



Phill Limited & another v Muisyo & another (Suing on behalf of the Estate of Walter Musoki Muisyo (Deceased)) (Civil Appeal E020 “B” of 2020) [2022] KEHC 14666 (KLR) (28 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14666 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL APPEAL E020 “B” OF 2020
AN ONGERI, J
OCTOBER 28, 2022**

BETWEEN

PHILL LIMITED 1ST APPELLANT

GIDEON MUGO GATWERI 2ND APPELLANT

AND

MBEKE MUISYO AND FRANCIS MUTINDA MUISYO 1ST RESPONDENT

VATICAN TRADERS 2ND RESPONDENT

**SUING ON BEHALF OF THE ESTATE OF WALTER MUSOKI MUISYO
(DECEASED)**

*(Being an appeal from the Judgment and Decree of Hon. E. W. Karani
(RM) in Kericho CMCC No.148 of 2018 delivered on 3/3/2020)*

JUDGMENT

1. The Respondents filed Kericho CMCC No.148 of 2018 against the Appellants seeking General Damages under the *Fatal Accidents Act* and the Law Reforms Act, Special Damages plus costs of the suit and interest. The Respondents filed the suit on behalf of Walter Musyoki Muisyo (deceased) as Personal Representatives.
2. The suit arose from an Accident which occurred on 12/9/2015 at Chagaik Area along Kericho-Nakuru Road involving Motor Vehicle Reg. No. KBL XXX Scania Bus in which the deceased Walter Musyoki Muisyo was travelling and Motor Vehicle Reg. No. KBT XXXD Faw Lorry belonging to the 1st Appellant which was being driven by the 2nd Appellant at the material time.



3. The evidence adduced by the parties at the Trial Court was that on the 12th of September 2015, at around 5:30pm, the 2nd Respondent received a phone call from his brother, Walter Musyoki Muisyo, who informed him that he had been involved in an accident along the Kericho-Nakuru road at Chagaik area, involving motor vehicle registration number KBL XXXK Scania bus in which he was travelling in and motor vehicle registration number KBT XXXD Isuzu lorry; and that he was at the Kericho District Hospital for treatment.
4. The 2nd respondent stated that he travelled to Kericho hospital to see his brother, only to be informed by one of the doctors that the said Walter Musyoki Muisyo was deceased. He thereafter made arrangements for his body to be transferred to Machakos Funeral Home and later laid him to rest.
5. The 1st respondent stated that at the time of his death, Walter Musyoki Muisyo was 29 years of age and he was working at KAMYN industries Limited earning a gross salary of Kshs. 50, 500 per month.
6. The 2nd appellant on the other hand stated that on the rainy Saturday evening of September 12, 2015, he was driving Motor Vehicle KBT XXXD lorry, transporting logs of wood towards Nakuru; and he had just joined the highway after ensuring that the road was clear for him to join the highway at Chagaik Junction, when a speeding Scania bus registration number KBL XXXK rammed into the rear end of his FAW truck, occasioning both material and physical injury.
7. He stated that he reported the incident to his manager, and thereafter helped the people at the scene remove the wounded from the mangled bus and rush them to hospital.
8. The 2nd appellant stated that his truck was later towed to Kericho police station where he recorded a statement, and that the matter is still pending under investigation, and he has never been charged with any traffic offence. He further stated that he blamed the driver of the bus registration number KBL XXXR for causing the accident as he drove negligently and carelessly without care of other road users.
9. The Appellants did not call any witnesses to shade light on how the accident occurred despite that they filed witness statements. The Trial Court relied on the doctrine of *Res Ipsa Loquitur* and found that the Respondents were 100% liable.
10. The Trial Court assessed damages as follows;
 - (i) General Damages for pain and Suffering.... 100,000/=
 - (ii) General Damages for loss of Expectation of Life.
 - (iii) General Damages for loss of Dependency 28,528 x 12 x 25 x 1/3
= 2,852,880/=
 - (iv) Special Damages..... = 1,665/=

Total..... = 3,054,545/=

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11. The Appellants who are aggrieved with the Judgment have filed this Appeal on the following grounds: -
 - (i) That the learned trial magistrate erred by arriving at a finding on liability which was not supported by evidence adduced at the hearing;
 - (ii) That the learned trial magistrate erred both in law and fact in basing his findings on irrelevant matters;



