



Wanyama v Olobo (Suing as a Legal and Personal Representative of the Estate of the Late Daniel Andika Indimuli - Deceased) & 2 others (Civil Appeal E033 of 2023) [2024] KEHC 8105 (KLR) (21 June 2024) (Interim Judgment)

Neutral citation: [2024] KEHC 8105 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E033 OF 2023
REA OUGO, J
JUNE 21, 2024**

BETWEEN

JOSPEPH WANYAMA APPELLANT

AND

**LINET IMINZA OLOBO (SUING AS A LEGAL AND PERSONAL REPRESENTATIVE OF THE ESTATE OF THE LATE DANIEL ANDIKA INDIMULI - DECEASED) 1ST RESPONDENT
VICTOR KIPROP ROTICH 2ND RESPONDENT
ROBERT MORARA ONYANCHA 3RD RESPONDENT**

(Being an appeal against the decision and judgment of the Honourable C.A.S Mutai (SRM) in Bungoma CMCC No 231 of 2018)

INTERIM JUDGMENT

1. This appeal is an appeal against the decision of the subordinate court on the *Fatal Accident Act* and *Law Reform Act*. By way of background, the 1st respondent filed a suit against the appellant, the 2nd and 3rd respondents seeking general and special damages, cost of the suit, and interest. She averred that on 11/2/2017 the deceased was travelling aboard on a Matatu registration number KBG 221F along the Sabatia-Ekero-Bungoma road. At the Eshitswitswi area, the matatu collided with motor vehicle KAY 670M, and the deceased sustained fatal injuries.
2. It was averred that the deceased was 48 years old and employed as a teacher earning Kshs 61,990/-. A wife and 4 children survived the deceased.
3. The appellant, the owner of motor vehicle registration number KAY 670M, filed his statement of defence and denied the occurrence of the accident. He further pleaded without prejudice that he



took reasonable steps to avert the accident, however, the accident was inevitable and he should not be condemned for what could not be reasonably avoided.

4. After conducting a hearing and considering the evidence before him, the trial magistrate found that the accident was caused by the drivers of the appellant and the 2nd and 3rd respondents. He entered judgment for the plaintiff against the defendants jointly and severally as follows:

- a. Pain and Suffering Kshs 50,000/-
- b. Loss of expectation of life Kshs 120,000/-
- c. Loss of dependency Kshs 3,310,992/-
- d. Special damages Kshs 245,183/-

Total Kshs 3,726,175/-

5. The appellant dissatisfied with the finding of the subordinate court filed this instant appeal on the following grounds:

1. That the learned trial magistrate erred in law and fact in holding the appellant liable for the alleged accident when there was no sufficient evidence to that effect.
2. That the learned trial magistrate erred in law and fact to hold the respondent wholly and/or substantially liable for the alleged accident.
3. That the learned trial magistrate erred in law and fact in failing to dismiss the respondent's suit in the lower court with costs to the appellant.
4. That the trial magistrate erred in law and fact by applying the basic principles of law of tort in analyzing the evidence before him in this suit during trial.
5. That the trial magistrate erred in law and fact by awarding the plaintiff special damages of Kshs 245,183/- when the same was not proved at trial.
6. That the trial magistrate erred in law and fact by awarding the plaintiff special damages for the doctor's attendance fees that was not pleaded as required by the law.
7. That the learned trial magistrate erred in law and fact by overly relying upon the evidence of the respondents when awarding damages which was not proved during trial.
8. That the learned trial magistrate erred in law and fact by failing to evaluate the injuries sustained and on the medical sheets and/or reports in awarding damages for pain and suffering at Kshs 80,000/- which same was not proved at the hearing.
9. That the learned trial magistrate erred in law and/or fact in making general damages that was so excessive so to amount to erroneous of loss and damages suffered by the respondent at Kshs 3,310,992 for loss of dependence.
10. That the trial magistrate erred in law and fact in failing to consider the appellant's submissions and legal authorities relied upon in support thereof.
11. That the learned trial magistrate decision albeit, discretionary was plainly wrong.

6. The appeal was canvassed through written submissions and both parties have complied by filing their respective submissions.



