



REPUBLIC OF KENYA



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Cebit Cargo Ltd & another v Kivuva & another (Suing as the Personal Representative of the Late Ndolo Makumi - Deceased) (Civil Appeal E013 of 2022) [2024] KEHC 6807 (KLR) (5 June 2024) (Judgment)

Neutral citation: [2024] KEHC 6807 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E013 OF 2022
GMA DULU, J
JUNE 5, 2024**

BETWEEN

CEBIT CARGO LTD 1ST APPELLANT

JOSHUA MBITHI NGUTU 2ND APPELLANT

AND

AGNES KAVINDU KIVUVA 1ST RESPONDENT

DENNIS NDOLO KIVUVA 2ND RESPONDENT

**SUING AS THE PERSONAL REPRESENTATIVE OF THE LATE NDOLO
MAKUMI - DECEASED**

*(From the Judgment in Civil Case No. 241 of 2019 delivered on 28th
February 2022 by Hon. A. M. Obura (Mrs.) (CM) at Voi Law Courts)*

JUDGMENT

1. In a judgment delivered on February 28, 2022, the learned trial Magistrate in Voi CMCC No. 241 of 2019 apportioned liability at 10%:90% based on the determination in Voi CMCC No. 243 of 2019 *Naomi Njeri Wanjiru =Versus= Cebit Cargo Ltd & Another* and concluded as follows:-

“Reasons wherefore I hereby enter judgment for the plaintiffs as against the defendants jointly and severally:-

Pain and suffering Kshs. 20,000/=

Loss of expectation of life Kshs. 100,000/=

Loss of dependency Kshs. 2,512,389/60



Special damages Kshs. 69,700/=

Sub-total Kshs. 2,702,089/60

Less 10% contribution Kshs. 270,208/96

Total Kshs. 2,431,880/64 (Two million four hundred and thirty one thousand, eight hundred and eighty shillings and sixty-four cents only.”

The plaintiffs are also awarded costs of the suit and interest thereon at court rates. It is so ordered.”

2. The issue of liability on appeal has already been determined in Voi High Court Civil Appeal No. E006 of 2022, as 10%:90% This court upholds the above apportionment of liability in this appeal. What remains is the determination of quantum of damages and costs.
3. It is however fair and proper however to reproduce all the grounds of appeal herein filed by Musungu Pekke & Company Advocates for the appellants which are on both liability and quantum of damages as follows:-
 1. That the learned Magistrate erred in law and fact in finding that the 2nd appellant was liable in causing the accident to the extent of 90% in respect of the road traffic accident which occurred on March 19, 2017 at Manyani area along Nairobi-Mombasa road involving the 1st appellant’s motor vehicle registration No. KAW xxxx/ZC 55xx Mercedes Axor that was being driven by the 2nd appellant and motor vehicle registration No. KCT xxxx Toyota Harrier that was being driven by one Martin Mbuta Mutua, now deceased when this was not obviously the case given the circumstances leading to the accident.
 2. That the learned Magistrate erred in law and fact by failing to analyse facts and circumstances leading to the road traffic accident which occurred on March 19, 2017 which greatly pointed to huge contributory negligence on the part of the driver of motor vehicle Reg. No. KCT xxxx Toyota Harrier and failed to apportion liability in the ratio of 50:50 as between the driver of motor vehicle Reg. No. KCT xxxx Toyota Harrier and the 2nd appellant. The particulars of negligence against the driver of motor vehicle Reg. No. KCT xxxx Toyota Harrier were:
 - i. Failing to slow, swerve, properly control motor vehicle Reg. No. KCT xxxx Toyota Harrier or take any evasive measures to avoid the accident and or mitigate the injuries on a section of the road that was straight, flat and with no corners.
 - ii. Driving motor vehicle Reg. No. KCT xxxx Toyota Harrier at high speed to the extent that he was unable to slow down and stop to avoid colliding head on with motor vehicle Reg. No. KAW xxxx/ZC/55xx that was being driven by the 2nd appellant.
 - iii. Failing to heed the warning signs of the driver for motor vehicle Reg. No. KAW xxxx/ZC/55xx which included hooting, flashing lights to alert him of the impending danger.
 - iv. Driving motor vehicle Reg. No. KCT xxxx Toyota Harrier at high speed to the extent that after carelessly colliding with motor vehicle Reg. No. KAW xxxx/ZC/55xx that was not in motion following a sudden engine failure, the said motor vehicle Reg. No. KCT xxxx Toyota Harrier was pushed backwards by about 25 meters after the impact, a clear indication that it was being driven at high speed.
 - v. Driving motor vehicle Reg. No. KCT xxxx Toyota Harrier while tired, fatigued and physically exhausted given the undisputed fact that the occupants of the said



motor vehicle, including its driver had travelled on the night of March 17, 2017 from Mombasa to Kitui and arrived in Kitui on March 18, 2017 to attend a wedding ceremony. This is a clear indication that they travelled at night from Mombasa to Kitui, attended the wedding ceremony during the day on March 18, 2017 and travelled back from Kitui to Mombasa in the night of March 18, 2017 until the early morning hours of March 19, 2017 when the accident occurred.

