



REPUBLIC OF KENYA



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**M'Itabari & another (Suing as the legal administrators of the Estate of
Musa Musyoki Kimweele - Deceased) v Abdi & another (Civil Appeal
121 of 2020) [2023] KEHC 27538 (KLR) (28 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 27538 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 121 OF 2020
F WANGARI, J
MARCH 28, 2023**

BETWEEN

GLADYS KAIDA M'ITABARI 1ST APPELLANT

NANCY KARIMI MUSA 2ND APPELLANT

**SUING AS THE LEGAL ADMINISTRATORS OF THE ESTATE OF MUSA
MUSYOKI KIMWEELE - DECEASED**

AND

MOHAMED A ABDI 1ST RESPONDENT

PEERLESS LOGISTICS LTD 2ND RESPONDENT

*(Being an appeal from the judgment delivered on 17th August, 2020
by Hon. Francis Kyambia in Mombasa CMCC No. 3218 of 2010)*

JUDGMENT

1. This is an appeal from the Judgment and decree of the Learned Chief Magistrate Hon. Francis Kyambia in Mombasa CMCC 3218 of 2010 given on 17/8/2020.
2. The appellant set out 6 grounds of appeal on both quantum and liability against the judgment delivered by the Court. The suit was dismissed with no order as to costs.
3. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.



4. This was aptly stated in the cases of *Selle vs Associated Motor Boat Company Ltd* [1968] EA 123 and *Peters vs Sunday Post Limited* [1985] EA 424 where in the latter case, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

5. I have looked at the Appellant’s grounds of appeal and in particular, the written submissions from the parties who participated.
6. In *Livestock Research Organization v Okoko & another* (Civil Appeal 36 A of 2021) [2022] KEHC 3302 (KLR) (29 June 2022) (Ruling), Justice R. E. Aburili, J. held as follows;

In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyse and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated that

:“[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect”

Pleadings

7. The plaintiff pleaded that the deceased was a passenger on motor vehicle registration no. KAL 460N and it collided with the 2nd Respondent’s motor vehicle registration no. KAS 579- ZC 2121 at Kiboko area along Mombasa-Nairobi road, resulting in the fatal injuries. Motor Vehicle Registration KAT 460N is said to belong to the 1st Defendant
8. The plaintiffs were said to be the administrators of the estate of the late Musa Musyoki Kimwele (deceased) who died on 1/6/2010.
9. The Appellants enumerated particulars of negligence on part of each of the Respondents. The particulars are a mirror of each other. The appellant pleaded the deceased was 47 years earning Ksh. 40,000 and left behind 5 dependants, the youngest being a 9-year-old son and the oldest, the 75 years old father. The petitioners were widow and daughter of the deceased respectively.
10. The appellants pleaded special damages of Ksh. 65,200. The plaintiff produced a Grant ad Colligenda Bona issued for purposes of filing suit. It was issued on 19/10/2010 by Lady Justice Maureen Odera in the High Court Succession Cause No. 246 OF 2010.
11. The appellant amended the plaint by re-describing one of the suit motor vehicles as registration Number. KAS 579Z/ ZC 2121. The plaint was further amended to change the 2nd Defendant to Peerless Logistics Ltd.



12. The 1st Respondent filed defence and blamed motor vehicle registration no. KAS 579Z ZC 2121. The driver Francis Maitha Musembi filed a comprehensive statement in which he blamed truck registration No. KAS 579Z – ZC 2121. He stated that was released on 5,000/= cash bail but was not charged.
13. The 1st Respondent filed an amended defence on 23/11/2017. There was interlocutory judgment entered on 17/9/2012. There was re-entry of Judgment on 29/7/13 against the new 2nd Defendant. The 2nd defendant was changed from Pitrikes Logistics Ltd to Peerless logistics ltd. There are thus two interlocutory judgments on record.

