



**Kara (Suing as the Legal Representative of the Estate of Peter Kara Nduati (Deceased)) v
Chiira (Civil Appeal E142 of 2021) [2022] KEHC 14424 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14424 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E142 OF 2021
DAS MAJANJA, J
OCTOBER 27, 2022**

BETWEEN

**JAMES NDUATI KARA APPELLANT
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF PETER KARA
NDUATI (DECEASED)**

AND

NIMROD KIHU CHIIRA RESPONDENT

*(Being an appeal from the Judgment and Decree of Hon. A. M. Maina, CM dated
27th July 2021 at the Thika Magistrates Court in Civil Case No. 110 of 2019)*

JUDGMENT

1. This is an appeal against the judgment and decree of the Subordinate Court dismissing the Appellant's claim. The Appellant, the legal representative of the Deceased, filed suit against the Respondent under the *Law Reform Act* (Chapter 26 of the Laws of Kenya) and the *Fatal Accidents Act* (Chapter 32 of the Laws of Kenya) following the Deceased's death in a road traffic accident that took place on January 13, 2018 along Thika Road, Kiambu County.
2. In the Memorandum of Appeal dated July 30, 2021, the Appellant set out 18 grounds of appeal on the trial court's finding on liability and quantum of damages. The parties have also filed written submissions in support of their respective positions.
3. I will deal with the issue of liability first. Whether and to what extent the Respondent is liable for the accident is a question of fact. As the first appellate court, this court is called upon to analyse and re-assess the evidence on record and reach its own conclusions bearing in mind that it neither saw nor



heard the witnesses testify (see *Selle v Associated Motor Boat Co.* [1968] EA 123). In *Jabane v Olenja* [1986] KLR 661, 664, Hancox JA., described the duty of the first appellate court as follows:

I accept this proposition, so far as it goes, and this court does have power to examine and re-evaluate the evidence and findings of fact of the trial court in order to determine whether the conclusion reached on the evidence should stand – see (*Peters vs. Sunday Post* [1958] E.A. 424). More recently, this court has held that it will not likely differ from the findings of fact of a trial judge who had the benefit of seeing and hearing all the witnesses, and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular *Ephantus Mwangi v Duncan Mwangi Wambugu* (1982-88) 1 KAR, 278 and *Mwana Sokoni v Kenya Bus Service* (1982-88)1 KAR 870.

4. According to the Plaintiff dated February 14, 2019, on the material day the Deceased, “was walking along and/or crossing the Thika Road Super Highway at the weighbridge opposite Ruiru Golf Club Road when the Defendant negligently controlled motor vehicle registration number KCM XXXL that he lost control of the vehicle and caused or permitted the same to veer off the road and violently collide with the Deceased as a result of which he sustained fatal injuries ...”
5. In support of his case, the Appellant called three witnesses. Corporal Njoka (PW 1) confirmed that accident took place involving the Appellant and the Respondent’s motor vehicle. He told the court that the he went to the scene of the accident and found that the Deceased was knocked down while crossing the road from the right to the left facing the Nairobi direction. He booked the report and produced the Police Abstract. In cross-examination, he stated that he could not tell whether the Deceased was crossing the road at a place designated for pedestrians. He also produced an extract of the Occurrence Book which showed the driver of the motor vehicle tried to avoid hitting the pedestrian but ended up hitting him. Neither James Nduati Kara (PW 2) or Erick Ndungu Nduati (PW 3) witnessed the accident.
6. The Respondent (DW 1) testified on his own behalf. He stated that the road had 4 lanes and that while driving, he saw the Deceased on the last lane as he crossed the road in an area that was not designated as a pedestrian crossing. He recalled that there was a Nissan Matatu driving parallel but about 3 meters ahead of him. He stated that as the Matatu ahead of him was moving, the Deceased just emerged and jumped over his bonnet after being missed by the Matatu and damaged his windscreen.
7. After considering the evidence, the trial magistrate concluded that the Appellant had not discharged his burden of proving the accident occurred due to the negligence of the Respondent. The court noted that the Appellant did not disprove or otherwise challenge the Respondent’s evidence that the deceased was crossing a busy superhighway in a non-designated pedestrian crossing area or that the Respondent exceeded the speed limit.
8. The Appellant has challenged the finding of the trial magistrate and submits that the trial magistrate failed to give due weight to his pleadings, evidence and submissions and in particular the report by the Respondent recorded in the Occurrence Book that he found the Deceased crossing from the right to the left and had realised his presence when he was in a near distance when the evidence pointed to him driving the vehicle without due care and attention. That since, the Deceased had almost finishing crossing the 4th lane, the Respondent ought to have noticed the Deceased in good time and ought to have taken precautionary measures.



9. The Respondent's submission is that the Appellant failed to prove its case on a balance of probabilities that the accident was due to his negligence. He urges the court to uphold the findings of the trial magistrate and dismiss the appeal on that account.
10. I have considered the evidence and submissions on the issue of liability. In any case based on negligence, the plaintiff bears the burden of proving that the defendant is liable. Under sections 107 and 108 of the *Evidence Act* (Chapter 80 of the Laws of Kenya), the person who alleges is under a duty to prove the particulars of negligence contained in the plaint on a balance of probability. As the Court of Appeal held in *Kirugi & Another v Kabiya & 3 Others* [1987] KLR 347, "The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof."
11. The Appellant's only evidence on the issue of liability was that of PW 1 who visited the scene after the accident. His testimony only confirms that an accident took place on the material date involving the Deceased and the Respondent. He however produced the OB extract which he stated was based on the Respondent's report of the accident. Thus the only direct evidence of what transpired is the Respondent's testimony and his own report made to the police.
12. The Respondent's testimony was emphatic and uncontroverted that the Deceased crossed the road at an undesignated pedestrian crossing and that he was driving at a speed of 80 km/hr in an area where the speed limit was 110 km/hr. This, coupled with the fact that PW 1 and the police abstract could not determine who was to blame for the accident meant that the learned magistrate could only arrive at the conclusion that the Respondent could not possibly be blamed for the accident and that the Deceased was clearly negligent and the author of the misfortune that befell him. The Deceased crossed the road at an undesignated pedestrian crossing area when there was undisputed evidence that there was a pedestrian crossing just 150 meters from the scene. Thus, the trial court was right to find that the Deceased was wholly to blame for the occurrence of the accident
13. I therefore dismiss the appeal with costs to the Respondent assessed at Kshs. 40,000.00 only.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF OCTOBER 2022.

M. KASANGO

JUDGE

_____ instructed by Njoroge Baiya and Company Advocates for the Appellant.

_____ instructed by Mugo Githinji and Company Advocates for the Respondents.

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