



**Kanini Haraka Enterprises v Mwichigi (Civil Appeal 10 of 2020)  
[2023] KEHC 26227 (KLR) (27 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 26227 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CIVIL APPEAL 10 OF 2020  
GL NZIOKA, J  
SEPTEMBER 27, 2023**

**BETWEEN**

**KANINI HAKAKA ENTERPRISES ..... APPELLANT**

**AND**

**DOMINIC NJIHIA MWICHIGI ..... RESPONDENT**

*(Being an appeal from the judgment delivered by Hon. M. Mutua  
Resident Magistrate (RM) dated 3rd March 2020 vide Civil Case  
No. 304 of 2016 at the Chief Magistrate's Court at Naivasha)*

**JUDGMENT**

1. By a plaint dated 1<sup>st</sup> April 2016, the plaintiff in his capacity as legal representative of the Estate of the late Samuel Kimani Njihia (herein “the deceased”) sued the defendant, seeking for judgment against the defendant for general and special damages, costs and interest.
2. It was the plaintiff’s case that, on the 6<sup>th</sup> day of September 2014, the deceased was lawfully riding a motor cycle registration No. No. KMCB 507Q along Kinangop-Naivasha road, when he was knocked down by a motor vehicle registration No. KBN 950F owned by the defendant and/or driven by its agents or driver.
3. The plaintiff blames the defendant for the accident on the grounds that; the defendant’s driver, agent or servant drove the subject motor vehicle with due care and attention, at a high speed, failed to slow down, swerve, braked or in anyway control the motor vehicle to avoid the accident or have regard to other users. That as a result of the accident the deceased lost his life.
4. However, by a statement of defence dated; 19<sup>th</sup> May, 2016, the defendant denied liability and/or all the particulars of negligence attributed to it. It was the defendant’s averment that, if the accident occurred at all, then without prejudice, the deceased solely or substantially contributed to the same, by riding the motor cycle without due care and attention, obstructing the driver of the motor vehicle registration



- No. KBN 950 , driving at an excessive speed failing to heed to consistent warning from the driver of the motor vehicle registration No. KBN 950F and take evasive measures to avoid the accident.
5. The case proceeded to full hearing wherein the trial court entered judgment on liability in favour of the plaintiff as against the defendant at 100% and awarded damages as follows:-
    - a) Pain and suffering-----Kshs 20,000
    - b) Loss of expectation of life-----Kshs 100,000
    - c) Loss of dependency-----Kshs 2,500,000
    - d) Special damages-----Kshs 32,550,00
    - Total sum-----Kshs 2,652,550.00

Plus costs and interest at court's rate.
  6. However, the defendant is aggrieved by decision of the trial court and appeals against it on liability and quantum on the following grounds:
    - a) That the learned magistrate erred in law and in fact and misdirected himself in finding that the respondent had proved their case to the required standards.
    - b) That the learned magistrate erred in law and in fact in misapprehending and failing to properly deal with the evidence adduced in court by the appellant and thus making assumption and a finding that is incongruent with principles , authorities and evidence.
    - c. That the learned magistrate erred in both law and fact by finding the appellant liable to the extent of 100% or at all when the evidence on record did not support such a finding
    - d. That the learned magistrate erred in both law and fact in awarding global sum of Kshs 2,500,000/= under the heading of loss of dependency without any basis or reasoning as to how the court arrived at the said figure
    - e. That the learned magistrate erred in law and fact in awarding damages under the head loss of dependency, that the speculative, excessive, untenable, unrealistic and unreasonable and not supported by the law or evidence.
    - f. That the learned magistrate erred in both law and fact by not considering the submissions and authorities rendered on behalf of the appellant on quantum and thereby making an award of loss of dependency that is clearing note
    - g. That the judgment of the trial court is unreasonable and contrary to law principles and facts of the case presented before the trial court.
  7. Pursuant to the aforesaid, the appellant seeks that, the appeal be allowed, the trial court's decision be set aside, and the respondent be condemned to pay costs of the appeal and the costs in the subordinate court.
  8. The appeal was disposed of vide filing of submissions. The appellant filed submissions dated 21<sup>st</sup> June 2022, and argued the trial court erred in apportioning 100% at liability against it relied solely on the evidence of (PW2) Francis Njoroge Kahia that, the subject motor vehicle was over-speeding despite the fact he was not an expert witness.
  9. That, in absence of an expert witness, the trial court ought to have made its own findings and conclusions based on the facts of the case and the evidence on record. Reliance was placed on the case



