



Kabui & another (Suing as the administrators of the Estate of the Late Peter Gachunu Irungu - Deceased) v Muhiu & 2 others (Civil Case 126 of 2013) [2023] KEHC 22791 (KLR) (Civ) (28 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22791 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL CASE 126 OF 2013
CW MEOLI, J
SEPTEMBER 28, 2023

BETWEEN

JACINTA WACUKA KABUI 1ST PLAINTIFF
JAMES KABUI WACHUKA 2ND PLAINTIFF
SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE PETER GACHUNU IRUNGU - DECEASED

AND

ANDREW KAMAU MUHIU 1ST DEFENDANT
HARUN MUIRURI MWAURA 2ND DEFENDANT
JAMES MAINA MATHAI 3RD DEFENDANT

JUDGMENT

1. By a plaint dated 18th April 2013 Jacinta Wacuka Kabui and James Kabui Wachuka (hereafter the 1st and 2nd Plaintiffs) sued Andrew Kamau Muhiu, Harun Muiruri Mwaura and James Maina Mathai (hereafter the 1st, 2nd and 3rd Defendants) seeking general damages, special damages. The claim arose out of a road traffic accident which allegedly resulted in the death of Peter Gachunu Irungu (hereafter the deceased).
2. It was alleged that on or about the 20th day of April, 2010 the deceased was lawfully driving the motor vehicle registration number KAR 984R (the first motor vehicle) along Kangundo Road near Njiru Shopping Centre when the motor vehicle registration number KAD 628N (the second motor vehicle) owned by the 2nd and 3rd Defendants at all material times and driven by the 1st Defendant, collided with



the first motor vehicle, causing the death of the deceased. The accident was attributed to negligence on the part of the 1st Defendant particularized as follows:

“Particulars of Negligence of The 1st Defendant

- a. Failing to stop, swerve or in any other way to manage/control the said motor vehicle and prevent it from causing the said accident.
 - b. Driving without due care and attention thus causing the said accident.
 - c. Driving at an excessive and dangerous speed.
 - d. Failing to exercise or maintain any sufficient or adequate control of the said motor vehicle so as to avoid the said accident.
 - e. Stopping in the middle of the road at night without displacing signs to that effect.
 - f. Driving in a manner contrary to the Highway Code”. (sic)
3. It was further pleaded that at the time of his death, the deceased who was aged 59 years enjoyed good health and worked as a taxi driver earning a monthly income of Kshs. 45,000/- p.m with high prospects of increasing his income. That the deceased provided for his family which included the 1st Plaintiff who was his wife, and her children among them the 2nd Plaintiff.
 4. Upon service of summons, the 2nd Defendant entered appearance and filed the statement of defence dated 1st October, 2013 denying the averments in the plaint and liability.
 5. The record shows that upon default to enter appearance and/or file their statements of defence and pursuant to the request of the Plaintiffs herein, an interlocutory judgment was entered against the 1st and 3rd Defendants on 1st April, 2019.
 6. The hearing of the suit commenced on 2nd November, 2022. The 1st Plaintiff testifying on oath as PW1 stated that she is the widow of the deceased. She adopted her witness statement filed on 19th April, 2013 as her evidence -in- chief and tendered a bundle of documents filed on like date as P. Exhibits 1-6. During cross-examination, the 1st Plaintiff testified that the according to the police abstract, the 1st Defendant was the owner of the second motor vehicle and confirmed that the 2nd Defendant’s name did not appear therein even though the second motor vehicle was registered in the name of the 2nd Defendant as of the time of filing the suit.
 7. PC Stella Ngina who was PW2 testified that at the time of giving her testimony, she was attached to Kayole Police Station and performing traffic duties. The police officer confirmed the issuance of the police abstract which was tendered as P. Exhibit 1, and further testified that the material accident involved the first and second motor vehicles. It was her evidence that on the material date, the second motor vehicle was headed from Kangundo whereas the first motor vehicle was headed in the opposite direction, and that the second motor vehicle lost control and collided with the first motor vehicle, resulting in the death of the deceased and other occupants in the first motor vehicle. She stated that the driver of the second motor vehicle was blamed for the accident.
 8. During cross-examination, PW2 stated that at the time of preparing the police abstract, the investigations had not been concluded but that ultimately, the driver of the second motor vehicle was held to blame, but she was unaware of any party being charged in relation to the accident. She further stated that at the time of the accident, the 1st Defendant was identified as the owner of the subject motor



vehicle and the driver as Francis Mwaura Kinyanjui. In re-examination, the police officer affirmed that she had brought with her the Occurrence Book (OB) extract. This marked the close of the Plaintiffs' case.

