



REPUBLIC OF KENYA



**Maina & another (Suing as the Administrators of the Estate of Jackson Maina - Deceased) v Ngugi & another (Civil Appeal E336 of 2021) [2022] KEHC 17177 (KLR) (Civ) (24 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 17177 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E336 OF 2021**

**DO CHEPKWONY, J**

**NOVEMBER 24, 2022**

**BETWEEN**

**JOYCE MUGURE MAINA ..... 1<sup>ST</sup> APPELLANT**

**JAMES MBURU KIMANI ..... 2<sup>ND</sup> APPELLANT**

**SUING AS THE ADMINISTRATORS OF THE ESTATE OF JACKSON MAINA -  
DECEASED**

**AND**

**JOHN NGUGI ..... 1<sup>ST</sup> RESPONDENT**

**EQUITY BANK (K) LTD ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. Kagoni E. M. (PM) at Nairobi dated 20th April, 2011 in Milimani Chief Magistrate's Civil Case No.7516 of 2016)*

**JUDGMENT**

1. Before this court for determination is an appeal vide a Memorandum of Appeal dated December 6, 2021 against the Judgment of Hon Kagoni EM (PM), which was delivered on April 20, 2021 in Milimani CMCC NO 7516 OF 2016.

The Appellant prays for orders that;

- a. This Appeal be allowed and the Judgment of the learned trial Magistrate on liability and quantum be set aside;
- b. This court does re-evaluate the evidence and that was tendered and renders a Judgment on the issue of liability and quantum;



- c. Costs of this Appeal be awarded to the Appellants
2. The Appellants vide the Plaint dated October 31, 2016 sued the Respondent for damages under the Law Reform Act and the Fatal Accidents Act, special damages of Kshs 550, costs of the suit and interest at court rates.
  3. The suit was as a result of an alleged fatal accident which occurred on March 29, 2014 along the Eastern Bypass near Utawala junction involving Motor Vehicle Registration No xxxx owned by the Respondents and Motor Cycle Registration No xxxx in which the deceased was a pillion passenger. The Respondents opposed the suit vide a defence dated April 7, 2017, in which the accident negligence and liability is denied. The matter proceeded to full trial wherein the Appellants called five witnesses whereas the Respondent called one witnesses. After listening to both parties, the trial court dismissed the Appellants' suit for want of proof with costs to the Respondents.
  4. The Appellants being dissatisfied by this outcome has brought the instant Appeal on the grounds that:-
    - a. Dismissing the suit despite the Appellants proving their case on a balance of probability against the 1<sup>st</sup> Respondent;
    - b. Disregarding the evidence of the Appellants' eye witness who was at the scene of the accident and placing weight on inconclusive findings on the Police Abstract report in dismissing the suit;
    - c. Failing to consider the Appellants evidence, submissions and authorities that had been tendered and in so doing dismissed the Appellants' suit;
    - d. Adopting a multiplier of 12 years for the deceased who died at the age of 43 years despite the deceased being of good health and formerly working in the private sector which is not bound by the statutory retirement age;
    - e. Finding that the award of loss of expectation needed to be subtracted from the award under the Fatal Accidents Act to avoid double compensation.
  5. On February 28, 2022, this court admitted the appeal for hearing and directed parties to canvass the same by way of written submission.
  6. Being a first appellate court, it is duty bound to re-examine the evidence that was adduced at the trial court afresh and make an independent decision as was well espoused in the case of *Selle & Another -vs- Associated Motor Boat Co Ltd & Others (1968) EA 123* in the following terms:

' I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. 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 allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Saif - Vs- Ali Mohamed Sholan (1955), 22 EACA 270)'



