



REPUBLIC OF KENYA



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**Waweru (Legal Representative of the Late Bernard Kamore Waweru) v Wairimu & another
(Civil Appeal E070 of 2021) [2024] KEHC 16640 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16640 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CIVIL APPEAL E070 OF 2021
CW GITHUA, J
DECEMBER 19, 2024**

BETWEEN

**EUDIAS WAMBUI WAWERU APPELLANT
LEGAL REPRESENTATIVE OF THE LATE BERNARD KAMORE WAWERU**

AND

**SAMUEL WANGIGE WAIRIMU 1ST RESPONDENT
MUCASWA LIMITED 2ND RESPONDENT**

*(Being an appeal from the judgement and decree of Hon. S.K Nyaga (RM), in
Murang'a CMCC No.371 of 2017 delivered on the 18th of November, 2021)*

JUDGMENT

1. This appeal challenges the Judgement delivered by the trial court on 18th November 2021 dismissing a suit filed by the appellant against the two respondents herein.
2. In the suit, the appellant in her capacity as the legal representative of the Estate of Benard Kamore Waweru sued the respondents seeking general and special damages under the Law Reform Act and the Fatal Accidents Act following the death of her son (the deceased) in a fatal road traffic accident whose occurrence was blamed on the negligence of the 1st respondent.
3. In the plaint dated 13th November 2017, it was alleged that on 8th May 2017, the 1st respondent negligently drove M/V Registration No. KCE 366 E (the subject motor vehicle) and ran over the deceased as a result of which he sustained fatal injuries.

These allegations were denied by the respondents in their statement in defence dated 6th August 2020.



4. After considering the evidence placed before the court, the learned trial magistrate made a finding that the deceased was to blame for his own death by attempting to steal a ride in the subject motor vehicle when it was still in motion. She dismissed the appellants suit with costs.
5. Aggrieved by the trial court's decision, the appellant filed the instant appeal relying on six grounds of appeal in which she faulted the learned trial magistrate for finding that the deceased caused his own death contending that the finding was based on hearsay evidence. She complained that the learned trial magistrate failed to appreciate that her evidence was not validly challenged; that the learned trial magistrate erred in finding that there was no independent evidence to prove how the accident occurred considering that there was an eye witness account recorded in a statement that was admitted as evidence post humously after its maker died. She further faulted the trial court's decision claiming that it was against the weight of the evidence on record.
6. On the above grounds, the appellant prayed that the trial court's judgement be set aside and be substituted by this court's judgement on liability against the respondents at 100%. The appellant also invited this court to assess and award her damages based on the evidence and submissions on record.
7. The appeal was prosecuted by way of written submissions which both parties duly filed and which I have carefully considered. I have also carefully re-evaluated and re-analysed the evidence adduced before the trial court as I am obliged to do in the exercise of my duty as the first appellate court.
8. The duty of the first appellate court has been elucidated in many authorities which I need not rehash here. Suffice it to say that the duty entails re-assessing and re-evaluating the evidence presented before the trial court to enable the appellate court make its own independent decision regarding the validity or otherwise of the trial court's decision. In executing this duty, the court must be careful to remember that unlike the trial court, it neither saw nor heard the witnesses testifying and give due allowance for that disadvantage.

See: Sumaria & Another V allied Industrial limited [2007] 2 kLR; Sielle & Another V Associates Motor Boat Company ltd & others [1968] EA 123.
9. Having considered the grounds of appeal together with the rival written submissions as well as the evidence on record, I find that the only issue for my determination in this appeal is whether the trial court erred in making its finding on liability and in dismissing the appellant's case.
10. I wish to start by reproducing an extract from the case of Michael Hubert Kloss & Another V David Seroney & 5 others [2009] eKLR which I find appropriate in describing the difficult task undertaken by courts when determining the issue of liability in road accident cases.

In the above case, the court of appeal expressed itself as follows:

“.... The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in *Stapley v Gypsum Mines Ltd (2)* (1953) A.C. 663 at p. 681 as follows: “To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it... The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must



not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally.”