9. The 2nd Defendant who was DW1 adopted his signed witness statement dated 5th November 2022 as his evidence-in-chief and produced his bundle of documents of like date as D. Exhibit 1-4. He testified that he sold the second motor vehicle to the 3rd Defendant in October, 2009 at a consideration of Kshs. 870,000/- and handed over all relevant documents to enable a transfer to the 3rd Defendant, the purchaser. Hence, at the time of the accident, he did not own the second motor vehicle. He further testified that he did not further engage with the 3rd Defendant. The 2nd Defendant's case was closed at this point. Parties thereafter filed written submissions.
10. The Plaintiffs' counsel submitted on two issues namely: liability and quantum of damages. On liability, it was submitted that the accident was wholly the result of negligence on the part of the 1st Defendant, in his capacity as both the owner and driver of the second motor vehicle at all material times. To buttress this point, counsel cited principles regarding negligence as spelt out in *Amani Kazungu Karema v Jackmash Auto Ltd & another* [2021] eKLR and *Embu Public Road Service Ltd. v Riimi* [1968] EA 22.
11. Counsel asserted that the 2nd Defendant ought to be found equally liable in his capacity as the beneficial owner of the second motor vehicle and in the absence of any contrary evidence. Citing the case of *Jared Magwaro Bundi & another v Primarosa Flowers Limited* [2018] eKLR to the effect that a motor vehicle's registration details are deemed to be prima facie evidence of ownership/title to the said motor vehicle, in the absence of any contrary evidence. It was submitted that the 2nd and 3rd Defendants therefore ought to be found vicariously liable for the actions/omissions by the 1st Defendant which resulted in the death of the deceased.
12. On quantum of damages, he urged concerning general damages for pain and suffering and loss of expectation of life, the respective sums of Kshs.100,000/- on each head as adequate compensation to the estate of the deceased. Here citing *Makano Makonye Monyanche v Hellen Nyangena* [2014] eKLR where a similar award was made under the head of loss of expectation of life. Regarding the award for loss of dependency, counsel urged the court to apply a multiplier of 15 years in respect to the deceased and relied on the case of *Caleb Juma Nyabuto v Evance Otieno Magaka & another* [2021] eKLR where a similar multiplier was applied at the instance of a deceased person aged 50 years.
13. Counsel further urged the court to apply a multiplicand of 65,000/- considering the deceased's earnings of Kshs. 45,000/- pm as a taxi driver and Kshs. 20,000/- from his farming business. On the dependency ratio, counsel proposed a ratio of 2/3 being the portion of the deceased's income going to the support of his family. Consequently, counsel tabulated the award under this head as follows:
$$\text{Kshs. } 65,000/- \times 15 \times 12 \times 2/3 = \text{Kshs. } 7,800,000/-$$
14. Finally, regarding special damages, counsel urged the court to award the pleaded sum of Kshs. 20,100/- placing reliance on the decisions rendered in *China Wu Yi Limited & another v Irene Leah Musau* [2022] eKLR and *Kenya Women Microfinance Ltd v Martha Wangari Kamau* [2020] eKLR in that regard.
15. The 2nd Defendant's counsel also filed the submissions dated 5th April, 2023. On liability, counsel submitted that the evidence tendered namely the police abstract listed the 1st Defendant as the owner of the second motor vehicle at the time of the accident and that in addition, reiterated evidence by the 2nd Defendant in proof of his assertions that he had sold the second motor vehicle to the 3rd Defendant on 12th October 2009, which was prior to the accident. Hence not being the in actual ownership of



the said motor vehicle the said Defendant was discharged from any liability arising out of the accident. Reference was made to *Abbay Abubakar Haji & another v Marair Freight Agencies Ltd* [1984] eKLR on the burden of proof in claims based on negligence. For those reasons, the court was urged to dismiss the case against the 2nd Defendant.

16. The court has considered the pleadings, the evidence tendered at the trial, as well as the rival submissions herein. Two key issues arising therefrom fall for determination, namely liability and quantum.

17. On liability, as earlier mentioned, an interlocutory judgment was entered against the 1st and 3rd Defendants for failure to enter appearance and/or file their statements of defence, thereby settling the issue of liability as against them. This position was echoed by the Court in the case of *Charles Ogendo Ayieko v Enoch Elisha Mwanyumba Mombasa HCCC No. 1035 of 1983* when it held that:

“Where an ex parte interlocutory judgement has already been entered against the defendant the Court does not have to decide on the question of liability.”