7. Thus, in considering the grounds upon which the appeal is premised, I have read through the proceedings and Judgment of the trial court, the written submissions by the parties as well as the cited authorities. I find the issues for determination being:-
- a. Who is liable for the accident?
  - b. What is the quantum?
  - a. Who is liable for the accident?
8. The trial court found that the Appellants had not proved their case, but established that there was an accident arising out of a collision between the suit Motor Cycle and Motor Vehicle when both parties admittedly agree that an accident occurred on March 29, 2014 along the Eastern Bypass near Utawala junction involving Motor Vehicle Registration No xxxx owned by the Respondents and Motor Cycle Registration No xxxx on which the deceased was a pillion passenger.
9. In their respective pleadings, both parties blame each other for the accident. However, the mere fact that an accident is admitted to the effect that the motor vehicle and the motorcycle collided is proof enough of negligence by either or both of the drivers of the said locomotives. In the case of *Esther Mukulu Matheka –vs- Merania Nduta HCCC 3039 OF 1991 (UR)* relied upon by the Appellant, it was stated that;
- ' Vehicles do not normally collide with each other unless one of the drivers or both are negligent'.
10. In my considered view, a logical conclusion is that either or both of the drivers did not comply with the road traffic rules. Courts have also observed that where it is difficult to establish negligence on either party, both should be found to bear equal liability for negligence. In the case of *Simplicious Maende Osiche & Another –vs- Cleophas Kundo Masibo (suing as the legal administrator and representative of Estate of Salton Walunywa Kungu – Deceased) [2020] eKLR*, court observed that:-
- ' It is now, therefore, settled that where there is a collision of two vehicles, a vehicle and motor cycle as in the case and there is no means of distinguishing between the two drivers as to who should be blamed, the court should apportion the blame equally'.
11. Similarly, in the case of *Abbay Abubakr & Fatuma Ali –vs- Marair Freight Agencies CA 17 of 1983*, the Court of Appeal said: -
- ' The trial Judge rightly applied to the facts before him the relevant law enunciated by Spry VP in *Lakamishi Attorney General (1971) EA 118 on 120* for such cases which it is not settled law in East Africa that where the evidence is relating to a traffic accident is insufficient to establish the negligence of any part the court must find the parties equally to blame. A judge is under a duty when confronted by conflicting evidence to reach a decision on it. In the case of most traffic accidents it is possible as a balance of probabilities to conclude that one other party was guilty of both parties were guilty of negligence. In many cases as for example where vehicles collide near the middle of the wide straight road in conditions of good visibility with no corners, there is in absence of any explanation an irresolvable inference of negligence on the part of both drivers because of one was negligent in moving to the centre of the road, the other must have negligent in failing to take evasive action.'



12. In the case at hand, the occurrence of the accident herein was at a junction. One cannot deduce from the circumstances of the accident who the negligent party was. I thus find the rider of the Motor Cycle and the driver of the Motor Vehicle in question both negligent and hold them liable for the accident at 50:50.
13. On quantum, it is trite that an appellate court can only disturb the trial court's award if the following principles as were set in the case of *Rook -vs- Rairrier (1941) 1 ALL ER 297* and echoed by the court in the case of *Butt -vs- Khan (1981) KLR 349*, are met by the Appellants: -

' An Appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.'

14. The Appellants argue that the trial court erred in deducting the award under the *Law Reform Act* from an award under the *Fatal Accidents Act*. It is also submitted that the multiplicand of 12 years was an error. For pain and suffering and loss of expectation of life, the trial court awarded Kshs 100,000/= and Kshs 80,000/= respectively which, in consideration of the facts presented and cited authorities, I find the amount to be within range and hence will leave them undisturbed.
15. The next issue for consideration is the multiplier. The deceased died at the age of 46 years. The trial court adopted a multiplier of 12 years on grounds that the deceased would have worked and retired at the age of 55 years. The Appellants proposed a multiplier of 17 years and argues that the deceased would have worked beyond the retirement age and the fact that the retirement age for Civil Servants at the time of the accident was 60 years. I do agree with the Appellants that the retirement age for Private Sector is not capped at 60 years like the Civil Servants and indeed the deceased would have worked beyond the 60 years retirement age. With that in mind and considering the vicissitudes of life, I take a multiplier of 15 years to be sufficient. The award would therefore be  $37,000 \times 15 \times 12 \times 2/3 = 4,440,000/=$
16. The upshot therefore is that the Appeal succeeds as follows;
1. Pain and suffering - Kshs 100,000/=
  2. Loss of expectation of life - Kshs 80,000/=
  3. Dependency - Kshs 4,440,000/=
  4. Special damages - Kshs 550/=
- TOTAL - Kshs 4,620,550/=
- Less 50% contribution - Kshs 2,310,275/=
17. Costs of the Appeal and the suit at the trial court with interest at court rates are awarded to the Appellants.

It is so ordered.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 24<sup>TH</sup> DAY OF NOVEMBER \_\_, 2022.**

**D. O. CHEPKWONY**

**JUDGE**



**In the presence of:**

Mr. Irungu counsel for Appellants

Mr. Nyoike counsel for 1<sup>st</sup> Respondent

**Court Assistant - Simon**

