



**Muta v Nyambura & another Suing as the personal representatives
of the Estate of Kenneth Waweru - Deceased) (Civil Appeal
E010 of 2023) [2024] KEHC 7337 (KLR) (19 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7337 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E010 OF 2023**

JM OMIDO, J

JUNE 19, 2024

BETWEEN

BARACK BUTALA MUTA APPELLANT

AND

**NANCY NJERI NYAMBURA & FRANCIS WAWERU MWANGI (SUING
AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF KENNETH
WAWERU - DECEASED) RESPONDENT**

*(Being an Appeal from the Judgement and Decree of Hon. J. A. Agonda Principal
Magistrate delivered on 19th December, 2022 in Ruiru CMCC No. E488 of 2022)*

JUDGMENT

1. Although this appeal, preferred by Barack Butala Muta (hereinafter referred to as “the Appellant”) is on both liability and quantum, against the judgement and decree of Hon. J. A. Agonda, Principal Magistrate rendered on 19th December, 2022 and entered in favour of Nancy Njeri Nyambura and Francis Waweru Mwangi (hereinafter referred to as “the Respondents”), I note that the parties did not address the appeal on the aspect of quantum but on liability only.
2. In the judgement, the court apportioned liability at 50%/50% and proceeded to assess damages under the following heads as stated below: Pain and suffering Kshs 50,000/- Loss of expectation of life Kshs 100,000/- Loss of dependency Kshs 828,600/- Special damages Kshs 140,550/-.
3. The grounds of appeal presented by the Appellant vide the Memorandum of Appeal 18th January, 2022 are as follows:
 - i. The Learned trial Magistrate erred in both law and fact in failing to weigh and assess the totality of the evidence adduced before her thereby coming to a wrong conclusion on the same.



- ii. The findings of the Learned trial Magistrate were based on a misapprehension of the facts and the circumstances of the case.
 - iii. The Learned trial Magistrate erred in law and in fact in failing to appreciate and critically analyze the evidence adduced by the Defendant.
 - iv. The Learned trial Magistrate erred in law and in fact in holding that the Plaintiff had proved his case on liability at 50% when there was no such proof.
 - v. The Learned trial Magistrate erred in law and in fact in holding that the Plaintiff had proved his case on special damages when the same were not specifically pleaded and proved.
 - vi. The findings of the Learned trial Magistrate goes against the totality of the evidence adduced by both parties thereby coming to wrong findings on both law and fact.
4. The court directed that the appeal proceeds by way of written submissions and both parties filed their respective submissions.
 5. This being the first appellate court, I am required under Section 78 of the *Civil Procedure Act* and as was espoused in the case of *Sielle v Associated Motor Boat Co. Ltd* [1969] E.A. 123 to reassess, reanalyze and reevaluate the evidence adduced in the Magistrate's Court and draw my conclusions while bearing in mind that I did not see or hear the witnesses when they testified.
 6. In *Sielle*, Sir Clement De Lestang observed that:

“This Court must consider the evidence, evaluate it itself and draw its own conclusions, though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.

However, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
 7. Going back to the evidence before the trial court, the Respondents (the Plaintiffs in the lower court matter), presented the suit before the lower court for and on behalf of the estate of Kenneth Waweru Nyambura (Deceased).
 8. The Respondents called Police Constable Maurice Okoth of Kahawa Sukari Police Station as the first witness (PW1). In his testimony, the officer told the court that the deceased met his demise following a road traffic accident that he was involved in on 25th September, 2020 at Githurai Car Wash area along Thika Road. He explained that the deceased was riding a motor cycle which hit an unknown motor vehicle as a result of which the deceased fell on the road.
 9. Police action was taken at the scene and the file compiled and forwarded to the Office of the Director of Public Prosecutions, and was returned with the directions that the case be disposed of by way of a public inquest. As at the time of the trial before the lower court, the inquest was pending before court.
 10. On being cross examined, the witness stated that he was relying on police records, which showed that the accident occurred when the motor cycle hit an unknown motor vehicle which was only identified as a 14 seater matatu, in the center lane of the highway and that as a result the impact, the motor cycle skidded off its lane and the deceased fell off onto the Appellant's lane where the Appellant's motor



vehicle registration number KCB 756U was in motion. The officer was emphatic that the police records did not indicate if the deceased's motor cycle came into contact with the Appellant's vehicle.

