



Cebit Cargo Ltd & another v Ndandi (Suing as the personal representative of the Late Martin Mutua Mbuta (Deceased) (Civil Appeal E010 of 2022) [2024] KEHC 6908 (KLR) (5 June 2024) (Judgment)

Neutral citation: [2024] KEHC 6908 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E010 OF 2022
GMA DULU, J
JUNE 5, 2024**

BETWEEN

CEBIT CARGO LTD 1ST APPELLANT

JOSHUA MBITHI NGUTU 2ND APPELLANT

AND

ROSE MBULU KIVUVA MUSENYA NDANDI (SUING AS THE PERSONAL REPRESENTATIVE OF THE LATE MARTIN MUTUA MBUTA (DECEASED) RESPONDENT

(From the Judgment in Civil Case No. 238 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 28th February 2022, the learned trial Magistrate in Voi CMCC No. 238 of 2019 apportioned liability at 10%:90% and concluded as follows:-

“Reasons wherefore, I hereby enter judgment for the plaintiff’s against the defendants jointly and severally as follows:-

- a. Pain and suffering Kshs. 20,000/=
 - b. Loss of expectation of life Kshs. 100,000/=
 - c. Loss of dependency Kshs. 2,512,389/60
 - d. Special damages Kshs. 10,700/=
- Sub-total Kshs. 2,643,089/60



Less 10% contribution Kshs. 264,308/96

Total Kshs. 2,378,780/64

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

2. Aggrieved by the decision of the trial court, the two appellants, who were the defendants in the trial court, have come to this court on appeal through counsel Musungu Pekke & Company Advocates, on the following grounds:-

1. That the trial 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 19th March 2017 at Manyani area along Nairobi-Mombasa road involving the 1st appellant’s motor vehicle registration No. KAW 432E/ZC 5556 Mercedes Axor that was being driven by the 2nd 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 19th 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 2nd 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 2nd 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 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 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 17th March 2017 from Mombasa to Kitui and arrived in Kitui on 18th 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 18th March 2017 and travelled back from Kitui to Mombasa in the night of 18th March 2017 until the early morning hours of 19th 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 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 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 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 on loss of dependency amounting to Kenya Shillings Two Million Five Hundred Twelve Thousand Three Hundred and Eighty Nine (2,512,389) 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/= as quantum on loss of dependency when employment or monthly income of the deceased was not proved at the trial on the balance of probability as is required by law.
 6. That by awarding the sum of Kshs. 2,512,389/= as loss of dependency for the estate of the deceased, the learned Magistrate arbitrarily 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 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.
 9. 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.
 10. 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 same and come to my own findings and conclusions 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*.



