deceased was not a defendant and that the suit had survived for her estate's benefits as opposed to against it.
8. On damages, he submitted that the authorities as cited by the appellants were relevant. He argued that the trial court erred by not increasing the award to Kshs. 800,000 as he had submitted. Counsel urged the court to allow the appeal with costs.

### **1st Respondent's submissions**

9. These were filed by Shem Kabatia & Company Advocates LLP and are dated 12<sup>th</sup> April, 2024. Counsel gave a background of the case and submitted that the evidence before the court confirmed that the deceased suffered fractures and blunt scalp injuries. Further, that the medical report dated 18<sup>th</sup> April, 2018 produced in court confirmed that the injuries were to be optimally rehabilitated.
10. Additionally, counsel submitted that the death of Betty Kasapa was not proved to have been caused directly or indirectly by the subject accident. That indeed her demise could be deemed an unfortunate occurrence after she had had an accident. He further argued that, there was no evidence of admission after the accident, indeed the produced medical report by the appellant showed that complete healing was anticipated. Therefore, it would be reasonable to say, that her demise could not have possibly been caused by the subject incident. He relied on section 2 (2) (c) of the Law Reforms Act and submitted that where an action did not survive, as a result the demise of that person not arising from the action in tort, the demise of the deceased as provided for under the Act, could not be sustained in law.
11. Counsel went on to submit that the suit claims for damages for injuries sustained being fractures and blunt injuries and not for damages under the *Law Reform Act* or *Fatal Accidents Act*. Such a suit could only be instituted by the individual against whom such tort was occasioned and not by her



beneficiaries. Accordingly, the suit could not be sustained as the same was instituted after her demise. He urged the court to dismiss the appeal with costs to the respondents.

### **Analysis and determination**

12. This being a first appellate court, I am guided by the dictum in the case of *Selle v Associated Motor Boat Co. Ltd.* [1965] E.A. 123, where it was held that the first appellate court has to re-consider and re-evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions.
13. Similarly, in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, the court stated with regard to the duty of the first appellate court, as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”
14. Having considered the record of appeal, grounds of appeal, the submissions and the authorities relied on by the respective parties, I find that the main issue for determination to be whether the appellants suit was subject to section 2(3) of the [Law Reform Act](#).
15. It is the appellants’ contention that the learned trial magistrate misconstrued Section 2 of the [Law Reform Act](#) and also erred by applying sub section 3 thereof. They argued further that the said subsection 3 only applied to suits that survived against the deceased’s estate. Additionally, that the deceased was not a defendant in the lower court suit and that the suit had survived for her estate’s benefits as opposed to against it.
16. On the other hand, the 1<sup>st</sup> respondent argued amongst other things that the suit claims for damages for injuries sustained being fractures and blunt injuries and not for damages under the [Law Reform Act](#) or [Fatal Accidents Act](#). That such a suit could only be instituted by the individual against whom such tort was occasioned and not by her beneficiaries. Further, that the appellants’ case could not be sustained as the same was instituted after the deceased’s demise.
17. The trial magistrate in her judgment faulted the appellants for failing to institute the suit before the lapse of six (6) months after being issued with letters of representation as was required under section 2 (3)(b) of the [Law Reform Act](#). For the said reasons, the trial court proceeded to dismiss the appellants’ suit with no orders as to costs.
18. It is only the 1<sup>st</sup> appellant who is the husband to the deceased who testified in the lower court as PW1. His case is that his wife was involved in a road accident on 5<sup>th</sup> April 2018 and suffered a fracture of the left humerus and blunt injuries on the scalp. She later passed away on 29<sup>th</sup> October, 2018. The death certificate (at page 24 of the record of appeal) shows the cause of death as cardiopulmonary arrest due to severe hypokalemia due to acute gastroenteritis with retrovital disease.
19. The respondents did not adduce any evidence. Though the trial Magistrate in the judgment said she considered both parties submissions, counsel for the appellants claims not to have been served by the 1<sup>st</sup> respondent’s submissions. I have perused the original record and have found the 1<sup>st</sup> respondent’s submissions before the lower court. Counsel mainly raised the issue with section 2(2)(c) of the [Law Reform Act](#), in the said submissions.



