



REPUBLIC OF KENYA



Karanja & another (Appealing as Legal Representatives of the Estate of Earnest Mwaura Ndung'u) v Bunyu (Civil Appeal E057 of 2022) [2023] KEHC 22903 (KLR) (29 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22903 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL E057 OF 2022
LM NJUGUNA, J
SEPTEMBER 29, 2023**

BETWEEN

MARY NJOKI KARANJA 1ST APPELLANT

PAULINE WANJIRU GICHUKI 2ND APPELLANT

**APPEALING AS LEGAL REPRESENTATIVES OF THE ESTATE OF EARNEST
MWAURA NDUNG'U**

AND

JAMES KINYUA BUNYU RESPONDENT

(Appeal arising from the decision of Hon. P.M. Mugure PM in Principal Magistrate's Court at Wang'uru Civil Case No. 101 of 2019 delivered on 13th June 2022)

JUDGMENT

1. The appeal herein has been filed *vide* memorandum of appeal dated July 1, 2022 wherein the appellant being dissatisfied with the decision of the court in Principal Magistrate's Court at Wang'uru civil case No 101 of 2019, now seeks orders that:
 - a. The magistrate's findings on liability be set aside in its entirety;
 - b. Judgment be entered for the plaintiff against the defendants on liability at 100% or such other percentage as the court deems fit; and
 - c. Costs of the appeal and the trial court with interest be to the appellants.
2. This appeal is premised on the grounds that the trial magistrate erred in law and fact:
 - a. In holding the deceased wholly liable for the accident yet the collision was in the middle of the road;



- b. In basing her judgment on a police abstract issued on a very preliminary level and before the deceased was even buried;
 - c. In disregarding the police abstract issued to the plaintiffs yet it was on record and was giving the current status of the police file;
 - d. In rejecting Cyrus Irungu Gachogu as an eye witness purely on the ground that his name was not on the initial abstract issued to the defendants at a very early stage of investigations; and
 - e. In handling a fatal accident claim in a casual and non-objective manner thereby reaching wrong and unjust findings.
3. The plaintiffs/appellants filed a plaint dated August 20, 2019 seeking special damages in the sum of Kshs 498,130/=, general damages and costs of the suit. The particulars were that on or about August 28, 2018, the deceased was lawfully driving his motor vehicle registration number KBJ 038L along Makutano – Embu road when at Makawani area, the defendant or his lawful driver drove motor vehicle registration number KCL 116W carelessly and recklessly that he lost control of it, thereby hitting the motor vehicle driven by the deceased who sustained fatal injuries.
 4. The 1st plaintiff/appellant who is the wife of the deceased stated that the deceased was a businessman dealing in paddy and hay and using the said business, he provided for herself and her children at the rate of Kshs 15,000/= per week. That the deceased used to provide Kshs 3,000/= per week for sustenance of the 2nd plaintiff/appellant who is his mother. That now that the deceased is dead, this provision has been cut off. That the vehicle in which the deceased died was valued at Kshs 500,000/= but because it was written off, the salvage was valued at Kshs 150,000/= thereby occasioning a loss of Kshs 350,000/= to the estate of the deceased. The 1st plaintiff/appellant also stated that the deceased was 27 years old when he died and would have lived a long productive life. Further that she has now been deprived of his company and intimacy and her children have been deprived of fatherly love and affection. The special damages claimed were computed at Kshs 498,130/= and specifically pleaded in her plaint. The 2nd plaintiff/appellant stated that she has lost her son whom she depended on. That he used to give her Kshs 3,000/= every week and therefore Kshs 12,000/= every month.
 5. The eye witness in the case, Cyrus Irungu Gachogu stated in his statement that he was riding his motor cycle behind the deceased's motor vehicle and he observed that the defendant's motor vehicle was driving in the middle of the road. That the defendant's vehicle hit the deceased's vehicle even though the deceased swerved accordingly to avoid the accident. That after the incident, the police arrived within 10 minutes and the deceased had already died. On cross examination, he stated that the deceased's car had swerved to the left side of the road but after the accident it was found on the right side of the road and the defendant's vehicle had rolled. He also confirmed that he saw brake lights on the deceased's car before the accident and he knew that the deceased had tried to slow down or stop the car to give way to the defendant's motor vehicle which was being driven in a zigzag manner.
 6. Victor Sirwara of Makutano Traffic Base stated that he received report of a head-on collision along Mwea-Makutano road where the deceased succumbed to injuries. The court noted that the occurrence book was not produced by the witness and there was no verification that he was even from the said police station. It was alleged that the occurrence book extract was in his phone. The court ruled that in the absence of the occurrence book extract, the evidence by this witness is inadmissible as the said phone is not an exhibit in the plaintiff's case. With that, the plaintiff's case was closed.
 7. The defendant denied the averments made therein by stating that the accident occurred through the fault of the deceased. He called PC Victor Sirwara of Makutano Traffic Base who produced occurrence