- of *Benard Philip Mutiso v Tabitha Mutiso* [2022] eKLR where the court cited an extract from *Cross and Tapper on Evidence* 11<sup>th</sup> Edition by Collin Tapper at page 566 that a witness must not give his opinion on matters that call for special knowledge or skill unless he is an expert on such matters.
10. Further, (PW3) No. 76734 PC Rodgers Wafula was not the investigating officer and only produced the police abstract form that indicated investigations were pending.
  11. The appellant submitted that, the respondent failed to prove the dependency of his mother and siblings, taking into consideration that the Chief's letter indicated him as the sole dependant. The case of; *John Kipkemei Siani & another v Abraham Chepkonga Kibos* [2022] eKLR was relied on, where the court quoted the case of *David Sukari Wasike (suing as the legal representative of the Estate of the Late Jentrix Nakhumicha Simiyu vs Barisi & another)* (Civil Appeal 146 of 2017) [2021] KECA 145 (KLR) and held that in absence of full particulars of dependency a person cannot be said to be a dependent.
  12. Further, the respondent failed to prove that the deceased earned Kshs. 45,000 per month. That, proof of income is key in a claim for loss of dependency as stated in the case of; *Arthur Nyamwate Omutondi & Others v United Millers Limited & 2 others* [2009] eKLR where the Court of Appeal held that proof of income is basic to a claim of loss of dependency under the Fatal Accident Act since a dependant can only be supported financially by what was earned in hard pounds and cents.
  13. Furthermore, although the trial court was correct in applying the global award approach, however, the global sum of Kshs. 2,500,000, awarded was without any basis or reasoning on how the figure was arrived at and therefore speculative, excessive, untenable, unrealistic and unreasonable for not been supported by law.
  14. The appellant relied on the case of; *John Kipkemei Siani & another v Abraham Chepkonga Kibos* (Supra) where the court held there was no proof of dependency and set aside the award of Kshs. 800,000 by the trial court and substituted it with an award of Kshs. 100,000.
  15. In light of the foregoing, the appellant urged the court to substitute the award of Kshs. 2,500,000 for loss of dependency with a sum of Kshs. 100,000 as both income and dependency were not proved.
  16. However, the respondent in submissions dated; 7<sup>th</sup> October 2022 argued that, he proved his case on a balance of probability through evidence of his witnesses that was uncontroverted. Further, the appellant's witness admitted during the hearing that he was not at the scene of the accident and therefore could not give evidence as to how the accident occurred. Furthermore, the appellant did not call the driver of the subject vehicle to testify as to how the accident occurred.
  17. The respondent relied on the case of *Trust Bank Limited vs Paramount Universal Bank Limited & 2 Others* Nairobi Milimani HCCS No. 1243 of 2001 where it was held that where a party fails to call evidence in support of its case, it fails to substantiate its claim and its pleadings remain mere statements of fact, and failure to adduce evidence means the evidence of the plaintiff is uncontroverted.
  18. He submitted that the circumstances under which a court can interfere with an award of damages were as set out in the case of; *Kemfro Africa Ltd T/A Meru Express Services Gathogo Kanin vs A.M Lubia and Olive Lubia* (1982-88) KAR 727 where it was held that the appellate court must be satisfied that the judge either in assessing damages took into account an irrelevant factor, or left out a relevant one or that the amount is inordinately low or high that it must be wholly erroneous estimate of the damages.
  19. That, the present case does not present a scenario warranting interference as the award is reasonable and that there was no misdirection on the part of the trial court. That, the deceased was twenty-four (24) years old, in good health and self-employed at the time of his death, and could have worked until