20. The trial magistrate relied on section 2 (3) of the Law Reform Act to dismiss the appellants' case. Section 2 of the Law Reform Act provides as follow:

1. Subject to the provisions of this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate: Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims for damages on the ground of adultery.

2. Where a cause of action so survives for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person—

a. shall not include any exemplary damages;

b. in the case of a breach of promise to marry, shall be limited to such damage, if any, to the estate of that person as flows from the breach of promise to marry; and

c. where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included.”

3. No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person unless either—

a. proceedings against him in respect of that cause of action were pending at the date of his death; or

b. proceedings are taken in respect thereof not later than six months after his executor or administrator took out representation.

21. A reading of the of these provisions reveals the following;

i. subsection (1)-All causes of action for or against the deceased survived them whether for or against his/her estate.

ii. subsection (3) A cause of action in tort where proceedings were pending against a deceased at the time of his/her death shall only survive if the proceedings thereof are taken not later than six (6) months after issuance of the letters of grant ad litem to his/her executor/administrator.

22. In the present case the suit is in respect of personal injuries sustained by the deceased as a result of an accident. The said injuries are not related to the cause of death as per the death certificate. Secondly, the claim is not against the estate of the deceased as is the requirement under section 2(3) of the Law Reform Act. It is for the benefit of the estate of the deceased. The Court of Appeal in the case of *Roman Karl Hintz v Mwang'ombe Mwakima* [1984] eKLR, held as follows:

“it seems to me, having regard to section 2 of the Law Reform Act, that a parent or next of kin or a personal representative can act as a representative of a deceased person and file an



action for the benefit of an estate of a person deceased without a grant of probate or letters of administration to the estate....”

23. In the circumstances of this case I find that the appellants did not err in the action they took. I therefore find that the trial Magistrate misinterpreted the stated provisions and arrived at a wrong decision. The Judgment delivered on 6<sup>th</sup> May 2022 dismissing the appellants’ suit is hereby set aside.
24. This court will proceed to re-evaluate and re-consider the evidence adduced. Besides filing a defence the 1<sup>st</sup> respondent did not adduce any evidence. However, his counsel filed submissions in the trial court. The 2<sup>nd</sup> respondent never participated the proceedings and judgment was entered against it on 30<sup>th</sup> July, 2021. The issue the 1<sup>st</sup> respondent raised on the Law Reform has already been determined in the previous paragraphs of this Judgment.
25. I now proceed to analyse the evidence on liability and assess the injuries sustained by the deceased as a result of the accident.
26. In the plaint dated 2<sup>nd</sup> March, 2020 it is stated that on or about 5<sup>th</sup> April 2018 the deceased was walking alongside Kabiria road in Kwangware when the 1<sup>st</sup> respondent acting for the 2<sup>nd</sup> defendant’s gain negligently road managed or controlled motorcycle KMEJ 600V that it hit the deceased who sustained serious injuries and suffered loss and damage.
27. The appellants listed under paragraph 4 of the plaint the particulars of negligence, injuries and special damages.
28. In view of the above, it is my opinion that the issue arising for determination is whether the respondents are liable for the accident and if yes what award are the appellants entitled to.
29. In Michael Hubert Kloss & Another v David Seroney & 5 Others [2009] eKLR the court stated thus:

“The determination of liability in a road traffic accident is not a scientific affair, Lord Reid put it more graphically in *Stapley v Gypsum Mines Ltd* (2) [1953] A.C 663 at pg 681 as follows;  
“To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide .....

“The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally”.
30. Further, in *Farah v Lento Agencies* [2006] 1 KLR 124, 125, the Court of Appeal held that:

“Where there is no concrete evidence to determine who is to blame between the two drivers, both should be held equally to blame. As no side could establish the fault of the opposite party, liability for the accident could be equally on both the drivers. Therefore, each driver was to blame”.



