Willow Motors Ltd & another v Kitanga (Suing as the Personal Representative of the Estate of James Mwanzia Wambua - Deceased) & another (Civil Appeal 320 of 2023) [2025] KEHC 11137 (KLR) (22 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11137 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 320 OF 2023

RC RUTTO, J

JULY 22, 2025

BETWEEN

WILLOW MOTORS LTD .... 1ST APPELLANT

DANIEL KIBAKA WACHIRA .... 2ND APPELLANT

AND

BERNARD MUSYOKA KITANGA (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF JAMES MWANZIA WAMBUA - DECEASED) .... 1ST RESPONDENT

MICHAEL KAMAU .... 2ND RESPONDENT

(An appeal from the judgment and decree of the Chief Magistrate's Court at Kithimani (P. Wechuli, PM.) delivered on 16th November 2023 in CMCC No. 120 of 2022)

JUDGMENT

1. This is an appeal and cross appeal against the decision of the Trial Court dated 16th November 2023. In that decision the trial court held 90% liability in favor of the 1st respondent against the appellants. It then proceeded to awarded Kshs..1,026,522.00 in damages as follows loss of dependency kshs.973,080/-; pain and suffering kshs.50,000/-; loss of expectation of life 100,000/- special damages kshs.17,500/- all less 10 per cent. The 1st respondent was also awarded costs of the suit together with interest thereon.

2. The facts leading to the appeal are that by plaint dated 8th June 2022, and amended on 18th January 2023 the 1st respondent sought for damages under the Fatal Accident Act, the *Law Reform Act*, special damages of Kshs.17,500.00 costs and interest of the suit. He averred that on 17th July 2021, the deceased James Mwanzia Wambua, was lawfully waiting for customers at a designated motor cycle stage aboard

his motor cycle registration number KMEJ 532Z at Kyeni stage in Matuu when the appellants motor vehicle registration number KBY o58Z ZB7571 lorry, was so carelessly and negligently driven that it lost control , veered off the road and a loose tyre went off the said vehicle rolled over towards the deceased and knocked him off as a result of which the deceased sustained fatal injuries.

3. In its judgment dated 16th November 2023, the trial court held 90% liability in favor of the 1st respondent against the appellants. It then proceeded to awarded Kshs.1,026,522.00 in damages. The trial magistrate further awarded the 1st respondent costs of the suit together with interest thereon.

4. The appellants are aggrieved by those findings lodged this appeal. In summary, the appellant urged this court to allow the appeal with costs, set aside the judgment dated 16th November 2023 on grounds that: the judgment was premised on wrong principles of the law; the 1st respondent's documents were not produced in evidence; the award on damages under the *Fatal Accidents Act* and the *Law Reform Act* were not proved; the trial court did not consider their submissions at trial; and the 1st respondent failed to prove his case on a balance of probabilities.

5. The 1st respondent filed his memorandum of cross appeal dated 15th February 2023. He raised five grounds disputing the findings of the learned magistrate which grounds are summarized as follows: the learned magistrate erred in the assessment of general damages when awarding loss of dependency; the learned magistrate failed to take into account the fact that the deceased underwent pain and suffering before his death and ought to have been awarded Kshs.100,000.00; and the award on general damages was inordinately low. For those reasons, he urged this court to allow his cross appeal, and dismiss the appellants' appeal with costs. He further prayed for costs of the appeal, the cross appeal and the suit at trial.

6. The appeal was heard on the basis of the parties written submissions. The appellants filed their joint written submissions and list of authorities dated 14th January 2025. They submitted that the 1st respondent failed to formally adopt documents in support of his case after parties recorded a consent on liability. The resultant effect gave rise to an incurable defect since ownership of the suit vehicle was not proved on a balance of probabilities. It is for those reasons, they argued, that the award lacked foundation to properly evaluate the claim.

7. Regarding the award of general damages, the appellant submitted that the dependents set out in the pleadings did not confer a relationship with the deceased as per the requirements of the *Fatal Accidents Act* and the awards given must accordingly fail. Finally, on the award on special damages, they submitted that the same was not proved. The appellants then addressed the memorandum of cross appeal submitting that grounds 1, 2, 3 and 4 were rendered moot. On ground 5, they submitted that the award of Kshs. 50,000.00 was sufficient. They prayed that their appeal be allowed and cross appeal be dismissed.

8. The 1st respondent opposed the appeal. He filed written submissions dated 21st February 2025. He submitted that parties entered into a binding consent judgment that was valid. Bearing that in mind, this appeal could not contest the findings on liability as the conditions for setting it aside had not been met. Furthermore, the appellants admitted to the occurrence of the accident in their statement of defence. He submitted that submissions are not pleadings and parties are bound by their pleadings.

