



Mursal & another v Evelyn Nthangu Manesa (Suing as the legal administrator of Chris Kipkoech) (Civil Appeal E23 of 2021) [2022] KEHC 286 (KLR) (6 April 2022) (Judgment)

Neutral citation: [2022] KEHC 286 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E23 OF 2021
JM MATIVO, J
APRIL 6, 2022**

BETWEEN

KAMAL JAM MURSAL 1ST APPELLANT

ALI MOTORS LIMITED 2ND APPELLANT

AND

**EVELYN NTHANGU MANESA (SUING AS THE LEGAL ADMINISTRATOR OF
CHRIS KIPKOECH) RESPONDENT**

*(Appeal against the Judgment of Hon. F. M. Nyakundi, SRM,
delivered on 20th April 2021, in Voi PMCC No. 202 of 2019)*

JUDGMENT

Introduction

1. The appellant seeks to overturn the judgment rendered in Nakuru P.M.C.C No. 202 of 2019 both on quantum and liability. In the said case, the Respondent had sued the appellants claiming general and special damages arising from a fatal road accident involving the motor vehicle KCP 446 S and the motor vehicle KCM 663 L owned by the 2nd appellant and driven by the 1st appellant at the material time. The deceased a one Chris Kipkoech, a passenger in the motor vehicle KCP 446 S sustained serious injuries from which he died.

The Duty of a first appellate court

2. A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and



hearing the witnesses first hand. This duty was stated in *Selle & another v Associated Motor Boat Co. Ltd. & others*¹ and in *Peters v Sunday Post Limited*.²

3. A first appellate court has jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it.³
4. A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust.⁴ The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section 78 of [Civil Procedure Act](#),⁵ a court of first appeal can appreciate the entire evidence and come to a different conclusion.

The case in the lower court

5. In her plaint dated 10th June 2019, the Respondent brought the suit in her capacity as the deceased's legal representative. She averred that on 12th May 2018 the deceased was lawfully travelling in motor vehicle registration number KCP 446 S along Mombasa-Nairobi high way when the 1st Respondent recklessly drove the motor vehicle KCM 663 causing it to collide with the motor vehicle KCP 446 S as a result of which the deceased sustained injuries from which he died while undergoing treatment. The particulars of negligence are particularized at paragraph 6 (a) to (j) of the Plaint.
6. In their statement of defense dated 20th August 2019, the appellants denied the occurrence of the accident. Alternatively, they blamed the driver of the motor vehicle KCP 446 S for causing the accident
7. In her evidence, the Respondent testified that the deceased who was her nephew was aged 5 months. She adopted her witness statement dated 29th July 2018. In the statement she stated that on 12th May 2018 the deceased was travelling from Kibwezi to Mombasa with her late mother in the motor vehicle KCP 446 S which was hit by the motor vehicle KCM 668 L. She said they were rushed to Coast General Hospital, Mombasa but unfortunately, they lost their lives. She said she paid Kshs. 12,500/= for the Post Mortem, Kshs. 5,000/= for the coffin and Kshs. 70,000/= for letters of administration.
8. The evidence of a one Moses Mukundi Macharia who testified in PMCC No. 204 of 2019 was applied to this case because both cases arose from the same accident. He also filed a Witness Statement in this case. His evidence was that he was driving the motor vehicle KCB 446 C on the left-hand side of the road towards Mombasa and there was a snarl-up on the road. On cross-examination, he said he was

¹ {1968} EA 123.

² {1958} E.A. page 424.

³ See *Santosh Hazari vs. Purushottam Tiwari (Deceased) by L.Rs* {2001} 3 SCC 179.

⁴ See *Kurian Chacko vs. Varkey Ouseph* AIR 1969 Kerala 316.

⁵ Cap 21, Laws of Kenya.



driving at a speed of between 60 to 70 KPH. On re-examination, he testified that the accident happened at a straight place and that he tried to avoid the other vehicle by moving to the pedestrian's side.

9. C Bernard Mwangi's evidence, in PMCC No. 204 of 2019 was also applied in this case. He testified that the appellants' vehicle was overtaking and it collided head on with the motor vehicle KCP 446 S causing it to roll several times and its occupants sustained serious injuries, two of them died while undergoing treatment. He testified that investigations confirmed that the appellant's vehicle was to blame because he left his proper lane while overtaking a fleet of vehicles and the impact took place on the lane towards Mombasa and the appellants' vehicle was overtaking on the said lane.
10. Despite filing a defense and a Witness Statements, the appellants did not tender evidence in support of their defense.
11. In her judgment, the trial Magistrate held that the Respondent established liability as against the appellant at 100% basis. On damages, after evaluating the evidence and decided cases, the learned Magistrate assessed damages as follows: - (a) Pain and Suffering Kshs. 100,000/=; (b) Special damages- Kshs. 87,500/=; (c) Loss of dependency Kshs. 800,000/=; and (d) Loss of life expectation of life- Kshs. 100,000/= aggregating to Kshs. 1,087,000/=.