11. The first Respondent (the first Plaintiff in the lower court matter) told the court that the deceased was her brother who owned motor cycle registration number KMDE 353K and worked as a boda boda rider. She was informed that the deceased had been involved in a road traffic accident on 25th September, 2020 at about 7.30am and proceeded to Kenyatta University Referral Hospital where he had been rushed to for treatment. She was informed of his demise at about 9.00am.
12. The first Respondent told the trial court that the deceased was before his demise 30 years old, of good health and earned about Kshs 5,000/- daily from his boda boda business. The amount she stated in her statement was Kshs 3,000/-. She stated that her daughter and herself depended on the deceased and that the deceased had assumed parental responsibility of her daughter and paid her school fees of Kshs 24,000/- per term and monthly rent of Kshs 30,000/. Other dependants of the deceased were his grandmother and grandfather.
13. The first Respondent blamed the driver of motor vehicle registration number KCB 756U for the accident stating that he drove recklessly, causing the accident that claimed the deceased's life. She did not witness the occurrence the accident.
14. The following documents were produced in support of the Appellants' case: Limited grant ad litem. Police abstract. Post mortem request form. Post mortem form. Acknowledgement of payment of autopsy fee. Burial permit. Deceased's certificate of death. A letter from the Chief Muguru Location dated 15th July, 2021. Copies of Respondents' national identity cards. Copy of records for motor vehicle registration number KCB 756U together with proof of payment thereof of Kshs 550/-. Court payment receipt for filing petition for letters ad litem for Kshs 770/-. Receipt for legal fees for letters ad litem for Kshs 80,000/=. Receipt for mortuary fees from Kenyatta University Funeral Home for Kshs 17,000/-. Receipt for admission and acceptance forms for bodies from Kenyatta University Funeral Home. Clearance form from Kenyatta University Funeral Home. Dispatch declaration from Kenyatta University Funeral Home. Fee structure for services at Kenyatta University Funeral Home. Receipt dated 28th September, 2021 from Amazing Funeral Services for Kshs 43,000/-. Log book for motor cycle registration number KMDE 353K. Demand letter and statutory notice.
15. The Appellant testified before the lower court that he was driving motor vehicle registration number KCB 756Q from Ruiru to Nairobi and kept to the extreme left lane, when at Githurai Car Wash area, the deceased who was riding his motor cycle in the innermost lane and in the same direction hit a matatu on his lane as a result of which the motorcycle and the deceased fell. The matatu did not stop.
16. He explained that the deceased fell on the second and third lanes while his motorcycle skidded to the lane of the Appellant. The Appellant was emphatic that his vehicle did not have any contact with the rider. He however stated that his vehicle hit the motor cycle that was skidding across in spite of his endeavors to avoid it by braking and hooting. He closed his case at that stage.
17. In the lower court's judgement, the Learned trial Magistrate framed the issues for determination and proceeded to analyze the same and reached her findings. On the basis of the material on record, the Learned trial Magistrate correctly reached the unchallenged findings that the accident in question occurred and that the Appellant was the registered owner of motor vehicle registration number KCB 756U.
18. The Appellant now appeals against both the court's finding on liability and quantum.