9. Responding to the allegation that the award on general damages was illegal, the 1st respondent submitted that as per the grant ad litem, it was confirmed that the beneficiaries of the deceased's estate were captured in the plaint. Having admitted liability, they were estopped from denying this fact. He was therefore entitled to general damages under the two statutes.

10. Addressing his memorandum of cross appeal, the 1st respondent submitted that the estate was entitled to an enhanced sum of Kshs.100,000.00 as the deceased suffered some pain before meeting his death. On loss of dependency, he urged this court to apply a global sums approach and award Kshs.2,500,000.00. Finally, it submitted that the award on special damages was specifically pleaded and proved. He prayed that the appeal be dismissed with costs and that his cross appeal be allowed with costs.

11. I have considered the memorandum of appeal, the memorandum of cross appeal and the rival written submissions, examined the record of appeal and analyzed the law. As a first appellate court, my primary role is to re-evaluate, re-assess and reanalyze the evidence on the record and draw my own conclusions bearing in mind that I did not have the advantage of seeing or hearing the witnesses. [See Gitobu Imanyara & 2 Others vs. Attorney General [2016] eKLR].

12. The record before us shows that on 28th September 2023, consent judgment on liability was entered in the ratio of 90:10 in favor of the 1st respondent as against the appellants. Parties were thereafter directed to take a date for submissions on the issue of quantum. Thus, the determination of liability was entered by consent of the parties.

13. It is trite law that consent judgment can only be set aside in the same manner as that of a contract. This is because a consent judgment is in essence a contract that binds the parties. The Court of Appeal held as follows in Samuel Mbugua Ikumbu vs. Barclays Bank of Kenya Limited [2015] KECA 390 (KLR) regarding consent judgment and this court wholly adopts that findings:

> " What are the circumstances that would lead to a consent order or judgment which has been adopted as an order of the court to be varied or set aside?
>
> The law on variation of a consent judgment is now settled. The variation of a consent judgment can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts. Hancox JA (as he then was) in the case of Flora Wasike v. Destimo Wamboko (1982 -1988)1 KAR 625, said in his judgment at page 626 –
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> "It is now settled law that a consent judgement or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out." See the decision of this Court in J.M. Mwakio v. Kenya Commercial Bank Ltd Civ. Apps 28 of 1982 and 69 of 1983"
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> This Court in the case of Brooke Bond Liebig v. Mallya 1975 E.A. 266 held:-
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> "A consent judgment may only be set aside for fraud collusion, or for any reason which would enable the court to set aside an agreement."
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> In Hirani v. Kassam (1952), 19EACA 131, this Court with approval quoted the following passage from Seton on Judgments and Orders, 7th edition, Vol.1 p.124 as follows:
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> "Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them...... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court..... or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement."

In a situation where the Advocate has no authority at all to enter a consent judgment, the consent judgment will be a nullity. See Kafuma v. Kimbowa Contractors 1974 EA (U) 91. This, however, cannot be construed to mean that the general authority given to an Advocate to act on behalf of his client in a matter allows for his conduct in all matters with an exception to entering consents. As adopted from common law, an Advocate who is duly instructed to act on behalf of his client has authority to act in every single thing that pertains to that matter even, enter consents on his or her behalf.

The extent of authority of a solicitor to compromise is set out in a passage in the Supreme Court Practice 1979 (Vol.2) paragraph 2013 page 620 as follows:-

"Authority of Solicitor- a solicitor has a general authority to compromise on behalf of his client, if he acts bona fide and not contrary to express negative direction; and it would seem that a solicitor acting as agent for the principal solicitor has the same power (Re Newen, [1903] 1 Ch pp 817,818; Little vs Spreadbury, [1910]2 KB 658). No limitation of the implied authority avails the client as against the other side unless such limitation has been brought to their notice-see Welsh vs Roe [1918 - (9] All E.R Rep 620." (Emphasis by underline)

This Court has adopted this postulation of the Advocate's authority in the Supreme Court's Practice with approval as was quoted in the case of Kenya Commercial Bank v. Specialized Engineering Company Ltd 1980 eKLR.

Consequently, the variation of a consent judgment at the instance of counsel's conduct can only succeed due to the general factors that would vary an agreement. This Court adopted the judgment of Harris J. R in the case of Kenya Commercial Bank Ltd v. Specialised Engineering Co. Ltd (1982) KLR P. 485 and held that:

"A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or by an agreement contrary to the Policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement."

14. In the present case, the appellants have not demonstrated that the consent was entered by means of fraud, coercion, misrepresentation, collusion or that the same was against public policy. For those reasons, it was untenable for the appellants to claim that the ownership of the suit vehicle was contested when they conceded to 90% liability of the accident. They wanted to have their cake and eat it since they were approbating and reprobating. That conduct is impermissible. Accordingly, I come to the unwavering conclusion that the appeal on liability lacks merit and it is hereby dismissed.