- the age of seventy (70) years since he was not limited by the retirement age. Further, the appellant did not prove vicissitudes of life and thus the multiplier of forty-six (46) years is reasonable.
20. He relied on the case of; *Violet Jeptum Rabedi v Albert Kubai Mbogori* (2013) eKLR where the court adopted a multiplier of fifteen (15) years where the deceased was forty-four (44) years and stated that, a private business cannot be limited by a formal retirement age and a person can carry on business to his late 60s or 70s.
  21. The respondent further submitted that, the deceased was earning Ksh. 45,000, which is reasonable in business and urged the court to award the same. He relied on the case of; *Jacob Ayiga Maruja & Another v Sincen Obaya* [2005] eKLR cited in the case of *Michael Murigi Karanja v Mohammed Salim Kassam* [2015] eKLR where it was held that production of documents is not the only way to prove the profession of a person, as it would do a lot of injustice to many Kenyans some of whom are illiterate and do not keep records.
  22. That both the respondent and the deceased's mother fully depended on the deceased for their day to day expenses and a ratio of 1/3 should be adopted since he was not married neither did he have children. Thus considering the fore said, the general damage should have been calculated as;  $45,000 \times \frac{1}{3} \times 46 \times 12 = 8,280,000$ , as such the award of Kshs. 2,500,000 for loss of dependency is not inordinately excessive.
  23. He argued that, even if the trial court applied the minimum wage under the Regulation of Wages (General) (Amendment) Order 2019 (Legal Notice No. 1) for a salesman, the amount would work out as Kshs.  $18,329.25 \times \frac{1}{3} \times 46 \times 12 = 3,372,582$ .
  24. He further relied on the case of; *Sukaru Industries Limited v Lensa Awour Nyagumba & Another* [2017] eKLR where the deceased was an adult and loader but had no formal evidence of income and the court reverted to the appropriate order.
  25. I have considered the appeal in the light of the materials placed before the court; in particular the trial court's record, the grounds of appeal and submissions. I note that, as held in; *Selle -vs- Associated Motor Boat EA 123*), the role of the first appellate court is to re-evaluate the evidence adduced in the trial court afresh and arrive at its decision giving allowance to the fact that, it did not have the benefit of the witnesses' demeanour.
  26. In that regard, I shall now deal with the issue of liability. The provisions of section 107(1) and (2) of the *Evidence Act* (Cap 80) Laws of Kenya, states that:
    - (1) 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.
    - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
  27. Pursuant to the aforesaid the respondent had the burden to prove, the particulars of negligence attributed to the appellant and/or its servant or driver. (PW1) Dominic Njihia Mwichigici, the father of the deceased was not at the scene when the accident occurred, so his evidence was least helpful as to the manner in which the accident occurred.
  28. However, the respondent called (PW2) Francis Njoroge Kahia, who adopted his statement as his evidence in chief. He testified that, while at a bus stage at Kinamba he saw the appellant's motor vehicle being driven from Kinangop direction towards Naivasha. That, it was being driven at a high speed and as a result, it lost control and went to the adjacent lane where it hit a motor cyclist who was lawfully riding his motor bike registration No. KMCB 507Q .



29. In cross-examination, the witness rebutted the assertion that, the motor cyclist was overtaking another motor vehicle. In re-examination he maintained that the motor vehicle was being driven at a high speed.
30. As regard (PW3) PC Rodgers Wafula who produced the police abstract form, it is noteworthy that, he was not the investigating officer and the form does not indicate the results of the investigating officer.
31. Be that as it were, it settled law that, a police abstract is mere evidence of occurrence of the accident and in the case of, *Florence Musembi and Geoffrey Mulunga Kimiti -vs- Francis Karengi* (2021) eKLR the court observed that unless the abstract contains information regarding the investigations, and outcome thereof, the mere production of the abstract cannot be conclusive evidence of negligence. In that regard the police abstract herein cannot be relied on in proof of negligence on the part of the appellant.
32. Even then, the defence witness (DW1) Samuel Ndungu Karunge, just like (PW1) Dominic Njihia was not at the scene when the accident occurred, therefore he could not testify as to how the accident occurred.
33. The trial court held that, the appellant was 100% liable as he had failed to call any evidence to rebut the respondent's evidence. I am satisfied that, the evidence of (PW2) Francis Njoroge Kahia, is direct evidence as to how the accident occurred. It clearly indicates that, the appellant's motor vehicle was being driven at a high speed.
34. It is not a matter of rock science to tell, if a motor vehicle is being driven at a high speed, and indeed the witness stated that, it is due to that speed that, the appellant's motor vehicle lost control and went to the deceased's lane and hit him. Therefore, the submissions by the appellant that the evidence of this witness was rebutted by the evidence of the defence witness who was not at the scene is not tenable.
35. Furthermore, the submissions that, the trial court should have drawn its own conclusion, is not sustainable as the court relies on evidence adduced. I therefore find that, the trial court correctly arrived at the decision that the appellant was 100% liable for the accident and I uphold that finding.
36. As regards quantum I find that, the only challenge raised is on the sum awarded as damages for loss of dependency. In awarding the same the trial court stated that, the respondent had not proved that, the deceased was earning Kshs. 45,000 per month and therefore adopted a "global figure approach" and awarded Kshs. 2,500,000.
37. I have considered the rival arguments of the parties on the same and, I find that with utmost due respect, the trial court did not lay a basis for the award of Kshs. 2,500,000 or even justification thereof. Therefore, this court is now called upon re-evaluate the general damages on loss of dependency.
38. In that case, I find that the figure of Kshs. 45,000 alleged to have been the monthly income of the deceased was not substantiated. Neither was there evidence that, the deceased was working as a mechanic or a welder, and/or had his own business. Although the respondent relied on the case of; *Michael Maruja Karanja v Mohamed Salim Kassam* to argue that, it is not mandatory that, income be proved by documentary evidence but I hold that it is mandatory that, it must be proved, whichever way or by any other means.
39. It cannot be said that where a litigant is unable to produce documentary evidence, then the burden of proof of that particular fact is dispensed with. That, would be a dangerous precedent that will not only contravene section 107 of *Evidence Act* but will encourage frivolous and baseless claims that will clog the justice system.