18. Moreover, the Court of Appeal in *Makala Mailu Mumende v Nyali Gulf & Country Club* [1991] KLR 13 held that:

“Judgement in default of appearance presupposes that there is a cause of action...The judge cannot set aside a Judgement without an application before him, as he has no jurisdiction to do so...Justice though must be done to both parties in accordance with the law...Where judgement is entered in default liability is admitted and the Court must proceed to assess damages.”

19. Similarly, in *Julius Murungi Muriangi v Equitorial Services Ltd & Another Nairobi HCCC No. 2714 of 1988* the same Court stated that:

“The defendants herein filed no defence and they are deemed to have admitted the facts complained of under Order 6 rule 9(1) of the Civil Procedure Rules since failure to file a defence operates as an admission of all the allegations in the plaint except damages.”

20. In view of all the foregoing circumstances, the only remaining issue for determination as concerns the 1st and 3rd Defendants is on quantum.

21. Regarding the Plaintiffs’ case as against the 2nd Defendant, it is apparent from the pleadings and evidence tendered that the key issue touching on liability revolves around the latter’s purported ownership of the second motor vehicle, thereby giving rise to alleged vicarious liability for the actions of the driver thereof. In that respect, it is trite law that the burden of proof lies with the Plaintiffs to prove their case against the 2nd Defendant, on a balance of probabilities. Section 107 (1) of the [Evidence Act](#), Cap 80 Laws of Kenya clarifies this position by providing that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”



22. Moreover, the evidential burden of proof which is captured in Sections 109 and 112 of the same Act stipulates that:
- “ 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.”
23. The abovementioned provisions were discussed in *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, in which the Court of Appeal rendered 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 case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”
24. The oral and documentary tendered at the trial reveals that an accident occurred on the material date and involving the first and second motor vehicles, resulting in the death of the deceased herein. As regards the ownership of the second motor vehicle, the law provides that the contents of the copy of records are deemed to be ‘prima facie’ evidence of ownership pursuant to the provisions of Section 8 of the *Traffic Act*, Cap. 403 Laws of Kenya which stipulates that the person whose name appears on the registration document in respect of a motor vehicle is deemed its owner, prima facie.
25. For their part, the Plaintiffs tendered the copy of records dated 7th February 2011 as P. Exhibit 6 to support their averment that at the date of the accident, the 2nd Defendant was the registered owner of the second motor vehicle. The Plaintiffs also tendered the police abstract relating to the accident dated 8th May, 2010 as P. Exhibit 1, the contents of which have been earlier stated. According to the police abstract, the 1st Defendant was listed as the owner of the second motor vehicle at all material times. The 2nd Defendant’s name was not captured therein, nor was he mentioned in the testimony of PW2.
26. On his part, the 2nd Defendant tendered D. Exhibit 2 being a copy of the sale agreement dated 12th October, 2009 to support the averment that prior to the accident, he had sold the second motor vehicle to the 3rd Defendant for consideration of Kshs. 870,000/- and that following the sale, he had handed over all requisite documents to enable the 3rd Defendant effect a transfer of the said motor vehicle to his name. Moreover, the 2nd Defendant tendered the police abstracts dated 8th May, 2010 and 6th August, 2010 as D. Exhibit 3 and D. Exhibit 4 respectively, to support his testimony that he was not the actual owner of the second motor vehicle as at the time of the accident.
27. The law is settled that in the absence of any contrary evidence, a police abstract is deemed to be conclusive proof of ownership. This was the reasoning taken by the Court of Appeal in *Wellington Nganga Muthiora v Akamba Public Road Services Ltd & Another* [2010] eKLR as referenced in the case of *Lochab Transport (K) Limited & another v Daniel Kariuki Gichuki* [2016] eKLR thus:
- “ Where police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even cross-examination challenged it, the police abstract being a prima facie evidence not rebutted could be relied on as proof of ownership in the absence of anything



else as proof in civil cases was within the standards of probability and not beyond reasonable doubt as is in criminal cases. However, where it was challenged by evidence or in cross-examination, the plaintiffs would need to produce certificate from the Registrar or any other proof such as an agreement for sale of the motor vehicle which would only be conclusive evidence in the absence of proof to the contrary”.

