



Kihuna & another v Murei & another ((Suing as the personal representatives of the Estate of the Late Nathan Kiptoo Rono)) (Civil Appeal E006 of 2023) [2024] KEHC 13801 (KLR) (30 September 2024) (Judgment)

Neutral citation: [2024] KEHC 13801 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL APPEAL E006 OF 2023
SN MUTUKU, J
SEPTEMBER 30, 2024**

BETWEEN

VICTOR NG'ANG'A KIHUNA 1ST APPELLANT

VISION FUND KENYA LIMITED 2ND APPELLANT

AND

VICKY JERONO MUREI & ANOTHER RESPONDENT

(SUING AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF THE LATE NATHAN KIPTOO RONO)

JUDGMENT

1. The Respondents filed a Plaintiff in the lower court against the Appellants, in CMCC No. 60 of 2020, seeking general damages under the Fatal Accidents Act and the Law Reform Act arising from a fatal road traffic accident involving Motor Vehicle registration number KBB 968T belonging to the 2nd Appellant and driven by the 1st Appellant and Nathan Kiptoo Rono (deceased). The Respondents also sought special damages amounting to Kshs 147,370, costs of the suit and interest.
2. The accident occurred on 29th June 2019 along Nairobi/Namanga Road at Kitengela Town. At the time of the accident, the deceased was a pedestrian. He died on the spot.
3. The trial court found the Appellants 100% liable. The court ruled in favour of the Respondents. They were granted Kshs 129,000 for special damages, Kshs 100,000 for pain and suffering, Kshs 100,000 for loss of expectation of life and Kshs 14,503,680 for loss of dependency, all totaling Kshs 14,832,680/ = plus costs of the suit and interest.



4. The Appellants are aggrieved by the judgment of the lower court and have moved this court on appeal. They filed a Memorandum of Appeal on 23rd January 2023 and an Amended Memorandum of Appeal on 30th August 2023.

Grounds of Appeal

5. The Appellants have raised six (6) grounds of appeal as follows:
- i. That the Learned Magistrate erred in holding the Appellants liable for the accident that occurred on 29th by considering hearsay evidence of the Respondents' witnesses.
 - ii. That the Learned Magistrate erred in holding the Appellants 100% liable for the accident without proof of negligence on their part.
 - iii. That the Learned Magistrate erred in law and fact in awarding damages for pain and suffering that were manifestly excessive in the circumstances.
 - iv. That the Learned Magistrate erred in awarding the Respondents inordinately high general damages in respect to loss of dependency against the principles of awarding the said damages.
 - v. That in any event, the Learned Magistrate erred in awarding the Respondents general damages that exceed the pecuniary jurisdiction of the Senior Resident Magistrate's Court of Kshs 7,000,000/= contrary to section 7(1) (d) of the Magistrate's Court [*Act No. 26 of 2015*](#).
 - vi. That the Learned Magistrate erred in failing to consider the Appellant's Submissions and the numerous binding authorities cited by the Appellants and in doing so, arrived at an erroneous conclusion.
6. The Appellants pray that this appeal be allowed, that the Judgment and Decree in Kajiado CMCC No. 60 of 2020 dated 20th January 2023 be set aside, that the suit against the Appellants be dismissed for failure of the Respondents to discharge their burden of proof and costs of this Appeal and of Kajiado CMCC No. 60 of 2020.
7. The appeal was canvassed through written submissions.

Appellants' submissions

8. The Appellants' submissions are dated 29th January 2024 and filed on 15th February 2024. They submitted on the following issues:
- i. Lack of jurisdiction of the trial court to award damages amounting to Kshs 14,503,680.
 - ii. Awarding exorbitantly high quantum of damages.
 - iii. Holding the Appellants 100% liable for the accident.
9. They submitted that the trial magistrate lacked jurisdiction to award damages more than Kshs 7,000,000 as provided under section 7(1) of the Magistrates' Court Act. They relied on various authorities including:
- a. [*R v Magistrates Court, Mombasa; Absin Synergy Limited \(Interested Party \(Judicial Review E033 of 2021\)*](#) [2022] KEHC 10 KLR (24 January 2022) (Judgment);
 - b. Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1089] KLR 1, and
 - c. Samuel Kamau Macharia v Kenya Commercial Bank & 2 Others, Civil Appeal No. 2 of 2011



