



**Cebit Cargo Ltd & another v Mainga (Suing as the Personal Representative of the Late Charles Mainga Makumi - Deceased) & another (Civil Appeal E014 of 2022) [2024] KEHC 6797 (KLR) (5 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6797 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
CIVIL APPEAL E014 OF 2022  
GMA DULU, J  
JUNE 5, 2024**

**BETWEEN**

**CEBIT CARGO LTD ..... 1<sup>ST</sup> APPELLANT**

**JOSHUA MBITHI NGUTU ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ELIZABETH WAKI MAINGA (SUING AS THE PERSONAL REPRESENTATIVE OF THE LATE CHARLES MAINGA MAKUMI - DECEASED) ..... 1<sup>ST</sup> RESPONDENT**

**FRANCIS MAKUMI MUSAU ..... 2<sup>ND</sup> RESPONDENT**

*(From the Judgment in Civil Case No. 240 of 2019 delivered on 17th February 2022 by Hon. A. M. Obura (Mrs.) (CM) at Voi Law Courts)*

**JUDGMENT**

1. In a judgment delivered on 28<sup>th</sup> February 2022, the learned trial Magistrate in Voi CMCC No. 240 of 2019 apportioned liability 10%:90% in line with the test case Voi CMCC No. 243 of 2019 Naomi Njeri Wanjiru =Versus= Cebit Cargo Ltd, and concluded as follows:-

Reasons wherefore, I hereby enter judgment for the Plaintiff's as against the defendants jointly and severally as follows:-

Pain and suffering Kshs. 20,000/=

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

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

General 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. Aggrieved by the decision of the trial court, the two appellants, who were the defendants, have come to this court on appeal through counsel Musungu Pekke & Company Advocates, on the following grounds:-
  1. That the learned Magistrate erred in law and fact in finding that the 2<sup>nd</sup> appellant was liable in causing the accident to the extent of 90% in respect of the road traffic accident which occurred on 19<sup>th</sup> March 2017 at Manyani area along Nairobi-Mombasa road involving the 1<sup>st</sup> appellant’s motor vehicle registration No. KAW 432E/ZC 5556 Mercedes Axor that was being driven by the 2<sup>nd</sup> appellant and motor vehicle registration No. KCT 189T 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 19<sup>th</sup> March 2017 which greatly pointed to huge contributory negligence on the part of the driver of motor vehicle Reg. No. KCT 189T Toyota Harrier and failed to apportion liability in the ratio of 50:50 as between the driver of motor vehicle Reg. No. KCT 189T Toyota Harrier and the 2<sup>nd</sup> appellant. The particulars of negligence against the driver of motor vehicle Reg. No. KCT 189T Toyota Harrier were:
    - i. Failing to slow, swerve, properly control motor vehicle Reg. No. KCT 189T 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 189T 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 432E/ZC/5556 that was being driven by the 2<sup>nd</sup> appellant.
    - iii. Failing to heed the warning signs of the driver for motor vehicle Reg. No. KAW 432E/ZC/5556 which included hooting, flashing lights to alert him of the impending danger.
    - iv. Driving motor vehicle Reg. No. KCT 189T Toyota Harrier at high speed to the extent that after carelessly colliding with motor vehicle Reg. No. KAW 432E/ZC/5556 that was not in motion following a sudden engine failure, the said motor vehicle Reg. No. KCT 189T Toyota Harrier was pushed backward 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 189T 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 17<sup>th</sup> March 2017 from Mombasa to Kitui and arrived in Kitui on 18<sup>th</sup> March 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 18<sup>th</sup> March 2017 and travelled back from Kitui to Mombasa in the night of 18<sup>th</sup> March 2017 until the early morning hours of 19<sup>th</sup> March 2017 when the accident occurred.



