



Muriithi (Suing as the Legal Representative and Administrator of the Estate of Stephen Mureithi Warama - Deceased) v Karanja & another (Civil Suit 932 of 2000) [2024] KEHC 200 (KLR) (Civ) (19 January 2024) (Judgment)

Neutral citation: [2024] KEHC 200 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL SUIT 932 OF 2000**

**CW MEOLI, J
JANUARY 19, 2024**

BETWEEN

JULIANA NJERI MURIITHI (SUING AS THE LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF STEPHEN MUREITHI WARAMA - DECEASED) PLAINTIFF

AND

**VERONICA NJERI KARANJA 1ST DEFENDANT
DANIEL NJOROGE 2ND DEFENDANT**

JUDGMENT

1. Juliana Njeri Muriithi (hereafter the Plaintiff) filed this suit in her capacity as the legal representatives of the estate of the late Stephen Mureithi Warama, (hereafter the deceased). In her plaint dated 15.06.2000, amended on 07.07.2000 and further amended on 15.12.2004 she named Veronica Njeri Karanja and Daniel Njoroge (hereafter the 1st & 2nd Defendant/Defendants) as defendants. The claim was for damages and allegedly arose from a road traffic accident that occurred on 10.07.1997 and in which the deceased sustained fatal injuries.
2. The Plaintiff avers that at all material times to the suit Peter Karanja Chege was the registered owner of motor vehicle registration number KAA 916L which was at all material times being driven by himself. That on the material date, the deceased was travelling in motor vehicle registration number KAE 821K, when the said Peter Karanja Chege so negligently drove, managed, and controlled motor vehicle registration number KAA 916L along Eldoret-Nakuru Road near Dolaraine Farm, that it rammmed into the rear of motor vehicle registration number KAE 821K, as a result of which the vehicle lost



- control and overturned. The Plaintiff further avers that the deceased sustained severe bodily injuries from which he died four days later, and his dependents and estate have suffered loss and damage.
3. Pursuant to a ruling delivered by Mbogholi J (as he then was) on 19.12.2019, the Defendants filed a statement of defence on 19.02.2020. Therein a preliminary point was pleaded to the effect that the suit was time barred by virtue of the provisions of Section 2(3)(b) of the Law Reform Act and Section 9(2) of the Fatal Accident Act. In addition, the Defendants denied the key averments in the plaint and liability and further pleaded, without prejudice to the averments or denials in their statement of defence, that if any accident occurred, the same was caused wholly by the negligence of the driver of motor vehicle registration number KAE 821K.
 4. During the hearing, the Plaintiff testified as PW1. Identifying herself as a businesswoman living in Nairobi and widow of the deceased, proceeded to adopt her witness statement dated 26.11.2012 and tendered as exhibits her list of documents dated 13.06.2005. These included copies of the Police Abstract a (PEXh.1), Certificate of Confirmation of Grant (PEXh.2), Death Certificate (Exh.3), Certificate of Marriage (PEXh.4), Birth Certificates (PEXh.5, 6 & 7), Bank Account Statements (PEXh.8) and Excerpts of Book of Accounts (PEXh.9). She testified that the deceased was a businessman and the sole bread winner for the family that included minor children. She prayed for damages as pleaded in the plaint.
 5. Under cross-examination by defence counsel, PW1 clarified that the initial plaint indicated that one Joseph Njoroge Gathatwa had caused the accident and that the amended plaint included amendment of the particulars of motor vehicle registration number KAE 821K. That the errors in the initial plaint were amended after she obtained a copy of the PEXh.1. It was her evidence further that she did not know who was driving motor vehicle registration number KAE 821K as she was not at the scene of the accident and did not witness the same. Admitting that PEXh.1 did not bear the name Peter Karanja Chege and that the accident occurred on 10.07.1998 as per the police abstract while accident date in the plaint referred to the year 1997.
 6. She further confirmed that she had no copy of the police abstract indicating 1997 as the year of the occurrence of the accident and that PEXh.1 named Joshua Muriithi as a casualty in the accident. She further clarified that the latter document did not name Peter Karanja Chege as the driver of any of the accident vehicles and that as per her witness statement, she knew the Defendants, as they hail from Kikuyu-Kamangu Area, having traced them after the accident. Admitting that she had never been a teacher contrary to the indication in the certificate of marriage she asserted that prior to her marriage she was a seamstress and had assisted tailoring students as a tutor but not as a professional teacher. She went on to state that the deceased was trading in beef and cow hides. She however, did not have receipts in respect of his business transactions but instead a book of accounts in which the deceased allegedly recorded his transactions.
 7. That as per the said record (PEXh.9), the deceased made profits and losses, but she did not know whether the deceased remitted any taxes. She proceeded to confirm that the foregoing document did not bear the deceased's name or signature. She stated that prior to filing the suit she did not know Peter Karanja Chege, who passed on alongside the deceased in the accident, and that the latter was aboard motor vehicle KAE 812K. That she did not have any documents relating to funeral expenses and that PEXh.8 was in respect of the deceased's savings account and not his business current account. In re-examination she clarified that the police abstract is dated 10.07.1998 whereas item 8 in PEXh.1 indicated the details of the accident register and date of the accident as 10.07.1997.
 8. The defence did not call any witnesses.