28. In the present instance and as noted above, the police abstract tendered name the 1st Defendant as being the owner of the subject motor vehicle at all material times. Concerning the copy of records tendered by the Plaintiffs, whereas the same listed the 2nd Defendant as being the registered owner thereof, the court is satisfied that the 2nd Defendant tendered credible evidence to rebut this position and to support the assertions that he sold the said motor vehicle to the 3rd Defendant months prior to the accident but it seems that there was a lapse on the part of the 3rd Defendant in effecting the change of ownership with the Registrar of Motor Vehicles.
29. In any event, a finding of liability has already been made against the 1st and 3rd Defendants by way of the interlocutory judgment. The court is therefore satisfied that the 2nd Defendant has reasonably shown by way of credible evidence that at the time of accident, he was not the actual owner of the second motor vehicle, notwithstanding the information reflected in the copy of records at the time.
30. In so finding, the court is guided by the following decision delivered by the Court of Appeal in Ignatius Makau Mutisya v Reuben Musyoki Muli [2015] eKLR:

“It is trite law that the ownership of a motor-vehicle is to be proved by the registration of a person as the owner of the motor-vehicle, unless proved otherwise. section 8 of the [Traffic Act](#) provides that;

“The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.” (Emphasis supplied).

This section has been interpreted to mean that the registration of the motor-vehicle is not conclusive proof of ownership. In the case of *Osapil vs Kaddy* [2000] 1 EALA 187 the Court of Appeal of Uganda held that a registration card or logbook was only prima-facie evidence of title to a motor vehicle. The person in whose name the vehicle was registered was presumed to be the owner thereof unless proved otherwise.

This Court adopted the interpretation above in the case of *Securicor Kenya Ltd v Kyumba Holdings Civil Appeal No. 73 of 2002* (Tunoi, O’Kubasu’ Deverell JJ.A) and held that;

“Our holding finds support in the decision in *OSAPIL v KADDY* [2000] 1 EALA 187 in which it was held by the Court of Appeal of Uganda that a registration card or logbook was only prima facie evidence of title to a motor vehicle and the person whose name the vehicle was registered was presumed to be the owner thereof unless proved otherwise. The appellant had, indeed, proved otherwise.”

Also recently, this Court in the case of *Joel Muga Opinja v. East Africa Sea Food Ltd* [2013] eKLR restated this position as follows: -

“We agree that the best way to prove ownership would be to produce to the Court a document from Registrar of Motor Vehicles showing who the registered owner is but when the abstract is not challenged and is produced in Court without any objection, the contents cannot later be denied.”



All this goes to show that the presumption that the person registered as owner of a motor vehicle in the logbook is the actual owner is rebuttable. Where there exists other compelling evidence to prove otherwise, then the Court can make a finding of ownership that is different from that contained in the logbook. Each case must however be considered on its own peculiar facts. As observed by this Court in the case of Francis Nzioka Ngao vs Silas Thiani Nkunga, Civil Appeal No.92 of 1998,

“Whether the property in a chattel being sold has or has not been passed to the buyer is a question of fact to be determined on the facts of each individual case.”

In this case, there is undisputed evidence to the effect that the appellant had actually purchased the motor vehicle from Machakos District Co-operative Union Ltd, repaired it, and then sold it to the respondent. It was also in evidence that when the appellant sold the lorry to the respondent, instead of ensuring that it had been transferred, he just signed the transfer forms and gave them to the respondent to complete the said transfer...we note that in the ordinary state of things, a seller of a motor vehicle hands over the motor vehicle to the buyer together with the duly executed transfer forms, and leaves it to the buyer to follow up the matter with the Registrar of Motor Vehicles. No adverse inference therefore should be made against the appellant for the sole reason that he did not follow up the respondent to ensure that the transfer had been effected.

...

Having considered this evidence, we are satisfied that the appellant proved before the trial court that he had already sold the lorry to the respondent long before the said accident. He, in our view rebutted the presumption that he was still the owner of the lorry, and not the respondent. Moreover, there was actually no evidence from the Registrar of Motor Vehicles placed before the Court to prove prima facie that the appellant was the registered owner of the lorry in question.

Our finding is that the special, insurable and actual owner of the lorry in question as at the time the accident happened was the respondent. The Appellant successfully rebutted the prima facie evidence on ownership as stipulated under section 8 of the *Traffic Act*.”

