



Sagany & another v Chepkemoi ((Suing as a legal administrator of the Estate of the Late Robert Kipyegon Chepkwony)) (Civil Appeal 9 of 2021) [2023] KEHC 1282 (KLR) (27 January 2023) (Judgment)

Neutral citation: [2023] KEHC 1282 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 9 OF 2021
DKN MAGARE, J
JANUARY 27, 2023**

BETWEEN

ERICK NYAMBANE SAGANY 1ST APPELLANT

JOHN KEBASO MASIEK 2ND APPELLANT

AND

ELIZABETH CHEPKEMOI RESPONDENT

**(SUING AS A LEGAL ADMINISTRATOR OF THE ESTATE OF THE LATE
ROBERT KIPYEGON CHEPKWONY)**

JUDGMENT

Background

1. This matter came up for hearing of an Appeal from the Judgment of Hon A Mukenga given on January 20, 2021 in Nakuru CMCC 303 of 2019. The file was placed before me during the Rapid Result Initiative (RRI) for January, 2023.
2. The matter came up for hearing on January 24, 2023. Despite being served, the Respondent did not attend court. I ordered the Appeal to proceed. Nevertheless, this court, being a court of record is bound to consider evidence and arrived at a decision, notwithstanding the absence of some of the parties.
3. Miss Mwangi argued the appeal before me on behalf of the appellants. She informed that the appeal is on quantum only stating that this damages of Kshs,200,000/= awarded were excessive. She urged the Court award between Kshs 100,000/= to Kshs 150,000/=. To her this was erroneous and as such should interfere with the decision of the Court below.



4. This was shocking because the matter is a fatal claim. Further only appeal on liability was preferred. Moreover the victim herein succumbed to the injuries arising from the accident. The learned counsel as such misconstrued the matter before me.
5. Upon perusing the record, I noted that the Memorandum of Appeal dated December 4, 2021 is on liability only. The appeal sought the following prayers:-
 - a. This appeal be allowed with costs.
 - b. Liability as assessed by the Honourable A Mukenya delivered on January 20, 2021 be set aside and this Honourable Court be pleased to assess liability afresh.
 - c. The costs of the Appeal be borne by the Respondent.
6. The claim arose from an accident on 16/4/2017 involving Motor Vehicle Registration No KCG 953 N and the deceased who was a pedestrian lawfully crossing the road at a shopping centre.
7. Being a fatal accident claim and the Court below entered Judgment as follows :-
 - a. Liability 60% for the Appellant and 40% for the deceased.
 - b. Pain and suffering Kshs 30,000/=
 - c. Loss of expectation of life 100,000/=.
 - d. Loss of dependency 500,000/=
 - e. Special damages 34550/= Total 664,550/=

Less 40% 265820

Net 398,730/=
8. Despite not being argued before me, the court will still consider the appeal on liability as it had not been withdrawn. The court will be happier is advocates helpfully prepare for appeals so as to properly place before court, their Client's cases. It also does not hurt to withdraw an appeal once you realise that it is untenable. This will save judicial time to enable deserving parties be heard.

Determination

9. The duty of the first Appellant Court is laid down in the considered judgment of Lement De Lestang, VP, Duffus and LawJJA, in the *locus Classicus* case of *Selle and another Vs Associated Motor Board Company and Others* [1968]EA 123, where the law looks in their usual gusto, held by as follows:-

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”
10. Therefore, where the findings of the trial Court are consistent with the evidence generally, this Court should not interfere with the same.



11. I find and hold that there being no ground of Appeal, on quantum there can be no valid appeal of quantum. This is premised on order 42 Rule 4 of the *Civil Procedure Rules* which state;

