Daniel v Makanga (Civil Appeal E139 of 2024)
[2025] KEHC 6043 (KLR) (7 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6043 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E139 OF 2024

AM MUTETI, J

MAY 7, 2025

BETWEEN

OTMANI AJUKU DANIEL ..... APPELLANT

AND

FRANCIS MAKANGA ..... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. J. KIMETTO in MASENO PMCC NO E067 of 2022 between FRANCIS MAKANGA MUNALA Suing as the legal representative administrators Ad-litem of the Estate of HILARY MUNALA MAKANGA DECEASED -versus -OTWANI AJAKU DANIEL delivered on 25th June 2024)

JUDGMENT

Introduction

1. The appeal arises out of a decision of the learned Honorable J.K Kimetoo P.M in Maseno PMCC No. E067 of 2022 between Francis Makanga Munala Vs. Otwani Ajuku Daniel , in which the learned Honorable magistrate found the appellant 100% liable for the accident giving rise to the suit and condemned him to pay the respondent in this appeal the sum of Ksh. 1, 670, 000 in damages plus costs and interests.

2. The appellant dissatisfied with the court's decision moved to this court to have the judgment set aside in its entirety.

3. The appellant filed a memorandum of appeal in which he has raised 5 grounds of appeal namely:-

    i. The learned magistrate erred in fact and in law in failing to consider the Appellant's submissions on quantum, liability and legal authorities relied upon in support thereof.

    ii. The learned magistrate erred in fact and law by finding the defendant 100% liable for the accident, when in fact no independent eyewitness testified as to how the accident happened.

iii. The learned magistrate erred in law and fact in awarding the estate of the deceased a sum of Kshs. 1,500,000/= (one million five hundred thousand) for the loss of dependency that was so excessive as to amount to an erroneous estimate of loss or damage suffered by the estate of the deceased.

iv. The learned magistrate erred in fact and in law when she failed to deduct the 150,000/- for loss of expectation of life from the general damage of kshs. 1,500,000/- thereby amounting to double compensation.

v. The trial magistrate erred in law and in fact in awarding general damages that was excessive in the circumstances leading to miscarriage of justice.

Issues

4. The issues that the court is called upon to determine in this appeal are:

   a. Who was to blame for the accident leading to the death of the deceased?

   b. Whether the damages as assessed by the learned Honorable magistrate were proportionate reasonable and comparable to other awards in similar cases.

Appellant's Case.

5. The appellant vide submissions dated 25th October 2024 urged this court to find that the learned Honorable magistrate was wrong in finding that the appellant was to blame 100% for the occurrence of the accident.

6. The appellant contends that the respondent was not able to prove that the driver of motor vehicle KBZ 260H Toyota Station wagon was negligent in the manner he drove on 21/3/2022 when the accident is said to have occurred.

7. The appellant submitted that since the driver was not charged with any traffic offence, this court should find that he cannot have been negligent.

8. The appellant cited the case of East Produce (K) LTD Vs. Christopher Astoiado Osiro (Civil Appeal No. 43 of 2001) in support of his argument on liability where the court held:-

> " It is trite law that the onus of proof is on he who alleges and in matters where negligence is alleged the position was well laid in the case of Kiema Mutuku Vs. Kenya Cargo Handling Services Ltd 1991 where it was held that there is as yet no liability without fault in the legal system in Kenya and a plaintiff must prove some negligence against the defendant where the claim is based on negligence"

9. The appellant has also taken issue with the fact that the police investigation file, sketch plans, investigations diary and witness statements were not produced in the lower court.

10. According to the appellant those materials would have shed light as to how the accident occurred to determine who was negligent.

11. It is the appellants argument that just because the appellant did not call any evidence, he should not have been held liable for the accident.

12. The appellant has further submitted that liability should have been apportioned at 50:50 since the deceased nor the driver testified as to the circumstances of the accident.

13. On damages the appellant urged this court to find that the damages awarded under the limb of loss of expectation of life Ksh. 150,000 and pain and suffering Ksh. 20,000 were fair and uncontested.

14. The appellant however went further to submit that the amount should be deducted from any award under the *Fatal Accidents Act* if at all since all the beneficiaries under both acts would ordinarily be the same.