11. In this case, though the appellant testified as PW1, her evidence as recorded in her witness statement dated 13th November 2017 which she adopted as her evidence in chief was not useful or relevant to the issue of liability. PW1 clearly stated that she did not witness the accident. She was only called to the scene after the accident happened.
12. PW2 who interestingly also testified as the only defence witness produced the police abstract which confirmed occurrence of the accident. He did not witness the accident and he was not the investigating officer. He did not therefore know the circumstances under which the accident occurred. The police abstract did not also help since it indicated that what caused the accident was still pending investigations.
13. Given the foregoing, I find that the learned trial magistrate erred when she relied on the evidence of DW1 to blame the deceased as the author of his misfortune. As correctly submitted by the appellant, the evidence of PW2 who was also DW1 was purely hearsay and was thus inadmissible in evidence.
14. In wrongly accepting the hearsay evidence adduced by DW1, the learned trial magistrate misdirected herself by holding that the appellant did not adduce independent evidence to contradict the version given by DW1 that the deceased was attempting to board the subject vehicle when it was in motion as a result of which he fell and was run over by the vehicle. I say so because there was evidence giving a different narration of how the accident occurred contained in a statement recorded by one Mr. Omari Maina Maihuria which was admitted as evidence post humously after its maker died before he testified.
15. The record shows that the statement was properly admitted as evidence under Section 35 of the [Evidence Act](#) pursuant to an application which was filed by the appellant dated 5th August 2024. The application was not opposed by the respondents and it was allowed as prayed. Section 35 of the [Evidence Act](#) stipulates as follows:

“In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say—

- (a) if the maker of the statement either—
 - i. had personal knowledge of the matters dealt with by the statement; or
 - ii. where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and

- (b) if the maker of the statement is called as a witness in the proceedings:

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if



his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.”

16. Having admitted the statement recorded by the late Mr. Omari as evidence, the learned trial magistrate had an obligation to consider it in her analysis of the evidence adduced in support of the appellant’s case which she failed to do without giving any reason. She did not even make any reference to the statement.
17. It is important to note that the evidence in the aforesaid statement represented the only eye witness account of how the accident occurred. This evidence was not controverted by any other evidence since, for undisclosed reasons, the 1st respondent who must have witnessed the accident having been the driver of the subject vehicle failed to testify.
18. According to the evidence of the late Mr. Omari, at the material time, the deceased had stopped the subject vehicle and after it stopped, he started boarding it but when he stepped on the vehicle’s door step, the vehicle was driven off causing him to fall down. He was then crashed by the rear wheel of the vehicle sustaining injuries that later led to his death.
19. As stated earlier, the 1st respondent did not testify before the trial court. He did not therefore offer any evidence to contradict the appellant’s allegation that he was indeed the driver of the subject vehicle at the material time.
20. In my view, the above uncontradicted evidence proves on a balance of probabilities that the 1st respondent negligently caused the accident in which the deceased sustained fatal injuries. Being the driver of the subject vehicle, the 1st respondent had a duty of care to all road users including passengers who were either boarding or were riding in the subject vehicle to ensure that they did so in safety. He breached that duty and he was therefore 100% liable to the appellant for negligently causing the death of her son.
21. The appellant either in her pleadings or in her evidence did not claim or allege that the 1st respondent was driving the subject vehicle at the material time as the 2nd respondent’s authorised driver, agent or servant.

In her plaint, the appellant only described the 2nd respondent as a limited liability company but did not establish any linkage between the company, the 1st respondent or the occurrence of the accident.

In the premises, I do not find any basis upon which liability for the accident in this case can attach to the 2nd respondent whether vicariously or otherwise.
22. For the above reasons, I find merit in the appeal against liability only as far as the 1st respondent is concerned. I therefore set aside the trial courts finding on liability and enter judgment on liability against the 1st respondent in favour of the appellant at a 100%. I however affirm the trial court’s decision dismissing the suit against the 2nd respondent with costs albeit for different reasons which are stated hereinabove.
23. Having found that the 1st respondent negligently caused the death of the deceased, it now behoves me as the first appellate court to step into the shoes of the trial court and assess the damages payable to the appellant under both the [*Law Reform Act*](#) and the [*Fatal Accidents Act*](#).
24. Starting with damages under the [*Law reform Act*](#), under the head of damages for pain and suffering, I wish to state at the outset that damages under this head are designed to compensate the deceased’s Estate for the pain and suffering the deceased endured before death.