9. Submissions were filed by the respective parties after the close of the hearing. The Plaintiff's submissions rested on the twin issues of liability and quantum. Regarding liability, counsel reiterated the Plaintiff's pleadings and evidence to contend that the Defendants have not controverted the facts presented by calling any witness. That the Plaintiff had proved on a balance of probabilities that an accident occurred on the material date. While calling to aid the decisions in *Linus Nganga Kiongo & 3 Others v Town Council of Kikuyu* [2012] eKLR and the provisions of Section 107 of the *Evidence Act*, counsel submitted that Peter Karanja Chege was solely to blame for the accident, and the administrators his estate and the Defendants ought to bear responsibility for the liability on his behalf.
10. Submitting on quantum of damages, counsel anchored his submissions on the decisions in *Southern Engineering Co. Ltd v Musingi Mutia* (1985) KLR 730. Concerning damages under the Fatal Accident Act and *Law Reform Act*, counsel relied on the decisions in *Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another Nairobi HCCC No. 1638 of 1998*, *Grace Kanini v Kenya Bus Services Nairobi HCCC No. 4708 of 1989*, *Jacob Ayiga Maruja & Another v Simeone Obayo Court of Appeal Civil Appeal No. 167 of 2002* [2005] eKLR and *Maina Kaniaru & Another v Joseph M. Wangondu* [1995] eKLR. To support the submission that damages for lost dependency should be calculated as follows; Kshs. 45,000 x 12 x 34 x 2/3 as the deceased was aged 27 years at death and was a businessman with an average monthly income between Kshs. 35,000/- to 45,000/- as documented in his books of account. Moreover, the deceased was the sole bread winner and provided fully for his family.
11. Counsel reiterated that at the time of death the deceased enjoyed robust health, had dependents, and would likely have continued to prosper in his business. The court was urged to award Kshs. 400,000/- for pain and suffering, Kshs. 200,000/- for loss of expectation of life and special damages in the sum of Kshs. 20,050/-. In conclusion, the court was urged to allow the suit as prayed with costs and interest.
12. On the part Defendants, counsel opened his submissions by addressing the preliminary issue of limitation by asserting that the Plaintiff's suit was time barred. Counsel relied on the provisions of Section 2(3)(b) of the *Law Reform Act*, Section 9(3) of the *Fatal Accidents Act* and Section 4(2) of the *Limitation of Actions Act*, the decisions in *Sera Musa v Manji's Ltd & Another* (1964) EA 654, *Veronica Gathoni Mwangi & Another v Samuel Kagwi Ngure & Another* [2020] eKLR and *Iga v Makere University* (1972) EA 62.
13. He asserted that as of 19.06.2000 when the suit was filed against the 1st Defendant, two years had lapsed since the letters of administration issued on 02.06.1998 to the Defendants jointly in respect of the estate of the late Peter Karanja Chege and on whose behalf the 1st Defendant was sued. It was further pointed out that the 2nd Defendant, a co-administrator of the estate of Peter Karanja with the 1st Defendant, was not initially sued by the Plaintiff and was irregularly enjoined in the suit without leave of the court, some five (5) years after filing of the suit.
14. That consequently, the claim as against the 2nd Defendant was time barred the cause of action having arisen on 10.07.1997. Counsel asserted that letters of administration are limited to a period of six months under statute. The object being the protection of legal representatives or administrators of the deceased's estate being vexed by litigation or claims brought long after conclusion of the process of administration of the estate of a deceased. The court was thus urged to find that it lacks the jurisdiction to entertain the suit and dismiss the same with costs.
15. In the alternative and without prejudice to the foregoing, and as concerns liability, counsel contended that PW1 in her evidence admitted that she did not witness the material accident. As such there was no evidence to support the averments in the plaint that motor vehicle KAE 812K rammed into the rear of motor vehicle KAA 916L. It was further submitted that the police abstract while indicating the date