Evidence

14. On 15/8/2014, the widow testified and produced supporting documents. She testified that the deceased used to give her Ksh 25,000 per month and Ksh. 500 per day. The deceased was a tomato wholesaler. He left the widow, and 3 children aged then 18, 16 and 9 years. According to the Appellant they spent Kshs. 60,000 as funeral expenses.
15. On cross examination, she confirmed her testimony in chief. She was a tomato trader herself earning over Ksh. 500 per day. The deceased used to hire a canter at Ksh. 40,000 per trip. The Appellants and other children had lost all the support.
16. PW2 Sergeant Ben Chipinde testified on the accident that was reported at Makindu police station. The police record indicate that it is the motor vehicle registration No. KAT 460 M to blame for the accident. He produced the occurrence book as Exhibit 2.
17. The driver gave evidence and confirmed that he was involved in the accident. He blamed KAS 579Z - ZC 2121 for the accident. He stated that the deceased was in his motor vehicle. He stated that he tried to avoid hitting motor vehicles in front but in vain. He lost control and knocked a vehicle ahead of him.

Submissions

18. The appellant filed submissions on 9/5/2022. On letters of administration, they aver that letters granted were limited to filing of the suit. They also stated that in the *Fatal Accidents Act*, letters of administration are not required. They relied on the case *Kinyosi Kitungi v Simon Okoth Obok & ano* [2003] eKLR, where the court held as follows: -

‘This issue deals with the dependants of the deceased. It is therefore a claim under the *Fatal Accidents Act*. Under this claim no, letters of grant is required in order to file suit. The law requires that a dependant (described under section 4 of the *Fatal Accidents Act*) as a child, spouse, or parents may sue for compensation. In this case the plaintiff sued under this Act, Section 8 though requires that the dependents must be particularized in the plaint’.

19. Whether burial expenses ought to be awarded. They rely that burial expenses were incurred and as such a sum of Kshs. 60,000 suffices. They rely on the decision of *Jacob Ayiga Maruja & another v Simeon Obayo* [2005] eKLR, where the court stated;

“funeral expenses and other expenses” were wholly unreasonable in the circumstances and we note that the respondent did not give a complete break-down of what he spent the money on. We accordingly reduce that figure to Shs.60,000/= which is just above half of the sum claimed. We, however, must not be understood to be laying down any law that in subsequent cases, Shs.60,000/= must be given as the reasonable funeral and other expenses. Those items



are and must remain subject to proof in each and every case and the Shs.60,000/= we have awarded herein apply strictly to the circumstances of this case.”

20. On liability, they ask that the court set aside findings on liability and enter judgment for the appellant.

1st Respondents submissions

21. The 1st Respondent took issue with letters of administration ad colligenda bona and stated letters of administration ad litem should have been used. Further they support that formal expenses should be strictly proved. They raise the issue of locus standi.

Analysis

22. The letters of administration are required only to the recovery by the estate of damages for Law Reform Act. The court therefore fell into a grave error when he dismissed the claim under fatal accidents Act in limine.
23. The Court fell into further error by addressing the issue of locus standi. The court should by now that locus standi is a vestigial appendage that cannot stand constitutional musters. It is also a serious issue that can catch the parties of guard. Consequently, by dint of order 2, rule 4 it must be succinctly pleaded. The Order 2, rule 4 of CPR states follows: -

Matters which must be specifically pleaded

A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—

- (a) which he alleges makes any claim or defence of the opposite party not maintainable;
- (b) which, if not specifically pleaded, might take the opposite party by surprise; or
- (c) which raises issues of fact not arising out of the preceding pleading.
24. The Court erred by departing from pleadings and engaging in the issue of locus standi. Further, the appellants had letters of administration allowing them to file suit. Those letters were from the Superior Court. The Chief Magistrate has no authority to question the court in awarding those letters. In any case the law provides for limited letters of administration under Rule 67A the Probate and Administration Rules.
25. Any defect in the letters does not limit the power granted by the court to file suit. This is more so in this case where the issue has not been pleaded. In World Explorers Safaris Limited v Cosmopolitan Travel Limited & another [2021] eKLR, it was held;

