



**Muriuki v Ngugi (Civil Appeal E001 of 2023)
[2024] KEHC 10839 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 10839 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E001 OF 2023**

**BK NJOROGE, J
JULY 26, 2024**

BETWEEN

JULIUS AUGUSTUS MURIUKI APPELLANT

AND

JULIUS GICHUHI NGUGI RESPONDENT

JUDGMENT

1. This Appeal arises out of the Judgement of Hon. C. A. Otieno Omondi (SPM) delivered on 30th November, 2022. The trial Court dismissed the Appellant’s case for failure to prove any negligence against the Respondent. To the Trial Court, the deceased was negligent in crossing the busy Thika Super Highway, while there was a designated foot bridge nearby.
2. This is a running down claim. The Appeal was flagged for the Rapid Results Initiative for the month of June, 2024. Directions for filing written submissions were duly given on 6/5/2024. Parties having filed their respective submissions, the Court reserved this matter for a Judgment. The Court has considered the submissions filed by the parties, as well as the authorities attached. The Court thanks Counsels for their industry.

Background Facts

3. The initial claim was filed by the Appellant as the Administrator of the Estate of his late son. He stated that his son was lawfully crossing the road on 23/11/2020. This was at a place called Kahawa Wendani along Thika Road. The son was knocked down by the Respondent’s motor vehicle registration number KAT XXXX a Toyota Saloon. He sustained fatal injuries and succumbed on the spot.
4. The Appellant blamed the Respondent for knocking down his son. He claimed damages under the *Law Reform Act* Cap 26 and under the *Fatal Accidents Act* Cap 32 of the Laws of Kenya.



5. The Respondent maintained that the deceased had crossed the road without any warning. The deceased failed to use a pedestrian foot bridge already provided. That he would not have expected a pedestrian to be crossing across the busy Thika Super Highway. The Respondent denied any liability and quantum. The trial Court, found in favour of the Respondent, and dismissed the Appellant's case, directing each party to bear their own costs. This is what has triggered this Appeal.

Issues for Determination

6. The Appellant has filed a Memorandum of Appeal consisting of five (5) grounds. The same challenges the trial Court's decision on liability and quantum.
7. The Court proceeds to frame two (2) issues for determination as follows:
 - a. Is the Appeal meritorious?
 - b. What final orders should issue?

Analysis

8. This is a first Appeal. This Court therefore has to appraise of itself of the evidence before the trial Court. It has a duty to relook, re-evaluate and re-analyze the evidence. Then it should reach its own independent conclusion. This is at all times bearing in mind that it did not see or hear any of the witnesses. See *Selle & Another -v- Associated Motor Boat Co. Ltd & others* [1968] E.A. 123.

Is the Appeal Meritorious?

9. The Appeal in essence challenges the trial Court's findings on liability and quantum.

On Liability

10. The Appellant was not an eye witness to the accident. He relied on the testimony of Plaintiff Witness 2, Corporal Samuel Kirimi, who produced the Police Abstract. From the Police investigations, the traffic accident occurred on 23/11/2020 at around 5.30 a.m. along the Thika Super Highway opposite Kahawa Barracks. The Respondent's motor vehicle registration number KAT XXXX was being driven from Ruiru to Nairobi. It knocked the deceased who was crossing the road from left to the right. The Police did not charge the driver and no blame was placed on either party. The Police officer further stated that the driver could have applied brakes and avoided hitting the pedestrian.
11. During cross-examination, the police officer confirmed that the accident occurred on the center lane of the Highway. The damage to the Respondent's motor vehicle was to the left front side. That there was a foot bridge and no pedestrian crossing where the accident occurred.
12. When the Respondent took the stand, he adopted his written statement as his evidence in chief. His version was that the accident occurred around 4.20am at Kahawa Wendani under the foot bridge. It occurred in the middle lane and the impact was on the left hand side of his motor vehicle. He could not have anticipated the accident. He only saw the deceased after he hit him. There was a vehicle to his right so he could not veer to the right. In cross-examination he testified that he was driving at between 80-100km/hr. That the deceased was crossing from the left to the right.
13. The trial Court found that the accident happened in the middle of the road away from the foot bridge and there was no zebra crossing. The trial Court was unable to find the Respondent blameworthy given that the accident happened on the middle lane and visibility was poor as the accident happened at 4.30am. The trial Court laid great emphasis on the failure by the deceased to use the foot bridge.



That motorists would not be expected to anticipate pedestrians to be crossing the Super Highway so near a footbridge.

