



REPUBLIC OF KENYA



**Makumi & another v Aldo & another (Suing as the Administrators  
of the Estate of David Kirimi Muriira) (Civil Appeal E663 of 2022)  
[2023] KEHC 21544 (KLR) (Civ) (18 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21544 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
CIVIL APPEAL E663 OF 2022  
AN ONGERI, J  
AUGUST 18, 2023**

**BETWEEN**

**JOHN GIOKO MAKUMI ..... 1<sup>ST</sup> APPELLANT**

**SAMUEL KAMAU ..... 2<sup>ND</sup> APPELLANT**

**AND**

**DANCUN MWORIA ALDO ..... 1<sup>ST</sup> RESPONDENT**

**JULIUS MURIIRA ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS THE ADMINISTRATORS OF THE ESTATE OF DAVID KIRIMI  
MURIIRA**

*(Being an appeal from the judgment and decree of Hon. E. Wanjala  
(PM) in Milimani CMCC no. 2640 of 2019 delivered on 9/7/2019)*

**JUDGMENT**

1. The respondent was the plaintiff in Milimani CMCC No 2640 of 2019 where he sued the two appellants for damages for fatal injuries sustained by David Kirimi Muriira (Deceased) on 20/5/2016 along Kenyatta Muigai Road, Dandora phase 1 when the deceased was hit by motor vehicle registration KCD 122A. the deceased died 3 days after the date of the accident.
2. The appellants filed a defence denying the respondent's plaint dated 16/4/2019.
3. The respondent's evidence was that the deceased was knocked by motor vehicle registration KCD 122A while walking home at a bus stage. PW 1 said the deceased called her and she went to the scene and she found the deceased bleeding on the left leg. She took him to Mama Lucy hospital where he



- was stitched and went home but the following day he was still in pain and he was taken to Mbagathi hospital where he died.
4. A postmortem was done which revealed that he died out of head injuries caused by blunt trauma.
  5. The DW1 appellant's driver said on 21/5/2016 while driving from Dandora to Town he saw some people who were hanging on the door of the motor vehicle registration KCD 122A. He said the vehicle was empty and when he told the conductor to check the people jumped one by one from the motor vehicle.
  6. The trial court found that the respondents had proved their case and the trial court found the appellants 100% liable and assessed damages as follows;  
Damages under the law report act 180,000  
Loss of dependency 1,840,389.60  
Special damages 26,000  
Total 2,046,389.60
  7. The appellants have appealed against both liability and quantum of damages for the following reasons
    - a. That the learned magistrate erred in law and in fact in not taking into consideration the overwhelming evidence tendered before her by the appellants in the trial court
    - b. That the learned magistrate erred in law and fact by finding the appellants 100% liable for the accident that occurred on 20/5/2016.
    - c. That the learned magistrate erred in fact in finding that the respondents were entitled to general damages of Kshs 2,048,389 assessed as Damages under law reform Kshs 180,000 and Loss of dependency assessed at Kshs 1,840,389.
    - d. That the learned magistrate erred in law and fact by shifting the onus of proving liability on the appellants and not the respondent to prove his case on the balance of probability.
  8. The parties filed written submissions as follows; the appellant submitted that the respondent did not object to the fact that the deceased boarded and later jumped from a moving vehicle. The deceased sustained severe injuries on the left knee and it was the duty of the respondent to prove on a balance of probability that the appellant was negligent and that he caused the injury that led to the death of the deceased.
  9. It was the appellant's submission that Kshs 2,046,389 for loss of dependency was inordinately high considering the deceased was 34 years old and no proof of earnings or employment was adduced at the trial therefore the trial magistrate erred in applying the multiplier approach. The appellants argued that the trial court should have adopted the global sum approach rather than the multiplier approach and proposed a sum of Kshs 800,000.
  10. The respondents submitted that at trial they produced evidence of the appellants negligence through the testimony of the deceased wife Nannis Kajuma who testified that she got to the scene of the accident and found that the deceased was bleeding from the injuries. The appellant did not deny the occurrence of the accident nor did they deny the 2<sup>nd</sup> appellant being the driver of KCD 122D. the only issue for determination was whether the driver of Motor Vehicle KCD 122D was negligent. Noting that the respondents did not witness the accident the trial magistrate considered the fact that it was the deceased himself who reported the accident at the police station after leaving the hospital.



11. The respondents relied on the police abstract as the evidence of the negligence of the 2<sup>nd</sup> defendant who was driving the subject motor vehicle which the appellants did not dispute. The appellants were therefore 100% liable for the accident as they did not produce any evidence contrary to the same.
12. The respondent argued that they were awarded Kshs 80,000 for pain and suffering which was correct since the deceased died on the 5<sup>th</sup> day after the accident and therefore suffered before his death. The post mortem report revealed that he died from a head wound caused by blunt trauma which was consisted with the accident.
13. The respondent submitted that the court made an award Kshs 100,000 for loss of expectation of life which both parties proposed. On loss of dependency the court made an award of 1,840,389.6 after the court applied the minimum wage under the regulation of wages (Agricultural Industry) (Amendment) Order 2015 where the minimum wage for a general laborer was Kshs 10,954.70. The deceased died at the age of 34 years and taking into account the retirement age in Kenya at 60 years he lost 26 years. He also had a family with two spouses and two children. Finally, on special damages the court awarded Kshs 26,000 as was claimed and proven by production of receipts.
14. This being a first appellate, the duty of the first appellate court is to re-assess the evidence before the trial court and to make its own conclusion whether to support the findings of the trial court while bearing in mind that the trial court had the opportunity to see the witnesses. In *Selle –Vs- Associated Motor Boat Co.* [1968] EA 123 it was held in the following terms: -

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

An 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 allowance in this respect.

In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

15. The issues for determination here are as follows;
  - i. Whether the trial court was right on its finding on liability.
  - ii. Whether the assessment of damages was erroneous.
  - iii. Who pays the costs of this suit.
16. On the issue as to whether the trial court was right on its finding on liability, I find that the deceased was conscious after the accident and there is evidence that he called PW1, his wife to the scene where she found him bleeding from the leg. The deceased told the wife that he was walking home when he was hit by the motor vehicle Registration No KCD 122D at the bus stop.



17. There is evidence that he was a pedestrian when the accident occurred. The wife of the deceased took him to Mama Lucy hospital where he was stitched and went home but the following day he was still in pain and he was taken to Mbagathi hospital where he died.
18. The trial court was right in finding the appellants testimony unbelievable.
19. The appellants said the deceased and two other people were hanging on the vehicle and they jumped off and were injured.
20. I find that the Trial court was right in finding the appellants 100% liable.
21. On the issue of quantum, although the court did not award damages for pain and suffering, I have considered the general damages awarded under the other headings and I find them adequate.
22. The deceased was 34 years old and he had a family with two wives and two children. The Trial court adopted the multiplier of 21 years considering the retirement age of 60 years and multiplicand of the minimum wage of Kshs 10,950.70 which is acceptable.
23. The only time when appellate court can interfere with an award of the trial court is when the award is inordinately high or low as to warrant interference or when the trial court relied on wrong principles and arrived at an erroneous conclusion.
24. In *Butt vs Khan* [1982] 1 KAR 5 the court correctly said;
 

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low”.
25. I accordingly find that the appeal here in lacks in merit and I dismiss it and uphold the trial court’s findings.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 18<sup>TH</sup> DAY OF AUGUST, 2023.**

.....

**A. N. ONGERI**

**JUDGE**

**In the presence of:**

- ..... for the 1<sup>st</sup> Appellant
- ..... For the 2<sup>nd</sup> Appellant
- ..... for the Respondent

