Muiruri & another v NN (Suing as the Legal Representative and Next Friend of MWN) (Civil Appeal 244 of 2023) [2025] KEHC 8106 (KLR) (5 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8106 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL 244 OF 2023

FN MUCHEMI, J

JUNE 5, 2025

BETWEEN

KELVIN KIRURI MUIRURI ..... 1ST APPELLANT

HIGHLANDS MINERAL WATER COMPANY LIMITED ..... 2ND APPELLANT

AND

NN (SUING AS THE LEGAL REPRESENTATIVE AND NEXT FRIEND OF MWN) ..... RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. M. W. Kurumbu (PM) delivered on 23rd February 2023 in Thika CMCC No. 732 of 2017)

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Thika Principal Magistrate in CMCC No. 732 of 2017 in a claim based on a motor vehicle accident whereby the court apportioned liability at the ratio of 90%:10% in favour of the respondent against the appellants and awarded the respondent general damages for pain and suffering at Kshs. 50,000/-, loss of expectation of life at Kshs. 100,000/-, loss of dependency at Kshs. 2,240,000/- and special damages at Kshs. 61,650/-.

2. Dissatisfied with the court's decision, the appellants lodged this appeal citing 9 grounds of appeal summarized as follows:-

    a. The learned trial magistrate erred in law and in fact in failing to appreciate the doctrine of apportioning equal liability hence arriving at a wrong decision of negligence and liability.

    b. The learned trial magistrate erred in law and in fact in awarding the respondent Kshs. 2,451,650/- which award is too excessive in the circumstances.

c. The learned trial magistrate erred in law and in fact in adopting the maximum number of productive working years of 28 years without considering the vicissitudes of life in making the award.

d. The learned trial magistrate erred and misdirected herself when she awarded the respondent special damages of Kshs. 61,650/- which were not specifically proved.

3. Directions were issued that parties put in written submissions and the record shows that only the appellants complied.

The Appellants' Submissions

4. The appellants submit that the 1st appellant testified that the deceased and her daughter alighted from a bus and without checking, proceeded to cross the road. Due to their proximity to his vehicle, he hooted and applied brakes but unfortunately he was unable to avoid hitting them. The appellants argue that their evidence stood uncontroverted as the respondent did not call any eye witness to rebut or explain how the accident happened. Relying on the case of Patrick Mutie Kimau & another vs Judy Wambui Ndurumo [1997] KECA 60 (KLR) , the appellants argue that a pedestrian owes a duty of care to other road users just as a motorist does.

5. The appellants refer to the case of Holistic Educational Trust vs Mulatya alias Musau Mulatya Samson & Another (Civil Appeal No. 035 of 2022) [2024] KEHC 3787 (KLR) (5 April 2024) (Judgment) and submit that the deceased should be held at least equally responsible for the accident as she failed to exercise due care, having crossed the road at an undesignated point, at night, and without ascertaining whether it was safe to do so.

6. The appellants argue that the deceased was 32 years old at the time of death and a multiplicand of 28 years in calculating the loss of dependency was excessive. Relying on the cases of Keroche Breweries vs Onsare & Another (Suing as a representative of the Estate of Jared Kemosi Oyaro -Deceased) (Civil Appeal 58 (E004) of 2020) [2024] KEHC 2577 (KLR) (12 March 2024) and Mercy Wanjiru Muiruri (Suing as the administrator of the Estate of Losie Njeri Mbugua) vs Robert Barasa & Another [2015] KEHC 6246 (KLR), the appellants argue that the trial court did not consider the uncertainties and contingencies of life that could have reasonably shortened the deceased's working lifespan. The appellants submit that a multiplicand of 20 years is fair, reasonable and consistent with judicial trends.

7. Relying on the case of Rai Cement Limited vs Stephen *& Another (Suing as the legal administrator of the Estate of Zablon Khaemba Wanyama (Deceased) (Civil Appeal 67 of 2021*) [2022] KEHC 13815 (KLR) (29 September 2022), the appellants argue that the deceased died on the spot and therefore urge the court to award pain and suffering as Kshs. 10,000/- and loss of expectation of life as Kshs. 80,000/-.

8. The appellants argue that special damages must be pleaded and specifically proved. The appellants further argue that although the trial court acknowledged that the respondent had only produced receipts amounting to Kshs. 18,150/-, it proceeded to award special damages of Kshs. 65,650/-.

Issues for determination

9. The main issues for determination are:-

a. Whether liability apportioned by the trial court was against the weight of the evidence adduced.

b. Whether the awards under the *Law Reform Act* were manifestly excessive.

c. Whether the award on loss of dependency is manifestly excessive.

d. Whether the award on special damages was specifically pleaded and proven.

The Law

10. Being a first Appeal, the court relies on a number of principles as set out in Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123:

> "…..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 into account of particular circumstances or probabilities materially to estimate the evidence."

11. In Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR the Court of Appeal stated that:-

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.

12. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-

a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

b. That 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 it; and

c. That 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.

Whether liability apportioned by the trial court was against the weight of the evidence adduced.

13. The appellants seek to have the court substitute the trial court's findings of 90% liability against them with 50% liability upon the deceased. The appellants assert that the accident was substantially caused by the deceased who as a pedestrian had a duty of care to other road users.

14. The principles guiding the appellate court's power to interfere with the trial court's finding on liability are well settled. In Khambi & Another vs Mahithi & Another [1968] EA 70 it was held that:-

It is well settled that where a trial Judge has apportioned liability according to the fault of the parties, his apportionment should not be interfered with on appeal, save in exceptional circumstances, as where there is some error in principle or the apportionment is manifestly erroneous and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.

