



**Wainaina & another (Suing as Father and Wife to and Administrators of Paul Wainaina Gikonyo - Deceased) v Ndirangu & another (Civil Appeal 120 of 2023) [2024] KEHC 2708 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2708 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL 120 OF 2023  
FN MUCHEMI, J  
MARCH 7, 2024**

**BETWEEN**

**JOSEPH GIKONYO WAINAINA ..... 1<sup>ST</sup> APPELLANT  
GRACE NYAMBURA WACHIRA ..... 2<sup>ND</sup> APPELLANT  
SUING AS FATHER AND WIFE TO AND ADMINISTRATORS OF PAUL  
WAINAINA GIKONYO - DECEASED**

**AND**

**DAVID MAINA NDIRANGU ..... 1<sup>ST</sup> RESPONDENT  
PAWAMU ENTERPRISES LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the Judgment of Hon. O. Wanyaga (SRM) delivered on 31<sup>st</sup> August 2022 in Thika CMCC No. 489 of 2021)*

**JUDGMENT**

**Brief facts**

1. This appeal arises from the judgment in Thika CMCC No. 489 of 2021 from a claim based on a road traffic accident whereby the trial court dismissed the suit in its entirety for reasons that the appellants failed to discharge their burden of proof on a balance of probabilities.
2. Dissatisfied with the court's decision, the appellants lodged this appeal citing 7 grounds condensed as follows:-
  - a. The learned trial magistrate erred in fact and in law in failing to make a determination on liability in favour of the appellants based on the evidence before him.



- b. Whether the learned trial magistrate erred in law and in fact in failing to make an assessment of damages.
3. Parties disposed of this appeal by way of filing submissions.

### **Appellant's Submissions**

4. The appellants submit that the trial court erred in failing to consider the central role played by pleadings in civil cases and the full purport of the pleadings before him. Relying on the cases of *Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another* (2004) eKLR and *Anthony Kithuku Kathyoli & Another vs Robert Nzomo Masila & Another* (2020) eKLR, the appellants argue that pleadings contain a summary form of the material facts. In the instant case, the 2<sup>nd</sup> respondent denied ownership, use and possession of motor vehicle registration number KBV 077M and further the respondents in their defence denied that the accident in question occurred, yet the appellants contend that those are not the correct facts. The appellants submit that the correct position is that the accident in question occurred and that the motor vehicle belonged to the 2<sup>nd</sup> respondent as DW1 said on cross examination.
5. The appellants further submit that the respondents in paragraph 9 of their defence continued to deny the occurrence of the accident but in the alternative blamed the deceased for causing the accident. This is by itself a contradictory statement. The appellants argue that although the respondents blamed the deceased for carrying excess number of pillion passengers and overtaking other vehicles on the road, the 1<sup>st</sup> respondent testified that there were no other vehicles on the road and that the deceased did not have any pillion passenger.
6. The appellant further argues that failure to call the police evidence is not fatal in running down civil proceedings. Any of the parties is at liberty to call the evidence of the police. To support their contentions the appellants rely on the case of *Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi* (2004) eKLR.
7. The appellants submit that their circumstantial evidence based on the testimonies on PW1 and PW3, a photographer and the photograph he produced in evidence. It was the appellants' case that the motor vehicle registration number KBV 077M came to a stop off the tarmac to its right hand side. The front right wheel was off the tarmac and the front wheel was on the tarmac. The accident impact damage was on the front left side of the said vehicle. That evidence was corroborated by the 1<sup>st</sup> respondent in cross examination. Further on re-examination, DW1 testified that after the impact the air bags blocked his vision and he could not see. The appellants argue that DW1 produced a Certificate of Examination and Test of Vehicle and nowhere is the issue of the airbags mentioned.
8. The appellant submits that the court ought to interfere with the lower court's finding on liability as motor vehicle registration number KBV 077M was damaged on its front left side, DW1 testified that his vehicle came to a stop on the right-hand side of the road and not on its left-hand side of the road. It is therefore, a mystery how DW1 crossed over the lane of oncoming traffic to bring the motor vehicle to a stop as he claimed. Although DW1 claims that the air bags blocked his vision compelling him to cross to the other side of the road, the appellants argue that the airbags could not stop DW1 from swerving to his left. Further the airbags could not force DW1 to swerve to the right hand side where there was a lot of danger since it was pleaded that the deceased motor cyclist was overtaking other vehicles.
9. The appellants contend that the testimony of DW1 set out to minimize his vehicle's speed before the collision. The way the motor vehicle crossed over and beyond to the lane meant for oncoming traffic indicates that the driver failed to maintain proper control of the vehicle. The appellants argue that the respondents were solely to blame for causing the accident as the motor vehicle stopped on the right