The appeal

12. Aggrieved by the findings both on quantum and liability, the appellants now seek to upset the judgment citing 6 grounds which can safely be reduced into two, namely, (a) that the trial Magistrate erred in law in assessing manifestly excessive damages (b) that the learned Magistrate erred in law in finding the appellants 100% liable. The appellants pray that this court reviews and or sets aside the findings on liability and quantum and that the costs of the appeal be borne by the Respondents.

The submissions

13. The appellants' counsel submitted that the Respondents did not establish liability. He argued that from the evidence adduced, both drivers were oversteering, and, no sketch maps were produced or photographs of the scene of the accident. He submitted that no traffic case was preferred against the 1st appellant, and, there is no conclusive evidence to show who was to blame so liability ought to have been apportioned equally. He relied on *Kenya Power and Lighting Company Ltd v Nathan Karanja Gachoka & another*⁶ which held that a Plaintiff must prove its case on a balance of probability whether the evidence is challenged or not.
14. On quantum of damages, counsel cited *West (H) & Sons Ltd v Shepherd*⁷ which held that awards must be reasonable and moderate. He also cited *Lim Poh Choo v Camden and Islington Area Health Authority*⁸ in which Lord Denning held that a claimant is only entitled to what is in the circumstances a fair compensation, fair both to her and to the defendants. He also cited *Hassan v Nathan Mwangi Kamau Transporters & 5 others*⁹ which held that inordinately high awards lead to monstrously high premiums for insurance of all sorts. He proposed Kshs. 15,000/= for pain and suffering (citing *Charles Masoso Baraza & another v Chekoech Rotyich & another*¹⁰) and Kshs. 80,000/= for loss of life

⁶ {2016} e KLR.

⁷ {1964} A.C. 326 at page 345.

⁸ {1979} 1 ALL ER 332.

⁹ NBI CA No. 123 of 1985.

¹⁰ {2014} e KLR.



expectation considering the uncertainties of life and relied on *Pauline Wambui Kiruma & another v Esther Wambui Njuguna*.¹¹ On loss of dependency, he proposed Kshs. 400,000/= and urged the court to allow the appeal with costs.

15. The Respondent's counsel submitted that even though the appellant filed witness statements, the witnesses were not called to testify. He submitted that the learned Magistrate carefully evaluated the evidence. He submitted that the appellant has not established any grounds to persuade this court to interfere with the lower courts findings and urged the court to uphold the findings on liability. (Citing *Kamal Jama Mursal & another v Moses Kiura Mukundi*).
16. On quantum, he submitted that this appeal lacks merits, and that the trial court considered all the evidence and submissions. He relied on *Maurice Miriti v Firoze Construction Co Ltd*¹² in support of the proposition that damages are payable irrespective of the age. He also cited *Kemfro Africa Limited T/A Meru Express Service Gathogo Kanini v A.M. Lubia & Olive Lubia*¹³ which underscored the principles which guide appellate courts while considering whether or not to interfere with an award of damages. He also cited *Kenya Power Lighting Company & another v Zakayo Saitioti Naingola & another*¹⁴ which held that damages should not be inordinately too high or too low, that they are meant to compensate a party, that past decisions should be taken as guides and inflation should also be considered.

Determination

17. For starters, I will address the issue of liability and in doing so, I will usefully cite *Halsbury's Laws of England*¹⁵ which states: -

“The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which the breach of duty a causal connection must be established.”

18. The core question here is whether the evidence established that the Respondent was 100% liable for the accident. Differently put, did the Respondent adduce sufficient evidence to establish the appellants were wholly to blame? The law pertaining to negligent conduct is based on the simple but broad premise of reasonable conduct. The law demands that a person, who is capable of taking care of himself and appreciating his own interests and the dangers thereto, that he takes the same reasonable precautions for his own interests as well as others. Turning to the evidence on record, it is clear there is no contest that the accident occurred. There is no contest that the deceased sustained fatal injuries. What is contested is who was to blame for the accident. The testimony of a one Moses Kiuka Mukundi the Plaintiff in PMCC No. 204 of 2019 was applied in this case. Also applied to this case is the testimony of PC Bernard Mwangi, a Police Officer. I have herein above summarized their testimony. I need not rehash it here. The Respondent opted not to adduce evidence despite filing a defense denying

¹¹ {2009} e KLR.

¹² HCC No. of 1979

¹³ {1982} KLR 727.

¹⁴ {2008} e KLR.

