



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 87 OF 2016

PETER CHEGE.....1ST APPELLANT

JERUSHA MWANGI.....2ND APPELLANT

HEZEKIAH MWANGI.....3RD APPELLANT

VERSUS

JOYCE LITHA KITONYI, JOSEPHINE MBITHE

KITONYI and PHILOMENA KITONYI (*suing*

as the Legal Representatives of the Estate of JOSEPH

KITONYI MUEMA (DECEASED).....PLAINTIFFS

(Being an appeal from the judgment and decree of the Chief Magistrate's Court at Thika (Hon. J.W. Onchuru) Delivered on 23/12/2013 in Thika CM Civil Case No. 359 of 2006)

JUDGMENT

1. This Appeal arises from a judgment and decree entered in Thika CMCC No. 359 of 2006. In that suit, the Respondents sued the Appellants for both general and special damages respecting a road traffic accident in which Joseph Kitonyi Muema (Deceased) died. The Respondents are the Legal Representatives of the estate of the Deceased. The Deceased was riding motor cycle registration number KAV 766D at the time of the accident. The 1st Appellant was the driver of the motor vehicle registration number KAV 233X which was involved in the accident. The 2nd and 3rd Appellants are the owners of the motor vehicles and were sued under the doctrine of vicarious liability.

2. The Appellants denied liability and filed a Statement of Defence. The matter proceeded to a full hearing in which the Respondents called two witnesses and the Appellants called three witnesses. At the conclusion of the trial, the Honourable Trial Magistrate apportioned liability for the accident at 80:20% in favour of the Respondents. On liability, the Honourable Trial Magistrate entered judgment as follows:

• Pain and suffering	Kshs. 40,000/=
• Loss of expectation of life	Kshs. 150,000/=
• Loss of dependency	Kshs.1,920,000/=
• Less 20% contribution	(Kshs. 422,000/=)
• Add special damages	Kshs. 51,7000/=
• Total	Kshs. 1,739,700/=

3. The Appellants are dissatisfied with the lower Court's judgment and have preferred the present Appeal. In their Memorandum of Appeal, they have listed six grounds of appeal as follows:

1. **THAT** the Honourable Trial Magistrate erred in law and in fact in apportioning liability in the ratio of **80:20%** in favour of the Respondents', and, against the Appellants without assigning reasons for the finding or at all contrary to the statutory requirements of Order 21 Rule 4 of the Civil Procedure Rules.

2. **THAT THE** Learned Magistrate erred in law and in fact in holding the Respondents (on behalf of the Estate of the deceased JOSEPH KITONYI MUEMA) to blame for the subject accident to the extent of 20% only which was/is manifestly low taking into account inter-alia the circumstances of the accident, and, the fact that the driver of motor vehicle registration number KAV 233X was not charged with any traffic offence.

3. **THAT** the Learned Trial Magistrate erred in law and in fact in failing to take into consideration or at all the entire submissions made by the Appellants' Moreso in respect of the issue of liability, the contradiction in the evidence of the respondents purported eye witness i.e PW1 and the fact that the Respondents' motor vehicle being on the main road had a right of way.

4. **THAT** the Learned Trial Magistrate erred in law and in fact in assessing quantum at Kshs.1,739,700 after apportionment which was manifestly excessive in the circumstances.

5. **THAT** the Learned Trial Magistrate erred in law and in fact in assessing the applicable Multiplier as 6 years for the deceased who was at the material time aged 59 years and had only 1 year before reaching the retirement age.

6. **THAT** the Learned Trial Magistrate erred in law and in fact in assessing the applicable Multiplicand at **Kshs.40,000/=** when there was no such evidence before the court, and without assigning reasons for that figure considering that the payslip presented in evidence clearly read **Kshs.37,665/=** as the deceased's basic salary.

4. The parties agreed to canvass the appeal by way of written submissions and neither party found it necessary to orally highlight. In both parties' submissions, they agreed that the grounds of appeal can be grouped into two: Grounds 1, 2, and 3 as challenging the Learned Trial Magistrate's findings on liability and grounds 4, 5, and 6 challenging the Learned Trial Magistrate's findings and conclusions on quantum of damages.

5. I have read and considered the respective arguments in the parties' written submissions.

6. As a first appellate court, this Court's duty is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. The duty of the court in a first appeal such as this one was stated in **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 demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hamed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).

7. This same position had been taken by the Court of Appeal for East Africa in **Peters –vs- Sunday Post Limited [1958] EA 424** where Sir Kenneth O’Connor stated as follows:-

It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt –vs- Thomas (1), [1947] A.C. 484. “My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.”