- of the accident to be 10.07.1998 did not bear the name of Peter Karanja Chege as the driver of motor vehicle KAE 812K on 10.07.1997. Thus, the abstract which contradicts the Plaintiff's pleadings.
16. Citing the provisions of Section 107 of the *Evidence Act* and the decision in *Treadsetters Tyres Ltd v John Wekesa Wepukhulu* [2010] eKLR, counsel submitted that the Plaintiff did not produce a copy of records in respect of motor vehicle KAA 916L and or otherwise demonstrate that Peter Karanja Chege was the registered owner of the vehicle in question at the date of the accident. Hence the court was urged to find that the Plaintiff failed to prove her case against Defendants.
 17. On damages under the *Law Reform Act*, counsel cited the decision in *Paul Chege Kabita v James Gicheru Ngubu & Another* [2019] eKLR to urge the court to award Kshs. 70,000/- for pain and suffering. On loss of expectation of life, counsel placed reliance on the decision in *Easy Coach Bus Services & Another v Henry Charles Tsuma & Another* (Suing as the administrator and personal representative of the Estate of Josephine Weyanga Tsuma (Deceased)) [2019] eKLR and *Melbrimo Investments Company Limited v Dinah Kemunto & Francis Sese* (Suing as Personal Representative of the Estate of Stephen Sinange alias Reuben Sinage (Deceased)) [2022] eKLR to urge the court to award Kshs. 100,000/- the deceased having died soon after the accident.
 18. Concerning damages under the *Fatal Accidents Act*, counsel argued that PW1 did not tender a business permit and her evidence on the income of the deceased contradicted the earnings pleaded in the plaint. Further, there was no nexus between the deceased and books of account produced herein, whereas the bank statements were in respect of savings and therefore not illustrative as to the deceased's earnings. That in the absence of proof of earnings, the minimum wage under the Regulation of Wages (General) Amendment Order 1997 ought to be applied in the circumstance. The decisions in *Melbrimo* (supra) and *Patrick Kanai Waweru* (suing as the legal administrator of the estate of Grace Njoki Kanai) v *George Ogwella & 2 Others* [2016] eKLR were relied on in urging the court to adopt the sum of Kshs, 8,361.50 as the deceased's monthly income.
 19. Citing *FMM & Another v Joseph Njuguna Kuria* [2016] eKLR he urged the court to adopt a multiplier of 18 years given that the deceased was 38 years old at death and his youngest dependent aged 6 years. Counsel therefore proposed the sum of Kshs. 1,204,056/- as damages for loss of dependency computed as follows; Kshs. 8,361.50/- x 12 x 2/3 x 18. The court was urged to award the quantum of special damages strictly pleaded and proved.
 20. The court has considered the pleadings, evidence as well as the submissions of the respective parties. The twin issues falling for determination are whether Plaintiff has established negligence against the Defendants on a balance of probabilities and if so, the quantum of damages to be awarded. However, before delving into the merits of the matter, the court has been called upon to determine a preliminary issue of statutory limitation as raised by the Defendants. To the effect that pursuant to the provisions of Section 2(3)(b) of the *Law Reform Act*, Section 9(3) of the Fatal Accident Act and Section 4(2) of the *Limitation of Actions Act* the suit herein is time barred. Because as of 19.06.2000 when it was filed against the 1st Defendant, two years had lapsed since the letters of administration issued jointly to the Defendants in respect of the estate of the late Peter Karanja Chege on whose estate the 1st Defendant was sued, had been issued.
 21. Secondly, that the 2nd Defendant, who is a co-administrator of the estate of Peter Karanja with the 1st Defendant, was not initially sued by the Plaintiff and was only enjoined into the suit irregularly without leave of the court, some five (5) years after filing of the suit. Consequently, the claim against the 2nd Defendant based on the cause of action that arose on 10.07.1997 is time barred. Counsel here citing the limitation of the validity of a grant of letters of administration.



22. The Plaintiff did not canvass the Defendants preliminary contestation in their submissions. The court has taken the liberty of perusing the entirety of the record before it. The same reveals that the Defendants filed a motion dated 31.01.2022 seeking inter alia an order “that this honorable court be pleased to strike out the plaint and dismiss the suit herein for being an abuse of the court process “ citing similar grounds for the contention that the suit herein is time barred by virtue of the provisions of Section 2(3)(b) of the Law Reform Act, Section 9(3) of the Fatal Accident Act and Section 4(2) of the Limitation of Actions Act.
23. Seron, J, by a ruling on 11.11.2022 dismissed the motion. The said ruling substantively addressed itself to the objection taken by the Defendants. The court further notes that on 24.11.2022 the Defendants filed a Notice of Appeal against the ruling. The outcome of the said challenge has not been disclosed. In the circumstances, this court would not deign to determine the merits of the said preliminary contestation in this judgment as that would be tantamount to it sitting on appeal from a decision of a court of equal jurisdiction. The court declines the Defendants’ invitation to address the objection in respect of the suit pertaining to Section 2(3)(b) of the Law Reform Act, Section 9(3) of the Fatal Accident Act and Section 4(2) of the Limitation of Actions Act.
24. Moving on to the substantive issues, the parties’ respective pleadings form the basis of their case before the court. In *Wareham t/a A.F. Wareham & 2 Others Kenya Post Office Savings Bank [2004] 2 KLR 91*, the Court of Appeal stated in this regard that: -
- “We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.”
25. By her further amended plaint, the Plaintiff pleaded and particularized the alleged negligence against Peter Karanja Chege who was the alleged driver of motor vehicle KAA 916L. The Defendants denied the particulars of negligence while equally pleading negligence against the driver of motor vehicle KAE 821K in which the deceased was allegedly travelling at the time of the accident.
26. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the Evidence Act. The Court of Appeal in *Mumbi M’Nabea v David M.Wachira [2016] eKLR* while discussing the standard of proof in civil liability claims in our jurisdiction had this to say:-
- “In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the Evidence Act, Cap 80 Laws of Kenya provides as follows:
- “Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists.” The above provision provides for the legal burden of proof.



