



REPUBLIC OF KENYA



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Mugaine v Kimathi (Suing as the Legal Representative of the Estate of Purity Kendi alias Purity Kendi Julius – Deceased) & 2 others (Civil Appeal E068 of 2021) [2025] KEHC 1930 (KLR) (18 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1930 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E068 OF 2021
HM NYAGA, J
FEBRUARY 18, 2025**

BETWEEN

FRANKLINE KITHINJI MUGAINE APPELLANT

AND

JAMES MWENDA KIMATHI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF PURITY KENDI ALIAS PURITY KENDI JULIUS – DECEASED) 1ST RESPONDENT

AMOS MUTURI 2ND RESPONDENT

PATRICK MWENDA KITHINJI 3RD RESPONDENT

(Being an appeal against the judgment and decree of the Hon. T. M. Mwangi (SPM) in the Chief Magistrate’s Court at Meru Civil case No. 6 of 2018)

JUDGMENT

Background

1. The 1st Respondent filed suit in the Chief Magistrate’s Court at Meru seeking general and special damages from the Appellant and 2nd and 3rd Respondents. The 1st Respondent brought the suit as the legal representative of the estate of Purity Kendi, who died in a road traffic accident along Meru – Mikinduri Road on 25/10/2017.
2. The accident involved motor vehicle registration number KCH 831U Toyota Probox(Probox) belonging to the Appellant and motor vehicle registered number KCC 499H, Isuzu Lorry (Lorry) belonging to the 2nd Respondent and driven by the 3rd Respondent.
3. The 1st Respondent averred that both the Appellant’s driver and the 3rd Respondent were negligent in driving their respective motor vehicles, as a result of which the deceased sustained fatal injuries.



4. After a full trial, the learned magistrate delivered judgment as follows;
 - a. Liability.
 - i. 80% against the Appellant.
 - ii. 20% against the 2nd and 3rd Respondents.
 - b. Damages.
 - i. Pain and suffering – Kshs. 25,000/-.
 - ii. Loss of expectation of life – Kshs. 150,000/-.
 - iii. Special damages – Kshs. 120,780/-.
5. The liability for each party was apportioned as per the finding on liability.
6. The 1st Respondent was also awarded costs of the suit and interest.

The Appeal

7. Aggrieved by the judgment, the Appellant filed a memorandum of appeal dated 4th June, 2021 in which he set out the following grounds:-
 - i. The learned Senior Principal Magistrate erred in law and in fact in finding that the deceased driver of motor vehicle registration number KCH 831U owned by the appellant and being driven towards Meru town was 80% to blame for the accident despite having found that the point of impact between KCH 831U and 2nd Respondent's motor vehicle registration number KCC 499H being driven in the opposite direction occurred on the left side of the road facing Meru town direction.
 - ii. The learned magistrate erred in law and in fact in relying on trivialities in disregarding the Appellant's evidence despite:-
 - a. The Appellant's evidence having been corroborated by the police officer (PW3) who confirmed that the 3rd Respondent as the driver of the KCC 499H was to blame and not the Appellant's deceased driver;
 - b. The police officer (PW3) confirming that the point of impact was on the correct lane of motor vehicle registration number KCH 831U owned by the Appellant and being driven towards Meru town;
 - c. The police officer (PW3) confirming that motor vehicle registration number KCH 831U was indeed stationary when the accident occurred;
 - d. The evidence of PW2 and that of PW4 being contradictory in the number of Probox motor vehicles that were involved in the alleged overtaking; and
 - e. There having been no direct evidence that KCH 821U was involved in any overtaking.
 - iii. The learned Senior Principal magistrate erred in law and in fact by assessing damages awardable to the 1st Respondent at the sum of Kshs. 3,400,000/- for loss of dependency, which assessment is inordinately high considering the weight of evidence put forward.



- iv. The learned Senior Principal Magistrate erred in law and in fact in disregarding the Appellant's evidence and written submissions and proceeding to substantially blame the Appellant's deceased driver.
 - v. The judgement/decree is against the weight of evidence before the lower court.
8. When the appeal came up for directions, the court directed that the same be argued vide written submissions. I will not rehash them herein. It suffices to state that I have duly considered them and I will, where necessary, refer to them.

Analysis and Determination

9. As a first appellate court, the court has a duty to evaluate and analyse the evidence afresh and reach its own independent conclusion. In *Selle and Another vs Associated Motor Boat Co. Ltd and others* (1968) EA 123 it was held as follows:-

“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.”

10. Earlier, Sir Kenneth O'Connor of the Court of Appeal for Eastern Africa in *Peters vs. Sunday Post Limited* [1958] EA 424 stated as follows:

“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.”