8. The appropriate standard of review established in these cases can be stated in three complementary principles:

- i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
- ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
- iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

9. These three principles are well settled and are derived from various binding and persuasive authorities including **Mary Wanjiku Gachigi v Ruth Muthoni Kamau (Civil Appeal No. 172 of 2000**: Tunoi, Bosire and Owuor JJA); **Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another** (Civil Appeal No. 345 of 2000: O’Kubasu, Githinji and Waki JJA); **Virani T/A Kisumu Beach Resort v Phoenix of East Africa Assurance Co. Ltd** (Kisumu High Court CC No. 88 of 2002).

10. With the above principles in mind, I will now proceed to deal with the Appeal.

11. The Respondents’ case at trial was founded on the alleged negligence of the 1st Appellant in driving the Motor Vehicle hence causing the accident in which the Deceased died. The Respondents called as a witness, Stephen Kiomi Muthoni, who testified that he was an eye witness to the accident. It was his evidence that he saw the Deceased riding the motor cycle towards Thika on Garissa Road. Stephen testified that he saw the Deceased use his indicator to show that he intended to turn right. According to

Stephen, the Deceased also used his hand to signal his intentions. Stephen testified that he then saw a Canter van, which turned out to be the Motor Vehicle driven by the 1st Appellant come speeding and knocking the motor cyclist, dragging him for about 3 metres before coming to a stop about 30 metres from the point of collision. Stephen testified that he was about 15 metres away from the accident scene and it was about 5:15pm in the evening and so he was able to clearly see what was happening.

12. On their part, the Appellants called three witnesses who testified to a totally different narrative. The 1st Appellant testified that he was driving the Motor Vehicle at a speed of about 50 Km/Hr when the accident happened. He said that both the Motor Vehicle and the Motor Cycle were moving in the same direction when suddenly, and without warning, the Deceased attempted to cross the road so that he could turn to a feeder road on the right side of the road. The 1st Appellant testified that the motor cyclist knocked the lorry on the left side, then knocked the windscreen before falling right in front of the Motor Vehicle. Due to the shortness of the distance, the Motor Vehicle could not stop even after the 1st Appellant applied the breaks so it knocked the Deceased and dragged him for about 5 metres before coming to a stop.

13. The Appellants' second witness gave a somewhat similar account. He testified as follows:

....I saw a motor bike on my left side. It came over, went in front of the vehicle and halt[ed] in front. I was seated on the left side. I saw [the] motor bike cut into the road. It was knocked down, helmet came to the left side of the windscreen...The lorry was not overspeeding because it was loaded with 4-5 tonnes. The road had pot holes. I did not see the Deceased in front of us. We were not following him. I did not see him myself. I did not see him indicate he was going to Del Monte. The motor bike was on my left, the helmet knocked the screen. I blame the motor cyclist.

14. PW2 corroborated the 1st Appellant's account that the vehicle stopped about 5 metres after the impact.

15. Based largely on this evidence, the Learned Trial Magistrate disposed off the issue of liability as follows:

It is not in dispute that on 07/08/2009 an accident did happen involving motor cycle KAV 766D and motor vehicle KAV 233X. The issue for determination is, did the driver of [the motor vehicle] drive the said vehicle negligently thus causing the accident. The plaintiffs in their submissions stated that the 1st defendant drove the said vehicle with speed, so negligently and dangerously without due regard that the area was a stage and busy junction and thus knocking the Deceased who was riding a motor cycle and indicated and stretched his hand that he was turning right. The accident was witnessed by PW1 who was at the stage and was able to see the accident happen. The Plaintiffs submitted that they had proved that indeed the 1st Defendant drove [the motor vehicle] at a speed which was dangerous....In their submissions, the Defendants argued that PW1 who was the only eye witness did not understand how the accident happened. They disputed that he knew the Deceased well. They submitted that PW1 told untruths about how the accident took place....Having considered the entire evidence adduced herein, I find that the Plaintiffs have proved that the Defendants, particularly, the 1st Defendant drove the said vehicle negligently thus knocking down the Deceased. I will enter judgment for the plaintiffs and apportion liability at 80:20% in favour of the Plaintiff against the Defendants jointly.

16. The Appellants complain that the narratives of the Respondents and that of the Appellants were diametrically opposed and that the Learned Trial Magistrate gave no reason why he found the 1st Appellant bore 80% liability for the accident. If the Learned Trial Magistrate found that both parties were careless and negligent, why assign the driver of the Motor Vehicle 80% of the blame?

17. The Appellants further complain that the Learned Trial Magistrate gave no explanation at all for his apportionment of liability. He also, the Appellants complain, did not give any reasons why he elected to believe PW1 and not DW1 and DW2 who were also at the accident scene.