19. On the issue of liability, the Appellant states that the Learned trial Magistrate erred in law and in fact in failing to properly consider the evidence on record and in reaching the conclusion that the Appellant's vehicle hit the deceased and effectively reaching the determination that the Appellant bore 50% blame.
20. Police records, as presented by Police Constable Maurice Okoth in his testimony indicated that the deceased's motor cycle hit another (unknown or unidentified) motor vehicle and that as a result of the impact, the motor cycle fell onto another lane. He stated that the deceased had fallen down when the motor cycle went to the Appellant's lane. He further stated when he was cross examined that "the motor cycle skidded to the extreme left lane where it was hit by the subject motor vehicle". The witness added that nothing in the police records indicated that there was contact between the deceased and the Appellant's vehicle.
21. The Appellant, just like Constable Okoth stated that the accident first occurred on a different lane when the deceased's motor cycle hit the unknown vehicle and then spilled over to other lanes due to the impact. As such, it is clear that the Appellant was not involved in the primary event that led to the deceased's demise. What set in motion the chain of events that led to the deceased's demise was the accident between his motor cycle and the unknown vehicle. The Appellant was not involved in the same. There is no evidence that was tendered as to who was to blame for the initial events involving the matatu and the deceased.
22. Constable Okoth was clear in his evidence when cross examined that there was no evidence that the Appellant's vehicle hit the deceased. That position corroborates the Appellant's evidence that whereas his vehicle came into contact with the deceased's motor cycle which had skidded across other lanes after the impact and finally onto the Appellant's lane, the deceased was by the time of such impact on a different lane, having fallen off the motor cycle, and was therefore not hit by the Appellant's vehicle.
23. As there is consistency between the evidence of the police officer and that of the Appellant, it is my finding that the trial magistrate erred by reaching the finding that the Appellant's vehicle hit the deceased, which finding was not made on the basis of the evidence that was on record, more so considering the fact that the accident spiraled from another or other lanes, onto the Appellant's lane and that the Appellant, as I have stated above, did not participate in the events that set it in motion. I take guidance from the decision of *Mburu & 6 others v Kirubi* (Civil Appeal E246 of 2021) [2023] KEHC 3599 (KLR) (20 April 2023) (Judgment) in which L.N. Mugambi, J. stated thus:

"This court nevertheless appreciates that an appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or on a misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings." (Emphasis mine).
24. It is to be noted that the Appellant was the only witness who was at the scene and there is no reason given by the trial court as to why his evidence was not believed.
25. In civil proceedings, the standard of proof is on a balance of probabilities and the burden of proof lies on the person who makes the allegations against another. The Respondents pleaded and listed particulars of negligence against the Appellant but in my view failed to discharge the burden as there is no material to show that the accident was caused by the Appellant or that he contributed to the same in any way, as there is nothing to show that he hit the deceased or caused his death.



26. On the issue of quantum, I take guidance from the case of *Kemfro Africa Ltd & another v A M Lubia & another* [1982-1988] KAR, where the Court of Appeal held:

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low”

27. There is also the case of *Kigaraari v Aya* [1982-1988] 1KAR 768 where the court held as follows:

“Damages must be within the limits set out in decided cases and also within the limits the Kenyan economy can afford. Large awards are inevitably passed on to members of public, the vast majority of whom cannot afford the burden in the form of increased insurance and increased fees.”

28. In *Charles Oriwo Odeyo v Apollo Justus Andabwa & another* [2017] eKLR the court held:

“On the issue of damages, it is settled that the award of damages is within the discretion of the trial court and the Appellate court would only interfere on the particular grounds. These grounds were and are;

- (a) that the court acted on wrong principles or that the award is so excessive or so low that no reasonable tribunal would have awarded, or
- (b) that the court has taken into consideration matters which it ought not to have or left out matters it ought to have considered and in the result arrived at wrong decision. (See *Butler v Butler* [1984] KLR 225).

The assessment of damages in personal injury cases by court is guided by the following principles: -

- 1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.
- 2) The award should be commensurable with the injuries sustained.
- 3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.
- 4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.
- 5) The awards should not be inordinately low or high (See *Boniface Waiti & another v Michael Kariuki Kamau* [2007] eKLR.”

29. The jurisprudence provided by the decisions above is that although the award of damages is within the discretion of the trial court, there are grounds on which an appellate court can interfere with the assessment by the trial court.

30. However, as stated above, the awards made in the judgement rendered by the Learned trial Magistrate were not challenged or in any way addressed in the submissions filed and I have no reason, in the circumstances to interfere with the findings that the trial court reached on the same.



31. In the result, I allow the appeal and set aside the finding of the trial court on liability at 50%/50% and substitute the same with a finding that liability as against the Appellant (the Defendant in the lower court) was not proved on a balance of probabilities and that the suit in the lower court stands dismissed with costs.

32. The Appellant will have the costs of this appeal.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 19TH DAY OF JUNE, 2024.

JOE M. OMIDO

JUDGE

For Appellant:Mr. Ochieng’.

For Respondents:Mr. Olunga.

Court Assistant:Ms. Njoroge.