- (iii) That the learned magistrate erred in law and in fact in failing to appreciate or take into account the appellant's submissions or at all;
 - (iv) That the respondent's case was not proved on a balance of probabilities as is required by law;
 - (v) That the learned magistrate erred in fact and in law in adopting Kshs. 28, 528 as the income of the deceased which was not supported by evidence;
 - (vi) That the learned trial magistrates award of damages was improper, unrealistic and inappropriate under all circumstances of the case;
 - (vii) That the learned trial magistrate erred on all points of fact and law in as far as both liability and award of damages is concerned.
12. The parties filed written submissions which I have duly considered. The appellant submitted that the trial magistrate erred in apportioning liability against the appellants despite there being no evidence linking the appellants negligence to the respondent's death. It was further submitted that the deceased died on the spot, and that the respondents did not file any treatment notes to show that the deceased was undergoing treatment before he died hence the deceased did not undergo much pain and suffering, and as such the trial magistrate erred in awarding a sum of Kshs. 100,000 for pain and suffering instead of Kshs. 10,000.
 13. The appellant submitted that the trial magistrate should have awarded the appellants Kshs. 80,000 for loss of expectation of life instead of Kshs. 100,000 as the deceased was 29 years of age at the time of his death, and further, that the court should have adopted the deceased's monthly income as being Kshs. 8, 500, as the respondents did not produce evidence of the deceased's income.
 14. The appellants further submitted that the deceased was 29 years of age and there was no certainty that he would have lived to 60 years and as such the court should have adopted a multiplier of 10 years; and further that the deceased was not married and did not have a family of his own, and as such the court should adopt a dependency ration of 1/3, since dependency was not proved.
 15. The respondent on the other hand submitted that evidence tendered before the magistrate's court proved that the accident occurred due to the negligence of the driver of KBT XXXD, FAW Lorry and further that the deceased was not in control of the motor vehicle registration KBL XXXK, and as such he could not have contributed to the occasioning of the accident.
 16. The respondent submitted that the trial court in its judgment took into account the submissions of all the parties and the fact that the trial court failed to agree with the submissions of the appellants counsel does not mean they were not considered.
 17. It was further submitted by the respondent that trial court correctly adopted Kshs. 28, 528.80 as the figure prescribed for a salesman in the *Regulation of Wages General order, 2015* as the deceased's pay slips did not bear the registry's stamp and were not admissible as evidence before the court; and the assertion that the court adopted the stated figures without evidence is misplaced.
 18. It was also submitted by the respondent that the award by the trial court is neither excessive nor unrealistic and the court should uphold the same.
 19. This being a first Appellate Court, the duty of the Court is as follows: - to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusion, bearing in mind that it has neither seen nor heard witnesses and should make due allowance in this respect.



20. Justice Mativo (as he then was), in *Bwire v Wayo & Sailoki* [2022] KEHC 7 (KLR), stated as follows regarding the duty of the 1st appellate court: - “A first appellate 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.”
21. The court of appeal in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, stated as follows:- “This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”
22. The issues for determination in this appeal are as follows: -
 - (i) Whether the Appellants were 100% liable for the Accident.
 - (ii) Whether the award of damages was improper and unrealistic.
 - (iii) Whether the Trial Court failed to take into account the submissions of the Appellants.
23. On the issue of liability, I find that there was no eye witness who testified before the Trial Court on behalf of the Respondents and in the circumstances, there was no basis for holding that the Appellants were 100% liable for the accident.
24. The Trial Court relied on the doctrine of *res ipsa loquitur* and therefore the findings on liability were not based on the evidence.
25. In the circumstances, I apportion liability at 70:30% in favour of the Respondents against the Appellants.
26. On the issue as to whether the award of damages was improper and unrealistic, I find that the Trial Court did not rely on wrong principles.
27. The only circumstances under which the appellate Court can interfere with an award of damages is when the court is convinced that the judge acted upon some wrong principles of law, or that the amount awarded was so extremely high or so very low as to make it an entirely erroneous estimate of the damage to which the Respondent is entitled.
28. The court of appeal in *Kemfro Africa Limited T/a “meru Express Services [1976]” & Another v Lubia & Another (no 2)* [1985] eKLR, stated as follows:- “The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”
29. In *Gicheru v Morton & Another* [2005] 2 KLR 333, the court held as follows:- “In order to justify reversing the trial judge on the question of the amount of damages it was generally necessary that the Court of Appeal should be convinced either that the judge acted upon some wrong principle of law,



or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the Court, an entirely erroneous estimate of the damage to which the Appellant was entitled.”

30. I accordingly uphold the award of damages but reduce it by 30%.

31. I enter judgment in favour of the Respondents against the Appellants in the sum of ksh .2,138,182 plus costs and interest at Court rates.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 28TH DAY OF OCTOBER, 2022

A. N. ONGERI

JUDGE