side of the road partly off the tarmac on the side meant for oncoming traffic. Further the motor vehicle had impact damage on its front left side. Thus the motor vehicle was clearly off its lane, had definitely crossed and was way beyond the centreline into the path supposed to be used by the deceased motor cyclist.

10. Relying on the case of Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi (2004) eKLR the appellants submit that where a trial court determines that liability has not been established, it ought to proceed and make an assessment of the damages it would have awarded, which the trial court failed to do in the instant case. The appellants reiterate their submissions on quantum and rely on the decision in Kenya Power & Lighting Co. Ltd vs Maria Kerubo Kianga & Another (2021) eKLR as submitted in the trial court.
11. The appellants contend that a multiplicand of Kshs. 15,000/- per month was reasonable as the deceased was employed as a butcher. The respondents submitted that Kshs. 7,240.95/- as the general monthly wage which the appellants refute as applicable as the figure applies to a general labourer which does not include a butcher. The appellants contend that the proper occupation to consider is that of shop assistant and not of a general labourer. Further the appellants contend that the Regulation of wages General Amendment Orders for the years 2018, the year of the accident and 2022 when the matter was heard, are applicable.
12. Relying on the cases of Melbrimo Investment Co. Ltd vs Dinah Kemunto & Another (2022) eKLR and Nancy Marigu Gabriel vs David Kimani (2015) eKLR and submit that the deceased was survived by his wife, daughter and parents and therefore the applicable dependency ratio is 2/3 and not 1/2 as submitted by the respondents. The appellants submit that the total award should work out as follows:- loss of dependency – Kshs. 15,000/- x 12 x 2/3 x 30 = Kshs. 3,600,000/-, Kshs. 50,000/- for pain and suffering, Kshs. 100,000/- for loss of expectation of life and Kshs. 147,155/- for special damages.

### **The Respondents' Submissions**

13. The respondents submit that the trial magistrate rightfully concluded that the appellants failed to discharge their burden of proof on a balance of probability. The respondents argue that the appellants did not lead any evidence to prove that they were negligent. Relying on the cases of Kiema Mutuku vs Kenya Cargo Services Limited (1991) and Benter Atieno Obonyo vs Anne Nganga & Another [2021] eKLR the respondents submit that it is trite law that there can be no liability without fault. As such, the respondents submit that the court ought not to interfere with the trial court's finding.
14. On the issue of quantum of damages, the respondents rely on the cases of Simon Bogonko vs Alfred Mongare Mecha & Another (Suing as the legal representatives of the Estate of Akama Mong'are (Deceased) [2019] eKLR and Omanga Fish Limited vs CKB & JM (Suing as the legal representatives of the estate of JMM (Deceased) [2019] eKLR and submit that the deceased died on the same day of the accident and thus Kshs. 20,000/- would be sufficient compensation under the head of pain and suffering. On the issue of loss of expectation of life, the respondents rely on the case of Devshibhai & Sons Limited vs Lule Kaluve Nyamai & Another (Suing as the legal representatives of Francis Kilonzo Lelu (Deceased) [2019] eKLR and submit that an award of Kshs. 100,000/- would be reasonable compensation.
15. The respondents rely on the decision in Rodgers Kinoti vs Linus Bundi Muriithi & Another [2022] eKLR and urge the court to apply a dependency ratio of 1/2 as the appellants indicated in the plaint that the dependants of the deceased were his father the 1<sup>st</sup> appellant, his mother, his wife, the 2<sup>nd</sup> appellant and their daughter. The respondent further submit that the deceased was a butcher as indicated in the death certificate dated 10/1/2019. The deceased's widow testified that the deceased was earning



