



**Mugo & another (Suing as Legal Administrators of the Estate of Paul Mugo Muthoni - Deceased)  
v Njoroge (Civil Appeal E099 of 2022) [2024] KEHC 6743 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6743 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CIVIL APPEAL E099 OF 2022**

**GL NZIOKA, J**

**JUNE 6, 2024**

**BETWEEN**

**JANE WANJA MUGO ..... 1<sup>ST</sup> APPELLANT**

**SAMUEL NDUNGU MUGO ..... 2<sup>ND</sup> APPELLANT**

**SUING AS LEGAL ADMINISTRATORS OF THE ESTATE OF PAUL MUGO  
MUTHONI - DECEASED**

**AND**

**PETER NJIHIA NJOROGE ..... RESPONDENT**

*(Being an appeal against the decision of Hon. Daffline Nyaboke  
Sure (SRM) delivered on 23<sup>rd</sup> November 2022 in Senior  
Principal Magistrate Civil Case No. E062 of 2022 at Engineer)*

**JUDGMENT**

1. By a plaint dated 11<sup>th</sup> April 2022 the plaintiffs (herein “the appellants”) sued the defendant (herein “the respondent”) seeking for judgment against the respondent for:
  - a. Damages under the *Fatal Accidents Act* (Cap 32) Laws of Kenya and damages under the *Law Reform Act* (Cap 26) Laws of Kenya.
  - b. Special damages of Kshs. 169, 550
  - c. Costs and interest of the suit.
  - d. Any other relief that the Honourable court shall find fit and just to grant.
2. The appellants case is that on 24<sup>th</sup> November, 2021 the deceased was lawfully riding motorcycle registration No. KMFB 215S at Lexo area along the Flyover-Njabini road when he was involved in



- a road traffic accident with motor vehicle registration No. KCD 753E owned and driven by the respondent.
3. That as a result of the accident the plaintiff deceased sustained fatal injuries. The appellants attributed the cause of the accident to the negligence of the respondent. That, the respondent was negligent by driving the motor vehicle without due care and attention, proper look out for other users, at excessive speed, overtaking carelessly without ascertaining it was safe to do so, that the road was clear before overtaking, failing to serve, control and/or brake to avoid the accident, and driving a defective vehicle.
  4. However, the respondent filed a statement of defence dated 10<sup>th</sup> May, 2022 and denied all the allegations in the plaint, in particular having been the driver of subject vehicle No. KCD 753E on the material date. He also denies the particulars of negligence attributed to him, and/or that the accident occurred and the deceased lost his life.
  5. However on a without prejudice basis the respondent averred that, if the accident occurred which he denied, it was due to the negligence of the deceased, by failing to keep a proper look out for the road and heed to the presence other road users specifically motor vehicle registration No. KCD 753E, joining the road abruptly, driving at a high speed, carelessly, recklessly, in a zigzag manner, suddenly overtaking, encroaching into the rightful lane thus ramming into vehicle registration KCD 753E, and the deceased being ignorant of his own safety, endangering his life and that of other road users and failing to wear protective gear, reflector and helmet.
  6. The appellants however filed a reply to statement of defence dated 13<sup>th</sup> May 2022, reiterated averments in the plaint and denied all the allegation in the defence and the particulars of negligence attributed to the deceased.
  7. The case proceeded to hearing wherein the appellants' case was supported by the evidence of; PW1 No. 92288 Corporal Dorcas Kathambi who produced the police abstract which indicates that, the deceased died on the spot. That the case was still pending investigations.
  8. In cross-examination she stated that, she was the investigating officer and that, she visited the scene after ten (10) minutes of the occurrence of the accident. That she found the deceased's body in the middle of the road, while the respondent's motor vehicle was off the road on the "other side of the road".
  9. That the point of impact was on the front side of the respondent's motor vehicle. Further, the appellant emerged from Lexo Petrol station and joined the main road.
  10. However in re-examination she admitted that, she was not present when the accident occurred, and that she relied on what by standers told her on how the accident occurred and where the deceased was coming from.
  11. PW2 Samuel Mugo testified that, he alighted from the deceased's motor cycle at 5.00am at Lexo Petrol station. That, he saw an oncoming lorry. That, as he was waiting to cross the road, after the lorry passed, he saw the lorry encroached on deceased's lane and a collision occurred. That he realized the lorry had lost control and colluded with the motor cycle and deceased was lying on the road, while the lorry was in a ditch. That, the deceased died on the spot and he assisted to take the deceased's body to the mortuary
  12. In cross-examination he maintained that, the lorry went onto deceased's lane. That he is a lorry driver and knows traffic rules. Further he was able to witness the incident well as he was 15 metres away and that the lorry was being driven in speed. He denied the allegation that, the deceased joined the road from the petrol station. He stated that, the deceased's body was on the left side of the road where the collision occurred and not in the middle part.