‘The issues in civil cases should be raised on the pleadings and if an issue arises which does not appear from the pleadings in their original form an appropriate amendment should be sought. Parties should not be unduly encouraged to rely, in the hope, perhaps, of obtaining some tactical advantage, to treat un-pleaded issues as having been fully investigated. The need for pleadings to be precise cannot be doubted. In MNM vs. DNMK & 13 Others, it was held that: -

“Decisions abound from this Court that unequivocally declaim the power of a court to determine issues which the parties have not raised in their pleadings or



otherwise by consent allowed the court to determine. For example in *Chalicha FCS Ltd v. Odhiambo & 9 Others* [1987] KLR 182, the Court held that:

“Cases must be decided on the issues on the record. The court has no power to make an order, unless by consent, which is outside the pleadings. In this instance, the issues raised by the Judge and the order thereon, was a nullity.”

Later in *Kenya Commercial Bank Ltd vs. Sheikh Osman Mohammed*, CA No. 179 of 2010 the Court expressed itself thus:

“It is not the function of a court in civil litigation to speculate or surmise as to the nature of the plaintiff’s claim. Pleadings must be deployed to serve their function, namely to inform the other party, and the court, with sufficient clarity what their case is so that the other party may have a fair opportunity to meet that case and more importantly, so that the issues for determination by the court are clear.”

26. I therefore set aside the finding that the letters of administration did not allow the Appellants to file suit, they did. In *Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) vs Kiarie Shoe Stores Limited* [2015] eKLR as follows:

“This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased’s estate under the *Law Reform Act* and dependants under the *Fatal Accidents Act* are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the *Fatal Accidents Act* should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the *Law Reform Act*, hence the issue of duplication does not arise.

27. Consequently, I award damages under *Law Reform Act* at to the tune of Kshs. 150,000/= . He had full life ahead and a business man, with all his dreams ahead. This to the award the court gave and there is no reason to differ with him. It is also the same damages given by *Douglas Ooga Nyansimora v Sammy Mutunga Makau & another* [2016] eKLR.

28. This is also informed by the decision of the Court of Appeal on setting of discretion. In the case of *Kemfro Africa Limited t/a “Meru Express Services (1976)” & Another Vs. Lubia & Another (No. 2.)* [1987] KLR, it was held;

“I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at some wrong principle or is manifestly excessive or inadequate

Special damages

10. The case of *David Bagine V Martin Bundi* [1997] eKLR settles what is required of special damages. The law Lords posited as follows: -

“It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this



Court in the case of *Mariam Maghema Ali v. Jackson M. Nyambu t/a Sisera store*, Civil Appeal No. 5 of 1990 (unreported) and *Idi Ayub Sahbani v. City Council of Nairobi* (1982-88) IKAR 681 at page 684: "...special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in *Bonham Carter vs. Hyde Park Hotel Limited* [1948] 64 TLR 177 thus:

Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it" We also refer to the cases of *Ouma vs. Nairobi City Council* [1976] KLR 297 at page 304 and *Kenya Bus Services vs. Mayende* (1991) 2 KAR 232 at page 235."

29. It is common sense that reasonable funeral expenses were incurred. In *Peter Ngari Njeru v Alchanger Njue Kitbogo & Josphat Njue (Suing as Legal Representatives of Eugenio Muchori Njue – Deceased)* [2019] eKLR, the court held;

"On the issue of funeral expenses, I rely on the case of *Alice O. Alukwe v Akamba Public Road Services Ltd & 3 others*, High Court of Kenya at Nakuru Civil Suit No. 26 Of 2005 where it was held: -

Special damages (funeral expenses)

However, she only produced the receipt for the police abstract and the advertisement charges. There were no receipts produced to prove the claim for funeral expenses. However, the court of appeal in the case of *Jacob Ayiga Maruja & Another V Simeon Obayo* (2005) eKLR awarded the plaintiff Kshs. 60,000/= for funeral expenses and held thus."