14. The Court has considered the evidence on record. The Court notes that the accident happened at the very wee hours of the morning. The Respondent placed the time at 4.30am. The Respondent testified that the visibility was poor, presumably, due to the darkness. In the Court's view the very early hours of the morning and the poor visibility called upon the Respondent to be extra vigilant and alert. Even on a Super Highway, with visibility being poor, a speed of between 80-100km/hour may be too fast in the circumstances. The driver of the Motor vehicle is always called upon to exercise vigilance, to be extra careful as he is driving a lethal machine.
15. This Court does not in any manner seek to place the burden of proof upon the Respondent. That burden at all times lay with the Appellant. His evidence through the Police Officer was that the accident happened at the middle lane. To this Court it means that the deceased had crossed the 1st lane and was now on to the middle lane. The Respondent should have noted his presence on the road. The evidence points to a pedestrian crossing the road.
16. This Court is alive to the fact that there was testimony of a foot bridge nearby. Do pedestrians always use the designated foot bridges? How many pedestrians would safely use the footbridge at midnight, let alone 4.30am? How safe are these footbridges at night? Is the Super Highway completely fenced off from the surrounding areas, as is the case of the Standard Gauge Railway (SGR)?
17. In the Court's view, the existence of a footbridge would not give a licence to a driver to put his foot flat on to the pedal so to speak. The driver could not throw caution to the wind. A driver must at all times be alert and give allowances for the unexpected, and out of the ordinary actions of other road users. This is more so at night when visibility is poor.
18. The deceased cannot escape any liability and neither can the Respondent. The Court proceeds to apportion liability equally at 50%: 50%. The Court relies on Waitbaka -v- Saratia [suing as the representative of the Estate of Arthur Mulindi Chonelwa] [2023] eKLR and Jane Muthoni Mukabi & 4 others (Suing as the personal representatives of the Estate of David Waitbaka Muthoni (Deceased) -v- Phillip Macharia Ndirangu & 4 others [2020] eKLR.

On Quantum

19. The trial Court assessed general damages as follows:
 - a. Pain and suffering Kshs.20,000/-
 - b. Loss of expectation of life Kshs.100,000/-
 - c. Dependency (Global award) Kshs.2,000,000/-
 - d. Special damages Kshs.399,950/-
20. The Appellant on appeal proposes the following awards.
 - a. Pain and suffering Kshs.200,000/-
 - b. Loss of expectation of life Kshs.200,000/-
 - c. Loss of dependency Kshs.12,400,000/-
 - d. Special damages Kshs.399,950/-



21. The Respondent has not challenged the computation on quantum. Save to challenge the loss dependency of Kshs.12,400,000/- as exaggerated. The Court notes that the awards for pain and suffering as well as loss of expectation of life are well within the range of comparables referred to the trial Court. In *Bashir Ahmed Butt –v- Uwais Ahmed Khan* [1982-88] KAR 5, it was held that the Appellate Court will not merely interfere with an award of damages unless it is so in inordinately high or low as to represent an entirely erroneous estimate. The Court is also guided by *Savanna Saw Mills Ltd –v- George Mwale Mudomo* [2005] eKLR. Assessment of damages is at the discretion of the trial Court. This Court will not disturb or interfere with the damages awarded merely because it feels it could have arrived at different figures.
22. On loss of dependency, the earnings of the deceased were not proved. The figure of Kshs.50,000/- is only an estimate. The deceased is said to have been a Security Guard at Qatar aged 34 years. To ask the Court to adopt the wages of Kshs.50,000/- without proof is asking the Court for too much. At the very least, a copy of the Contract of Employment or a letter from the employer would have provided some guidance on actual pay, taxes paid etc.
23. The trial Court applied a global award of Kshs.2,000,000/-. This Court is guided by *Albert Odawa – v- Gichuru Githenji* [2007] eKLR; *Moses Mairura Muchiri –v- Cyrus Maina Macharia (suing as the personal representative of the Estate of Mercy Nzula Maina (deceased))* (2016) eKLR and *Mwangagi & another –v- FKM (Suing as Legal Representative of the Estate of the late ANK)* [2021] eKLR. Where the multiplicand is unclear, the Court may safely adopt the global award approach. This is because the multiplier assessment approach is not cast on stone.
24. The Court has no reasons to interfere with the global award of Kshs.2,000,000/- made.

What final Orders should Issue.

25. Save as to interfering with the issue of liability, the Court does not interfere with the assessment of the awards made by the trial Court. The Special damages remain as proved.
26. The Appellant having succeeded partially, he is awarded half the costs of this Appeal. He is also awarded the costs of the trial Court below.

Determination

27.
 - a) The Appeal succeeds partially in that the Judgement of the trial Court on liability is set aside and replaced with a Judgement on liability at 50%:50% in favour of the Appellant.
 - b)
 - i) General damages on pain and suffering Kshs. 20,000
 - ii) On loss of expectation of life Kshs.100,000
 - iii) On Loss of dependency (Global figure) Kshs.2,000,000
 - iv) Special damages Kshs. 399,950
Kshs.2,519,950 Less 50% contributing negligence Kshs.1,259,975
Total Kshs.1,259,975
 - c. The Appellant is awarded a half costs of this Appel as well as the costs of the trial Court below.



28. It is so ordered.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
26TH DAY OF JULY, 2024.**

NJOROGE BENJAMIN K.

JUDGE

In the presence of:

No appearance for the Appellant

No appearance for the Respondent

Court Assistant: Luyai

