



REPUBLIC OF KENYA



**Warui & another v Nguyo & another (Sued as Administrators of the Estate of Richard Munene Maina - Deceased) (Civil Appeal E008 of 2021) [2023] KEHC 25915 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 25915 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CIVIL APPEAL E008 OF 2021  
MA ODERO, J  
NOVEMBER 30, 2023**

**BETWEEN**

**CHRISTOPHER MUCHOMBA WARUI ..... 1<sup>ST</sup> APPELLANT**

**CHARLES WARUI MUCHOMBA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**DAVID GITHAE NGUYO ..... 1<sup>ST</sup> RESPONDENT**

**TERESA NDUTA KINYUA ..... 2<sup>ND</sup> RESPONDENT**

**SUED AS ADMINISTRATORS OF THE ESTATE OF RICHARD MUNENE  
MAINA - DECEASED**

*(Appeal from the Ruling of the Principal Magistrate Hon. A. Mwangi  
in Karatina PMCC No. 15 of 2013 Delivered on 25th March 2021)*

**JUDGMENT**

1. Before this court is the Memorandum of Appeal dated 7<sup>th</sup> April 2021 by which the Appellants Christopher Muchomba And Charles Warui Muchomba seek the following orders:-
  1. That the ruling be set aside and the matter be ordered to be heard afresh”
2. The Respondents Teresa Nduta Kinyua & David Githae Nguyo (as Administrators of the estate of Richard Munene Maina) opposed the appeal.

**Background**

3. This appeal arises from the judgement delivered in Karatina PMCC No. 15 of 2013.



4. The claim arose from a Plaintiff filed on 6<sup>th</sup> February, 2013 seeking damages both under the [Law Reform Act](#) and [Fatal Accidents Act](#) where the Plaintiffs were suing as the administrators of the estate of Richard Munene Maina(deceased) aged 26 years who met his demise through a road traffic accident at Gathugu-Karatina road at Karindundu area occasioned by the 2<sup>nd</sup> Appellant who was the beneficial owner of the vehicle KBB 076L matatu. It was alleged that the matatu veered off the road occasioning fatal injuries to the deceased who was a fare paying passenger in the said vehicle.
5. The deceased left seven dependants namely Teresa Nduta Kinyua (mother) -52 years, Stephen Kinyua Maina (brother – 36 Years), Francis Chege Maina (brother – 31 years) Joseph Nguyo Maina -32 years, James Macharia Maina (Brother 24 years), DGM (brother 13 years) and JKM (brother 12 years). Together with general damages, the Plaintiff also prayed for special damages amounting to Kshs.31,200/= costs of the suit and interest on the three prayers.
6. The Respondents opposed the suit. On 20<sup>th</sup> June 2018 the learned trial magistrate E. MICHIEKA delivered his judgment which was in favour of the Respondents as follows:-
  - a. Loss of dependency- Kshs.772,110/=
  - b. Special Damages -Kshs. 20,950/=
  - c. Grand Total Kshs.993,060
7. The court also awarded the Respondents costs and interest from the date of judgement until payment in full.
8. Being aggrieved by this judgement the Appellants filed this present appeal which appeal is premised on the following grounds:-
  - a. The learned trial magistrate erred in law and fact by refusing to set aside the judgement entered without the benefit of the Appellant evidences.
  - b. The learned trial magistrate erred in law and fact in assessment of the chronology of events by laying blame on the Appellants.
  - c. That the learned magistrate erred in law and fact by not appreciating that the appellants having retained the services of an advocate the Appellants expected to be fully updated of the matter by their advocates.
  - d. That the learned magistrate erred in fact by failing to consider that the fact that the Appellants had sought to act in person was on the advice of their advocates who had advised that it is only then that the insurance company can take over the matter.
  - e. That the learned magistrate erred in law and fact by laying the whole blame on the Appellants in the manner the suit was prosecuted.
9. The Appellants in their submissions blamed their Advocate for their failure to present a defence claiming that their Advocate had failed to keep them informed on the progress of the case.
10. On their part the Respondents urged this court to uphold the decision made by the trial court.

### **Analysis And Determination**

11. I have carefully considered the Memorandum of Appeal filed in this matter together with the written submissions filed by both parties.



12. In the case of Abok James Odera & Associates –vs- John Patrick Machira T/a Machira & Co. Advocates [2013]EKLR it was held that:-

“ This being a first appeal, we are reminded of our primary role as a fist appellate court namely, to re- evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”
13. The Appellants have challenged the finding of the trial court on the issues of liability and quantum.
14. On the issue of liability, the evidence was that this was a self involved accident. The deceased was a passenger in a matatu Registration KBB 076L. It was alleged that the vehicle was driven negligently lost control and veered off the road leading to fatal injuries sustained by the deceased. A police abstract was produced as an exhibit.
15. The trial magistrate considered the evidence detailing how the accident had occurred. Despite the Appellants having filed a defence dated 27<sup>th</sup> August 2013 there was no evidence called by the Appellants to controvert the accounts given by the Respondents. The trial court therefore found the Appellants 100% liable for the accident.
16. A mere denial will not suffice as a defence to a suit. In the case of Margaret Njeri Mbugua –vs- Kirk Mweya Nyaga [2016]eKLR the court held that:-