¹⁵ 4th Ed at Para 662 (page 476).



liability. It is established position that where a party fails to adduce evidence, his pleadings remain mere allegations which are not proved.

19. In *Interchemie EA Limited vs Nakuru Veterinary Centre Limited* it was held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted. A similar position was held in *Trust Bank Limited v Paramount Universal Bank Limited & 2 Others* where it was stated that "is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged."
20. The appellant's counsel did not adduce evidence in the lower court, but cross-examined the Respondent. The purpose of cross-examination is three-fold. First, to elicit evidence in support of the party cross-examining. Second, to cast doubts on, or undermine the witness's evidence to weaken the opponent's case. Three, to undermine the witness's credibility. Fourth, to put the party's case and challenge disputed evidence. However, once a party cross-examines an opponent's witness, he can only rebut the issues raised during cross-examination by calling witnesses. Accordingly, the attempt to cast doubts on the findings on liability fails.
21. In every legal proceeding, the parties are required to adhere to important rules known as evidentiary standards and burdens of proof. These rules determine which party is responsible for putting forth enough evidence to either prove or defeat a particular claim and the amount of evidence necessary to accomplish that goal. In my view, in the instant case, to meet this standard, the appellants were required to do much more in the lower court. By opting not to adduce evidence to rebut the Respondent's evidence, they took the risk of leaving the Respondent's evidence unchallenged.
22. I should perhaps mention that the testimony of Mr. Mukundi falls into the category of evidence described as "direct" evidence. Direct evidence is evidence, that if believed, directly proves a fact in issue. Directly means that a person does not have to make any inferences or presumptions as to proof. Direct evidence is a piece of evidence often in the form of the testimony of witnesses or eyewitness accounts. Examples of direct evidence are when a person testifies that he/she:- saw an accused commit a crime, heard another person say a certain word or words, or observed a certain act take place. If, for example, a witness testifies that it was raining outside, this personal knowledge is direct proof to show that it was raining.
23. "Direct Evidence" is evidence that establishes a particular fact without the need to make an inference in order to connect the evidence to the fact. It supports the truth of an assertion (in criminal law, an assertion of guilt or of innocence and in civil cases an account of what the witnesses personally saw) directly, i.e., without the need for an intervening inference. It directly proves or disproves the fact. So Direct Evidence is real, tangible, or clear evidence of a fact, happening, or thing that requires no thinking or consideration to prove its existence. It does not require any type of reasoning or inference to arrive at the conclusion.
24. I have evaluated the direct testimony of Mr. Mukundi, particularly the evidence that the 1st appellant was overtaking and that the accident occurred on the lane towards the opposite direction suggesting that the 1st appellant left his lawful lane. Mr. Mukundi also stated that he tried to evade the accident by swerving to the pedestrian's side. In absence of evidence to the contrary, I find no reason to fault the learned Magistrate's findings on 100% liability as against the appellants. The invitation to this court to apportion liability equally is not supported by the evidence on record.
25. I now turn to the question whether there are any grounds at all to interfere with the award of damages. The law on circumstances under which an appellate court would interfere with an award of damages



is settled. An appellate court will not interfere with an award of general damages by a trial court unless the trial court acted under a mistake of law, or, where the trial court acted in disregard of principles, or, where the trial court took into account irrelevant matters or failed to take into account relevant matters, or, where the trial court acted under a misapprehension of facts, or, where injustice would result if the appellate court does not interfere; and, where the amount awarded is either ridiculously low or ridiculously high that it must have been erroneous estimate of the damage.¹⁶

26. Award of damages is an exercise of discretion of the trial court but the same should be within limits set out in decided case law and must not be inordinately so low or so high as to reflect an erroneous figure. The award must also take into account the prevailing economic environment. The Court of Appeal in *Kivati v Coastal Bottlers Ltd*¹⁷ stated:-

“The Court of Appeal should only disturb an award of damages when the trial Judge has taken into account a factor he ought not to have or failed to take into account something he ought to have or if the award is so high or so low that it amounts to an erroneous estimate.”

27. In *Ken Odondi & two others v James Okoth Omburah t/a Okoth Omburah & Company Advocates*¹⁸ stated as follows: -

“We agree that this court will not ordinary 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 wrong principles of law or that the award was so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled.”