40. The appellant in its submissions in the trial court on the subject issue argued that, this is not a suitable case for a multiplier approach and suggested a global figure of Kshs. 300,000. Unfortunately, the appellant did not justify the proposed figure.

41. The law on award of damages is settled on the requirement of comparability similar injuries and awards therein. In the case of *Frankline Kimathi Maariu & another v Philip Akungu Mitu Mborothi (suing as administrator and personal representative of Antony Mwiti Gakungu deceased)* [2020] eKLR the court observed that: -

“(23) In the present case, there was no satisfactory proof of the monthly income. Where there is no salary proved or employment, the Court should be wary into subscribing to a figure so as to come up with a probable sum to be used as a multiplicand. In such circumstances, it is advisable to apply the global sum approach or the minimum wage as the appropriate mode of assessing the loss of dependency.”

42. Further, in the case of; *Petronila Muli v Richard Muindi Savi & Catherine Mwende Mwindu* (2021) eKLR the court stated that: -

“25. On the question of the multiplicand adopted by the trial court using a minimum wage guideline, it is apparent that the deceased was engaged in informal employment where it is difficult to tell the actual regular income.

In such circumstances, the legal position is to adopt the minimum wage guideline as a guiding principle in assessing loss of income. The trial court was correct in principle to adopt the guidelines as per the Regulations of wages (General Amendment Order (2015).”

43. In the instant matter, the respondent did not prove income of Kshs. 45,000 pleaded therefore the Regulation of Wages (General) (Amendment) Order 2013, that came into operation on 1<sup>st</sup> May 2013 were in force, applies. The Order provides the minimum wage for a general labourer is Kshs. 9,780.95. The deceased died in an accident on 6<sup>th</sup> September 2014 and the afore figure is applicable.

44. The award of loss of dependency is calculated as follows;  $9,780.95 \times 1/3 \times 12 \times 31 = 1,212,837.80$

45. The upshot of the aforesaid is that, judgment is entered for the appellant as follows:

- a) Liability 100%
- b) Pain and suffering-----Kshs. 20,000
- c) Loss of expectation of life----- Kshs 100,000
- d) Loss of dependency-----Kshs 1,212,837.80
- e) Special damages-----Kshs 32,550
- f) Total sum awarded-----Kshs 1,365,387.80

Plus, costs and interest at court rates from the date of the judgment in the trial court till payment in full

46. As regards costs of appeal I order that each party to meet its own costs of the appeal.

It is so ordered.



DATED, DELIVERED AND SIGNED THIS 27<sup>TH</sup> DAY OF SEPTEMBER 2023.

GRACE L. NZIOKA

JUDGE

**In the presence of:**

Mr, Mureithi holding brief for Mr. Mwangi for the appellant.

Ms. Kiberenge for the respondent.

Ms. Ogutu: Court Assistant