18. The Appellants argue that the evidence of the Appellants' witnesses was more credible because there are questions about the truth-telling capacity of PW1. This is because, the Appellants argue, PW1 appears to have lied that he called the Deceased's wife after the accident yet the Deceased's wife (who testified as PW2) said that he got calls from Mugambi and not PW1. With this contradiction, the Appellants argue, the Court ought to have treated his testimony with caution.

19. Further, on the question of liability, the Appellants argue that the distance it took for the Motor Vehicle to come to a stop after the accident – 3-5 metres -- evidences the fact that the Motor Vehicle was not speeding.

20. The Appellants argue that in the circumstances of this case, faced with the duelling accounts of the two sides, the Learned Trial Magistrate should have apportioned liability equally. The Appellants relied on *Berkley-Steward & Others v Lewis Kimani Wanyeki (Court of Appeal Civil Appeal No. 65 of 1984) [1982-84] KLR 1118*. In that case, Nyarangi J.A. stated that:

Every day, proof of collision is held to be sufficient to call on the defendants for an answer. Never do both escape liability. One or the other is held to blame, and sometimes both. If each of the drivers were alive and neither chose to give evidence, the Court would unhesitatingly hold that both were to blame. They would not escape simply because the Court had nothing by which to draw any distinction between them....

21. The Appellants also cited a number of High Court decisions to similar effect.

22. I have now re-evaluated the evidence on record as I am required to do. I do agree with the Appellants that the Learned Trial Magistrate did not offer any reasons for assigning the liability as he did. Neither did he give any reasons why he chose to disbelieve the accounts of the Appellants' witnesses while believing that of the Respondent.

23. However, I have come to the conclusion that there were sufficient grounds for the Learned Trial Magistrate to reach the conclusions that the version of the accident by the Respondents was more believable. I say so for at least four reasons.

24. First, I have looked at the evidence of the 1st Appellant. His testimony that the Deceased was riding his motor cycle parallel to the Motor Vehicle and then he hit the Motor Vehicle on the left side and then found himself in front of the oncoming Motor Vehicle seems implausible to me. If the motor cyclist hit the left side of the Motor Vehicle, it would have been impossible for him to be catapulted in front of the Motor Vehicle and then for his helmet to hit the windscreen as the witness claimed.

25. Second, Investigator's Report which was produced as evidence by the Appellants states the following at paragraph 9:

According to the insured's brother herein, Mr. Evans Gicheru Maina, who was traveling in the insured vehicle when this accident happened, he asserted that the circumstances of the accident were that there was a third party motor cycle registration number KAV 766D which was ahead of them heading in the same direction. On nearing the right junction to a feeder road leading to Kiboko Coffee estate the accident ensued...The circumstances of the accident are that the third party motor cyclist abruptly turned right in a bid to head to the feeder road leading to Kiboko Coffee estate when the insured was very close to him.

26. This is a paragraph from the Appellant's own witness which is clear that the motor cycle was in front of the Motor Vehicle and not parallel to it. It belies the evidence in Court by DW1 and DW2 who claimed that the motor cyclist was riding parallel to the Motor Vehicle and then suddenly turned right.

27. Third, the photos attached to the Investigator's Report also clearly show that the accident happened in the middle of the road and not on the right side of the road which is where it would have occurred if the version of events by DW1 and DW2 was correct.

28. Fourth, the sketch map attached to the Investigator's Report produced by the Appellants also shows that the accident occurred at a place verging to the right side of the road towards the feeder road – a clear indication that the Motor Vehicle knocked the Deceased from its right side and not the left side.

29. Lastly, I note that while the Appellants' witnesses were all interested parties in the case, the Respondent's witness was a neutral third party who had nothing to gain from giving an account of the incident as he saw it. He admitted he knew the Deceased but he was not his friend. He would therefore have no reason to lie on his behalf. I also found no reason to doubt his credibility on account of the fact that he testified that he called the Deceased's wife to inform her about the accident while the wife in her testimony said that it was a Mugambi who called her. The wife also said that the Mugambi who called her was in Court. It would appear that the name "Mugambi" was the name she referred PW1 as. This minor discrepancy, in my view, is not sufficient to raise judicial antennae to the possibility that we are dealing with an untruthful witness.

30. From these observations, it would appear to me that the Respondent's version of events was more credible and that the Learned Trial Magistrate was entitled to conclude so. It was also proper based on these accounts to apportion 20% liability to the Deceased because it would appear true that while he properly indicated that his intentions to turn, the distance between himself and the Motor Vehicle was probably too short for the driver of the Motor Vehicle to react effectively to completely avoid the accident.

