Macharia (Suing on Behalf of the Estate of Dancan Ndegwa Macharia - Deceased) v Kiratu (Civil Appeal E013 & E014 of 2024 (Consolidated)) [2025] KEHC 2040 (KLR) (21 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2040 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYANDARUA

CIVIL APPEAL E013 & E014 OF 2024 (CONSOLIDATED)

KW KIARIE, J

FEBRUARY 21, 2025

BETWEEN

MONICA WANGARI MACHARIA (SUING ON BEHALF OF THE ESTATE OF DANCAN NDEGWA MACHARIA - DECEASED) ..... APPELLANT

AND

MOSES GIOCHE KIRATU ..... RESPONDENT

(Being an Appeal from the judgment and decree in Engineer Principal Magistrate's PMCC No. E018 of 2023 by Hon. H.O. Barasa – Chief Magistrate)

JUDGMENT

1. The appellant, Monica Wangari Macharia (suing on behalf of the estate of Dancan Ndegwa Macharia), was the plaintiff in Engineer Principal Magistrate's PMCC No. E018 of 2023. She had sued for a claim of general damages and special damages following a road traffic accident involving motor vehicle KCC 205L and the motorcycle registration number KMER 890C on which the deceased was riding. As a result of the collision, the deceased sustained fatal injuries. The learned trial magistrate held the appellant 10 per cent liable while the respondent was held 90 per cent liable. The appellant was awarded Kshs. 270,00.00 in general damages before factoring in contributory negligence.

2. The appellant was aggrieved by the judgment and filed this appeal through Wainaina Gikima & Company Advocates. She raised the following grounds of appeal:

    a. The learned trial magistrate misdirected himself in law and fact by not taking into account the plaintiff's submissions and, therefore, arriving at an erroneous finding on lost years/loss of dependency.

b. The learned trial magistrate misdirected himself in law and fact by requiring a higher degree of proof of dependency other than on a balance of probabilities and, therefore, arrived at an erroneous finding on the loss of dependency/lost years;

c. The learned trial magistrate misdirected himself in law and fact by not taking into account the plaintiff's pleadings as read together with the documentary evidence and, therefore, arrived at an erroneous finding on lost years/dependency;

d. The learned trial magistrate erred in finding that dependency had not been proved on a lance of probabilities and, therefore, arrived at an erroneous finding under the *Fatal Accidents Act*.

e. The learned trial magistrate erred in law and fact by not considering the evidence on dependency produced through the Chief's letter despite the same being unchallenged at trial and, therefore, arrived at an erroneous finding on lost years /loss of dependency under the *Fatal Accidents Act*.

f. The learned trial magistrate erred in law and fact by considering extraneous matters and going out of the ambit of the proceedings and evidence tendered, hence arriving at an erroneous decision.

g. That the learned trial magistrate erred in law and fact by failing to uphold precedent and the doctrine of stare decisis.

3. The respondent opposed the appeal by filing appeal number E014 of 2024 through Matiri Mburu & Chepkemoi Advocates. He raised the following grounds:

a. That the learned magistrate erred in law and fact by failing to find that the deceased was wholly or substantially liable for the accident and dismissed the suit or apportion a higher percentage of contribution.

b. That the learned magistrate's findings on liability went against the weight of evidence.

c. That learned magistrates erred in law and fact in failing to find that the Plaintiff/Respondent had failed to make out her case and hence dismiss the same.

d. That the learned magistrate was, in error of law and fact, failing to take into account certain considerations material to an estimate of evidence.

4. This Court is the first appellate court. I recognize my duty to assess all the evidence on record, considering that I did not have the advantage of observing the witnesses testify and noting their demeanour. I will be guided by the decision in the case of Selle vs Associated Motor Boat Co. Ltd. [1965] E.A. 123, in which it was held that the first appellate court must reconsider and evaluate the evidence presented before the trial court, assess it, and draw its conclusions in the matter.

5. Daniel Kuria Mugo (PW2) testified that he witnessed the accident. He stated that at the time of the fatal collision, the driver of the motor vehicle KCC 205L was overtaking two other vehicles, which was when it collided with the oncoming motorcyclist.

6. In his defence, Moses Gioche Kiratu (the respondent) conceded that he was driving in the opposite direction to the motorcyclist he collided with. He, however, contended that it was the motorcyclist who went to his lane.

7. The investing Officer was Corporal George Odhiambo (PW3). His investigations revealed that the driver of motor vehicle KCC 205L pulled to the near side and hit the motorcyclist, who was coming

from the opposite direction, with a right-side mirror. This evidence corroborated that of PW2 and displaced the respondent's defence.

8. The learned trial court's finding on liability cannot be faulted. The consequence of this finding is that Civil Appeal number E014 of 2024 is dismissed.

9. The appeal is on the quantum assessed in general damages. Before an appellate court can interfere with an award of damages, it must be satisfied that the applied a wrong principle of the law, considered some irrelevant factors or left out some relevant ones or that the award is so inordinately low or so inordinately high. These principles were laid down by the Privy Council in Nance vs British Columbia Electric Railways Co. Ltd. [1951]AC 601 on page 613, where it held:

> The principles which apply under this head are not in doubt. Whether the assessment of damages is by a judge or jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have granted a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of the law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages (Flint vs Lovell [1935] 1KB 354) approved by the House of Lords in Davis vs Powell Duffryn Associated Collievers Ltd. [1941]AC 601.

10. When the deceased passed away, he was 44 years old. He was described as a goods distributor who utilised a motorcycle for this purpose. His sister (PW1) testified that he earned Kshs. 1500 per day, but no documentary evidence was presented to the court. In Albert Odawa vs. Gichimu Githenji; Nakuru HCCA No.15 of 2003 (2007), eKLR Justice Ringera expressed himself as follows:

> The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can and must be abandoned where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are known or are knowable without undue speculation; where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do.

11. Although dependence was not established to the required standards, the appropriate approach, given the circumstances of this case, should have been a global sum award. Therefore, I find that the general damages award was inordinately low. Consequently, it is set aside. Since I will make a global award, the damages awarded for pain and suffering are equally set aside.

12. I have looked at the decisions relied upon by the parties in the trial court and the awards made therein. I have also perused other relevant decisions. In the case of David Mbuba & another v Victoria Mwongeli Kimwalu & another [2018] eKLR, an award Kshs. 2,500,000.00 was given under the *Fatal Accidents Act*. In the instant case, I am persuaded to make an award of kshs.2 500,000/- to the estate of the deceased. This will be subjected to contributory negligence.

13. The appeal, therefore, succeeds with costs.

DELIVERED AND SIGNED AT NYANDARUA THIS 21ST DAY OF FEBRUARY 2025

KIARIE WAWERU KIARIE

JUDGE