



**Malik Boeki Company Limited & another v Musumba (Suing as Personal Representative of the Estate of Sisto Njiru (DCD)) (Civil Appeal E006 of 2024) [2024] KEHC 16180 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16180 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CIVIL APPEAL E006 OF 2024  
LM NJUGUNA, J  
DECEMBER 19, 2024**

**BETWEEN**

**MALIK BOEKI COMPANY LIMITED ..... 1<sup>ST</sup> APPELLANT**

**DUNCAN WAMAE NDWIGA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**SADIA ONYANGO MUSUMBA ..... RESPONDENT**

**SUING AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SISTO NJIRU (DCD)**

*(Appeal arising from the decision of Hon. S. Ouko, SRM in Runyenjes Civil Case No.70 of 2018 delivered on 21st December 2023)*

**JUDGMENT**

1. The appeal herein has been filed vide memorandum of appeal dated 25<sup>th</sup> January 2024 wherein the appellant, being dissatisfied with the decision of the court as abovementioned, now seeks orders that:
  - a. The appeal be allowed;
  - b. The judgment of the trial court be set aside and/or vacated; and
  - c. The costs of the appeal be in the cause.
2. This appeal is premised on the grounds that:
  1. That , the Learned trial magistrate erred in law and in fact in delivering a Judgement which was in all respects against the legal principles of judicial fairness, the laws of natural justice, as well as the laws of equity;



2. That , the Learned trial magistrate erred in law and in fact in delivering a Judgement which turned a blind eye to the overwhelming evidence adduced by the defendants at the hearing thereof, which entirely controverted the Plaintiff's evidence, thus totally misdirecting herself, and hence making the wrong conclusion;
  3. That , the Learned trial magistrate erred in law and in fact in not considering the issues put forth by the defendant's in their statement of defence, as well as in the defendant's written submissions, thus advertently ignoring the substantial evidence adduced by the defendants in the said pleadings, which led the court award to the Plaintiff an exaggerated, excessive and/or unreasonable quantum of damages;
  4. That , the Learned trial magistrate erred in law and in fact in delivering a Judgement which was not based on any legal analysis and/or reasoning and awarding unverifiable lump sum figures in the guise of quantum of damages, which figures lacked any legal backing, through neither statutory provisions nor decided judicial precedents;
  5. That , the Learned trial magistrate erred in law and in fact in delivering a Judgement which was not considerate of the current economic crisis and the current rate of inflation;
  6. That , the Learned trial magistrate erred in law and in fact in delivering a Judgement which did not consider and/or take into account the legal reasoning encompassed in the legal principles of contributory negligence and volenti non fit injuria, thus unfairly holding the defendants as the parties wholly to blame for the alleged accident, and yet there was a defence on record, which controverted the Plaintiff's allegations in that respect;
  7. That , the Learned trial magistrate erred in law and in fact in delivering a Judgement which fell short of the substantive legal threshold required in any other Judgement, in not framing the issues for determination, the applicable law, and the concluding remarks, hence totally misdirecting herself and hence delivering a wrong Judgement; and
  8. That , the Learned trial magistrate erred in law and in fact in delivering a Judgement which was wrong and unfair in the circumstances.
3. Through a plaint dated 07<sup>th</sup> December 2018, the respondent sought judgment against the appellants for general damages under the *Fatal Accidents Act* and the *Law Reform Act*, Special damages as pleaded in the plaint and costs of the suit with interest. The respondent is the widow of the deceased, and the 1<sup>st</sup> appellant was the registered owner of the motor vehicle that hit the deceased at the time of the accident while the 2<sup>nd</sup> respondent is the reputed owner of the said motor vehicle. It was her case that on 14<sup>th</sup> December 2017 at about 7pm, the deceased was riding his motor cycle registration number KMEA 125Y along Embu-Meru road and just before Thuci River bridge, the 1<sup>st</sup> appellant's motor vehicle veered from its lane and hit the deceased's motor cycle head on, causing him fatal injuries. The respondent blamed the appellants for the negligence that resulted in the death of the deceased who was survived by a widow and 2 children aged 14 and 9 years old. She stated that the deceased who was a 39 year-old businessman at the time of the accident, used to support his family with his income of Kshs.50,000/= per month.
  4. The 2<sup>nd</sup> appellant filed a statement of defense refuting the averments made in the plaint and averred that the respondent failed to raise a cause of action against him. At the hearing, PW1 was the respondent who stated that at the time of the accident, the deceased was 39 years old and had 2 children with the third one on the way. At the time of the testimony, the third child was 7 months old. That the deceased hired a motor cycle to use for his business and that it belonged to Agapio Kariuki. That the