11. Having considered the matter, I am of the view that the issues that fall for determination are:-
- i. Whether the deceased was aboard motor vehicle KCH 831U at the time of the accident.
 - ii. Apportionment of liability between the Appellant and the 2nd and 3rd Respondents.
 - iii. Whether the award of damages was excessive.
 - iv. who should bear the costs of this appeal?

12. In addressing the said issues, I will look at the relevant evidence tendered in court.

13. The 1st Respondent was PW1, the husband to the deceased. He stated that he did not witness the accident, but he learnt of it about 15 minutes after its occurrence. He told the court that his wife used to sell firewood and would earn around Kshs. 58,000/- to 60,000/- a month. He produced the documents listed in his list of exhibits which included the receipts to prove his claim for special damages. He further stated that his wife was a fare paying passenger in the Probox.



14. PW2 was Elias Kithinji M'Itirai. He testified that on the material day, he was around the scene at the accident. He stated that he saw the lorry which was coming from Meru direction headed towards Giaki while the Probox was headed in the opposite direction. He stated that the two vehicles collided head-on at Thimangiri market. He rushed to the scene to attend to the occupants of the said vehicles. He stated that Purity Kendi (deceased) was one of the passengers in the Probox. Many passengers died on the spot but Kendi was rushed to hospital while still alive.
15. The witness further stated that the Probox was overtaking another Probox which was silver in colour when it collided with the lorry. He blamed the driver of the Probox and the 3rd Respondent for the accident. He said that both vehicles were being driven too fast in the circumstances.
16. On cross examination by advocate for 2nd and 3rd Respondents, the witness said that the lorry was on its proper lane when the accident occurred. The point of impact according to him, was on the left side facing Meru direction. He blamed the lorry driver because he did not swerve to avoid the accident. That the road was not clear for the lorry to overtake.
17. PW3 was P.C. David Chacha based at Meru Police Station, traffic section. He stated that the accident was investigated by Sergeant Mwikali who he knew well. He produced the police abstract as an exhibit. The witness admitted that he was not the one who attended to the accident but from the sketch plan drawn by the investigator, the driver of the lorry was to blame for the accident. The point of impact was on the extreme left side of the road when facing Meru direction. The lorry driver was charged in court over the accident.
18. In his defence, the Appellant stated that his vehicle was involved in an accident when it was hit by a lorry although he did not witness it. He denied that his vehicle was used to ferry passengers.
19. The 2nd defence witness was Erick Kathunkumi (DW2). He stated that he was at the scene of the accident when it happened. He stated that when the Probox passed him, it did not have any passengers. The vehicle then went and stopped just a few meters away. As he was walking towards it, it was hit by a lorry. He suffered some injuries in the process. He averred that the lorry was zigzagging on road before it hit the Probox.
20. DW3 was Edward Murithi Muthwi. He stated that on the material day, he gave the driver of the Probox keys. Later became to learn of the accident. He did not witness it.
21. DW4 was the 3rd Respondent. He admitted that he was the one who was driving the lorry in question. At the scene of the accident, he hit the right side of the Probox which was headed towards Meru. He said that he was driving at around 50 kph. He averred that there some passengers in the Probox and some died. He added that people at the scene wanted to beat him as the other driver died at the spot. He blamed the driver of the Probox for the accident.
22. The occurrence of the accident is not disputed. All the witnesses have alluded to this fact.
23. The first question to be answered is whether the deceased was a passenger aboard motor vehicle registration number KCH 831U.
24. From the evidence adduced, there is a suggestion by Eric Kathunkumi (DW2) that the deceased was not a passenger aboard the said vehicle.
25. Now, from the documents produced in court, including the police abstract (Exhibit 2), the deceased was classified as a passenger. Obviously, she was not aboard the lorry. That leaves only one other possibility, that she was a passenger in the Probox. Just like the trial court, I find the evidence of DW2 to be unreliable. It was designed to achieve one goal, that is to try and convince the court that there were



no passengers in the Probox vehicle. His evidence is overwhelmed by that tendered by the Plaintiff's witnesses, including that of Elias (PW2) and PC Chacha, PW3 and the 3rd Defendant.