31. In the premises, the court finds that liability has not been proven against the 2nd Defendant and the Plaintiffs’ case must fail and is therefore dismissed.
32. The court will now deal with the issue of damages, as regards the remaining Defendants (the 1st and 3rd). Regarding general damages for pain and suffering, from the material before the court, it is apparent that the deceased succumbed to injuries sustained in the accident on the same date, namely, the 20th of April, 2010. See the death certificate (P. Exhibit 2). An award of Kshs.20,000/- will suffice considering the comparable case of Lucy Wambui Kihoro (Suing as the Personal Representative Of Deceased, Douglas Kinyua Wambui) v Elizabeth Njeri Obuong [2015] eKLR where the court awarded the sum of Kshs.20,000/- in similar circumstances.
33. Regarding general damages for loss of expectation of life, the evidence on record shows that the deceased died aged 59 years. On all accounts, he enjoyed good health until his demise. The courts ordinarily grant the conventional sum of Kshs.100,000/ under this head. See for instance, Mumias Sugar Company Limited v Henry Olukokolo Ashuma (suing as the legal representative in the estate of Patrick Kweyu Ashuma (Deceased) & another [2018] eKLR and the case of Caleb Juma Nyabuto v Evance Otieno Magaka & another [2021] eKLR. In the circumstances, the court is persuaded that a similar award of Kshs.100,000/ would constitute adequate damages for loss of expectation of life.



34. Turning to general damages for lost dependency, the court was urged to adopt the multiplier approach. On the multiplier, the Plaintiffs tendered a copy of the death certificate as P. Exhibit 2 indicating that the deceased died at the age of 59 years. The court considered the multiplier of 15 years suggested by the Plaintiffs as well as the authority cited in that respect but noted that the same related to a deceased person aged 50 years.
35. Upon considering the case of Peter Chege & 2 others v Joyce Litha Kitonyi & 2 others [2017] eKLR and the case of Tipper Hauliers Limited v Gladys Nanjala Namulata & another (Suing as the Legal Representative of the Estate of the Late Peter Wafula Kisache) [2020] eKLR where the respective courts upheld the use of a multiplier of 6 years at the instance of deceased persons who died aged 59 years, the court will apply a similar multiplier of 6 years which is reasonable in the circumstances. The court will also adopt a dependency ratio of 2/3 in view of the 1st Plaintiff's evidence that prior to his death, the deceased supported her and their two (2) children, whose ages were however not disclosed.
36. Concerning the multiplicand, the court considered the averments by the Plaintiffs that prior to his death, the deceased worked as a taxi driver earning a monthly income of Kshs. 65,000/- made up of Kshs.45,000/- being salary and an approximate sum of Kshs.20,000/- from his farming business. While the death certificate tendered indicated that the deceased was a driver by occupation, no evidence of his earnings was tendered before this court.
37. In the circumstances, the court is inclined to apply the Regulation of Wages (General) (Amendment) Order 2022. The minimum wages payable to a vehicle driver in Nairobi is Kshs. 20,517.80 pm. The court will therefore apply this sum as the multiplicand in the absence of any credible evidence to support the asserted earnings from farming. Consequently, the award under the head for loss of dependency will be computed as follows: - Kshs. 20,517.80 x 6 x 12 x 2/3 = Kshs. 984,854.40
38. The Plaintiffs claimed the sum of Kshs. 20, 100/- as special damages. Special damages must be specifically pleaded and strictly proved. This was reaffirmed by the Court of Appeal in David Bageine v Martin Bundi [1997] eKLR when it stated thus:
- “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 v 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.’”
39. The special damages sought relate to expenses said to have been incurred following the death of the deceased in addition to expenses incurred in obtaining the police abstract and letters of administration, totaling the sum of Kshs. 20,100/-. However, the Plaintiffs only tendered a mortuary receipt dated 27th April, 2010 for the sum of Kshs.3,800/- and a receipt on legal fees dated 28th October, 2010 for the sum of Kshs. 10,000/- and as P. Exhibits 4 a) and b). The court will therefore grant the sum of Kshs. 13,800/- under this head.
40. Consequently, judgment is hereby entered in favour of the Plaintiffs against the 1st and 3rd Defendants jointly and severally as follows:



Liability 100%

a. General damages

Pain and suffering Kshs.20,000/-

Loss of expectation of life Kshs.100,000/-

Lost dependency Kshs. Kshs. 984,854.40

Special damages Kshs. 13,800/-

Total Kshs.1,118,654.40

41. The Plaintiffs will also get the costs of the suit and interest at court rates until payment in full. The suit against the 2nd Defendant is hereby dismissed but the parties will however bear their own costs given the circumstances of the case.

DELIVERED AND SIGNED AT NAIROBI ON THIS 28TH DAY OF SEPTEMBER 2023.

C.MEOLI

JUDGE

In the presence of:

For the Plaintiff: Ms. Wangui

For the 2nd Defendant: Mr. Mbuthia

C/A: Carol

