



Macharia (suing as the Legal Representative of Kelvin Macharia Mbugua) v Pangamwa (K) Limited & another (Civil Appeal E10 of 2020) [2023] KEHC 21835 (KLR) (25 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21835 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E10 OF 2020**

**A MSHILA, J
AUGUST 25, 2023**

BETWEEN

**JAMES MBUGUA MACHARIA (SUING AS THE LEGAL REPRESENTATIVE OF
KELVIN MACHARIA MBUGUA) APPELLANT**

AND

PANGAMWA (K) LIMITED 1ST RESPONDENT

SOLAI KENYA LIMITED 2ND RESPONDENT

*(Being an appeal from the Judgment of Hon. C.N.Mugo delivered on 3rd
November, 2020 at Limuru Law Courts in SPMCC NO. 298 OF 2019)*

JUDGMENT

Background

1. By a Complaint filed on November 11, 2019, the Appellant herein being the legal representatives to the estate of Kelvin Macharia Mbugua (Deceased) sued the Respondents claiming compensation for the fatal injuries sustained by the deceased when the deceased was a lawful pedestrian walking along Nairobi-Naivasha Road at Gatarama Area when the 1st Respondent drove motor vehicle registration number KCR 869R negligently causing it to veer off the road and hit the deceased as a consequence of which he suffered fatal injuries.
2. The Respondents filed their statement of Defence denying any liability for the accident. They contended that failure by the Appellant to plead the date of the cause of action is fatal. The alleged accident that occurred on December 13, 2018, was said to have been caused by the negligent acts of the deceased.



3. The matter proceeded to a full hearing. At the conclusion of the trial, the Honourable Trial Magistrate apportioned liability at 80:20% as against the deceased and the Respondents' driver respectively. The court also awarded damages as follows:-
- Pain and suffering Kshs 20,000/=
- Loss of expectation of life Kshs 100,000/=
- Loss of dependency Kshs 1,680,000/=
- Special damages Kshs 51,000/=
- Total Kshs 1,851,000/=
- Less (double compensation) Kshs 100,000/=
- Total Kshs 1,751,000/=
- Less 80% Kshs 1,400,800/=
- Balance Kshs 350,200/=
4. The Appellant is dissatisfied with the lower Court's judgment and has preferred the present Appeal. In his Memorandum of Appeal, he has listed three grounds of appeal namely that:-
- The Learned Trial Magistrate erred in law and fact by apportioning liability at 80:20 in favour of the Defendants.
 - The Learned Trial Magistrate erred in law and fact for failing to find that the Plaintiff was not the primary contributor to the accident.
 - The Learned Trial Magistrate erred in law and fact for awarding costs of the suit to the Defendants.
5. The court directed the parties to canvass the appeal by way of written submissions. Hereunder are their respective submissions;

Appellant's Submissions.

6. The Appellant submits that the trial court erred in the apportionment of liability at 80:20 as the court also held that the parties were equally to blame for the accident. It was submitted that it was unbelievable that the Defendant's driver was driving at a slow speed as the impact would not have been fatal. The deceased being hit by the frontal part of the motor vehicle, at the middle of the road meant that the pedestrian had fully crossed the path of the accident motor vehicle fully. The driver was blamed for failing to keep proper look out being that it was rainy and foggy as such the driver should have been held with a larger extent of negligence as opposed to the deceased. It was submitted that the driver failed to produce any evidence to show the actions he took to avoid the accident as such he should be found to have been careless. Further, it was submitted that the accident area being an area with homesteads meant that the driver should have expected that people would be walking or crossing the road as such he should have been more careful. The court was urged to revise the liability and find the defendant's driver 100% liable for the accident. In relying on the case of *Alfred Chivatsi & another vs Mercy Zawadi* (2019) eKLR the Appellant contended that the Respondents owed the deceased a duty of care which they breached by driving at a high speed and failed to keep proper look out as a result of which the deceased suffered fatal injuries. In the circumstances, the court was urged to find the driver negligent.
7. The Appellant also prayed for costs and interest from the date of filing suit until payment in full to be borne by the Respondents.



Respondent's Submissions

8. The Respondent submitted that the trial court correctly apportioned liability against the deceased person by finding that he was the author of his own misfortunes. The deceased was blamed for crossing the road when it was unsafe to do so as such the accident would not have happened. The deceased was accused of endangering his life and that of other road users. The driver was found to have been driving at a reasonable speed taking into account the time of the night and the weather conditions as well as the busy condition of the road. The Appellant was said to have failed to discharge his burden as he did not prove how the driver was negligent. Reliance was placed in the case of *Caren Auma Oyugi Okwiri vs Emergency Relief Supplies Ltd & another* (2017) eKLR. The court was urged to uphold the findings of the court on liability.
9. With regard to costs, it was submitted that costs follow the event and the Respondents having been found to be successful were entitled to costs. The court was urged to dismiss the appeal with costs to the Respondents.