“The Appellant shall not except with serve of the Court, urge or be heard in support of any ground of objection not set forth in the Memorandum of Appeal...”
12. The Appeal, herein being on quantum only cannot stand as there is no ground of appeal to the said effect in the memorandum of appeal. It is therefore dismissed in toto. liability
13. PC Benard Makutha, testified that the deceased was crossing the road from right to left and way knocked down. He produced a police abstract and gave evidence on the contents of the Abstract and the police OB. He testified that the accident occurred at shopping.
14. On the other hand, the Appellant driver, DW1 testified that the traffic was far. He blamed the deceased for not being careful when crossing the road. He stated that he hooted and braked but found the deceased had already hit his vehicle and landed on the windscreen. The court below did not analyse this piece of evidence. Had he done that he will have realised it is a worthless piece of verbosity with no evidential value.
15. The reason is, if you find someone on your screen, you don't hoot because it is already done. If on the other hand you see a pedestrian on the road, from far, you slow down and hoot or take evasive action. This is the point where section 60(1) of the *Evidence Act* comes in. It is not rocket science. Where a driver had an opportunity to see the pedestrian, he cannot be surprised that the same pedestrian is on his bonnet, unless the driver is a careless one who does not give a damn what happens to the pedestrians. Such inconsistent evidence should be disregarded in favour of the general circumstances that arise from the evidence in general.
16. From the evidence, it is clear that the driver was driving on very high speed otherwise he will have been able to control the motor vehicle at a shopping centre.
17. I concur with the Learned trial Magistrate that the Appellant's driver was driving at a speed that did not take into account a belief of activities obtaining a long that section of the road and would have avoided the accident had he slowed down.
18. This is the point where 100% liability should have come in as there was no evidence of negligence of the deceased. Ordinarily one does not find himself on a bonnet of a slow moving vehicle as there is no momentum to propel him up to the bonnet. It is a different story, if the victim was on a fast moving motor cycle or another vehicle.
19. The doctrine of *res ipsa loquitur* dictates that from the evidence on record, given the high speed which the driver was driving at a shopping centre and hit the deceased who was a pedestrian. There is no other explanation other than extreme speed for the scene described and the extent of the injuries suffered as seen from exhibit 1.
20. While agreeing with nothing useful to add in the Court of Appeal decision of *Patrick Mutee & Another Kamau Vs Judy Wambui Ndunwa* (1997) eKLR, I wish to state that pedestrians are also allowed to cross the roads. In shopping centres, they have to eke out a living hence the need for motorists to respect the coexistence. It is not much to ask.
21. It is not enough to allege that there were no eye witnesses. In matters accident, even the dead speak. The court should consider the extent of damage to the vehicle, the injuries to the deceased, the loci of the accident and apply doctrines that will help the court reach a just decision. It is high time we move from mechanical evidence to even taking judicial notice.



22. Indeed, in supreme court [*petition no 26 of 2019\(consolidated with 34 and 35 of 2019\)*](#) the supreme court, earlier today had this to say regarding the duty of the court when there is paucity of evidence but other ways of getting the same in paragraph 73 as doth:-

“we fortified by the provisions of sections 59 and 60 of the evidence act which stipulate circumstances in which courts can take judicial notice of facts requiring no proof. Section 60(1)(o) of the evidence Act stipulates that:

“the courts shall take judicial notice of the following facts-

...

(o) all matters of general or local notoriety”

23. It is thus open to the court to refer to effective stopping distances in various driving manual and equally to decipher from the kind of injuries suffered, the nature of the impact and probable cause. Courts should never treat crossing of roads as a crime and punish pedestrians instead of finding the proper cause of the accident, all circumstances considered. The court below erred in finding the pedestrian liable without evidence.

24. However, I will not disturb the finding on liability since the Respondent did not cross Appeal.

25. The Appellant thus has no reason to complain having escaped at a whisker of indolence of the respondent who did not cross appeal.

26. The foregoing, has foreclosed this appeal it lacks merit and is begging me to dismiss the same. I proceed to do so.

Disposition

27. The Appeal filed herein is hereby dismissed with costs as it has no merit at all.

28. In exercise of the powers granted to the Court under Section 27 of the [*Civil Procedure Act*](#), I award costs of the appeal of Kshs 100, 000/= payable to the Respondent within 30 days fairly which the execution to proceed.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF JANUARY, 2023.

HON. MR. JUSTICE DENNIS KIZITO MAGARE

In the presence of:

For Appellant- no appearance

For the respondent - No appearance

Nancy Bor –Court Assistant