book number 02/29/08/2018 which detailed witnesses as Samuel Wachira, Stella Gatune and James Kinyua. The abstract excluded Cyrus Irungu Gachogu who was the eye witness in the plaintiff's case. On cross-examination, he stated that he cannot confirm whether the plaintiff's eye witness had recorded a statement at the police station. He further confirmed that he had come to the court as a witness for the plaintiff.

8. DW2 was the driver of the defendant's vehicle who stated that the accident occurred when the deceased's vehicle was being driven in a zigzag manner. That if the deceased had stopped his vehicle, the accident would not have happened. He said that he did not see any motor cycle behind the deceased's motor vehicle. On cross-examination, he stated that the vehicle of the deceased was being driven at high speed and it hit the front tyre of the defendant's vehicle. That the accident was reported to the police but he was not given any notice of intended prosecution. That he (the driver) alongside representatives of the deceased were present when the occurrence book was recorded.
9. DW3 is the respondent herein and was a passenger in the defendant's vehicle at the co-driver's seat. He stated that he saw an oncoming vehicle being driven in a zigzag manner and suddenly hit their vehicle's tyre causing the axle and wheel to come off. That he did not see any motor cycle behind the deceased's vehicle before the accident and that the plaintiff's eye witness is lying when he says he witnessed the accident. That the deceased is the one who drove into the defendant's lane on the road. On cross-examination he stated that the accident was not head-on but rather the deceased vehicle hit his vehicle on the right-hand side. That the police told him that the deceased was a drunk driver who died on the spot following the incident. That he met the family of the deceased on the day following the accident and they mentioned that the deceased had been warned against too much drinking. He further stated he had cautioned his driver to slow down when they both saw the manner in which the deceased was driving his vehicle.
10. In reaching a determination on this matter, the trial court was guided by the case of *David Kajoogi M'mugaa v Francis Muthomi* (2012) eKLR where it was held that not every injury is as a result of someone else's negligence. The magistrate considered the evidence brought before the court and found that the defendant was not liable for the accident therefore the damages could not be awarded as prayed. I do note that the trial magistrate went as far as assessing the damages and envisioning what the court would have awarded if liability had been established.
11. In this appeal, the court directed that the matter be disposed of by way of written submissions and both parties complied.
12. In the appellant's submissions, they reminded the court of its role as an appellate court which is to reach its own judgment based on the evidence at trial. On this, they cited the case of *John Bwire v Joram Wayo* (2021) eKLR. It was their case that the court should have noted that the defendant's driver did nothing at all to prevent the accident from happening, even though the deceased allegedly swerved to avoid the accident. It was their argument that the accident happened on the road meaning that the deceased cannot be held wholly liable for the accident. That the trial court assumed that the defendant's driver was helpless and could not do anything at all to avert the accident. They relied on the case of *Abbay Abubakar Haji & Fatuma Abdulla v Freight Agencies Ltd* (1984) eKLR where the court held that both parties to an accident ought to be seen to have taken necessary caution to avert the accident otherwise the liability falls on both of them in equal measure.
13. That the fact that the police abstract brought before this court wholly blames the deceased for the accident, does not mean that the court should have determined the case based on this presumption. That the trial court did not pay attention to the discrepancies found in the abstract produced by DW1 who had allegedly lost the abstract issued to the appellants and had a copy in his phone. Reliance was



placed on the case of [Charles Ocharo Momanyi v United Millers Limited](#) (2017) eKLR. That the trial court erred in disregarding the testimony of PW3 who had been listed as an eye witness in the plaintiff's case and even termed him as a stranger in the case because he was not in any of the vehicles involved in the accident. It was their case that the investigation was not complete and yet a person had died thus showing laxity on the part of the police. That there was a miscarriage of justice on the part of the trial court and the appellate court ought to right these wrongs and award damages as the trial court had enumerated.

