



Njoroge & another v Waititu (Suing as the personal representative of the Late Erick Kiarie Njenga) (Civil Appeal E598 of 2022) [2024] KEHC 9519 (KLR) (Civ) (26 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9519 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E598 OF 2022

WM MUSYOKA, J

JULY 26, 2024

BETWEEN

OBADIAH KIMANI NJOROGE 1ST APPELLANT

NICHOLAS NGATIA 2ND APPELLANT

AND

ESTHER NJOKI WAITITU (SUING AS THE PERSONAL REPRESENTATIVE OF THE LATE ERICK KIARIE NJENGA) RESPONDENT

(An appeal arising from the judgment of Hon. E Wanjala, Principal Magistrate, PM, delivered on 24th September 2021, in Milimani CMCCC No. 3791 of 2012)

JUDGMENT

1. The suit at the primary court was initiated by the respondent, against the appellants, for compensation, arising from a road traffic accident, which allegedly happened on 26th November 2010, which resulted in the death of the late Erick Kiarie Njenga, hereafter the deceased, 10 days later. The deceased was a passenger in motor vehicle KBF 343B, belonging to the 1st appellant, but driven by the 2nd appellant, along Mombasa Road. The case by the respondent was that the said motor vehicle was recklessly or negligently driven by the 2nd appellant, which resulted in the fatal accident. The appellants filed a joint defence, in which they denied everything pleaded in the plaint. They pleaded, in the alternative, that the deceased was a gratuitous passenger in the accident vehicle, who was not entitled to compensation.
2. 2 trials were conducted. In the first trial, only the respondent participated in the proceedings, where she called 2 witnesses, and a judgment was rendered by Hon. C. Obulutsa, Chief Magistrate, on 8th May 2013. However, those proceedings were set aside, and a fresh trial was conducted, which involved the appellants. In the second trial, 2 witnesses testified for the respondent, and none testified



for the appellant. Judgment was delivered on 24th September 2021, by Hon. Wanjala, PM. Liability was resolved at 100%. On damages, the court awarded Kshs. 5,584,264.00 for loss of dependency, Kshs.544,264.00 special damages, and damages under the Law Reform Act, Cap 26, Laws of Kenya, at Kshs. 600,000.00.