25. The appellant in her submissions proposed a sum of Kshs. 100,000 under this head. The respondent on their part proposed Kshs. 10,000 arguing that the deceased did not suffer pain for along time.
26. In this case, there is evidence to prove that the deceased died on the day after the accident while undergoing treatment. (See the death certificate dated 4th July 2017). He did not die on the spot. He thus suffered pain for about a day before succumbing to his injuries. In the premises, I find the Kshs 100,000 proposed by the appellant as damages under this head reasonable and the same is allowed.
27. Regarding damages for loss of expectation of life, it is clear from the evidence of PW1 and from the death certificate that the deceased was 30 years old at the time of his death. He therefore died at the prime of his life and would probably have lived for many more years had his life not been cut short by the negligent act of the 1st respondent. His estate was thus entitled to compensation for the loss of his young life.
28. In her submissions, the appellant proposed Kshs. 150,000 as damages under this head while the respondents proposed the conventional sum of Kshs 100,000 relying on the case of Kenya Red Cross V IDS(suing as the legal representative of the Estate of MDR (Deceased) [2020] eKLR.
29. Given the age at which the deceased lost his life, I find the award proposed by the appellant fair and reasonable taking into account inflationary trends.
- The appellant is therefore awarded on behalf of the deceased's Estate Kshs 150,000 as damages for loss of expectation of life.
30. Turning to the damages sought under the *Fatal Accidents Act* for loss of dependency, I find that though claiming that she was the deceased's only dependant and that the deceased used to support her with Kshs 3,000 per month from his income as a construction worker and a farmer, the appellant did not adduce any evidence to confirm that the deceased was earning any income from any source.
31. Proof of income forms the basis of assessment of damages for loss of dependency using the multiplier approach such as the one suggested by the appellant in her submissions.
- As I held in *Jecinta Ruguru V Beatrice Muthoni Muthike (suing as the legal representative of the late Isaac Muthike Nyaga) Civil Appeal No. 40 of 2017*, the multiplier approach is not the only method of calculating damages for loss of dependency. Where the deceased's income is not ascertainable and other facts in the case do not facilitate its application, it should be abandoned and the lump sum principle or global award approach used in its place.
32. I also associate myself with the holding of Ngaah J in *Moses Mairua Muchiri V Cyrus Maina Macharia (suing as the personal representative of the Estate of Mercy Nzula Maina (deceased) 2016 ekLR* when he stated thus :
- “It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case”
33. In this case, as stated earlier, the deceased died at the age of 30 years. According to PW1, she was his only dependant. She did not indicate her age to enable the court estimate the length of her dependency.



Using the multiplier approach which I have already held was not suitable in this case, the appellant proposed a sum of Kshs 2,784,696.

The respondents on their part proposed a sum of Kshs 810,000 relying on three authorities in which the deceased persons died at between the ages of 21-31 years and their dependants were awarded between Kshs 600,000 -1, 000,000 for loss of dependency.

34. The case of Kwamboka (suing as a dependant and personal representative of the Estate of Albert Nyabongoya Onchiri V Okiru & Another (Civil appeal No E017 of 2023) KEHC 8442 is also relevant. In this case, the deceased was 35 years old and his wife as his only dependant. His legal representative was awarded Kshs 1,000,000 for loss of dependency.
35. Guided by the above authority and having taken all relevant factors into account, I have come to the conclusion that a global award of Kshs. 1,000,000 would be adequate compensation for the appellant's loss of dependency in this case. The same is hereby allowed.
36. Regarding the claim for special damages, I find that although the appellant pleaded a total sum of Kshs 74,700 as special damages which included a claim of Kshs 44,100 for funeral expenses, in her evidence under cross-examination, she admitted that she only contributed Kshs 3,000 towards the deceased's funeral expenses. The rest of the money was raised by well wishers.

A perusal of the trial court's record shows that the appellant specifically proved all other claims pleaded as special damages. In the premises, I award the appellant special damages in the sum of Kshs. 33,600.

37. The upshot of this Judgement is that the appellant's appeal on liability is allowed as against the 1st respondent at 100%.

The appeal against the 2nd respondent is dismissed in its entirety.

The appellant is awarded damages as follows:

For pain and suffering - Kshs 100,000

For loss of expectation of life - Kshs 150,000

For loss of dependency - Kshs 1,000,000

Special damages - Kshs 33,600

Total - Kshs 1,283,600

38. The award of general damages will attract interest at court rates from today until payment in full.
The award of special damages will accrue interest from date of filing suit until payment in full.
39. On costs, the 1st respondent will bear the appellant's costs in the lower court but each party shall bear its own costs of the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 19TH DAY OF DECEMBER, 2024.

HON. C. W. GITHUA

JUDGE

In the Presence of:

Ms. Wangui Wangai for Mr Mbutia for the Appellant.

No Appearance for the Respondents



Ms. Susan Waiganjo, Court Assistant