15. The view of the appellant is that by doing so the court would be avoiding double compensation.

16. In support of the argument the appellant relied on the case of Transpares Kenya Ltd Vs. S.M.M (Suing as the legal representative for and on behalf of the State of E.M.M (deceased) [2015] eKLR quoting the court of appeal in Kemfro Vs. A.M Lubia & Another [1982-1988] KAR 727 where the court of appeal held that:-

> " The net benefit will be inherited by the same dependants under the *Law Reform Act* and that must be taken into account in the damages awarded under the *Fatal Accidents Act* because the loss suffered under the latter Act must be off -set by the gain from the estate under the former Act"

17. In furtherance of his argument the appellant has urged this court to consider that the global method of assessment of damages was the best method in the circumstances of this case since there was no proof of earnings that could be utilized if the court was to use the multiplier method.

18. The sum of Ksh. 1,500,000 that the court awarded was according to the appellant inordinately high.

19. This submission on the part of the appellant I must say is contradictory for he submitted in the early part of his submission that they were not contesting the figure of Ksh.1, 500,000.

20. The appellant's view is that a global award of Ksh. 800,000 would have been reasonable in the circumstances.

Respondent's Case.

21. On his part the respondent urges the court to find that this appeal has no merit.

22. The respondent maintains that the fact that the driver was not charged by the police with a traffic offence should not influence the mind of the court in determining the issue of liability.

23. The respondent's position is that he has no control of the police thus the fact of them not charging the driver should not be a factor to sway the court into apportioning liability at 50:50 or at all.

24. The respondent has placed reliance on the case of Isaac K. Chemjor & Another Vs. Laban Keptoo [2019] eKLR where the court held:-

> " Negligence was in the driving at a high speed without due care that there were other vehicles and other road users to avoid collision with whom he would be required to slow down, and consequently should drive at such speed bearing in mind the traffic on the road and nature of the road and all surrounding circumstances that would permit the driver to safely control his vehicle and avoid accidents. The suggestion that another person could have been the cause of the accident and or contributed thereto must be proved by the maker in accordance with section 109 of the *Evidence Act* that-
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> "The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie

on any particular person." There being no evidence that could lead to any other probability that another person was involved or the cause of the accident, the Court on a balance of probabilities test believe the explanation for the accident as given by the respondent, and there was in it no reasonable hypothesis that another vehicle or person was involved in the cause of the accident. The respondent had discharged his burden of proof under sections 107 and 108 of the *Evidence Act* in showing that the accident was occasioned by the 2nd appellant in his driving fast beyond his ability to control the vehicle when he encountered another road user. There being no evidence of involvement in the cause of the accident by any other person the Court finds on a balance of probabilities that the events as related by the respondent are more probable than not. The Court must hold the 2nd appellant liable for the accident at 100%."

25. The respondent also cited the case of Alex Njoroge & Another Vs. Florence Nduku Mutua [2021] eKLR where the court held:-

> " It must always be remembered that the decision of who to charge where there is a collision occurs rests on the police and the parties have no control over that decision. Therefore, the fact that the police decide to charge one driver and not the other cannot be taken to be conclusive evidence of who between the two drivers is culpable. I therefore do not read too much into the fact that the Appellant was charged and acquitted of the traffic offence. This was the position adopted by the Court of Appeal in Calistus Ochien'g Oyalo & Others vs. Mr. & Mrs. Aoko Civil Appeal No. 130 of 1996, where it was held that police do conduct their investigations for their purpose and a party cannot be expected to direct them on how to do it.
>
> Therefore, proof of negligence being on a balance of probabilities does not solely depend on the opinion of the investigation officer. Negligence can be proved notwithstanding the fact that the accident in question was never reported to the police since there is no nexus between a report of an accident to the police with proof of negligence."

26. It was the respondent's position that the evidence he presented adequately proved his case and that the same remained unchallenged since the appellant did not lead any evidence in rebuttal.

27. Further, considering that the deceased was aged 23 years, at the time of death, the figure of Ksh 1,500,000 as a global award was reasonable according to the respondent.

28. The respondent thus urges this court to dismiss the appeal on both liability and quantum.

Analysis And Determination.

29. After carefully considering the rival submissions by the parties this court finds that the appeal has no merit on both liability and quantum.

30. In this courts view, the mere act of police failing to prefer charges against offending drivers should never be entertained as a basis for holding that a driver was not negligent.

31. The decision whether to prefer charges or not is a matter left at the exclusive discretion of the Director of Public Prosecutions whom victims of accidents have no power to direct or control under Article 157(10) of *the Constitution*.

32. The decision of the Director of Public Prosecutions not to charge an individual may be informed by many factors some of which may never be disclosed to an accident victim.