"We agreed and the courts have always recognized that a reasonable award ought to be made in respect of reasonable and legitimate funeral expenses. But when such a large sum is claimed for such expenses then there ought to be proof of what the money was spent on. We however must not be understood to be laying down any law that in subsequent cases Kshs. 60,000/= must be given as reasonable funeral expenses. Those items are and must remain subject to proof in each and every case and the Kshs. 60,000/= we have awarded herein apply strictly to the circumstances of this case."

30. I have it on Judicial authority that burial expenses are not like other special damages. A claim for Kshs. 60,000/= for burial that took place in Meru for a body that was held in morgue in Mombasa is reasonable. I allow it.
31. The Appellant sought Kshs. 5,000/= for letters of administration. Unlike burial expenses these are easily available both from the court and the lawyer. I will award only Kshs. 2,400 being filing fees since a grant was issued. There is no receipt for the balance.

Damages under Fatal Accident Act

32. The Court fell into error by surmising damages. They should be individualized. I set aside the award under *Fatal Accidents Act*. It is not based on relevant factors. The deceased as per the death certificate was 47 years. He was a business man and could have worked up to the biblical age of 70 years. He



had 23 full years to live. He had a 9 year old child who could have depended on him for up to 25 years, that is for another 16 years. He had a young wife aged 36 and who needed his companionship and consort. The daughter was 18 years old and critically needed him to cross young adulthood. Taking into consideration all these factors, a multiplier of 18 years will suffice.

33. The deceased died while doing business. He was a tomato wholesaler. He could earn anything between Ksh. 25,000 - 30,000. The widow gave two versions. He gave her Ksh. 25,000 per month, send some money home and gave her Ksh. 500 per day. However, without business records his estimated income is about Ksh. 20,000 per month. It is also in line with the minimum wage in Mombasa for their two workers.
34. I adopt the 2/3 dependency ratio. I reject both parties' submission on this as it is not based on legal principles. This therefore works out as follows: -
- $$2/3 \times 18 \times 20,000 \times 12 = 2,400,000/$$

Liability

35. Both parties have addressed the issue of liability. The entry of interlocutory judgment is not ipso facto proof of liability. In this matter, the 1st Defendant admitted ramming onto a vehicle in front of him. The police also blamed him. The explanation he gave does not show lack of blame. I therefore find and hold that the 1st respondent was 80% liable for the accident. The 2nd defendant being the owner of motor vehicle Registration No. KAS 579Z – ZC 2121 is therefore 20% liable.

Determination

- a. I find and hold that the assessment and award of damages was so low as to amount to an erroneous estimate of damages
- b. The finding on liabilities is set aside in toto and in lieu therefore substantiated with finding of liability as follows: -
- i. Against the 1st Respondent -80%
 - ii. Against the 2nd Respondent 20 %
- c. A finding that the grant of letters issued by Justice Maureen Odera are not proper, is hereby set aside in toto and the court finds that the issue was neither pleaded nor proved.
- d. Judgment is entered for the Appellant against the Respondents as follows;
- i. Liability 80:20 between the 1st Respondent and the 2nd Respondent
 - ii. General damages of Kshs. 2,400,000
 - iii. General damages under the law Reform for loss expectation of life for Kshs. 150,000
 - iv. Burial expenses Ksh. 60,000
 - v. Fees for letters of Administration Ksh. 2410
 - vi. Total Apportioned; Ksh. 2,089,928 and 522,482 against the 1st Respondent and 2nd respondent respectively.
- e. Burial expenses and special damages to attract interest from the date of filing suit in the lower court



- f. General damage's both that the *Law Reform Act* and *Fatal Accident Act*. shall attract interest from the date of Judgment in the lower court.
- g. Costs of the suit in the court below of the appeal for Kshs. 154,000/= shared in the ratio 80:20.
- h. This file is closed and the lower court file is returned to the lower court.

DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 28TH DAY OF MARCH, 2023.

F. WANGARI

JUDGE

In the presence of:

Musyoki Advocate h/b for Nyabena Advocate for Appellants

N/A for Respondents

Turuki, Court Assistant