Kshs. 400/- per day but on cross examination, she admitted that she did not have any proof that he was earning Kshs. 400/- per day. PW4, the deceased's employer did not provide an employment letter or evidence of income suggesting that the deceased was earning Kshs. 400/- per day. Relying on the case of *Nyamira Tea Farmers Sacco vs Wifred Nyambati Keraita & Another* [2011] eKLR the respondents submit that in the absence of documentary evidence to show proof of income, it is customary for courts to rely on the minimum wage order under the Regulation of Wages Order. The respondents submit that the court ought to adopt the sum of Kshs. 7240.95/- as provided in the Regulation of Wages (General) (Amendment) Order 2018 as the deceased used to reside in Kimnadi. On the issue of the multiplier, the respondents rely on the case of *Bash Hauliers vs Dama Kalume Karisa & Another* [2020] eKLR and submit that the court ought to adopt a multiplier of 20 years as the deceased died at the age of 32 years. Thus the respondents contend that the total award under loss of dependency should work out as follows:-  $Kshs. 7240.95/- \times 20 \times 12 \times \frac{1}{2} = Kshs. 868,914/-$ .

16. The respondents submits that special damages ought to be specifically pleaded and proved. The respondents further submit that although PW1 produced receipts for funeral expenses totalling to Kshs. 40,250/- some of the receipt did not have stamps as required by Section 19(1) of the *Stamp Duty Act*. The court pursuant to Section 19(3)(b) of the Stamp Act had discretion to allow the plaintiff to obtain a certificate from the stamp collector but none was sought by the plaintiff. Thus, the respondents urge the court to disregard the same as they are inadmissible in evidence. To support these contentions, the respondents rely on the case of *S.D.V Transami K. Ltd vs Scholastica Nyambura* [2012] eKLR. The respondents submit that the court ought to award Kshs. 1,119,809/- as total compensation made out as follows:- pain and suffering Kshs. 20,000/-, loss of expectation of life Kshs. 100,000/-, loss of dependency Kshs. 868,914/- and special damages Kshs. 130,895/-.

### **Issue for determination**

17. The main issue for determination is whether the appellants proved their case on a balance of probabilities.

### **The Law**

18. 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.”

19. 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.
20. 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 the appellants proved their case on a balance of probabilities.

21. 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.
22. The evidence on record is clear that the appellants did not witness the accident. PW1 and PW3 went to the scene of the accident. PW1 testified that after the accident, a pickup, motor vehicle registration number KBV 077M front wheel was off the tarmac to its right and the other wheels were on the tarmac. PW1 further testified that the deceased's motor cycle registration number KMEH 611E, front panel was off the tarmac to the left as one heads towards Ndakaini whereas the rear panel was on the tarmac. The witness further testified that the pickup's bumper was damaged and there was oil on the right side of the tarmac as one faces Ndakaini. PW3 testified that he rushed to the scene of the accident and took photographs of the scene. According to him, the pickup driver was on the wrong as the point of impact was in the middle of the road.
23. The appellants did not call the investigating officer to shed light on how the accident occurred. Notably, the appellants produced a police abstract which did not place any blame on either the deceased or the 1<sup>st</sup> respondent for the accident and the matter was referred to DPP for inquest.
24. DW1, the 1<sup>st</sup> respondent testified that on the material day he was on his way to Nairobi from the farm at Kiawaitera area, a motorcycle approached at a high speed on his lane. DW1 further testified that when the deceased noticed his motor vehicle, he turned on his full head lights and DW1 slowed down to allow the deceased to return to his lane. The deceased did not return to his lane and ended up colliding with DW1's vehicle head on. The witness said that he swerved and stopped at the right side of the road as the airbags had already come out. On cross examination the witness testified that there were no other vehicles or motor cycles on the road. He further testified that upon collision, the airbags came out and his vehicle stopped on the right side as opposed to the left side. DW1 further testified on re-examination that after the airbags came out his vision was blocked and that his vehicle was spilling oil as a result of the damage.
25. It is trite law that he who alleges must prove. Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya, provides that:-  
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 exist.
26. In *Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal held that:-