15. During the hearing, it is clear that the 1st appellant was the only person who witnessed the accident. He testified that on 11th December 2016 he was driving motor vehicle registration number KAS 306B along Nairobi Thika superhighway when he reached near Ndarugu area, the deceased accompanied by a minor alighted a bus and without checking crossed the road at a place where there was no pedestrian crossing. The witness stated that he was very close to the deceased and minor and he applied brakes and hooted but could not avoid hitting them. The evidence by the 1st appellant stood uncontroverted. The

deceased being a pedestrian was under a duty to be on the look out while crossing the road but there was no evidence that he did so. The 1st appellant admitted that he was unable to control the vehicle to avoid the accident which is an indication that he was driving at a high speed. The 1st appellant being the driver of a motor vehicle was handling a lethal machine and ought to have driven his vehicle with due care and attention in order to avoid the accident. For the appellant to fail to brake when he saw the deceased, leads to a conclusion that he was driving at a high speed.

16. The appellants adduced evidence to warrant this court to interfere with the ratio of liability against them and they have sufficiently demonstrated that the deceased contributed to the occurrence of the accident. Thus, it is my view that liability ought to be apportioned at the rate of 60 : 40 in favour of the respondent as against the appellants. As such, I set aside the order of the court below on the ratio of 90 : 10 for liability and substitute it with that of 60 : 40

Whether the award under the *Law Reform Act* was manifestly excessive.

17. The Court of Appeal in Catholic Diocese of Kisumu vs Sophia Achieng Tele Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an Appellate court can interfere with an award of damages in the following terms:-

> " It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its won for that awarded by the court below simply because it would awarded different figure if it had tried the case at first instance. The appellant court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

18. Similarly in Sheikh Mustaq Hassan vs Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457 that:-

> " The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect....A member of an appellate court when naturally and reasonably says to himself "what figure would I have made" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own."

19. In the instant case, the appellants fault the court below for awarding excessive damages for pain and suffering and loss of expectation. In the case of Hyder Nthenya Musili & Another vs China Wu Yi Limited & Another [2017] eKLR the court stated:-

As regards damages awarded under the *Law Reform Act*, the principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death...The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs. 100,000/- while for pain and suffering the awards range from Kshs. 10,000/- to Kshs. 100,000/- with the higher damages being awarded if the pain and suffering was prolonged before death.

20. In the instant case, it is not disputed that the deceased died on the spot. Given that the sums awardable under this head range from Kshs. 10,000/- to Kshs. 100,000/- from past authorities, it is my considered the sum of Kshs. 10,000/- would be reasonable compensation for pain and suffering as the deceased died at the scene of the accident and Kshs. 100,000/- for loss of expectation of life.

Whether the award on loss of dependency is manifestly excessive.

21. The Court of Appeal in Chunibhai J. Patel & Another vs P. F. Hayes & Others [1957] EA 748, 749 stated the law on assessment of damages under the *Fatal Accidents Act* and held:-

> The Court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependents, the net earning power of the deceased (i.e his income less tax) and the proportion of his net income which he would have made available for his dependents. From this it should be possible to arrive at the annual value of dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase.

22. The deceased was 32 years old at the time of her death and a farmer as indicated in the death certificate. PW1 testified that the deceased had three children and one of them died in the same accident. The deceased left behind two children aged 15 and 9 years respectively.

23. The appellants argue that the trial court erred by adopting a multiplier of 28 years without taking into consideration the vicissitudes of life. The trial court in adopting a multiplier of 28 years, relied on the case of Constance Kanyorota Ngugi vs Coast Bus Co. Ltd Nairobi High Court Civil Suit No. 3444 of 1994 and reasoned that the deceased would have probably worked until the age of 65 years. The deceased was said to have been young and healthy before her sudden death. Her life was cut short by the occurrence of the said accident. Furthermore the proposal by the appellants of a multiplier of 20 years, in my view is low and unreasonable. At the age of 32 years, the deceased would have worked for another 33 years or even more considering she was a farmer. Considering the vicissitudes of life, I find that the multiplier of 28 years adopted by the court was reasonable and it is hereby upheld.

Whether the award on special damages was specifically pleaded and proven.

24. It is trite law that special damages must be both pleaded and proved, before they can be awarded by a court. This was stipulated in the Court of Appeal decision of Hahn V. Singh Civil Appeal No. 42 of 1983 [1985] KLR 716 where the court held:-

> Special damages must not only be specifically claimed (pleaded) but also strictly proved.....for they are not direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.

25. On perusal of the respondent's Plaint dated 7th August 2017, the respondent pleaded special damages of Kshs. 61,650/- and the court awarded the same taking into account that a reasonable award may be awarded for burial expenses.

26. I have perused the record and it is my considered view that the respondent pleaded and proved the sum of Kshs. 11,350/-. However it is trite law that reasonable funeral expenses need not be specifically proved on the rationale that a mourning family is not capable of putting together all receipts of expenses in preparation of a burial in anticipation of a court case. Ben Otieno Owaga & 2 Others vs Eliakim Owalla & Another [2017] eKLR. In that regard, I shall allow a modest and reasonable funeral expense

of Kshs. 50,000/-. In my view, special damages in the sum of Kshs. 61,350/- was rightly allowed and is hereby upheld.

27. In view of the foregoing, I find that the Appeal partly has merit and ought to be allowed at the ratio of 60 : 40 on damages.

28. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED ND SIGNED AT THIKA THIS 5TH DAY OF JUNE 2025.

F. MUCHEMI

JUDGE