15. However, it is instructive to note, and as rightly pointed out by the appellants, the documents sought to be relied on were neither marked for identification or adopted in evidence. What transpired was that a consent order was adopted by the court and thereafter parties proceeded to submit on quantum. The respondents were still obliged to prove their case by adducing evidence. The Court of Appeal in Kenneth Nyaga Mwige vs. Austin Kiguta & 2 others [2015] KECA 334 (KLR) held as follows regarding the production of documents and the relevance of identification:

" 20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document

produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account.

21. In Des Raj Sharma -v- Reginam (1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification; and that the term "exhibit" should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of Michael Hausa -v- The State (1994) 7-8 SCNJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence.

22. Guided by the decisions cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.

16. I must reiterate however that the absence of marking documents for identification did not vitiate the sustenance of the findings of liability since it was entered by consent. It also does not invalidate the pleadings that were filed by both parties as they become part of the court record. In assessing quantum, the trial magistrate relied on the written submissions of the parties. How would the court assess the quantum of damage absent documents marked for identification?

17. Guided by the ruminations of the Court of Appeal, I find that the documents relied on by the 1st respondent, absent being marked for identification, did not form part of the evidence on record and is of very little probative value, if any. I therefore find that the trial court, absent that procedural necessity, ought to only have relied on the pleadings on record since it is undisputed that the estate of the deceased was certainly entitled to compensation since parties had a consent on lability that was adopted as the court's judgment.

18. On damages for pain and suffering, the trial magistrate awarded the deceased Kshs.50,000.00 under this head. From the evidence on record, it is not clear whether the deceased died on the spot or not or whether death was prolonged since he was undergoing some form of treatment. The 1st respondent has not demonstrated how the trial magistrate failed to properly assess damages under this head and how the trial court applied wrong principles. In the circumstances, we find that the award of Kshs.50,000.00 was fair and reasonable taking into account the current market inflation. We will therefore not disturb that finding. On the award for loss of expectation of life, we find that the award of Kshs.100,000.00 is a conventional sum and we shall not interfere with those findings.

19. Taking into account the award of damages under those two heads, we now turn to the award of damages on loss of dependency. Before delving into the award made by the trial court, we must address one issue raised by the appellants. They contended that this award should not have been made since the deceased died leaving no dependents. It is not denied that the deceased died unmarried and without a child. Furthermore, his parents did not institute the present action in claiming for damages under the *Fatal Accidents Act*.

20. Section 4 of the *Fatal Accidents Act* categorically provides that every action brought by virtue of the provisions of the Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused. The Court of Appeal in the case of Mwangi & another (Suing as the Legal Representatives of the Late Richard Mwangi Gathoni Deceased) vs. Ngure & another [2023] KECA 448 (KLR) dismissed a claim fo general damages under the *Fatal Accidents Act* lodged by the deceased's brother. The Court held in part:

> "It is therefore clear that it is only in respect of claims brought for the benefit of the wife, husband, parent and child of a deceased under the Fatal Accident Act that ought to be brought in the name of the executor or administrator of the person deceased. Loss of dependency falls under Fatal Accident Act. Accordingly, the 2nd Appellant could not make a claim under the said Act for loss of dependency as he was not a dependent."

21. This court takes the same approach. The suit was instituted by the deceased's uncle. The purported surviving dependents are the deceased's two uncles and brother. However, no evidence was led to demonstrate that the dependents derived benefit from the deceased's earning. Alternatively, they failed to demonstrate how the deceased supported these dependents. Section 4 of the *Fatal Accidents Act* is couched in mandatory terms. I therefore find that the trial magistrate erred in awarding damages under this head. The listed dependents do not fall within the four corners of section 4 of the *Fatal Accidents Act*. To this extent, I agree with the appellants.

22. On special damages, since the documents were not marked for identification, they were not proved. I therefore find that the award entered by the trial court was in error. I must similarly interfere with that finding. Taking into account the reliefs sought in the memorandum of appeal and memorandum of cross appeal, the following are my orders:

    1. Judgment on liability is entered at 90:10 in favor of the 1st respondent as against the appellants;
    2. The award of pain and suffering is sustained at Kshs.50,000.00;
    3. The award on loss of expectation of life at Kshs.100,000.00;
    4. The award on loss of dependency by the trial court is hereby set aside and substituted with an order dismissing the award under this head.
    5. The award on special damages is hereby set aside and substituted with an order dismissing the same.
    6. I direct that each party shall bear their own costs of this appeal and the memorandum of cross appeal.

    It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 22ND DAY OF JULY 2025.

RHODA RUTTO

JUDGE

In the presence of;

....Appellant

....Respondent

Selina Court Assistant