14. The respondent submitted that this appellate court must not forget its powers in this appeal and that the trial magistrate acted within the law. He stated that the evidence of DW1 was withdrawn because he did not have the occurrence book with him. He discredited the evidence of PW3 who alleged that he had been following the deceased's car for a long distance but could not tell what color it was. That PW3 was not at the scene and did not even record a statement at the police station. That the only witnesses to the accident are the ones listed in the police abstract produced by the defendant. He submitted that the appeal stands on shaky grounds and urged the court to be guided by the case of [Elijah Ole Kool v Ikonya Thuo](#) (2001) eKLR to find that the appeal has no merit.
15. After perusal of the trial court record, the grounds of appeal and the competing submissions, I find that the issues for determination are:
 - a. Whether or not the trial magistrate was just in determining liability on the basis of the police abstract presented by the defendant;
 - b. Whether PW3 was a credible witness for the case.
16. The parties in the case at trial were faced with proving their case to the standard of a balance of probabilities or on a preponderance of evidence. According to the 9th edition [Black's Law Dictionary](#), Balance of probabilities also means preponderance of the evidence means:

“The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.”
17. Similarly, sections 109 and 112 of the [Evidence Act](#), cap 80 Laws of Kenya, provide 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.”
18. This standard of proof was also discussed in the case of [Eastern Produce \(K\) Ltd- Chemomi Tea Estate v Bonfas Shoya](#) (2018) eKLR where the court held:

“The burden of proof in civil cases on the balance of probability was defined in the case of [Kanyungu Njogu v Daniel Kimani Maingi](#) (2000) eKLR that when the court is faced with



two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other.”

19. That having been said, I do note that a police abstract was presented as evidence during the defense case by the same police officer who when called upon to produce police abstract earlier during the plaintiff’s case, stated that it had been misplaced. During the plaintiff’s case, the said police officer stated that he had a copy of the abstract in his phone and did not have any physical copies on hand. The trial magistrate rightly ruled that the abstract he has in his phone is inadmissible as the phone was not an exhibit in the case. This police officer was the last witness in the plaintiff’s case before they rested their case. The same police officer testified as DW1 and he produced a police abstract detailing the accident. I take note that there is a significant difference between the two abstracts produced by the plaintiff and the defendant, further noting that the one produced by the plaintiff was found to be inadmissible.
20. The abstract presented by the plaintiff, which was allegedly misplaced at the police station arises from OB N 30/28/08/2018 which details the accident and seems to have been taken out immediately following the accident as the case should be. The abstract presented by the defendant arises from OB N 02/29/08/2018 which was prepared by the same investigating officer stating that the case is pending investigation. The essence of an OB is not to serve as mainstream evidence in a case, but rather, it is a starting point to show that the accident was actually reported. Section 73 of the [Traffic Act](#) provides as follows:

“73. Duty to stop and report

1. If, in any case, owing to the presence of a motor vehicle on a road, an accident occurs whereby injury or damage is caused to any person, vehicle, dog or cattle, the driver of the motor vehicle shall stop, and if required to do so by any person having reasonable grounds for so requiring give his name and address, and also the name and address of the owner and the identification marks of the vehicle.
2. Any other person in the vehicle at the time of the accident shall also, if required to do so, give his name and address.
3. If in the case of any such accident as aforesaid the driver of the motor vehicle for any reason does not give his name and address to any such person as aforesaid, or if any injury has been caused to any person, dog or cattle, the driver shall report the accident at a police station or to a police officer as soon as reasonably possible, and in any case within twenty-four hours of the occurrence thereof.
4. The owner of a motor vehicle shall supply the police with all information necessary for the identification of a driver involved in an accident.”

21. In my view, the accident was reported and even better, the police officers arrived at the scene of the accident and this is enough to sustain a trial. In the case of [Peter Kanithi Kimunya v Aden Guyo Haro](#) (2014) eKLR the court held:

“A police abstract is not proof of occurrence of an accident but of the fact that following an accident, the occurrence thereof was ‘reported’ at a particular police station.”



With this in mind, the trial court should not have heavily relied on the abstract but rather on the evidence by the witnesses.

22. Where necessary, this being an appellate court should be able to determine on any issue that was misconstrued at trial. As submitted by both parties, which submissions, I am in agreement with, this court is well mandated to determine the issues herein. This was the finding of the court in the case of *Catherine Mbithe Ngina v Silker Agencies Limited* [2021] eKLR where the court in discussing this, relied on the case of *Peters v Sunday Post Limited* [1958] EA 424, where it was held that:

“Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given...Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge’s conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question...It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong.”