- deceased operated a quarry and he earned Kshs.50,000/= monthly, out of which he used Kshs.30,000/= to support his family. That after the death of the deceased, she incurred costs at the funeral and she had some receipts.
5. PW2 was Elijah Mungai Agnes who stated that on the day of the accident, he was walking home when he saw the appellant's motor vehicle approaching at high speed. That at the scene, there is a bend on the road and the driver of the motor vehicle veered into the oncoming lane, thus hitting the deceased. That the impact of the accident was so great that the deceased died on the spot. That when he learned that it was the deceased who had died, he called the deceased's mother since he knew the family very well. That the motor vehicle remained at the scene after the accident but the driver ran away. Police went to the scene after about 1 hour and removed the body of the deceased to Kyeni Hospital mortuary. On cross-examination, he said that the deceased was his friend and a businessman who owned a shop and quarry which he supervised. That he saw the vehicle veering off its lane onto the deceased's lane at high speed. That there is a corner at the bridge.
  6. PW3 was PC Gladys Kiptoo of Runyenjes Police Station who produced the police abstract as evidence. She stated that when she visited the scene of the accident, she learned that the motor vehicle had collided with the deceased's motor cycle after it veered into the opposite lane.
  7. The appellants closed their case and did not call any witnesses. The trial court found the appellants 100% liable for the accident and the death of the deceased. It awarded damages as follows; Kshs.100,000/= for pain and suffering, Kshs.100,000/= for loss of expectation of life and Kshs.2,003,632/= for loss of expectation of life using the multiplier method with the minimum wage as multiplicand and a multiplier of 20 years against a dependency ratio of  $\frac{2}{3}$ . The respondent was also awarded special damages of Kshs.91,980/= plus costs of the suit and interest.
  8. The appeal was canvassed by way of written submissions.
  9. The appellant submitted that the respondent failed to sue the driver of the motor vehicle, which is a fatal flaw in her case. That the eye witness did not place the appellants at the accident scene and that the accident is said to have occurred when it was dark, a fact that the trial court failed to consider. They discredited the testimonies of PW2 and PW3 and stated that the respondent failed to discharge the burden of proof to the required standard. They took issue with the quantum as assessed by the trial court.
  10. It was their argument that the damages for pain and suffering is too high and that the same should be reduced to Kshs.20,000/= and they relied on the case of Solomon Okoth Oduma v. Munyarugero German & Another (2020) eKLR. That the respondent did not prove the deceased's income neither did she produce birth certificates to show that the deceased was the father of the 3 children as alleged. That the multiplier method was not applicable in this case and he relied on the cases of Peter Kibogoro Wanjohi v. Christine Wakuthi Muriuki & Another (2009) eKLR and Jenipher Odhiambo Oloo & Another v. Elizabeth Mbuka Adams & Another HCCC No. 33 of 2001.
  11. They urged the court to apply a multiplier of 10 years to the minimum wage and a ratio of  $\frac{1}{3}$  to make the total KShs.500,908/=. It was their submission that given the circumstances surrounding the accident and the time when it occurred, liability should be apportioned equally between the deceased and the appellants.
  12. The respondent submitted that there is no error in the findings of the trial court since the eye witness account of the accident was unrebutted. That the standard of proof was discharged in accordance with sections 107 and 109 of the *Evidence Act*. She relied on the cases of Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd [2013] eKLR and Charles Oriwo Odeyo v Appollo Justus Andabwa &



another [2017] eKLR and argued that the awards by the trial court are modest in the circumstances. That the multiplier method was applicable and the trial court correctly applied it in assessing damages for loss of dependency. She urged the court to dismiss the appeal.

13. From the foregoing, the issues for determination are the following;
  - a. Whether liability was properly apportioned by the trial court; and
  - b. Whether the damages awarded are just in the circumstances.
14. As a first appellate court, it is the duty of this court to examine the evidence adduced at trial afresh. This was held in the case of *Williamson Diamonds Ltd and another v Brown* [1970] EA 1, as follows:

“The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion.”
15. In this appeal, the issue of liability is so key that once the same is determined, the issue of quantum will follow with ease. Liability is a matter of fact since this court must re-look the circumstances under which the accident in question occurred. Matters of fact are determined from evidence and the burden of proof lies on the party alleging the facts to prove them. Section 107 (1) of the *Evidence Act* provides that:

“Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.”
16. The evidential burden is further established under sections 109 and 112 of the *Evidence Act*. In the case of *Evans Nyakwana v. Cleophas Bwana Ongaro* (2015) eKLR the evidential burden was discussed and the court stated that:

“As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side.”
17. The standard of proof in civil cases such as this one is on a balance of probabilities. In the case of *Miller v. Minister of Pensions* (1947) 2 All ER 372 (supra) discussing the burden of proof the court had this to say;-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not. This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”