As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.

27. On evaluation of the evidence on causation of the accident it is evident that DW1 was the only witness who saw how the accident occurred. The witness attributed blame to the driver of the motor cycle who he said was speeding and was on DW1's lawful lane. The appellants failed to call the investigating officer who could have shed light on who was to blame for the accident. Furthermore, both PW1 and PW3 gave an account of the incident at the scene of the accident according to their opinions. None of the witnesses was trained on how to analyze an accident and the testimony of the investigating officer would come in handy. Thus, the onus of proving the accident occurred due to the negligence of the respondents was upon the appellants. However, no sufficient evidence to support the appellants' case on a balance of probabilities was provided. The appellants ought to have called the investigating officer who visited the scene to produce the investigation file. As such, I find that the appellants failed to prove their case on a balance of probabilities.
28. Regarding the assessment of damages, the trial court did not assess any damages, for the reason that it had dismissed the suit. That was manifestly erroneous as was espoused in the case of *Frida Agwanda & Ezekiel Onduru Okech vs Titus Kagichu Mbugua* [2015] eKLR where the court held that:-
- Indeed even when the learned magistrate dismissed the claim, in such a case, he should have assessed damages, notwithstanding the dismissal. That now will be done by this court, for convenience, instead of returning the file to the lower court for assessment.
29. Similarly in *Lei Masaku vs Kaplana Builders Ltd* [2014] eKLR it was observed thus:-
- It has been held time and again by the Court of Appeal that the court of first instance assess damages even if it finds that liability has not been established. To have casually dismissed the suit and failed to address that issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the appellate court need to know the view by the court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behooves this court to assess quantum.
30. I will therefore proceed to assess damages as required by the law.

#### **Damages under the *Law Reform Act*.**

31. 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.
32. In the instant case, it is not disputed that the deceased died on 15/9/2018 which was the same day of the accident. Given that the sums awardable under this head range from Kshs. 10,000/- to Kshs.



100,000/- from past authorities. The sum of Kshs. 50,000/- would be reasonable compensation for pain and suffering and Kshs. 100,000/- for loss of expectation of life, and I would so hold.

### **Damages under the Fatal Accidents Act**

#### **Loss of Dependency**

33. 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.

34. The deceased was 32 years old at the time of his death. The 2<sup>nd</sup> appellant stated in her pleadings that she was married to the deceased and were blessed with one child. The appellants further indicated that the deceased's father and mother were his dependents before he died. Additionally, the appellants stated that the deceased was employed as a butcher earning Kshs. 400/- per day and Kshs. 15,000/- per month.

35. Dependency is a matter of fact and must be proved by evidence as was held in *Abdalla Rubeya Hemed vs Kayuma Mvurya & Another* [2017] eKLR as follows:-

Dependency is always a matter of fact to be proved by evidence. It is not that the deceased earned a sum and therefore must have devoted a portion or part of it to his dependence. Rather the claimant must give some evidence to show that he was dependent upon the deceased and to what extent.