3. The appellants were aggrieved, hence the instant appeal. The grounds in the memorandum of appeal, dated 2nd August 2022, revolve around liability; the trial court not considering that the deceased had no income; the court ignoring the known applicable principles and relevant authorities on both liability and quantum; the damages awarded being inordinately high, particularly on loss of dependency, and on pain and suffering; and the award of damages being both under the Law Reform Act and the Fatal Accidents Act, Cap 32, Laws of Kenya.
4. Directions were given on 6th February 2024, for disposal of the appeal by way of written submissions. There has been compliance, by both sides.
5. The appellants have collapsed their 8 grounds into 2: on liability and assessment of damages. On liability, they have cited Lawrence Asava vs. Gesalt Gild Limited & another [2019] eKLR (C. Kariuki, J), Midans Services Limited & another vs. Ronald Kaputo [2022] eKLR (Meoli, J) and Benter Atieno Obonyo vs. Anne Nganga & another [2021] eKLR (Chemitei, J). On assessment of damages, they have submitted around the multiplier, the multiplicand, damages under the Law Reform Act and special damages, and they have cited Petronilla Muli vs. Richard Muindi Savi & Catherine Mwendu Mwindu [2021] eKLR (Limo, J), Joshua Mungania & another vs. Gregory Omondi Angova [2018] eKLR (Majanja, J), Stanwel Holdings Limited & another vs. Rachael Haluku Emanuel & another [2020] eKLR (Nyakundi, J) and Ndege & another (suing as administrators of the estate of Moses Kariuki Muthaga Deceased) vs. Ontumbi & another [2023] KEHC 19905 (KLR)(Mshila, J), to support their arguments.
6. The respondent similarly submits around liability and quantum. On liability, she relies on the decisions in Lawrence Asava vs. Gesalt Gild Limited & another [2019] eKLR (C. Kariuki, J), Shaneebal Ltd vs. County Government of Machakos [2018] eKLR (Odunga, J), Peter Ngigi Kuria & another (suing as the legal representative of the estate of Joan Wambui Ngigi) vs. Thomas Ondili Oduol & another [2019] eKLR (Mwongo, J), Margaret Waithera Maina vs. Michael K. Kamau [2017] eKLR (Waki, Nambuye & Kiage, JJA), Susan Kanini Mwangangi vs. Patrick Mbithi Kavita [2019] eKLR (Odunga, J) and PA Okello & MM Nsereko t/a Kaburu Okello & Partners vs. Stella Karimi Kabia & 2 others [2012] eKLR (O’Kubasu, Waki & Onyango Otieno, JJA). On quantum of damages, she submits around the multiplier, the multiplicand and loss of dependency, damages under the Law Reform Act and the Fatal Accidents Act, loss of expectation of life and special damages, and relies on Benedeta Wanjiku Kamau vs. Changwon Cheboi & Anwarali & Brothers Ltd [2013] eKLR (Emukule, J), Rosemary Mwasya & another vs. Steve Tito Mwasya & Jacinta Ndinda Muendo [2018] eKLR (Githinji, Nambuye & Okwengu, JJA), Francis Righa vs. Mary Njeri (suing as the legal representative of the estate of James Kariuki Nganga [2014] eKLR (Wendoh, J), Petronilla Muli vs. Richard Muindi Savi & Catherine Mwendu Mwindu [2021] eKLR (Limo, J), Joshua Mungania & another vs. Gregory Omondi Angova [2018] eKLR (Majanja, J), Jacob Ayiga Maruja & another vs. Simeon Obayo [2005] eKLR (Omolo, Tunoi & Githinji, JJA), Board of Trustees of the Anglican Church of Kenya Diocese of Marsabit vs. ASD & FHW [2018] eKLR (Chitembwe, J), NMG vs. Muchai Teresia [2015] eKLR (Kimaru, J), Ishmael Nyasimi vs. David Onchangu Orioki [2018] eKLR (Majanja, J) and Daniel Kuria Nganga vs. Nairobi City Council [2013] eKLR (Ougo, J).
7. There are 2 issues for determination: apportionment of liability and assessment of damages.