- vi. Wilfully carrying excess passengers beyond the capacity of 5 passengers in motor vehicle Reg. No. KCT xxxx Toyota Harrier.
3. That the learned Magistrate erred in law and fact by failing to hold that physical exhaustion, failing to heed the warning signs by the 2nd appellant on the impending danger, failing to stop, swerve or control his motor vehicle to avoid the accident, driving at high speed and careless driving on the part of the driver of motor vehicle Reg. No. KCT xxxx Toyota Harrier were the major factors which made the late Martin Mbuta Mutua unable to carefully drive and control motor vehicle Reg. No. KCT xxxx Toyota Harrier thus he was liable for the road traffic accident which occurred on 19th March 2017 to the extent of 50% in contributory negligence and liability.
4. That the learned Magistrate erred in law and fact by awarding excessive arbitrary and unjustifiable amount of quantum of loss of dependency amounting to Kenya Shillings Two Million Five Hundred and Twelve Thousand Three Hundred Eighty Nine and Sixty Cents (2,512,389.60/=) only when the same was not proved at all as it is required by law.
5. That the learned Magistrate erred in law and fact by awarding the sum of Kshs. 2,512,389.60/= as quantum on loss of dependency when employment or monthly income of the deceased was not proved at trial on the balance of probability as it is required by law.
6. That by awarding the sum of Kshs. 2,512,389.60/= as loss of dependency for the estate of the deceased, the learned Magistrate arbitrary and unreasonably exercised her judicial discretion as no factual or documentary evidence had been presented before the trial court by the respondents to arrive at such an award.
7. That the learned Magistrate erred in law and fact by failing to appreciate and apply the principles set in law of what constitutes an income of an individual or a company known as under the *Income Tax Act* whereby no tax returns were produced in court by the respondents to prove the deceased's net income.
8. That the learned Magistrate erred in law and fact in awarding special damages of Kshs. 69,700/= that was not specifically pleaded and proved as it is required by law.
9. That the learned Magistrate erred in law and fact by disregarding the submissions and authorities cited by the appellants in support of their defence case and proceeded to award judgment in favour of the respondents.
10. That the quantum of damages is excessive, inordinately high and erroneous estimate of the damages awarded to the respondents with due regard to the weight and circumstances of the case.
11. The appellants shall have leave of court to amend, add, alter and/or omit any ground on or before hearing hereof.



4. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Musungu Pekke & Company Advocates for the appellants, as well as the submissions filed by Gitonga Muriuki & Company Advocates for the respondents.
5. This being a first appeal, I have a duty to reconsider all the evidence on record, re-evaluate the said evidence and come to my own findings bearing in mind though that I did not have the opportunity to hear and see witnesses testify to determine their demeanour and give due allowance for that – see *Selle =Versus= Associated Motor Boat Company Ltd* (1968) EA 132.
6. These appeals being in a series, I am informed that this appeal No. E006 of 2022 is the lead file. I note that in the other five appeals in the series also, the submissions were on both quantum of damages awarded, and on liability.
7. As I have stated earlier in this judgment, I will however, deal only with quantum of damages and costs, as liability has been determined at 10%:90% in Voi High Court Civil Appeal E006 of 2022.
8. This being a civil case, the standard of proof on both liability and is on the balance of probabilities, see the English case of *Miller =Versus= Minister of Pensions* (1942) 2 ALL ER 372. Thus the respondents had to prove the quantum of damages on the balance of probabilities.
9. In proving their case on quantum of damages at the trial in Voi CMCC No. 241 of 2019 the plaintiffs (now respondents) called one witness PW1 Agnes Kavindu Kivuva mother of the deceased who was her 4th born son. She testified that the deceased was 24 years at the time of the fatal accident. She stated that he was in the clearing and forwarding business and assisted her financially in upkeep and payment of school fees.
10. In deciding on the issue quantum of damages awarded, I have to remind myself that assessment of damages is an exercise of discretionary power by a trial court and that an appellate court will be slow to interfere unless certain parameters are satisfied. In this regard, I am of the view that it will suffice if I cite only the case relied upon by the appellants counsel herein – *Kemfro Africa Ltd & Another =Versus= Lubia & Another* (1985) eKLR wherein it was stated as follows:-

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal for Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”
11. I bear in mind in the submissions to this court on appeal, the appellant’s counsel disagreed with the multiplier of 36 years used by the trial court and proposed a multiplier of 30 years to determine loss of dependency.
12. I note that in the judgment delivered on February 28, 2022, the trial Magistrate considered separately each head of award for damages. Having considered the evidence, I find no error committed by the trial court in assessing the quantum of damages for pain and suffering and for loss of expectation of life. I uphold the same.
13. With regard to the award for loss of dependency, the trial Magistrate applied the minimum wage and a multiplier of 36 years.



14. In my view, since the general retirement age in Kenya now is 60 years, and since assessment of damages is an exercise of the court's discretionary power, and in the absence of any indication of ill health, of the deceased, this court cannot find fault in the Magistrate's decision to use a multiplier of 36 years which presumes a working span upto 60 years for a 24 years old young man. I will uphold the award for loss of dependency.
15. As for special damages, I find no fault or error committed by the trial court, as the Magistrate awarded what was pleaded and proved on the balance of probabilities.
16. I thus find no merits in the appeal, which is hereby dismissed. The appellants will pay the respondents costs of appeal, jointly and severally.

DATED, SIGNED AND DELIVERED THIS 5TH DAY OF JUNE 2024 IN OPEN COURT AT VOI VIRTUALLY.

GEORGE DULU

JUDGE

In the presence of:-

Alfred/Trizah – Court Assistants

Mr. Were holding brief for Mr. Musungu for the appellant

Mr. Muriuki and Mr. Mbithi for the respondent