10. It was submitted that the Respondents were aware that the trial magistrate lacked pecuniary jurisdiction to award the amount of general damages they were seeking and that the trial magistrate, upon consideration of the issue of jurisdiction, instead of downing her tools, arrogated upon herself the jurisdiction of a Senior Principal Magistrate and awarded the Respondent general damages sought of Kshs 14,503,680.
11. It was submitted that having filed the primary suit in a court devoid of jurisdiction, the same is void ab initio; that the Respondents knew that the trial court lacked jurisdiction because their counsel Ms Waithera sought to arrest the judgment alleging that the court lacked pecuniary jurisdiction to deal with the matter; that the trial court delivered a ruling stating that it has jurisdiction as the damages sought had not been proved; that the Respondent did not appeal that ruling; that no appeal was filed and an attempt was made to have the matter transferred to a court with jurisdiction which was denied.
12. On the issue of liability, it was submitted that the burden of proof lay with the Respondent to prove negligence on the part of the Appellants; that the Respondents did not adduce evidence to demonstrate that the Appellants were fully to blame for the accident that occurred on 29th June 2019. They accused the trial magistrate for finding the Appellants 100% liable without evidence. They accused the trial court in failing to consider that the Respondents did not avail an eye-witness to establish the circumstances of the accident; that the Respondent's account of the accident was at variance with that of the Police Officer, PW4. They pointed out the evidence by Respondents that the deceased was lawfully walking along the footpath near Nora Dishes in Kitengela Town when the 1st Defendant being the driver of MVR No. KBB 968T negligently managed and/or controlled the motor vehicle thereby causing it to veer off the road and violently knock down the deceased causing him fatal injuries, and that of PW4 that "It was a fatal road accident at 02.00 hours along Namanga Road near Nora Dishes Kitengela involving KBP 968T Toyota Double Cabin and driven by Victor Ng'ang'a and a pedestrian Nathan Kiptoo Rono of 48 years who was crossing from left to right towards Isinya direction".
13. They submitted that there is no evidence on record to support the allegation that the deceased was walking off the road and that the evidence of PW4 varies with the averments made in the Plaint and therefore this evidence has no probative value to the averments and does not prove that the accident occurred on the side of the road.
14. On the issue of exorbitant quantum of damages, it was submitted that assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case at first instance (see *Catholic Diocese of Kisumu v Sophia Achieng Tete Civil Appeal No 284 of 2001 [2004] 2 KLR 55*).
15. They submitted under pain and suffering and loss of expectation of life that it is generally accepted principle that very nominal damages will be awarded on these two heads of damages if death followed immediately after the accident; that the award for damages for loss of expectation of life is Kshs 100,000 and for pain and suffering from Kshs 10,000 to Kshs 100,000 with higher damages being awarded if the pain and suffering was prolonged before the death (see *Mercy Muriuki & another v Saul Mwangi Nduati & another (Suing as the legal Administrator of the Estate of the late Robert Mwangi [2019] eKLR)*).
16. It was submitted that the deceased was aged 42 years at the time of his death and that he was earning Kshs 100,720 per month; that he had dependents including a baby and therefore the court should use the dependency rate of 2/3 as the deceased must have used the majority of his income on his family's upkeep; that a multiplier of 12 years should be applied on account of the vagaries and uncertainties of life giving the amount of general damages under this head at:



100,720 x 12 x 12 x 2/3 = 9,669,120.

17. It was submitted that since this figure is higher than the pecuniary jurisdiction of the trial magistrate, the amount over and above Kshs 7,000,000 should be waived to bring the award within the jurisdiction of the trial court.

Respondents' submissions

18. The Respondent's submissions are dated 5th March 2014 and filed on the same day. The Respondents submitted on whether the trial court erred in holding the Appellants liable for the accident and submitted that they called 4 witnesses and proved the case against the Respondents who did not call any witnesses and therefore failed to controvert the evidence of the Respondents. They relied on *Interchemie EA Limited v Nakuru Veterinary Centre Limited Nairobi (Milimani) HCCC No. 165B of 2000* where it was held that "..... where no witness is called on behalf of the defendant, the evidence tendered on behalf of the Plaintiff stands uncontroverted."

19. They submitted that the Respondents proved their case on a balance of probabilities which the trial magistrate found sufficient to hold the Appellants 100% liable. They relied on *William Kabogo Gitau v George Thuo & 2 Others [2010] 1 KLR 526* where the Court stated that:

"In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is liable to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

20. They submitted that the trial court did not make any errors in finding the Appellants 100% liable for the accident of 29th June 2019 because the Appellants had an opportunity to call witnesses to controvert the evidence of the Respondents which they did not do.

21. They submitted that the deceased suffered serious injuries from the accident; that he was aged 42 years old at the time of his death and that the postmortem showed that the deceased's body had undergone reconstruction showing that the impact was big and therefore the deceased must have died a very painful death regardless of having died on the spot. They submitted that the trial court did not err in awarding the general damages and that the general damages awarded were not exorbitantly high. They relied on *Moses Maina Waweru v Esther Wanjiru Githae (Suing as the Personal Representative of the Estate of the late David Githae Kiririo Taiti [2022] eKLR* where the court stated that:

"Loss of dependency is a question of fact. The criteria to be used in determining an award for loss of dependency for a deceased who left behind dependants is the number of dependants, the age of the dependants and the level of dependency. In my view the award ought to be higher where the dependants are young. The age at which the deceased died is also a relevant factor."

22. They submitted that they proved that the deceased was 42 years old at the time of the accident and that he had a young family comprised of four daughters, all minors aged 2 months, 11 years, 15 years and 16 years at the time of the accident and therefore they sought a multiplier of 18 year as the deceased would have retired at the age of 60 years; that the deceased was earning Kshs 100,720 per month and



that the trial court was persuaded by *Joan Gacheri v Sabina Mwomburi* [2018] eKLR, where the court held that:

“At the age of 42 years, the deceased could have worked up to 60 years and beyond. However, the vicissitudes of life have to be taken into account and the fact that the award will probably be made in lumpsum. The young age of the children left behind must also be taken into account. the last born would have been dependent on the deceased beyond the age of 60 years. In the premises, I find the multiplier of 18 years reasonable...”