8. On liability, it is not disputed that the accident happened, involving the motor vehicle belonging to and controlled by the appellants. The issue is about how the accident happened, and whether, given the circumstances of the accident, the appellants could be held liable. The respondent did not call eyewitnesses, instead she relied on a police officer to produce the police records. That police witness was not the investigator of the accident. It was submitted that she could not be relied on to give an account of how the accident happened. However, her testimony was useful, in terms of confirming to the court that an accident did in fact happen, involving a vehicle owned and controlled by the appellants, in which vehicle the deceased was a passenger, who died as a result of that accident. There was, no doubt, liability, for the appellants owed the deceased, as a passenger in their vehicle a duty of care.
9. The accident was not self-involving. The appellants' vehicle did not roll on its own. There was collision between it and another vehicle. Neither party made the owner and driver of that other vehicle a party to the suit. Liability was apportioned without taking into account the role or place of that other vehicle in the accident, or its contribution to the accident. It is on that account that the appellants argue that liability ought to have been resolved at 50%:50% between them and that other vehicle. Should the trial court have done that? I do not think so. Liability can only be apportioned between parties to a suit. It cannot be apportioned against a person or entity who or that has not been named as a party to the suit. There was no basis or foundation for the trial court to apportion liability at 50%:50% between the appellants and a non-party to the suit. It is a cardinal principle of natural justice and fair hearing that no person is to be condemned unheard. To attribute liability on a person, who has not been made a party to the suit, would amount to judging that person before affording them a chance to be heard in defence, and it would be unjust.
10. Whose obligation was it to bring the owner and driver of the other vehicle into the suit? Was it that of the respondent or the appellants? The deceased was a passenger in the vehicle owned and controlled by the appellants. The appellants, on that account, owed him a duty of care. Of course, the persons in charge and control of the other vehicle also owed a duty of care to other road users, including the appellants and the deceased. However, the primary duty of care to the deceased, was owed by the owner and driver of the vehicle in which he was a passenger. Were anything to happen to the deceased, in the course of travelling in that vehicle, the persons that he could look up to, for an account, would be the owner and driver of the vehicle in which he was a passenger, and not any other vehicle that might contribute, one way or the other, to the mishap. The drivers and owners of the vehicles involved, in the incidence of a collision, would owe a duty of care to each other, once they put their vehicles on the road. In the event of such a collision, the passenger would be expected to call the owner and driver of the vehicle, in which he was travelling, to account, and, should the owner and driver feel that the mishap was caused or contributed to by another, it would be their duty to call upon the owner and driver of the other vehicle to account. In this case, it should have been the appellants who ought to have brought the owner of that other vehicle into the dispute, by way of third party proceedings, to have liability apportioned as between them and the owner and driver of that other vehicle. In the absence of the owner and driver of that other vehicle, as parties to the suit, the trial court could only apportion liability to the owner and driver of the vehicle in which the deceased was a passenger. The deceased was a passenger in the accident, and, no liability could be apportioned as between him and the owner and driver of the vehicle.
11. One other thing, the respondent tendered evidence, through the police witness, who produced the police file, which had a police abstract, an OB extract, and statements of eyewitnesses, who were passengers in the accident vehicle. According to that record, the 2nd appellant, who was the driver of the vehicle in which the deceased was a passenger, was blamed for changing lanes. I have seen, from the trial record, 2 handwritten statements, that were produced by the police witness, from Andrew



Kathukya Giati and Simon Ndumia Mukubwa, recorded on 28th January 2011. Both stated that the 2nd appellant rammed into the back of the other vehicle. The 2nd appellant did not testify, to counter the narrative from the police witness. That meant that the evidence tendered by the police witness, on liability, inclusive of the documents that she placed on record, was not controverted. In *Multiple Hauliers (EA) Ltd vs. Justus Mutua Malundu & 2 others* [2017] eKLR (PJ Otieno, J), the court stated that there is a general “presumption that he who hits another from behind is ipso facto negligent.” The application of that presumption, to the facts of the instant case, would mean that joinder of the owner and driver of that other vehicle would not have changed the situation, for liability would still have remained at 100%, for the hit from behind suggested lack of proper look out, on the part of the 2nd appellant, for the vehicles that were in front of his vehicle. Clearly, the issue of apportioning liability, whether between the appellants and the non-parties to the suit, or between the appellants and the deceased, could not arise.