33. The decision is not a matter that the victim of an accident can influence, control or direct under Article 157 (10) of *the constitution*. The court must therefore not hold it against the accident victim.

34. The proof of negligence is on a balance of probabilities. It is the duty of the party suing to adduce the evidence of negligence. To demand that the plaintiff produces a police file, sketch plans, statements recorded by the police and the police investigations diary is to raise the bar too high considering that the police retain control of their investigations and under Article 245 (4) (a) of *the constitution* no person may give directions to the inspector General with respect to the investigation of any particular offence or offences.

35. To hold that a plaintiff who is unable to direct the police to carry out investigations into a traffic offence should produce the file compiled following police investigations would be tantamount to holding that not a single claim arising out of an accident will ever succeed without the cooperation of the police. That would be a sad state of affairs and would greatly prejudice accident victims. It is a precedent that this court is not minded to set.

36. The argument by the appellant in that regard is hereby rejected as basis for holding that negligence was not proved.

37. In any event, the appellant has conceded that there was negligence attributable to the driver only that in their view it ought to have been 50:50.

38. The court has perused the record and the only evidence that was received in the proceedings in the lower court was that of the plaintiff (respondent).

39. The respondent's witness produced among other documents a statement recorded by one Maurice Ouma Oulu which was attached the plaintiffs list of witnesses dated 26th September 2022.

40. In the said statement Maurice Ouma Oulu states:-

> " That sometimes on 21st March 2022around 1700hrs while I was at Coptic area within Luanda awaiting to board a matatu to Kisumu, I witnessed an accident involving motor vehicle registration number KBZ 260 H Toyota Station Wagon and motorcycle registration number KMFY 142 Q being driven by the deceased- Hillary Munala Makanga.
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> The said motorcycle was being ridden from Luanda towards Maseno and the vehicle KBZ 260 H Toyota Station Wagon was coming from the opposite direction from Kisumu towards Luanda. Suddenly the said motor vehicle started overtaking a slow moving vehicle and it hit the motorcycle registration number KMFY 142 Q which was being driven by the deceased herein. The rider died instantly.
>
> That I wholly blame the driver and owner of the motor vehicle Reg.No. KBZ 260 H Toyota Station Wagon for the death of the said Diana Atieno Akuku since he knocked the deceased from behind."

41. It is clear from this statement that the accident was solely caused by the driver of motor vehicle KBZ 260H when it attempted to overtake.

42. In my view, the appellant having failed to adduce any evidence to challenge that piece of evidence, the finding of 100 % liability was justified in the circumstances.

43. The appeal on liability is therefore dismissed.

44. On quantum the figure of Ksh 1,500,000 for the life of a 23 year old, in my view is reasonable and is not in any way excessive or inordinate.

45. The proposal by the appellant of Ksh. 800,000 was not based on anything. It is simply a figure that the appellant tossed up without any legal or evidential basis. It therefore cannot be accepted by this court as a justifiable figure without more. The question of assessment of damages is a matter of discretion and this court is not prepared to interfere with it lightly.

46. The appellant was not able to show that the trial court applied the wrong principles of law in arriving at the figure of Ksh1,500,000 or that the court took into account or failed to take into account relevant facts in arriving at the decision he did to warrant the interference by this court. See Mbogo vs. Shah (1968) EA page 93.

47. The global award method invites reasonability of this court in determining what to award in damages.

48. The age of the deceased was said to have been 23 years. He certainly was an able -bodied person capable of riding a motorbike at that age and was be able to generate some income.

49. The use of motor cycles by the youth as a means of income generation in this country is a matter that this court must take judicial notice of under Section 60 of the *Evidence Act*. It is a matter of common notoriety thus cannot be ignored by this court.

50. The Life of the deceased was cut short at a tender age. To interfere with the discretion of the learned Honorable magistrate's would be without cause. I do not therefore accept the argument that the learned Honorable magistrate applied the wrong principles in arriving at the figure as a result this court finds that the appeal has no merit and is hereby dismissed with costs to the respondent.

51. It is so ordered.

DATED, SIGNED AND **DELIVERED VIRTUALLY** AT **NAIROBI** THIS **7TH** DAY OF **MAY 2025.**

A. M. MUTETI

JUDGE

In the presence of:

Court Assistant: Kiptoo

Nyangano for the Appellant

No appearance for the Respondent

KISUMU HIGH COURT CIVIL APPEAL No. E 139 of 2024 - Otmani Ajuku Daniel –Vs-Francis Makanga

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