36. Further in *Rahab Wanjiru Nderitu vs Daniel Muteti & 4 Others* [2016] eKLR the court held that:-

The plaintiff must prove dependency. If a wife, she must prove marriage to the deceased either by customary marriage or by production of marriage certificate or by any other acceptable manner, by a letter from the Chief confirming that the plaintiff is a wife of the deceased and that the children are children of the deceased in the absence of birth certificates or any other documents to confirm the same.

37. From the record it is evident that the deceased died at the age of 32 years as provided in the death certificate. The appellants produced a letter from the chief to support his claim of dependency. The same letter was used to apply for letters of grant ad litem in Succession Cause No. 116 of 2021 Thika. It is thus my considered opinion that the appellants proved dependency and that the ratio of 2/3 is applicable.

38. The deceased died at the age of 32 years and the appellants proposed in their submissions that the court adopt a multiplier of 30 years. Relying on the cases of *Mellbrimo Investment Company Limited vs Dinah Kemunto & Francis Sese* (Suing as personal representative of the Estate of Stephen Sinange alias Reuben Sinange (Deceased) [2022] eKLR and *Bash Hauliers vs Dama Kalume Karisa & Another* [2020] eKLR where the deceased died at the age of 35 years and 32 years respectively, the courts adopted a multiplier of 20 years, this court adopts a similar multiplier of 20 years.

39. Although the 2<sup>nd</sup> appellant argued that the deceased was a butcher and used to earn an income of Kshs. 400/- per day, she did not produce any proof to that effect. Furthermore, PW4 the deceased's employer testified that he paid the deceased Kshs. 400/- per day, but he did not provide any documentary evidence to support the same. Therefore in the absence of evidence of the deceased's earnings, the trial court ought to have applied the minimum wage. This principle was stipulated in the case of *Petronila Muli vs Richard Muindi Savi & Catherine Mwendu Mwindu* [2021] eKLR where the court stated:-



On the question of the multiplicand adopted by the trial court using a minimum wage guideline, it is apparent that the deceased was engaged in informal employment where it is difficult to tell the actual regular income. In such circumstances, the legal position is to adopt the minimum wage guideline as a guiding principle in assessing loss of income.

40. The deceased died on 15/9/2018 and thus the applicable guidelines are as per the Regulation of Wages (General) (Amendment) Order, 2018. The appellants led evidence that the deceased was a butcher and therefore we can classify him as a general labourer. From the death certificate, the deceased resided at Kimandi which falls under the column for “all other areas”. The minimum statutory wage for a general labourer was Kshs. 7240.95/- as per the Regulation of Wages (General) (Amendment) Order, 2018. Accordingly, the courts adopts a multiplicand of Kshs. 7,240.95/-. Therefore the loss of dependency is computed as follows:-

**Kshs. 7,240.95/- x 20 x 12 x 2/3 = Kshs. 1,158,552/-.**

41. Out of the appellant’s claim for special damages in the sum of Kshs. 147,155/-, the total amount of Kshs. 147,155/- was proved by way of receipts. On the issue of the revenue stamp, the cases of Benjamin Muela Kimono vs Daniel Kipkirong Tarus & Another [2011] eKLR and Joseph Kimani & Another vs James Kangara Kahanya [2017] eKLR, both courts held that it is the duty of the receiver of the money who has the duty to affix the revenue stamps, not the payee who cannot be penalized for omissions of the receiver.
42. Moreover the Court of Appeal in Paul N. Njoroge vs Abdul Sabuni Sabonyo [2015] eKLR stated that before holding a document inadmissible in evidence on the sole ground of it was not properly stamped. The court ought to have given an opportunity to the party producing it to pay the stamp duty and penalty. Thus it is my considered view that the sum of Kshs. 147,155/- was pleaded and proved.

### **Conclusion**

43. Consequently, it is my finding that this appeal lacks merit and is hereby dismissed with costs to the respondents.
44. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 7<sup>TH</sup> DAY OF MARCH 2024.**

**F. MUCHEMI**

**JUDGE**