Trial Court's Evidence

10. James Mbugua Macharia (PW1) adopted his witness statement as his evidence. He testified that the deceased was his son aged 27 years, unmarried and that he was working at Clean Shelf Supermarket. He produced the letters of administration. He stated that the matter was reported at Lari Police Station where he was issued with an abstract. He also produced the death certificate and receipts for burial expenses. He produced the deceased's payslip that indicated that the deceased was being paid Kshs 9,700/=. He also produced the copy of records of the search. He prayed for compensation as his son was taking care of the family.
11. No 63XXX PC David Chirchir Rutoa police officer at Lari Police Station produced the abstract for the accident herein. He testified that the deceased emerged from the left side of the road while running and crossed the road as such he was knocked down and died on the spot. He stated that the deceased was not tested for alcohol or found in possession of alcohol. He stated that the driver was not charged for a traffic offence.
12. Isaiah Waweru Gathinji(DW1) the driver of the subject motor vehicle relied on his witness statement. He testified that he was driving from Nairobi to Naivasha when at the scene of the accident the deceased appeared from the bush, entered the road and jumped to his lane. He testified that he could not have avoided the accident as there was a lot of traffic from the opposite lane as such the deceased was hit by the frontal part of the vehicle. That he stopped and called the police who transferred the deceased to the mortuary as he died on the spot. He stated that the deceased had alcoholic beverages in his pocket. He blamed the deceased for the accident as there was no pedestrian crossing. He urged the court to dismiss the suit as against the Defendants.

Issues for Determination

13. Having read and considered the trial court record and the submissions by both parties, the issues arising for determination are;
 - i. Whether the trial court erred in apportioning liability at 80:20 in favour of the Defendants and;
 - ii. Whether costs should have been awarded to the Defendants at the lower court trial.



Analysis

14. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. In *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123, this principle was enunciated thus

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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 allowance in this respect...”

Whether the trial court erred in apportioning liability at 80:20 in favour of the Defendants;

15. The legal burden of proof is set at Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya which 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. Sections 109 and 112 of the *Evidence Act* provide for the evidential burden of proof which is captured as follows:

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.

17. In the case of *Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another* Civil Appeal No 345 of 2000 [2005] 1 EA 334 it was held that:-

“As a general proposition under Section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Section 109 and 112 of the *Act*..”

18. Reference is also made to the case of *Nadwa vs Kenya Kazi Ltd* (1988) eKLR, where the Court of Appeal observed that:-

“In an action for negligence the burden is always on the Plaintiffs to prove that the accident was caused by the negligence of the Defendant. However, if in the cause of trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the Defendant the issue will be decided in the Plaintiffs favour unless the Defendants evidence provides some answer adequate to displace that inference.”

19. DW1 Isaiah Waweru Githinjith the driver of the accident motor vehicle testified that while he was driving from Nairobi to Naivasha the deceased appeared from the bush and entered the road then he jumped



- into his lane. He stated that he could not avoid the accident since there was a lot of traffic from the opposite lane. He stated that the deceased had alcoholic beverages in his pocket. He blamed the deceased for the accident as there was no pedestrian crossing.
20. In cross-examination, he stated that he has been a driver for more than 22 years and that he has proper eyesight. He indicated that he was driving between 40 km/h-60 km/h. He stated that the deceased emerged from the bush where he saw him at a distance of less than 1 metre. He hooted and braked but the distance was too short. He also indicated that he tried everything possible so as to avoid the accident. He reiterated that there was no pedestrian crossing along that road. He did not expect someone to cross the road, if so they should have been careful. He confirmed that there are homesteads near that area. He stated that the accident occurred at the middle of the road on the left side.
21. PW2 PC David Chirchir Ruto No 63xxx was a police officer from Lari Police Station who testified that the pedestrian emerged from the left side of the road while running and crossed the road when he was knocked down and he died on the spot. The sketch map showed that the deceased was at the middle of the road. He indicated that the deceased was not tested for alcohol.
22. In cross examination he stated that traffic was high on both sides and that it was rainy and foggy. He stated that according to the investigations the deceased crossed the road without due care and that he recommended that an inquest be held. Point of impact was said to have been at the middle of the road on the middle line. Speed limit for a highway was said to be 80 km/h. the vehicle was found to have no pre accident defects. The vehicle was damaged on the front bumper and the windscreen.
23. The court in *Masembe vs Sugar Corporation and Another* [2002] 2 EA 434, held that:-
- “When a man drives a motor car along the road, he is bound to anticipate that there may be things and people or animals in the way at any moment, and he is bound not to go faster that will permit him at any time to avoid anything he sees after he has seen it.... A reasonable person driving a motor vehicle on a highway with due care and attention, does not hit every stationary object on his way, merely because the object is wrongfully there. He takes reasonable steps to avoid hitting or colliding with the object Whereas a driver is not to foresee every extremity of folly which occurs on the road, equally he is not certainly entitled to drive on the footing that other users of the road, either drivers or pedestrians, will exercise reasonable care. He is bound to anticipate any act which is reasonably foreseeable, that is to say anything which the experience of the road users teaches them that people do albeit negligently.... There may be occasions when criminal or traffic offences are committed without giving rise to civil liability.”
24. Nevertheless, there is overwhelming evidence that the driver tried everything possible to avoid the accident in vain. The driver testified that he was driving at a low speed. Further the driver testified that the deceased suddenly appeared on the road but he tried to hoot and applied brakes but the distance between them was too short as such the accident was unavoidable and the deceased was hit and he died on the spot. In disposing off the issue of liability, the trial court stated that the deceased owed a duty of care to other road users to move with due care and in a manner that would not endanger his safety. The court further held that if the driver was driving at 40 km/h which is a slow speed he would have been able to stop in time to avoid the hitting the deceased and the impact would not have been so great as to cause fatal injuries. The court also took judicial notice that the Nairobi-Naivasha highway is a relatively busy road with a lot of traffic as such if someone emerges from nowhere running and crossing the road albeit not at a designated pedestrian crossing, the possibility of being knocked down are high.