5. These appeals are in a series and I am informed that the lead file is appeal No. E006 of 2022 in which liability has already been addressed and determined by the court. However, this appeal also has grounds on both liability and quantum of damages.
6. This court having determined the liability at 10%:90% in the lead file Voi HCCA No. E006 of 2022, I adopt liability at 10%:90% in this appeal also. Thus my substantive considerations in this appeal will be limited to assessment of quantum of damages and costs.
7. The standard of proof in civil cases has consistently been reiterated by courts which is on the balance of probabilities, see the case of *Miller =Versus= Minister Pensions (1942) 2 ALL ER 372*. Thus the respondents who were the plaintiffs had the burden of proving the damages on the balance of probabilities.
8. IN proving their case at the trial in Voi CMCC No. 238 of 2019 the respondents called two (2) witnesses PW1 Musenya Ndandi wife of the deceased and PW2 Rose Mbulu Kivua also a wife of the deceased. On their part the appellants called one witness DW1 the driver of trailer KAW 432E/ZC 5556, who was also 2nd defendant and 2nd appellant herein.
9. PW1 Musenya Ndandi testified in evidence that the deceased was her husband who was involved and died in a motor traffic accident on 19th March 2017. That he had two wives and children, and that he was driving a Toyota Harrier vehicle when the accident occurred. That the witness was the first wife. It was her evidence that deceased had four children, and that though employed by Ndolo Makumi since 2011, he had no employment letter. She adopted her witness statement.
10. PW2 was Rose Mbulu Kivuva whose evidence was that they obtained letters of administration for the deceased with her co-wife, and that she was the second wife with 2 children. In cross-examination, she stated that her husband was driving a motor vehicle carrying 6 passengers, and that he was employed by Mr. Makumi at Kshs. 20,000/= per month. She however had no documents on the employment. She stated that the deceased was provider of the family.
11. On their part, the respondents called one witness DW1 Joshua Mbithi Ngutu the trailer driver of KAW 432E/ZC 5556 carrying container of 100 tonnes. He testified that the vehicle collided with a Toyota Harrier motor vehicle carrying 6 passengers instead of the authorized 5 passengers. He relied on his statement. He testified that the accident occurred on 19th March 2017 when he was driving from Mombasa.
12. In cross-examination, he stated that the vehicle he drove belonged to Cebit Cargo Ltd, but that he was not given written authority to testify for the company, and that the accident occurred on the highway ahead of Manyani Prison at 3:30a.m, and that police were notified. He agreed that he had testified in a traffic case. He confirmed that he encountered a pot hole and swerved right. He agreed that when he wanted to swerve back to the left, the engine went off, and that he switched on full lights, and that the accident occurred on the lane of the vehicle coming from Nairobi.
13. He confirmed also he was charged with a traffic offence of causing death by dangerous driving and was fined a total of Kshs. 950,000/= that is Kshs. 150,000/= for each count of causing death by dangerous driving, and Kshs. 50,000/= for driving a defective motor vehicle. He maintained that liquor bottles were found in the Harrier vehicle though he did not have photos of the same.
14. In re-examination, he maintained that the Harrier vehicle should only have carried 2 people in front and 3 people at the back. He stated that as he was carrying a heavy container, he could not swerve back to his side of the road abruptly.



15. 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 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.”

16. I note that in this appeal, the appellant’s counsel proposed in submissions quantum of damages as under:-

Special damages Kshs. 10,200

Pain and suffering Kshs. 20,000

Loss of expectation of life Kshs. 100,000

Loss of dependency Kshs. 1,954,080

Sub Total Kshs. 2,084,280/80

Less 50% liability Kshs. 1,042,140/40

17. Counsel for the respondents, on the other hand, has argued that this court should uphold the trial court’s finding on quantum of damages.

18. With regard to the specific amounts of awards assessed by the trial court under the various heads, I find nothing which can persuade me to vary the figure of Kshs. 20,000/= for pain and suffering and Kshs. 100,000/= for loss of life expectancy under the [Law Reform Act](#), as the figures are within range of similar awards based on the facts and circumstance of this case.

19. With regard to loss of dependency, I note that the trial court took into account that the deceased, alleged to be a driver, had no documents of employment. The Magistrate therefore went by the minimum wage in Mombasa as suggested by counsel for the appellants thus Kshs. 17,447/15 per month. The appellant’s counsel does not appear to have an issue with the monthly salary figure and the dependency ratio.

20. Appellant’s counsel however, appears to be concerned about the multiplier of 18 years used by the Magistrate and suggests a multiplier of 14 years, though he also mentions 27 years.

21. In my view, for a healthy person at 42 years of age, using a multiplier of 18 years as the Magistrate did, which would translate to the retirement age of 60 years for the deceased, is not out of range, since from the evidence on record, there is nothing to suggest that the deceased was ailing, or that as a qualified driver, he would be out of employment earlier than retirement age. In any case, there is no bar for a healthy person driving for gain even after attaining the age of 60 years.

22. I thus find no misdirection or fault committed by the trial Magistrate to justify this court to interfere with the exercise of the trial court’s discretion in assessing the quantum of damages herein for loss of dependency. I uphold the award.



23. As for special damages also, I find no fault committed by the trial court, as the trial Magistrate awarded what was pleaded and proved on the balance of probabilities.
24. I thus find no merits in this appeal. I dismiss the appeal and uphold the decision of the trial court on liability as well as quantum of damages. I award the costs of appeal to the respondents against the appellants 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 Musungu for appellant

Mr. Muriuki and Mr. Mbithi for respondent