13. PW3 Jane Wanja Mugo, the deceased's wife testified that the deceased was aged thirty one (31) years old and used to earn Kshs. 100 per day. That the marriage was blessed with one child Ann Gathoni and she and her child relied on the deceased for maintenance.
14. In cross-examination she conceded, that she did not witness the accident. That their child is 3 years old. She maintained that, the deceased was maintaining her and the child.
15. The defence case was supported by the evidence of; DW1 Daniel Kimura who was driving the subject motor vehicle registration No. KCD 753 Isuzu canter. He adopted his statement in which he stated that, the deceased joined the main road without stopping or giving way and collided with his motor vehicle. He blamed the deceased for the accident.
16. In cross-examination he stated that the deceased hit the left side of the vehicle. That, he was from the petrol station. That, he swerved onto the right and motor vehicle ended up in the ditch. That, though he braked the motor vehicle skidded to the right side of the road. He denied having driven at a high speed. That, he did not agree with what the police said and maintained he was not to blame for the accident. However, he admitted the police abstract produced indicates the case is still under investigation.
17. In re-examination he stated that, only the petrol station attendants were at the scene. That, he swerved to avoid hitting the deceased.
18. The parties filed their respective submission and by a judgment delivered on 23<sup>rd</sup> November 2022, the trial court held that, the plaintiffs had not established his case on a balance of probability and dismissed the suit with costs. Hence the appeal herein.
19. The appeal herein was canvassed vide filing of submissions. The appellants filed submissions dated; 29<sup>th</sup> June, 2023 and argued that the trial Magistrate erred in appraising the evidence before her by determining that the suit based on the evidence of PW1 Corporal Dorcas Kathambi. That, PW1 only confirmed the occurrence of the accident as she visited the scene ten (10) minutes after the accident occurred and was informed by by-standers how the accident occurred.
20. Further, PW1's evidence was purely hearsay as she did not produce a sketch of the accident or the final investigation report and therefore inadmissible.
21. The appellants faulted the trial Magistrate for not according more weight to the evidence of PW2 Samuel Mugo who was a direct eye witness and whose credibility was not questioned, as opposed to PW1 Corporal Kathambi and relied on the case of; Ann Njeri Njoroge & another vs New Kenya Creameries Coopertave Limited [2018] eKLR.
22. The appellants submitted that PW2 Samuel Mugo had been dropped by the deceased just before the accident and witnessed the accident from fifteen (15) meters away as he was waiting for the oncoming lorry to pass so he could cross the road.
23. Further, the subordinate court erred in holding that it was not clear whether or not the deceased had entered the petrol station despite the evidence on record by PW2 Mr Mugo that the deceased had fully fuelled his motorcycle the previous night. Furthermore, the deceased dropped PW2 some distance from the petrol station and was joining the road to proceed with his journey.
24. That additionally, the evidence on record shows that the subject lorry left its lane knocked down the deceased and landed in the ditch on the wrong lane. That, the allegation that the driver took evasive action was not supported by the evidence as there was no evidence of skid marks due to the application of emergency breaks.