26. In arrival to the first question, I find that the deceased was a passenger in the Probox vehicle KCH 831U.
27. So, who was to blame for the accident?
28. There is a lot of conflicting evidence on how the accident occurred. Obviously DW2's evidence is quite unreliable for the reasons I have given herein. The trial magistrate was right to attack and ignore his evidence. That leaves the evidence of PW2, PW3, DW4, which is relevant to the accident itself.
29. The evidence on record is that the Probox vehicle was headed towards Meru while the lorry was coming from Meru. According to PW3, the sketch map in the investigation file showed that the Probox vehicle was partly on and partly off the road. It is not clear if the vehicle was stationary at the time of the accident. The point of impact was the extreme left, off the road when one faces Meru direction. The lorry was headed in the opposite direction, so it ought to have been on the left side of the road, facing Giaki direction.
30. The damage to the lorry, according to its certificate of inspection, was to the front, meaning that it hit the Probox with its front part on the off side and the middle.
31. The evidence on record is that the driver of the lorry was charged in court over the accident. He has tried to explain that he was on his lane when he saw an oncoming vehicle that was overtaking. He then tried to apply his brakes, but ended up hitting the Probox. He admitted that he was partly to blame, and he conceded 20% contribution.
32. I have carefully analysed the evidence. The fact that DW4 crossed his lane and hit the Probox, is sufficient to explain how the accident occurred. The Probox was on its rightful lane, whether on, off or partly around off the road. There is really no sufficient evidence to suggest that it is the said Probox that was overtaking another Probox. It is thus difficult to uphold the trial magistrate's finding that the Probox was largely to blame. The fact that the lorry left its lane and hit the Probox, which was on its designated lane, is sufficient to find that the lorry driver was to blame for the collision. Even assuming that there was oncoming vehicle, he did not have a reason to swerve to his right, when the left side was clear and was the better option. The police who conducted the investigations found DW4 to blame for the accident and he was duly charged in court.
33. In my opinion, the evidence on record points to DW4 as the primary cause of the accident. He appears to have been speeding and not driving at 50 KPH as he suggests. That is why he was unable to control his vehicle and he swerved to his right, hitting the Probox.
34. As for the Probox, it is apparent that it was either picking passengers or about to pick passengers. In that case it ought to have been off the road completely. The evidence on record suggests that it was partly on the road. In my view, a stationary vehicle ought to be off the road completely, unless it has broken down on the road and cannot move off it. If the latter happens, then the driver has a duty to provide other road users with a warning sign. That did not happen.
35. Looking on the above, I would assess liability at 80% against the driver of the lorry and 20% against the driver of the Probox, who, unfortunately, is deceased.
36. I therefore set aside the holding of the trial magistrate and substitute it with the above finding.



37. On quantum, the Appellant is aggrieved by the award on loss of dependency. It is well settled that this court will not set aside an award of damages by the trial court, unless it is shown that the trial court applied the wrong principles, or that the damages are excessively high or low.
38. These Principles were laid in *Butt vs Khan* (1978] eKLR where it was held that;
- “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.”
39. Similarly, in the case of *Savanna Saw Mills Ltd Vs Gorge Mwale Mudomo* (2005) eKLR the court stated as follows: -
- “It is the law that the assessment of damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court simply because it would have awarded a different figure if it had tried the case at the first instance ...”
40. The evidence on record shows that the deceased used to supply firewood to Githongo Tea Factory. For instance, in January 2017, she supplied firewood worth Kshs. 15,950/-. In February 2017 she supplied firewood worth Kshs. 24,650/-. In March 2017 the firewood supply was worth Kshs. 39,125/- while in April it was Kshs. 41,750/-.
41. That evidence was not really challenged, so it is reasonable to conclude that she was earning a living as presented by the plaintiff. The supply of the firewood to the factory is not controverted. The deceased must have been sourcing the same from somewhere, so the cost of procuring the same must be taken account of.
42. From the evidence, the deceased’s total earnings for 2017 awarded to Kshs. 444,850/- which translates to award Kshs. 49,427/- a month. Taking account of cost of purchase and other expenses, I think that the trial magistrate was correct to fix an average of Kshs. 25,000/- a month. It is not excessive by any standards.
43. I am also of the view that the multiplicand and multiplier applied by the trial magistrate was proper and uphold the same. The deceased was at her prime and the kind of business she was doing could have been done into her latter stages of her life. Being a wife and a mother meant that her income was expected to support her family.
44. The other heads of damages were not challenged and I will not disturb them.
45. In the end, I set aside the finding of the learned Magistrate on liability and substitute it with a finding that the 2nd and 3rd Respondents are held 80% liable for the accident. The Appellant is held 20% liable.
46. The awards of damages were upheld.
47. The Appellant shall have costs of the appeal, to be borne by the 2nd and 3rd Respondents.

H.M. NYAGA

JUDGE

SIGNED, DATED AND DELIVERED AT MERU THIS 18TH DAY OF FEBRUARY, 2025.

H.M. NYAGA



JUDGE