“ A mere denial is not a sufficient defence and a defendants has to show either by affidavit, oral evidence, or otherwise that there is a good defence.....”
17. The appellants have blamed their Advocates for their failure to mount a defence to the charge. The Appellants claimed that they expected their Advocate would keep them fully updated with the progress of the case, which they claim the Advocate failed to do resulting in their failure to produce witnesses at the defence hearing.
18. The record shows that he appellants had an Advocate on record. On 14<sup>th</sup> June 2017 when the matter came up for hearing counsel for the Defendant was present. Defence hearing was set for 27<sup>th</sup> September 2017. On that date counsel for defendant was present and sought an adjournment. Despite objection from the Plaintiff the court gave a last adjournment.
19. On 18<sup>th</sup> October 2017 the matter came up again. The court fixed defence hearing for 31<sup>st</sup> January 2018. On that date counsel for defendant was present and sought an adjournment. The court having already given a last adjournment denied the adjournment and closed the defendants case.
20. From the record it is clear that the Advocate for the Appellant was always in court and actively participated in the proceedings. If he did not pass the information to his clients then neither the court nor the Respondents can be blamed for the laxity of the Advocate.
21. A case belongs to the litigant not to his lawyer. Any person who files a suit has an obligation to follow up on the progress of his case. A litigant cannot abandon his case and then turn around and blame the lawyer. It is said that a bad workman blames his tools – litigants have a habit of blaming their Advocates any time they lose a case.



22. In Neeta Gohil –vs Fidelity Commercial Bank Limited[2019]eKLR the court observed as follows:-

“However, it is not in every case that a mistake committed by an Advocate would be a ground for setting aside orders of the court. In Savings And Loans Limited Vs Susan Muritu (milimani) Hccs No. 397 Of 2002 Kimaru, J expressed himself as follows:- “Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former Advocates failure to attend Court on the date the application was fixed for hearing, It is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate’s failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff’s determination to execute the decree issued in its favour is an indictment on the defendant. She had been indolent and taking into account her last conduct in the prosecution the application to set aside the default judgment that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant. I hold similar view that it is not enough for a party to simply blame an advocate for a mistake but the party must show tangible steps taken by him in following up his matter (own emphasis)

23. In this case the Advocate did not fail to attend court. The record shows that on 31<sup>st</sup> January 2018 the Appellant Advocate was present in court when their case was closed.

24. The reason given by the court was that despite a last adjournment having been granted the Appellants had still not bothered to avail their witnesses on the hearing date. I cannot fault the trial court for that decision.

25. In the circumstances the account given by the Respondents witnesses was neither challenged nor controverted by the appellants. Based on the above I find that the finding of 100% liability against the Appellants was correct.

26. The Appellants have also challenged the finding of the trial court on quantum. The determination of quantum lies at the sole discretion of the trial court. An appeal court will only interfere with findings of quantum where it is found that such finding were erroneous or were based on wrong principles of law. In the case of Ken Odondi & 2 Others –vs James Okoth Omburah & Company Advocates [2013]eKLR the court of Appeal stated as follows:-

“We agree that this court will not ordinarily interfere with the findings of a trial judge on an award of damages merely because this court may take the view that had it tried the case it would have awarded higher or lower damages different from the award of the trial judge. To so interfere, this court must be persuaded that the trial judge acted on the wrong principles of law or that the award was so high or so low as to make it an entirely erroneous estimate of damages to the plaintiff is entitled....”

27. In this matter the deceased was a young man aged twenty- six(26) years old. He is said to have been working as a cook. No evidence was adduced to show what the deceased was earning at the time of his demise. As such the earnings would be premised on the minimum wage provided for by law at the time being Kshs.8,579/=



28. In the case of Beatrice Wangui Thairu Vs Hon. Ezekiel Bargetuny & Another (nairobi Hccc No. 1438 unreported it was held that:-

“The principles applicable to an assessment of damages under the *Fatal Accidents Act* are all too clear. The court must in the first instance find out the value of annual dependency. Such value is usually called multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchases. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature.”

29. The learned trial magistrate did consider this case when arriving at his decision. The court also noted that the deceased was not married, and had no children therefore his only dependants were his parents and siblings.

30. It has not been demonstrated that the trial magistrate applied wrong principles of law in assessing damages. The amount awarded as damages was not in my view excessive. I uphold the award made for loss of dependency.

31. I find that the special damages awarded were specifically proved as provided for in law.

32. Finally I find no reason to interfere with the findings and awards made on the trial court in this matter.

33. Based on the foregoing this appeal fails and is dismissed in its entirety. I uphold the decision of the trial court delivered on 20<sup>th</sup> June 2018. Costs of the appeal are awarded to the Respondents.

**DATED IN NYERI THIS 30<sup>TH</sup> DAY OF NOVEMBER 2023**

.....

**HON. MAUREEN.A ODERO**

**JUDGE**