25. The appellants submitted that the trial Magistrate erred in failing to assess damages and in the circumstance the duty fell on the appellate court. They relied on the case of John Wainaina Kagwe vs Hussein Dairy Limited [2013] eKLR where the Court of Appeal cited the decision(s) in *Selle & Another vs Associated Motor Boat Co. Ltd. & Others* (1968) EA 123 and *Williamson Diamonds Ltd vs Brown* [1970] EA 1 and stated that it is a misdirection for a court to fail to assess damages it would have awarded in the event the appeal failed as it would have assisted the appellate court have regard to the trial court's perception of damages payable in the event the appellate court disagreed and overturned the trial court's decision.
26. That the Court of Appeal further stated that, the trial court having had the opportunity to observe and see the witnesses the appellant testify, it is able to gauge his injuries and the appropriate damages awardable.
27. However, the respondent in submissions dated 17<sup>th</sup> April, 2023 argued that the trial court considered the evidence on record and the submissions by the parties in arriving at its decision.
28. That, the appellants were attempting to impeach the evidence of PW1 Corporal Kathambi who produced two police abstracts and was their own witness. He cited section 163 of the *Evidence Act* (Cap 80) Laws of Kenya, which provides manner in which the party who calls a witness may, with the consent of the court, impeach the credit of such a witness.
29. The respondent submitted that at no time in the trial court did the appellants seek to impeach the credit of PW1 Corporal Kathambi and therefore it would be prejudicial if the appeal succeeds based on a complaint of the weight attached to the appellants' witness.
30. Further, the appellants did not succeed in proving the accident as the evidence of PW2 Samuel Mugo was incoherent, inaccurate, marred with inconsistencies and contradicted the evidence of PW1, Corporal Kathambi the investigating officer.
31. The respondent cited section(s) 107, 109 and 112 of the *Evidence Act* on the legal and evidential burden of proof in a civil suit. That, the appellants called three (3) witnesses in support of their case
32. Further reliance was placed on the case of; *Fred Ben Okoth vs Equator Bottlers Limited* (2015) eKLR where the Court of Appeal relied on the case of; *Clerk and Lindsell on Torts* and stated that the burden of proving causation rests with the claimant who must adduce evidence that more likely than not the wrongful conduct of the defendant resulted in damages complained of.
33. The respondent further cited section 112 of the *Evidence Act* that provides that the burden of proving or disapproving any fact in proceedings is on the person with knowledge of such fact, and argued that it was the respondent's driver Daniel Kimura who testified as DW1 who had special knowledge of the facts that led to the accident and whose weight of evidence and that of PW1 Corporal Kathambi that the trial court dismissed the appellants case.
34. On quantum, the respondent submitted that under the head of pain and suffering, general damages of KShs. 20,000 would be adequate as the deceased died on the material day of the accident and relied on the case of; *Doinyo Lessos Creameries Ltd vs Elizabeth Angira Chaka* [2019] eKLR where the Court of Appeal awarded KShs. 20,000 for pain and suffering where the deceased died immediately after the accident.
35. As regard loss of life expectation, the respondent proposed an award of KShs. 100,000 taking into consideration that the deceased was 31 years old at the time of the accident. That a similar sum was held to be a conventional sum in the case of; *Doinyo Lessos Creameries Ltd vs Elizabeth Angira Chaka* (supra).