31. Guided by the above cited authorities, it is my view that in determining liability this court must consider the facts of the case and establish what mainly contributed to the cause of the accident. The court will always consider the manner of driving, conduct of the pedestrian and identify the person who was at fault and place the blame on him/her. Where the facts and circumstances are such that it is not clear who was at fault and who was to blame, the court will apportion liability.
32. I have considered the evidence adduced before the trial court. It is not in dispute that the 1<sup>st</sup> respondent was the rider of motor cycle registration number KMEJ 600V which hit the deceased. The said motor cycle belonged to the 2<sup>nd</sup> respondent. During trial the appellant testified as the only witness and did not tell the court much on how the accident occurred since he was not an eye witness. He adopted his witness statement dated 2<sup>nd</sup> March 2020, and produced the list of documents as evidence (Exhibit 1 to 11). He referred to the police abstract which stated that the deceased was a pedestrian when the accident occurred.
33. The respondents did not call any witness despite entering appearance and with the 1<sup>st</sup> respondent filing his defence. In the said statement of defence the 1<sup>st</sup> respondent denied the contents of the plaint and pleaded negligence on the part of the deceased under paragraph 4.
34. After analysing all the evidence above, this court notes that the only document that attests to the occurrence of the accident is the police abstract. There is no police investigation report to show whether either the deceased who was a pedestrian at the time of the accident or the rider of the motor cycle registration KMEJ 600V was wholly to blame. The police abstract does not give sufficient details. The respondent who does not deny that the accident took place failed to testify for purposes of enlightening the court on how the said accident occurred. The appellant on his part was not there when the accident occurred and so the person who was better placed to testify and assist the court was the 1<sup>st</sup> respondent who elected not to.
35. The legal burden was on the appellant to demonstrate that the respondents were to blame for the accident. The appellant relied on the police abstract which only confirmed that the accident occurred on the material date. The victim who could have testified died about 6 months after the accident.
36. Having considered the circumstances leading to the occurrence of the accident, it is my view that none of the parties proved who was entirely to blame for the accident. Both deceased and the rider of the motor cycle (1<sup>st</sup> respondent) ought to have been careful while using on a public road.
37. Consequently, it is my finding that both the deceased and the 1<sup>st</sup> respondent are equally to blame for the accident. Therefore, liability is apportioned at 50:50 between the parties herein.
38. Moving to the issue of quantum, the Court of Appeal in Odinga Jacktone Ouma v Moureen Achieng Odera [2016] eKLR stated as follows: -

“comparable injuries should attract comparable awards”.
39. Further, in the case of Borthy-Gest stated in West (H) & Son Ltd v Shepherd [1964] A.C. 326 pg. 345:

“But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible



comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional.”

40. According to the medical report by Dr. Wokabi found at (pages 14-15 of the record of appeal) the injuries sustained by the deceased include; blunt injuries on the scalp, fracture of the left humerus and permanent incapacity at 10%. The appellants prayed for an award of Kshs. 800,000/=. Counsel relied on the decisions in; Kweri Peter & 2 Others v Ann Wanjiku Maina [2017] Eklr, where an award of kshs. 600,000/= was made for fracture of the radius in 2017. Also, in Cleophas Shimanyula v Mohamed Salat [2018] eKLR, where an award of Kshs. 500,000/= was made for fracture of the humerus.
41. The 1<sup>st</sup> respondent in his submissions both in the lower court did not make any submissions on quantum.
42. Applying the principles in the above cited authorities and those cited by the appellants and considering the injuries the deceased sustained with a level of permanent incapacity at 10% resulting therefrom this court finds an award of kshs. 550,000/= to be sufficient compensation. This is subject to 50% contributory negligence on the part of the deceased. The claim for special damages fails.
43. Judgment is therefore entered against the respondent jointly and severally for Ksh 275,000/= (Two hundred and seventy-five thousand) plus costs and interest at court rates, from the date of Judgment in the subordinate court.
44. Orders accordingly.

**DELIVERED VIRTUALLY, DATED AND SIGNED THIS 30TH DAY OF JULY, 2024 IN OPEN COURT AT NAKURU.**

**H. I. ONG’UDI**

**JUDGE**

