



Kinyua v Njuguna (Suing as the Legal Representative of the Estate of the Late Agnes Nyambura Wachira) (Civil Appeal E425 of 2024) [2024] KEHC 16883 (KLR) (Civ) (20 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16883 (KLR)

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

CIVIL

CIVIL APPEAL E425 OF 2024

AB MWAMUYE, J

DECEMBER 20, 2024

BETWEEN

AGOSTINO KINYUA APPELLANT

AND

LUCY NJOKI NJUGUNA RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE
AGNES NYAMBURA WACHIRA**

JUDGMENT

1. This is an appeal against the judgment and decree of the Trial Court, which found the Appellant 100% liable for the fatal accident involving the deceased, Agnes Nyambura Wachira, and awarded damages in favour of the Respondent. The Appellant contests both the finding of liability and the quantum of damages awarded, claiming they were excessive and unsupported by evidence. The Respondent argues that the judgment was sound in law and fact.
2. The Appellant filed the following grounds of appeal:-
 - i. That the Learned Trial Magistrate erred in law in failing to appreciate the evidence on liability and thereby reaching a wrong finding thereon.
 - ii. That the Learned Trial Magistrate erred in law and in fact in making a finding on liability that was not supported by the evidence on record.
 - iii. That the Learned Trial Magistrate erred in law and in fact in reaching a finding that the Appellant was liable at 100%.



- iv. That the Learned Trial Magistrate erred in law and in fact in making an award on general damages that was inordinately high.
 - v. That the Learned Trial Magistrate erred in law and in fact in failing to consider and/or appreciate the Appellant's submissions.
3. Having considered the record of appeal, submissions by both parties, and the applicable law, the issues for determination are:
- a. Whether the Trial Court erred in finding the appellant 100% liable for the accident.
 - b. Whether the quantum of damages awarded by the Trial Court was excessive or unreasonable.

Whether the Trial Court erred in finding the appellant 100% liable for the accident.

4. The Appellant argued that the Respondent failed to discharge the burden of proof required to establish negligence on the part of the appellant. Citing *Joseph Maina Ngugi v Jane Njeri Wangari* [2023] eKLR, the Appellant emphasized that the burden of proof lies with the plaintiff to prove their case on a balance of probabilities. They also referenced *Peter Kariuki Njoroge v Beth Wairimu* [2023] eKLR, where the Court of Appeal held that findings of 100% liability must be based on clear and convincing evidence.
5. The Appellant contended that the evidence presented by the Respondent was insufficient. They highlighted the testimony of PW3 (the police officer), who admitted to not visiting the accident scene and being unable to attribute fault to the Appellant. In *John Mwangi v Mary Wambui* [2023] eKLR, the Court held that testimony from an investigating officer who did not visit the accident scene carries minimal evidentiary weight.
6. The Appellant argued that this doctrine of *Res Ipsa Loquitur* was wrongly applied, as the Respondent failed to exclude other possible causes of the accident, such as mechanical failure or actions of other road users. The Appellant relied on *David Kipkemoi v Sarah Jebet* [2023] eKLR, which held that *res ipsa loquitur* cannot apply when there are multiple explanations for an accident.
7. The Appellant submitted that the deceased may have contributed to the accident and that the Trial Court failed to consider this possibility. Citing *James Kariuki v Elizabeth Njeri* [2023] eKLR, they argued that pedestrians have a duty to exercise reasonable care for their own safety.
8. The Respondent argues that the Trial Court's decision was based on uncontroverted evidence from PW1 and PW2, who testified about the accident's circumstances. The Appellant did not call any witnesses or provide evidence to counter the Respondent's case. Citing *Trust Bank Ltd v Paramount Universal Bank Ltd*, the Respondent asserts that unchallenged evidence must be accepted as proof of the plaintiff's case.
9. The Respondent contends that the Appellant did not plead contributory negligence during the Trial. Raising it at the appellate stage amounts to an abuse of Court process, as held in *Michael Hubert Kloss v David Seroney* [2009] eKLR.
10. The Trial Court's finding of 100% liability was primarily based on the testimony of PW1 and PW2, which was not countered by the appellant. While the doctrine of *res ipsa loquitur* was applied, its applicability is questionable given the lack of clarity regarding the accident's cause. In *Peter Njoroge v Mary Waithera* [2023] eKLR, the Court emphasized that circumstantial or incomplete evidence warrants apportionment of liability rather than a finding of sole negligence.



11. The Appellant's reliance on *David Kipkemoi v Sarah Jebet* [2023] eKLR is persuasive, as the Respondent did not exclude alternative explanations for the accident. However, the Appellant's failure to adduce evidence weakens their argument.
12. On contributory negligence, the Appellant did not plead this at Trial, which undermines their ability to raise it on appeal.
13. The evidence on record does not conclusively establish that the Appellant was solely responsible for the accident. The absence of independent corroboration, such as an investigative report, raises doubts about the Trial Court's conclusion. Accordingly, I find that liability should be apportioned at 70% to the Appellant and 30% to the Respondent, on behalf of the deceased.

Quantum of Damages.

14. The Appellant argued that the damages awarded by the Trial Court were inordinately high and not supported by proper reasoning. They cited *Mutuku v Kenya Power & Lighting Co Ltd* [2009] eKLR, where lower awards were given in similar circumstances.
15. The Respondent contended that the Trial Court's awards were reasonable and consistent with judicial precedent. They cited *Kemfro Africa Ltd v A.M. Lubia* (1982-88), which restricts appellate Courts from interfering with damages unless the Trial Court acted on wrong principles or arrived at an erroneous estimate.
16. The Trial Court awarded:
 - a. Pain and Suffering: Kshs. 50,000.
 - b. Loss of Expectation of Life: Kshs. 100,000.
 - c. Loss of Dependency: Kshs. 1,500,000 (based on a multiplicand of 24 years).
 - d. Special Damages: Kshs. 135,075.
17. While the awards for pain and suffering and loss of expectation of life are within reasonable limits, the calculation for loss of dependency warrants review. The multiplicand of 24 years appears excessive given the uncertainties in the deceased's future earning capacity. In *Hassan v Nathan Mwangi Kamau Transporters & 5 Others*, the Court emphasized the need for moderation to avoid unreasonably high awards.
18. The award for loss of dependency is adjusted to reflect a multiplicand of 20 years, resulting in an adjusted award of Kshs. 1,250,000. The other awards are upheld.

Conclusion and Orders.

19. The Trial Court's finding of 100% liability is set aside. Liability is apportioned at 70% to the Appellant and 30% to the Respondent.
20. The award for loss of dependency is reduced to Kshs. 1,250,000.00. The total damages are recalculated as follows:
 - a. Pain and Suffering: Kshs. 50,000.00
 - b. Loss of Expectation of Life: Kshs. 100,000.00
 - c. Loss of Dependency: Kshs. 1,250,000.00



d. Special Damages: Kshs. 135,075.00

e. Total Adjusted Damages: Kshs. 1,535,075, subject to the 70:30 apportionment.

21. Each party shall bear their own costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 20TH DAY OF DECEMBER 2024.

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BAHATI MWAMUYE

JUDGE

In the Presence Of:

Counsel for the Appellant – Ms. Luchemo

Counsel for the Respondent – Ms. Musembi h/b Mr. Karoki

Court Assistant – Mr. Guyo