36. On loss of dependency, the respondent argued that no evidence was adduced to prove that the deceased was married and had a child and proposed a dependency ration of 1/3. The case of; Chania Shuttle v Mary Mumbi [2017] eKLR was cited where the court stated that dependency ratio is a consideration of fact to be determined on a case to case basis.
37. On the multiplicand, the respondent submitted that no evidence was produced to show that the deceased owned a motorcycle and earned Kshs. 1,000 daily to support the appellant's submission of Kshs. 30,000 as the multiplicand. That in the circumstances, he urged the court to adopt Kshs 7,240.95 per month as the multiplicand, being the monthly wage of a general labourer in other areas other than cities or municipalities under the Regulation of Wages (General) (amendment) Order 2018 Legal Notice 2 of 2019.
38. The respondent further submitted that, the court adopt a multiplier of 10 years and relied on the case of Roger Dainty vs Mwinyi Omar Haji & another [2004] eKLR where the Court of Appeal found that the multiplier of 10 years for the deceased who was 27 years old was reasonable.
39. The respondent submitted that taking into consideration the afore, the loss of dependency be calculated as follows:  $7,240.95 \times 10 \times 12 \times 1/3 =$  Kshs 289,638
40. On special damages, the respondent conceded that the appellant had provided receipts worth Kshs. 169,550 and be awarded as such, and cited the case of; Delta Haulage Services Ltd vs Complast Industries Limited & Another (2015) eKLR where the court stated that special damages must not only be pleaded but also be proved specifically.
41. In conclusion, the respondent urged that damages be assessed at Kshs. 579,188 as follows:
- a. Pain and suffering Kshs. 20,000
  - b. Loss of life expectation Kshs. 100,000
  - c. Loss of dependency Kshs. 289,638
  - d. Special damages Kshs. 169,550
42. In considering the appeal, I note the role of first appellate court is to re-evaluate the evidence adduced in the trial court afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses as held by the Court of Appeal in the case of; Selle & Another vs Associated Motor Boat Co. Ltd. & Others (1968) EA 123.
43. The Court of Appeal thus observed: -
- “I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. 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. 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 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.”



44. Having evaluated the evidence adduced in the trial court, I find that, as regard liability, I note that PW2 Mugo and DW1 Kimura testified as eye witness.
45. PW1 corporal Kathambi admitted that, she was not at the scene when the accident occurred. That what she told the court as to the occurrence of the accident was what she gathered from “by standers”. Her evidence was thus hearsay in the absence of the by standers. Yet, the trial court placed a lot of weight on it.
46. Further, although PW1 Corporal Kathambi testified that she was the investigating officer, the police abstract she produced clearly indicates that the case was still under investigation, which means there is no conclusive evidence on how the accident occurred and who among the deceased and the driver of the motor vehicle was to blame.
47. Furthermore, the evidence of the investigating officer is not supported by any documentary evidence. As an investigating officer and first person to arrive at the scene, she is expected to have drawn and produced a sketch plan of the scene showing inter alia, the point of impact and the final resting position of the deceased, the motor vehicle and motor cycle.
48. PW1 Corporal Kathambi did not produce any sketch plan to that effect but simply stated orally what she was told or saw. Yet the trial court held her that her evidence corroborated the defendant’s case and relied on it to dismiss the plaintiff’s case. Furthermore, the alleged impact on the motor vehicle is not supported by any inspection report, yet this was a fatal accident.
49. The evidence of PW2 Mugo was that the motor vehicle was speeding. It rested in the ditch on the opposite side. That issue of speed, and skid marks, if any, or distance from point of impact to the point where motor vehicle rested was important to indicate speed at which the motor vehicle was being driven at the time of the accident. The investigating officer was well placed to provide that evidence.
50. The court is aware the burden of proof in civil matters is on balance of probability and rests on the plaintiff, however, where the trial court relies on the evidence of a witness to make a finding then it has to evaluate that evidence in totality.
51. I have dealt a lot on the evidence of the investigating officer, in that, the trial court relied on it heavily in dismissing the evidence of PW2 Mugo and appellants’ case.
52. In that regard the trial court thus stated:

“From the above, PW1 established the deceased was emerging from a petrol station when the accident occurred and this is the version that DW1 has given. Meanwhile, PW2 was inconsistent as noted above. PW1 had no reason to lie in court and for this reason I am left to believe the deceased was joining the road from the petrol station which is on Njambini lane.