23. It was submitted that the Appellants did not raise the issue of jurisdiction in the lower court; that it is the Respondents who raised the issue through a letter to the court raising the issue of jurisdiction which letter prompted a ruling by the trial court. The Respondents urge that the Appeal be dismissed with costs and that the judgment of the trial court be upheld.

Analysis and Determination

24. I have taken time to read the entire record of the trial court. I am alive to my role as the first appellant court. I have analyzed and evaluated the entire evidence with a view to arriving at an independent conclusion. I am aware that I did not observe the witnesses giving evidence and I will give allowance to that. I have also considered rival submissions and the issues raised.
25. I have read the evidence of the Respondents which clearly disclose the facts of this case are clear to me. The trial magistrate used a multiplier of 18 years and dependency ratio of 2/3 arriving at Kshs 14,503,680 as general damages. She granted Kshs 100,000 each as damages for pain and suffering and loss of expectation of life and special damages of Kshs 129,000, giving a total of Kshs 14,832,680.
26. It has been submitted that the trial magistrate exceeded her pecuniary jurisdiction as provided under section 7 of the Magistrates’ Court Act. The Appellants want this court to allow the appeal and dismiss the suit against them in the lower court. I have read section 7 above. It provides that:

A magistrate’s court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed—

- (a) twenty million shillings, where the court is presided over by a chief magistrate;
 - (b) fifteen million shillings, where the court is presided over by a senior principal magistrate;
 - (c) ten million shillings, where the court is presided over by a principal magistrate;
 - (d) seven million shillings, where the court is presided over by a senior resident magistrate; or
 - (e) five million shillings, where the court is presided over by a resident magistrate (emphasis added).
27. The issue of jurisdiction is central to the mandate of the court. Jurisdiction is the authority which a court possesses in order to decide matters before it. John Beecroft Saunders in “Words and Phrases Legally Defined”, Volume 3 at Page 113 defines court jurisdiction as follows:

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the



court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited.”

28. In *Owners of the Motor Vessel “Lillian S” v. Caltex Oil (Kenya) Ltd* [1989] KLR 1, the Court rendered itself thus:

...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law does not in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

29. The jurisdiction courts exercise flows from *the Constitution* and legislation. A court cannot arrogate to itself jurisdiction through any means. A court cannot exercise jurisdiction it does not possess.

30. The record of the lower court shows that the trial magistrate was a senior resident magistrate at the time he decided the matter in respect of this appeal. This fact was not lost to the Respondents. They raised the issue through their legal counsel prompting the ruling delivered on 18th January 2023. The trial court was therefore aware that she lacks jurisdiction to determine this matter. In order not to prejudice the parties, the trial magistrate ought to have taken appropriate steps to ensure that the matter is placed before a court with requisite jurisdiction.

31. In my considered view and with respect, I find that it was wrong for the trial magistrate to continue handling the matter even when she was aware that she lacked the jurisdiction to determine the case. She arrogated herself jurisdiction she did not possess and awarded damages way above what the law provides.

32. An appellate court can disturb an award for general damages in certain circumstances as shown in the case of *Bashir Ahmed Butt vs. Uwais Ahmed Khan* (1982-88) KAR where it was stated as follows:

‘An appellate court will not disturb an award for general 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...’

33. The fate of a decision made without jurisdiction was expressed in *Benson Makori Makworo v Nairobi Metropolitan Services & 2 others* [2022] eKLR as follows:

A decision made by a court of law without proper jurisdiction amounts to nullity ab initio, and such a decision is amenable to setting aside ex debito justitiae.

34. To my mind, this court sitting as the first appellate court is justified in interfering with the decision of the trial court for reasons that the decision was made by the trial magistrate who had no proper jurisdiction. That decision is nullity ab initio. With this finding, this court will not proceed to determine other issues raised in this appeal lest this court make pronouncements that may be prejudicial to the parties.

35. I have considered this matter deeply. It is my view that the parties herein deserve to have their matter heard by a court with requisite jurisdiction. They have the right to access justice. They have not obtained that justice due to the mistakes that have occurred in this matter. In the name of substantive justice, I will allow the Appeal partially, by setting aside the judgment and the decree dated 20th January 2023 issued in favour of the Respondents in *Kajiado CMCC No. 60 of 2020*. I decline to dismiss the Respondents’ suit namely *Kajiado CMCC No. 60 of 2020*. Instead, I order that the file in CMCC



No. 60 of 2020 shall be returned to the Chief Magistrate, Kajiado Law Courts, to assign it to another magistrate, other than Hon. Jane Kamau, for retrial.

36. I order that each party bears own costs for this appeal.

37. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 30TH SEPTEMBER 2024.

S. N. MUTUKU

JUDGE