However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:

“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.”

The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M’airanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280* where it was held that:

“Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

27. The duty of proving the averments contained in the further amended plaint lay squarely upon the Plaintiff. In *Karugi & Another v Kabiya & 3 Others (1987) KLR 347* the Court of Appeal stated that:

“[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff’s case is not controverted or is proved on a balance of probabilities by reason of the defendants’ failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...-. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.” (Emphasis added)

28. Superior courts have consistently held that the mere occurrence of an accident, without more, cannot be proof of negligence. As the Court of Appeal stated in *Eastern Produce (K) Ltd V. Christopher Atiado Osiro [2006] eKLR*, the onus of proof lies upon him who alleges and where negligence is alleged, some form of negligence must be proved against the defendant. The court in that case cited the famous decision of *Kiema Mutuku V. Kenya Cargo Hauling Services Ltd [1991] 2KAR 258* where the Court of Appeal, reiterating the foregoing stated 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.”

29. In *Gideon Ndungu Nguribu & Another v Michael Njagi Karimi [2017] eKLR* the Court of Appeal stated that “determination of liability in a road traffic case is not a scientific affair” and proceeded to quote Lord Reid in *Stapley vs Gypsum Mines Ltd (2) [1953] A.C. 663* at p. 681 as follows:

“To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it ...

The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any



one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally.” (Emphasis added)

30. The Plaintiff’s pleaded case was that Peter Karanja Chege was both the owner and driver of the vehicle KAA 916L and caused the accident through negligent driving. However, PW1 did not produce evidence to support these averments. She testified during cross-examination that did not know the identity of the person who was driving motor vehicle registration number KAE 821K in which the deceased was travelling at the material time, nor witness the accident. Further PExh.1 did not bear the name of Peter Karanja Chege as the driver or owner of the vehicle KAA 916L which allegedly rammed into the former vehicle. Moreover, while it was pleaded that the accident occurred in the year 1997, the police abstract indicated 10.07.1998 as the date of the accident.
31. PW1 did not call an eyewitness or the investigating officer to shed light on the circumstances of the accident. Thus, beyond merely asserting the occurrence of the accident, PW1’s evidence did not contain any admissible and or credible evidence as to how the accident occurred and was of no probative value on the question of liability. In sum, the Plaintiff did not tender evidence in proof of the allegations of negligence pleaded against Peter Karanja Chege, and by extension the Defendants herein.
32. Secondly, as to the ownership of motor vehicle KAA 916L the Plaintiff pleaded that Peter Karanja Chege, was the alleged registered owner of the said vehicle. Among material produced by PW1 as PExh.1 to PExh.9, there was no document indicating the ownership of motor vehicle KAA 916L by Peter Karanja Chege. In these circumstances, no blameworthiness or responsibility for the accident could be attributed to the said person in respect of the motor vehicle KAA 916L, and the accident. As earlier stated, the burden of proof on the foregoing rested with the Plaintiff but she failed to discharge it.
33. In the result, the court finds that the Plaintiff failed to establish on a balance of probability that Peter Karanja Chege and by extension the Defendants are blameworthy and liable for the accident. Under Section 107 of the Evidence Act, the burden of proof lay with the Plaintiff and if her evidence did not support the facts pleaded, she failed as the party with the burden of proof. See the cases of Wareham t/ a A.F. Wareham and Karugi Kabiya (supra). That being the case, the question of quantum of damages is rendered moot. The court having found that the Plaintiff has failed to prove her case on a balance of probabilities will proceed to dismiss it. However, considering the circumstances in which the suit arose, the Court will direct that each party bears its own costs in the suit.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 19TH DAY OF JANUARY 2024.

C.MEOLI

JUDGE

In the presence of:

For the Plaintiff: N/A

For the Defendants: Mr. Thuo

C/A: CAROL