7. The appellant argues that the respondent's witnesses testified that the driver of motor vehicle registration number KBG 221F veered off from its lane and hit the appellant on the driver's side. The matatu was overtaking at high speed. The police did not blame the appellant and neither did they come to court to produce the police abstract. There were no sketch maps to confirm the occurrence of the accident. The appellant was in his rightful lane when the accident occurred and sustained injuries and was admitted for 14 days following the occurrence of the accident. The appellant urged the court to discharge the appellant from liability. The appellant did not make any submissions on damages awarded by the subordinate court.
8. The respondent in her submissions argues that the trial magistrate rightfully considered liability, gave the judgment against the defendants, and concluded that they were 100% liable. The award of quantum was properly assessed and awarded by the subordinate court and should be upheld by this court. She also argued that the award was somewhat too low considering the multiplicand of the lost years and the deceased's salary.

Analysis And Determination

9. First, I shall re-evaluate the evidence and arguments presented during the trial, as is expected of a first appellate court. (see the case of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123).
10. Linet Iminza Alobo (Pw1) testified that the deceased was her husband and adopted her witness statement dated 13/12/2017 as her evidence in chief. Pw1 in her statement reiterated the contents of her plaint. She testified that the deceased died earning Kshs 61,990/- and together they had 4 children. On cross-examination, she testified that the deceased died after 11 days and that the deceased colleagues covered some of the funeral expenses while the benevolent fund met some expenses. She also testified on cross-examination that she did not witness the accident.
11. Joseph Lukunga (Pw2) testified that he knew the deceased and adopted his statement made at Butere police station as his evidence in chief. He testified that he was seated in the middle seat behind the driver's seat in the matatu. The weather was clear and traffic was moderate. He recalled that the driver was overtaking and the vehicle in the other lane was approaching while flashing its lights. He then heard a bang and people screaming. On cross-examination, he testified that the matatu was being driven at high speed as it overtook. The matatu did not stop even after the saloon car flashed its light. Pw2 testified that he blamed the matatu driver for the accident. On 4/8/2022 by consent of the parties, the police abstract was adopted as evidence and marked Pexh4.
12. The appellant testified as Dw1. He adopted his witness statement He testified that according to the abstract, the matatu driver was to blame for the accident. He recalled that in the Eshitswitswi area, he saw a police roadblock and slowed down. Suddenly the matatu which was driven at high speed as it attempted to evade the roadblock lost control, left its lane, and hit his vehicle. Pw2 tried averting the accident by steering his vehicle onto his left side of the road, however, the matatu crushed on his driver's side and ripped all the doors. He recalled that he was driving at 38-50 Km/hr at the time of the accident. He testified that following the accident he was taken to the Intensive Care Unit (ICU). He testified that he did not contribute to the death of the deceased.
13. The appellant in his submissions abandoned his appeal on the grounds of quantum and made no arguments on the damages awarded by the subordinate court. The only issue raised by the appellant in his submissions is whether the trial magistrate apportioned liability correctly. The respondent produced a police abstract marked as Pexh4. According to the results of the investigations, the driver of KBG 221F was to blame. Pw2 testified that the driver of the matatu was to blame as he was driving at



high speed. This was further fortified by the evidence of Dw1 who testified that the matatu was driven at high speed causing it to lose control, left its lane and hit his vehicle.

14. In the event of a road traffic accident involving a collision between two motor vehicles, the court allocates liability based on the degree of fault attributable to each driver. (See *Ndatbo v Chebet* (Civil Appeal 8 of 2020) [2022] KEHC 346 (KLR) (16 March 2022) (Judgment)). The evidence on record is that the matatu was driven at high speed so that the driver could evade the traffic police at the roadblock. The totality of the evidence at the trial court leads to the conclusion that the 2nd and 3rd respondents were entirely to blame. Although the appellant was at a roadblock, he testified that he was driving at 50km/hr. In my view, his speed was not high, he also took precautions by flashing the matatu indicating that he was driving dangerously.
15. I have carefully considered the evidence on record and agree with the submissions of the appellant that the trial magistrate erred in apportioning all the defendants' liability at 100%. Consequently, I find that the 2nd and 3rd respondents shall bear liability at 100%. The appellant is awarded the cost of the appeal.

DATED, SIGNED, AND DELIVERED AT BUNGOMA THIS 21ST DAY OF JUNE 2024

R.E. OUGO

JUDGE

In the presence of:

Miss Nanzushi -For the Appellant

Respondent -Absent

Wilkister -C/A