31. I will now turn to the quantum.

32. First, the Appellants complain that the award of Kshs. 40,000/= for pain and suffering was excessive since there was evidence that the Deceased died on the spot. They base this on the fact that the Certificate of Death indicates the place of death as Gatuanryaga which is where the accident occurred.

33. On my part, I do not find an award of Kshs. 40,000/= for pain and suffering as excessive. I say so for two reasons. First, the evidence that the Deceased died on the spot is not conclusive. Two witnesses testified that he was ferried to the hospital while he was still alive indicating that he may have died on the way there. Secondly, there are number of authorities where more than a nominal figure was awarded even though the Deceased died instantly. See, for example, *Jennifer Odhiambo and Another v. Elizabeth Mbuka Acham & Another* and *Meneza Adhiambo v. Agnes Susan Wairimu & others* where Kshs.20,000/= and 30,000/= respectively was awarded more than 10 years ago in respect of persons who died instantly.

34. The Appellants are also aggrieved by the computation for loss of dependency particularly the multiplier and multiplicand which the Learned Trial Magistrate chose. They argue that the Deceased was 59 years and since the official retirement age is 60 years, the multiplier should have been 1 year only. Additionally, the Appellants complain that the 6 years used by the Learned Trial Magistrate was excessive because there was no evidence tendered to show that his adult children depended on him.

35. On the multiplicand, the Appellants resist the Learned Trial Magistrate's use of Kshs. 40,000/=. They argue that there was no basis for this and that the correct multiplicand is Kshs. 34,930/= computed as follows:

i.	Basic Salary			Kshs. 33,206.25
ii.	Add	House	Allowance	Kshs.9,303.00
iii.	Less	PAYE		Kshs.7,576.40
iv.	Less	NSSF	& NHIF	Kshs. 520
v.	Net Pay			Kshs. 34,930.85

36. Starting with the complaint about the multiplicand, I wish to note three things about the Appellants' proposed formula. First, that the Appellants have used figures based on the salary slip for April, 2007. There is a second salary slip produced for July, 2009 which shows that the Deceased's salary had gone up by then. For example, his basic pay was now Kshs. 37,655.89. Secondly, the proposed formula does not include transport allowance which from analysis of the two payslips was a constant included in the pay package of the Deceased. Third, it must be appreciated that the multiplier method is only a method not a dogma (see *Albert Odawa V Gichimu Gichenji Nakuru HCCA 15/2003 [2007] eKLR*). The aim is to approximate what loss the estate of the Deceased has suffered following the wrongful death of the Deceased. It is, of course, not possible to come up with a precise figure for the loss.

37. In the circumstances, I find the use by the Trial Magistrate of the figure of Kshs. 40,000/= per month is reasonable. Indeed, if one does the additions using the salary slip for July, 2009, the net pay after statutory deductions will be about Kshs. 40,146/= which can be rounded off to Kshs. 40,000/=. In doing this addition, I assumed the Deceased's House Allowance remained at Kshs. 9,301/= since the figure for housing allowance is not legible in the pay slip for July, 2009.

38. What about the multiplier? I also do not agree with the Appellants that the multiplier of 6 was excessive. While the Deceased was 59 years old, there is no evidence that he would have been required by his employer to retire at the age of 60. The retirement age of 60 is official for civil servants and government employees. It is certainly not stipulated for private employers. Indeed, most private employers keep employees in their employment long after 60 years. It was therefore not unreasonable for the Learned Trial Magistrate to use the multiplier of 6 years. In doing so, he assumed that the Deceased would have retired at 65.

39. As regarding proof of dependency, I also do not agree that no evidence was tendered of this. The uncontested testimony of PW2, the wife of the Deceased was thus:

My husband used to cater for maintenance bills with about Kshs. 40,000/=. We were blessed with six children, two were in Form 4 then. Albanus Mbatha and Pauline Syotwili who are twins. My husband used to pay fees. They dropped out of school. I used to operate a kiosk supported by my husband's salary. When he died, the stock got finished and we closed the kiosk. After my husband's death, we began suffering...

40. This is clear evidence as there can be of the Respondents' dependency on the Deceased. It was eminently reasonable for the Learned Trial Magistrate to use a ratio of two-thirds in computing loss of dependency.

41. In the circumstances, and for the reasons enumerated above, I find no merit in this appeal. Consequently, I dismiss it with costs.

42. Orders accordingly.

Dated and delivered at Kiambu this 14th day of December, 2017.

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JOEL NGUGI

JUDGE