28. Award of damages is an exercise of discretion of the trial court but the same should be within limits set out in decided case law and must not be inordinately so low or so high as to reflect an erroneous figure. The award must also take into account the prevailing economic environment. In the Ghanaian case of *Mensah v Amakom Sawmill*¹⁹ Apaloo, J. (as he then was)²⁰ articulated how difficult the subject of assessment of damages is and turned to the judgment of Lord Wright in *Davies v Powell Duffryn Associated Collieries Limited*²¹ for support. This case is regarded as the pointer to the practical way in which assessment of damages should be ascertained. Lord Wright said: -

“There is no question here of what may be called sentimental damage, bereavement or pain and suffering. It is a hard matter of pounds, shillings and pence, subject to the element of reasonable future probabilities. The starting point is the amount of wages that the deceased was earning, the ascertainment of which to some extent may depend on the regularity of his employment. Then there is an estimate of how much was required or expended for his

¹⁶ The Court of Appeal of Nigeria discussing the same issue in the case of *Dumez (Nig) Ltd V. Ogboli* {1972} 3 S.C. Page 196." Per BADA, J.C.A (P. 28, paras. C-G).

¹⁷ Civil Appeal No. 69 of 1984

¹⁸ Court of Appeal, Kisumu, CA No 84 of 2009, Onyango Otieno, Azangalala & Kantai JJA

¹⁹ [1962] 1 GLR, 373,

²⁰ Apaloo J later became a High Court Judge of Kenya, Court of Appeal Judge in Kenya, and Chief Justice of Kenya

²¹ [1942] 1 All ER, 657



own personal and living expenses. The balance will give a 'datum' or 'basic' figure which will generally be turned into a lump sum by taking a certain 'number of years purchase'. That sum, however, has to be tasked down by having due regard to the uncertainties,..."

29. Some of the uncertainties or questions asked are: -
- a) How long would the deceased have continued to live if he had not met this particular accident?
 - b) How much working life did he have? This second question brings into focus the deceased's state of health and age.
 - c) Some of the uncertainties taken into account in rolling down the amount are: - the deceased may not have been successful in business in the future as he had been in the past. He might have been taken ill and become bedridden and thus incapable of earning income. Where plaintiffs are young widows, the possibility of re-marriage in the shortest possible time.²²
30. Lord Wright's rule, which was applied by other decided cases, was admirably summarized in *Charlesworth on Negligence*²³ as follows: -

“Method of calculating damages: When the income of the deceased is derived from his own earnings, 'it then becomes necessary to consider what, but for the accident which terminated his life, work and remuneration, and also how far these, if realized, would have conduced to the benefit of the individual claiming compensation.' The manner of arriving at the damages is; (a) to ascertain the net income of the deceased available for the support of himself and his dependants; (b) (i) to deduct there from such part of his income as the deceased was accustomed to spend upon himself, whether for maintenance or pleasure, or (ii) what should amount to the same thing, to ascertain what part of his net income the deceased was accustomed to spend for the benefit of the dependents, and then; (c) to capitalize the difference between the sums (a) and (b) (i) or (b) (ii) (sometimes called the 'lump sum' or the 'basic figure') by multiplying it by a figure representing the proper 'number of years' purchase arrived at having regard to the deceased's expectation of life, the probable duration of his earning capacity, the possibility of his earning capacity being increased or decreased in the future, the expectation of life of the dependents and the probable duration of the continuance of the deceased's assistance to the dependents during their joint lives. From the sum thus ascertained must be deducted any pecuniary advantage received by the dependents in consequence of the death.”

31. Any legal process should yield an appropriate compensation that is compensation, which is neither too much, nor too little. The compensation must remain fair, reasonable and just. The level must also not result in injustice to the defendant, and it must not be out of accord with what society as a whole would perceive as being reasonable. The deceased was 5 months old. No one can say with certainty what the future held for the child or how long he would have lived. Taking into account the vicissitudes of life, no amount of speculation can yield a clear answer. Even the Khs. 400,000/= suggested by the appellants in the lower court is simply guess work.
32. Having accentuated the applicable principles in cases of this nature, and bearing in mind the uncertainties of life, and considering the age of the deceased, I find and hold that the award on loss of life

²² *de Graft Johnson v Ghana Commercial Bank (Royal Exchange Assurance Ltd 3rd Party)* [1977] 1 GLR 179, Edusel, J.

²³ (3rd Edition), pp 560 & 561, para. 909.



expectation is on the higher side. In summary, I find myself in agreement with the findings on liability. As for damages, I uphold the award on (a) Pain and Suffering Kshs. 100,000/=; (b) Special damages- Kshs. 87,500/=; (c) However, I reduce the award on Loss of dependency from Kshs. 800,000/= to Kshs. 400,000/= which is the amount the appellants proposed in the lower court, and (d) I uphold the award on loss of life expectation of life of Kshs. 100,000/=. The upshot is that the total award is reduced to Kshs. 687,000/=. Each party shall bear its costs for this appeal.

Orders accordingly

SIGNED AND DATED AT NAKURU THIS 6TH DAY OF APRIL 2022

JOHN M. MATIVO

JUDGE