12. On quantum, the appellants have issues with the multiplier, the multiplicand, the award for pain and suffering, and special damages.
13. The multiplier and multiplicand can be taken together, for they relate to loss of dependency. The appellants submit that the award under that heading should have ranged between Kshs. 700,000.00 and Kshs. 1,000,000.00, based on *Stanwel Holdings Limited & another vs. Rachael Haluku Emanuel & another* [2020] eKLR (Nyakundi, J). That submission would make sense only if the court were to adopt the global award approach. There is discretion to either use the global award approach, or the multiplier/multiplicand approach. The trial court chose the latter, and cannot be faulted for that. The issue should be whether the multiplier and the multiplicand adopted were reasonable.
14. On the multiplier, the trial court adopted 30 years, while the appellants root for 20 years, following the decision in *Petronilla Muli vs. Richard Muindi Savi & Catherine Mwendu Mwindu* [2021] eKLR (Limo, J). There is discretion when it comes to arriving at a multiplier, and the authorities indicate that the courts have worked with figures between 20 and 40. In *Crown Bus Services Ltd & 2 others vs. Jamila Nyongesa and Amida Nyongesa* [2020] eKLR (Muriithi, J), the court applied a multiplier of 35 for a 21 year old; while in *West Kenya Sugar Co. Ltd vs. Falantina Adungosi Odionyi* (suing as the legal representative of Patrick Igala Odionyi – deceased) [2020] eKLR (Kiarie, J), a multiplier of 33 was used in respect of a deceased person aged 21. In *Benedeta Wanjiku Kamau vs. Changwon Cheboi & Anwarali & Brothers Ltd* [2013] eKLR (Emukule, J), the court adopted a multiplier of 30 for a 23 year old; and in *Rosemary Mwasya & another vs. Steve Tito Mwasya & Jacinta Ndinda Muendo* [2018] eKLR (Githinji, Nambuye & Okwengu, JJA), it was 30 for a 19 year old. In *Daniel Kuria Nganga vs. Nairobi City Council* [2013] eKLR (Ougo, J), the court adopted a multiplier of 37, for an 18 year old. In *Petronilla Muli vs. Richard Muindi Savi & Catherine Mwendu Mwindu* [2021] eKLR (Limo, J), a multiplier of 36, for a 19 year old, was reduced to 20. The multiplier adopted by the trial court was, therefore, within range.
15. With respect to the multiplicand, the appellants submit that the deceased was still in college, and had no income, hence the approach adopted by the trial court was speculative, and that the court should have used the global award approach instead. I reiterate what I have stated above, that adoption of either approach is at the discretion of the court, going by *Petronilla Muli vs. Richard Muindi Savi & Catherine Mwendu Mwindu* [2021] eKLR (Limo, J). In the instant case, the trial court chose the multiplier/multiplicand approach, based on *Ponderosa Logistics Limited vs. Wesley Cheptoo arap Chelagat and Alex Cheptoo* (suing as the representative in the estate of Mark Too (deceased) [2020] eKLR (MT Matheka, J). It was applied in *Joshua Mungania & another vs. Gregory Omondi Angova* [2018] eKLR (Majanja, J), where the deceased was also a university student, on the basis that the future career of a university student could not be said to be speculative, as the future employment of such a



person can be evaluated for the nature of course or study being undertaken by him, and adopting the multiplier/multiplicand approach would, therefore, have a basis. What can perhaps be faulted is the quantum. The trial court used the public service entry salary scale for 2020, while the deceased had died in 2010. The entry scale, in the case of the deceased herein, in 2010 would have been Kshs. 26,323.00, and that would have been the more realistic figure to adopt for a multiplicand.

16. The appellants did not submit on the dependency ratio, and I believe that they are contented with it. The loss of dependency should work out, in the circumstances, as follows: $26,323 \times 12 \times 30 \times 1/3 = 3,158,760.00$.
17. In view of everything that I have said above, I find and hold that the appeal herein has merit, but only to the limited extent of the multiplicand. I will set aside the multiplicand adopted, of Kshs. 37,000.00, which I hereby do, and I hereby substitute it with one of Kshs. 26,323.00. That would mean the total award on loss of dependency would work out in the manner stated in paragraph 16 hereabove. The rest of the awards shall remain undisturbed. The appeal is allowed to that limited extent. Each party shall bear their own costs. It is so ordered.

DELIVERED BY EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 26TH DAY OF JULY 2024.

W MUSYOKA

JUDGE

Ms. Veronica, Court Assistant, Milimani, Nairobi.

Mr. Arthur Etyang, Court Assistant, Busia.

Ms. Eva Adhiambo, Legal Researcher.

Advocates

Mr. Keiru, instructed by Kamotho Njomo & Company, Advocates for the appellants.

Ms. Esonga, instructed by Oronga Esonga & Company, Advocates for the respondent.