25. Both parties were blamed for the accident with primary responsibility going to the deceased. The court proceeded to apportion liability at 80:20 in favour of the Defendants.
26. The Appellant herein submits that the 1st Respondent was negligent as he drove at a high speed and failed to take into consideration the bad weather which affected visibility as such the driver should have been found to bear the larger extent of the negligence instead of the deceased.
27. The Respondents on the other hand submit that the deceased owed a duty of care to other road users including himself which he failed to do as such he endangered his life by suddenly entering the road while running and proceeding to cross at an unsafe place.
28. In *Mwanasokoni vs Kenya Bus Services Ltd* [1985] KLR 931 the Court of Appeal said:-

“Accordingly only when a finding of fact that is challenged on appeal is based on no evidence, or on a misapprehension of evidence or the judge is shown demonstratively to have acted on wrong principles in reaching a finding he did, will this court interfere”.
29. This court is satisfied that the trial court did not act on the wrong principles in reaching its decisions and finds that the trial court analysed the evidence before it on negligence as demonstrated above and arrived at its decision. Indeed this court finds that the deceased was the author of his own misfortunes, as much as the driver owed him a duty of care, the evidence on record, shows that the deceased suddenly entered the road which was busy and vehicles are expected to be driving at 80km/h as it is a highway. The weather was also bad as it was raining and foggy. As much as the driver tried to avoid the accident, the circumstances were too dangerous as such the deceased was fatally knocked.
30. The trial court in its finding proceeded to find the driver partly to blame for the accident and proceeded to apportion liability at 80:20 in favour of the Respondents in that as much as the driver owed a duty of care to the other road users and should at all times be wary of any eventualities, the deceased suddenly entered the road and proceeded to cross when it was unsafe and without due caution as to his own safety. This court is satisfied with that the explanation given by the 1st Respondent on the measures he took to avoid the accident and this court finds no good reason to interfere with trial courts decision to attribute the greater part of negligence to the deceased.
31. This ground of appeal is found devoid of merit and it is disallowed.

Whether Costs Should Have Been Awarded To The Defendants In The Lower Court.

32. The trial court was faulted for awarding costs to the Respondents. Costs follow the event and are awarded to the winning party. In the case herein, the deceased was largely blamed for the accident as such he bore the bigger portion. In the circumstances, the trial court correctly awarded costs to the Respondents who were the successful parties as they were found to be partially negligent and liability was apportioned at 20% in their favour and at 80% as against the deceased.
33. Refer to the case of *Orix (K) Limited vs Paul Kabeu & 2 others* (2014) eKLR where the court held *inter alia* that:-

“.....the court should have been guided by the law that costs follow the event, and the plaintiff being the successful party should ordinarily be awarded costs unless its conduct is such that it would be denied costs or the successful issue was not attracting costs. None of the deviant factors are present in this case and the court would still have awarded costs to the plaintiff, which I do.”



34. This court finds no good reason to interfere with the trial courts decision in awarding costs to the successful party who were the Respondents; This ground of appeal is found to be lacking in merit and it is hereby disallowed.

Findings and Determination

35. For the forgoing reasons the appeal is found to be devoid of merit in its entirety and the same is hereby dismissed with costs to the Respondents.

Orders Accordingly.

DATED SIGNED AND DELIVERED AT KIAMBU THIS 25TH DAY OF AUGUST, 2023

A.MSHILA

JUDGE

In the presence of;

Mwenda – Court Assistant

Waweru – h/b for Gachomo for Appellant

N/A – for Respondent