Having reached the conclusion that the deceased was joining from the main highway and onto the right lane – Flyover Lane; I have also accepted that DW1 was on the left lane and probably at 60-70km/h which is within the acceptable range for lorries.”
53. Pursuant to the afore finding the reason why the trial court dismissed the evidence of PW2 in totality is said to be inconsistencies. However, PW2 Mr Mugo maintained that, he was at the scene, he had just alighted from the deceased’s motor bike and saw him join the road and was hit while already on the road
54. The trial court finding that the deceased was coming from the petrol station after fuelling is not supported by evidence of any witness. Furthermore, he may have fuelled and had already joined the road when he was hit.



55. Even assuming he was joining the road, it is the evidence of PW2 Mugo that the driver of the lorry was driving at a high speed and failed to control his motor. Does the fact that, the motor vehicle landed in a ditch support the evidence of speed which could have contributed to the accident.
56. The trial court in its finding stated that the lorry was probably being driven at 60-70KM/per hour “which is an acceptable range” with utmost respect, it is not a matter of probability but fact.
57. Taking note that the evidence of PW2 Mugo and DW1 Kimura who were eye witnesses are at variance as how the accident occurred, the fact that, the investigation of the accident has not been concluded and none of parties have been held to solely blame for the accident, the considered opinion of this court is just and fair to hold each party to blame in equal measures.
58. In that respect I set aside the judgment of the trial court dismissing the appellants case on liability and substitute it with judgment or liability in the ratio of 50:50% in favour of the appellants as against the respondent.
59. As regards quantum, I have considered the submission of the parties in the trial court and an appeal. On loss of dependency the plaintiff suggested a multiplier of 29 years, a ratio of 2/3 and monthly income of Kshs 30,000 working over as;  $29 \times 12 \times 30,000 \times \frac{2}{3} = \text{Kshs } 6,960,00$ .
60. The respondent suggested a multiplier of ten (10) years ratio of, 1/3 due to lack of evidence of marriage of the deceased and the minimum wages as per the Regulation of Wages (General) Amendment Order 2018, Legal Notice No. 2 of 2019. Thus working out as  $\text{Kshs } 7,240.95 \times 10 \times \frac{1}{3} \times 12 = \text{Kshs } 289,638$ .
61. In my considered opinion the deceased was 31 years old. He would have been in active employment up to the age sixty (60) years thus worked for a further 29 years. However, taking into account vicissitudes of life, a multiplier of 25 years is reasonable. I adopt it. As regards the multiplicand Kshs 7,240,95 is proper in the absence proof of monthly earning. The multiplier ratio of 2/3 is applicable based on the chief’s letter recognizing wife and child. Therefore loss of dependency is calculated as:  
 $\text{Kshs } 7,240.95 \times 25 \times \frac{2}{3} \times 12 = \text{Kshs } 1,448,190.00$   
Less 50% Kshs 724,095.00
62. On the head of pain and suffering, the evidence revealed the deceased died on the spot. Based on authorities cited, I award a sum of Kshs 20,000 less 50% to Kshs 10,000.
63. On the head of loss of expectation of life, I have considered the authorities cited, I award Kshs 100,000 less 50% to Kshs 50,000. Special damages, I award Kshs 169,550 as supported by receipts less 50% to Kshs 84,775.00
64. Hence the award of quantum is as follows:
- a. Loss of dependency----- Kshs 724,095
  - b. Loss of expectation of life-----Kshs 50,000
  - c. Pain and suffering-----Kshs 10,000
  - d. Special damages-----Kshs 84,775
- Total-----Kshs 868,870.00
65. Each party shall bear the costs of its case in the trial court and on appeal. The sum awarded herein shall attract interest at court rate from the date of this judgment to payment in full.
66. It is so ordered.



**DATED, DELIVERED AND SIGNED THIS 6<sup>TH</sup> DAY OF JUNE, 2024.**

**GRACE L. NZIOKA**

**JUDGE**

In the presence of

Mr. Machage for the appellants

Ms. Dede for the respondent

Ms. Ogutu: Court assistant

Court- Stay of execution 30 days