18. On to the evidence, PW2 gave an eye witness account of the accident. He stated that he had just crossed the road when he saw the appellants' motor vehicle approaching at high speed. That the vehicle veered into the oncoming lane where the deceased was riding his motor cycle and collided with him head-on. According to him, the impact was so great that the deceased died on the spot. He stated that the accident happened at around 7pm and it was a bit dark. It also happened near the bridge to river Thuci where there is a bend on the road. That the driver of the motor vehicle ran away leaving the motor vehicle at the scene.
19. The appellants did not call any witnesses in support of their case, leading the trial court to find that they are 100% liable for the accident. It is my view that on a balance of probabilities, the appellants are to blame for the accident given the evidence adduced. In the case of *Hussein Omar Farah v. Lento Agencies* (2006) eKLR the court found that from evidence, both drivers were to blame for the accident but this arose through evidence of the opposing parties. In the present case, there is only one version of the story which the court is persuaded by. Additionally, there is no basis for apportioning liability equally between the deceased and the appellants.
20. On the issue of quantum, the trial court awarded Kshs.100,000/= as damages for pain and suffering and Kshs.100,000/= for loss of expectation of life. In the case of *Mercy Muriuki & Another vs. Samuel Mwangi Nduati & Another* (Suing as the legal Administrator of the Estate of the late Robert Mwangi) [2019] eKLR, the court observed:

“The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Ksh. 100,000/- while for pain and suffering the awards range from Ksh. 10,000/= to Ksh. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.”

21. In my view, considering that the deceased died on the spot, it is prudent to keep the award of damages for pain and suffering to a minimum. The appellants suggested that Kshs.20,000/= would suffice under this head, and I agree with them. As for damages for loss of expectation of life, I am guided by the case of *Benham vs Gambling*, (1941) AC 157:

“In assessing damages for this purpose, the question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness, the test is not subjective and the right sum to award depends on an objective assessment of what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. Of course, no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not loss of future pecuniary prospects.”

The trial court's award under the head of loss of expectation of life is modest and just in the circumstances.

22. On the general damages for loss of dependency, PW1 stated that the deceased was a businessman earning Kshs.50,000/= per month. That he used part of this money to take care of his family which comprised of a wife and 2 children at the time of his death. One more child was born after his death. PW2, the deceased's friend stated that the deceased owned a shop and he supervised work at his quarry. There was no document to prove these earnings thus the trial court applied the multiplier method using the applicable minimum wage of Kshs.12,522.70/= in 2018. The deceased was 39 years old when he died and the court applied a multiplier of 20 years and a ratio of  $\frac{2}{3}$ .



23. I do not agree with the appellants that a ratio of 1/3 should be applied because after his death, the family of the deceased comprises of 3 children and a widow. In their submissions, the appellants stated that the respondent did not prove that she was a wife of the deceased, neither did she produced her children's birth certificates. In this regard, I note that among the documents that were filed in the case is the Chief's letter dated 15/2/2018 which list the legal heirs of the deceased. Among them are his two children namely Viviana Nyakio and Lavenda Wawira. The evidence on record is that the deceased's wife was expecting her third child when the accident occurred and by the time she testified, the child had been born. In my considered view, the dependants were proven and the appellants did not dispute their existence at the trial. On the multiplicand, given that there was no accurate proof of income, the trial court proceeded correctly in applying the minimum wage and the ratio of 1/3. The multiplier method does not need to be abandoned since the circumstances of the case facilitate its application.

24. As regards special damages, the court is bound to award only those amounts that are specifically pleaded and strictly proved. The respondent produced receipts of Kshs.81,780/=. The trial court added an amount for expenses incurred for the funeral. In the case of Maritim & Another v. Anjere (1990-1994) EA 312 at 316 it was held:

“It is now trite law that special damages must not only be pleaded but must also be specifically proved and those damages awarded as special damages but which were not pleaded in the plaint must be disallowed.”

25. Therefore, in the end, I find that the appeal partially succeeds with orders thus:

- a. The finding of the trial court on liability is hereby upheld;
- b. The appellants to pay the respondent general damages with interest from the date of this judgement until payment in full, as follows:
  - i. Pain and suffering- Kshs.20,000/=
  - ii. Loss of expectation of life- Kshs.100,000/=
  - iii. Loss of dependency- Kshs.2,003,632/=
- c. The appellants to pay the respondent special damages of Kshs.81,780/= with interest from the date of filing the plaint until payment in full;
- d. The respondent is hereby awarded the costs of this appeal with interest; and
- e. Interests on monetary awards shall be at court rates.

26. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 19<sup>TH</sup> DAY OF DECEMBER, 2024.**

**L. NJUGUNA**

**JUDGE**

..... for the 1<sup>st</sup> Appellant

..... for the 2<sup>nd</sup> Appellant

..... for the Respondent