- vi. Wilfully carrying excess passengers beyond the capacity of 5 passengers in motor vehicle Reg. No. KCT 189T 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 2<sup>nd</sup> 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 189T Toyota Harrier were the major factors which made the late Martin Mbuta Mutua unable to carefully drive and control motor vehicle Reg. No. KCT 189T Toyota Harrier thus he was liable for the road traffic accident which occurred on 19<sup>th</sup> 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 Ninety Six and Sixty Cents (2,512,396.60/=) 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 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 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 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. That the appellants shall crave leave of court to amend, add, alter and/or, omit any ground on or before hearing hereof.
3. 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.
4. 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*.



5. These appeals being in a series, I am informed that appeal No. E006 of 2022 is the lead file. I note that in this and the other five appeals in the series, the submissions were on both quantum of damages awarded, and on liability.
6. This court has however already determined the issue of liability at 10%:90% in the lead file Voi HCCA No. E006 of 2022, and I adopt liability of 10%:90% in this file also. Thus my substantive considerations in this appeal will be limited to the assessment of quantum of damages and costs.
7. This being a civil case, the standard of proof was on the balance of probabilities, see the English case of *Miller =Versus= Minister of Pensions (1942) 2 ALL ER 372*.
8. In proving their case at the trial in Voi CMCC No. 240 of 2019 the plaintiffs (now respondents) called only one witness PW1 Francis Makumi Musau, the father of Charles Maingi Makumi the deceased, whose evidence was that the deceased was his last born son.
9. It was his evidence that the deceased was an unmarried young man who worked in clearing and forwarding business at Mombasa employed by a brother for Kshs. 30,000/= per month. He however did not have an employment letter or port pass. It was his evidence that deceased sent him 3,000/= per month, and adopted and relied upon his witness statement, and other documents filed. That was the plaintiff evidence.
10. Since this case was in a series of six (6), the defendants and trial Magistrate relied on the defence evidence tendered Joshua Mbithi Ngutu (DW1) who testified in the test case, subject of Voi HCCA E006 of 2022.
11. Coming now to the 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 with that exercise of discretion 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.”
12. On appeal herein, counsel for the appellant has proposed computation of damages as follows:-
 

Special damages Kshs. 69,700/=

Pain and suffering Kshs. 20,000/=

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

Loss of dependency Kshs.2,093,658/=

(Kshs. 17,447.15 x 12 months x 30 years x 1/3)

Sub-total Kshs. 2,084,280.80/=

Less 50% liability Kshs.1,141,679/=
13. On my part, I note that in the judgment delivered herein on 28<sup>th</sup> February 2022, the trial Magistrate considered separately each head of award for damages. In that regard, I find no error committed by the



trial court in assessing the quantum of damages for pain and suffering and for loss of life expectancy. I uphold the same.

14. With regard to the award for loss of dependency, the trial Magistrate considered the oral evidence of PW1 on the income of the deceased, that deceased was a clearing and forwarding operative. That he was employed by his brother also deceased in the same accident at a monthly salary of Kshs. 30,000/=. No documentary evidence of employment and income was tendered. It is agreed even in the submissions of appellant's counsel in this appeal that the deceased was aged 24 years. He was also unmarried.
15. After evaluating the evidence, the Magistrate used the minimum wages guidelines and applied the following method of arriving at loss of dependency – Kshs.  $17,447/15 \times 12 \text{ months} \times 36 \text{ years} \times 1/3 = \text{Kshs. } 2,512,389/60$  subject to 10% contribution. The difference with the appellant's position is thus only the number of years to be used in assessing this head of damages.
16. In my view, taking into account the fact that the general retirement age in Kenya now is 60 years, and the fact that the deceased was a young man with no indication of ill health, the trial Magistrate exercised the court's discretion in assessing damages herein reasonably and within acceptable parameters. I will not disturb the award for loss of dependency.
17. As for special damages, I find no fault of the trial court, as the Magistrate awarded what was pleaded and proved on the balance of probabilities.
18. I thus find no metis in the appeal, which is hereby dismissed. I award costs of the appeal to the respondent payable by the appellants jointly and severally.

**DATED, SIGNED AND DELIVERED THIS 5<sup>TH</sup> 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