23. Having established that the issue of liability cannot be proved by reliance on the police abstract, I shall now consider the evidence on record as I address my second issue for determination on whether PW3 was a credible witness. The respondent vehemently denies that PW3 was an eye-witness in the case because he did not appear on the police abstract presented during the defense case. It is my view that whoever is named as witnesses in the police abstract does not matter so long as the accident was



reported. PW3 testified that he was riding his motor cycle behind the deceased person's vehicle. The fact that he was not able to identify the colour of the vehicle is immaterial because after the impact, he stated that he got busy helping to rescue the deceased and did not pay much attention to a lot of things. It is also not unusual for a witness to recount events leading to an incident in a manner that would seem unsure but at the end of the day it leads to the same place. In the case of *Richard Munene v Republic* (2018) eKLR the court held:

“It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.”

24. In the premises, PW3 is a credible witness and his testimony should not have been discredited. After this finding, I am persuaded that looking at the evidence wholesomely, the accident happened as a result of the fault of both parties. I am guided by the case of *Charles Ocharo Momanyi v United Millers Limited* (2017) eKLR the court discussed this element and relied on the case of *Robinson v Oluoch* (1971) EA 376 wherein it was held: -

“Careless driving necessarily connotes some degree of negligence and in those circumstances, it may not be open to the respondent to deny that his driving, in relation to the accident, was negligent...”

25. Similarly, in the case of *Abbay Abubakar Haji Patuma Ali Abdulla v Freight Agencies Ltd* (1984) eKLR the court stated;

“The trial judge rightly applied to the facts before him the relevant law enunciated by Spry, v P in *Lakhamshi v Attorney General*, (1971) E A 118, 120 for such cases which:

“It is not settled law in East Africa that where the evidence relating to a traffic accident is insufficient to establish the negligence of any party, the court must find the parties equally to blame. A judge is under a duty when confronted by conflicting evidence to reach a decision on it. In the case of most traffic accidents it is possible on a balance of probabilities to conclude that one other party was guilty or both parties were guilty of negligence. In many cases as for example where vehicles collide near the middle of a wide straight road in conditions of good visibility with no courses, there is in the absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the center of the road, the other must have been negligent in failing to take evasive action. Although it is usually possible, but nevertheless often extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence, yet where it is not possible it is proper to divide the blame equally between them. Where, however, there is a lack of evidence, the position is different. It is difficult to see how a party can be found guilty of negligence if there is no evidence that he was in fact negligent and if negligence on his part cannot properly be inferred from the circumstances of the accident.

26. There is no evidence to prove that the defendant's driver did the best in his power to avert the accident. I am inclined to settle on a liability ratio of 50%:50% in favour of the defendant/respondent. I find that the trial magistrate already considered the award of special and general damages that would have been applied had the issue of liability been established at trial.



27. I do agree with the computations made at trial and will apply them as follows: for damages for pain and suffering has been reduced to the minimum because the deceased died on the spot. Further, damages for loss of expectation of life has also been reduced to the maximum applicable according to previous court decisions for instance in the case of *Benham v Gambling*, (1941) AC 157 where the court held that the amount awarded must be modest.

28. On damages for loss of consortium, I shall not award the same and I choose to be guided by the case of *Innocent Keti Makaya Denge v Peter Kipkore Cheserek & another* [2015] eKLR where it was held:

“...In my view, loss of consortium can only be subsumed in a claim for loss of amenities in an action instituted by a survivor of an accident in which it is claimed that owing to the injuries sustained in the accident in question, the plaintiff was incapable of enjoying consortium with his/her spouse and that his or her quality of life had as a result been diminished. Loss of consortium cannot thus be maintained as a claim on its own...”

Damages for loss of dependency shall be applied as the trial magistrate computed it rightfully using the multiplier method with the minimum wage at the time of death given that the deceased’s income could not be proved.

29. Consequently, the appeal herein is allowed and the following orders to issue:

- a. Liability Ratio 50:50
- b. Special damages Kshs 498,130/=
- General damages
- c. Pain and suffering Kshs 10,000/=
- d. Loss for expectation of life Kshs 100,000/=
- e. Loss of dependency Kshs 1,077,808/=
- f. General damages total Kshs 1,187,808/=
- g. Less 50% contribution Kshs 593,904/=
- h. Total damages payable to the appellants: Kshs 1,092,034/=
- i. Special damages shall attract interest from the date of filing of the plaint whereas, general damages shall attract interest from the date of the judgment of the trial court.
- j. Costs of the trial court suit, this appeal to be borne by the appellants and respondents at the ratio of 50:50.

30. It is so ordered.

DELIVERED, DATED AND SIGNED AT KERUGOYA THIS 29TH DAY OF SEPTEMBER, 2023.

L. NJUGUNA

JUDGE

.....for the Appellants

.....for the Respondent

