



David & another (Suing as Legal Representatives of Amos Ngari Ileri) v Wanja & 2 others (Suing as Legal Representatives of Amos Ngari Ileri) (Civil Appeal E021, E022 & E024 of 2023 (Consolidated)) [2024] KEHC 9648 (KLR) (24 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9648 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E021, E022 & E024 OF 2023 (CONSOLIDATED)**

LM NJUGUNA, J

JULY 24, 2024

BETWEEN

BENJAMIN MWANIKI DAVID 1ST APPELLANT

BENARD IRERI NGARI AND LYDIA NDEGI IRERI 2ND APPELLANT

SUING AS LEGAL REPRESENTATIVES OF AMOS NGARI IRERI

AND

IVY WANJA 1ST RESPONDENT

BENARD IRERI NGARI AND LYDIA NDEGI IRERI 2ND RESPONDENT

BENJAMIN MWANIKI DAVID 3RD RESPONDENT

SUING AS LEGAL REPRESENTATIVES OF AMOS NGARI IRERI

*(Being appeals arising from the Judgments of Hon. S.K. Ngii in Siakago
MCCC Nos. 102 of 2018 and E11 of 2019 delivered on 11th May 2023)*

JUDGMENT

1. The appellants have filed memoranda of appeal dated 26th May 2023 in HCCA No E021 of 2023, 27th May 2023 in HCCA No E022 of 2023 and 09th June 2023 in HCCA No E024 of 2023.
2. Through HCCA No E021 of 2023 and HCCA No E022 of 2023, the 1st appellant sought for orders that:
 - a. The appeals be allowed with costs;
 - b. The judgments delivered on 11th May 2023 by Hon. S. Ngii in Siakago MCCC No 102 of 2018 and E11 of 2019 respectively, be set aside and be substituted with a different award: and



- c. Costs of this appeal be borne by the respondent.
- The grounds of appeal in HCCA No E021 of 2023 and HCCA No E022 of 2023 are that the learned Magistrate erred in law and fact:
- d. By disregarding the evidence given by the appellant stating that he did not cause the accident;
- e. In failing to consider the evidence of the driver and police officer called by the appellant and the police abstract produced by the defendant which does not apportion blame to the motor vehicle KCJ 584H but instead indicates that the matter is still pending investigation;
- f. In determining that the appellant was to blame for the accident, which fact was against the weight of the evidence on record; and
- g. In failing to consider the appellant's submissions on liability and quantum.
3. In HCCA No E024 of 2023, the 2nd appellant prayed that the appeal be allowed and that this court reverses the award under the head of loss of dependency to the following:
- Kshs $7,240 \times 12 \text{ months} \times 25 \text{ years} \times \frac{1}{3} = \text{Kshs } 1,448,000/=$ (and all things remaining constant, the final award to be Kshs 1,614,505/=).
- Their grounds of appeal are that the trial court erred in law and in fact:
- a. In finding that the only dependants of the deceased (Amos Ngari Nderi) are adults and thus there is no proof that they substantially relied on the deceased; and
- b. In finding that on dependency, the ratio of $\frac{1}{3}$ would suffice and thereafter awarding a manifestly and inordinately low award under the head of loss of dependency.
4. When the Memoranda of appeal were filed, the Court on the 22nd February, 2024, directed that the records of appeal for HCCA E021 of 2023 and HCCA EO22 of 2023 be filed within 5 days failing which the appeals shall stand dismissed. On the 7th day of March, 2023, the Court noted that the records of appeal had not been filed and the appeals stood dismissed. However, the orders made on 7th March, 2023 were made in error for the reason that in computing this period, Sunday the 25th February, 2024 should be excluded under order 50 Rule (2) of the *Civil Procedure Rules* which state as follows.
- “where any limited time less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceedings, Sunday, Christmas Day and Good Friday and any other day appointed as a Public Holiday shall not be reckoned in the computation of such limited time”
- This is to say, though the records of appeal were filed outside time by one day, going by the provisions of order 50 rule (2), the records of appeal ought to have been deemed as filed within time, as the 25th February, 2023 was a Sunday, and it ought not to be reckoned in computing the five (5) days period that the appellant had been granted by the Court to file the records of appeal. This being a legal issue and in the interest of justice, the Court will therefore proceed and determine all the appeals herein.
5. The brief facts of the case are that on 16th March 2018, the deceased was riding his motor cycle registration number KMDH 021M while carrying the 1st respondent along Embu-Kiritiri Road when near Muraru market area, the 1st appellant, or his driver, agent, employee, servant, assignee, so negligently, carelessly or recklessly drove, managed and controlled the 1st appellant's motor vehicle that



- he caused or permitted the same to violently knock the motorcycle thus causing fatal injuries to the deceased and bodily injuries to the 1st respondent.
6. The 1st and 2nd respondents blamed the 1st appellant for negligence and the 2nd respondents sought judgment against him for special damages, general damages pursuant to the *Fatal Accidents Act* and *Law Reform Act* plus costs and interests. The 1st respondent sought judgment against the 1st appellant for special damages as prayed, general damages, costs and interest. The 1st appellant filed his statements of defense in both matters, denying the averments made by the 1st and 2nd respondents.
 7. At the hearing of the 1st respondent's case in Siakago MCCC No 102 of 2018, PW1 was PC Peter Otieno Auka of Kiritiri Police Station who narrated the circumstances of how the accident occurred. He stated that the deceased died as a result of the accident while the 1st respondent sustained bodily injuries. He produced the police abstract that had been issued to the 1st respondent. On cross-examination, he stated that the matter was pending under investigations and that he was not the one investigating the accident.
 8. PW2 was the 1st respondent who stated that she was a pillion passenger on the deceased's motor cycle on Embu-Kiritiri road. That she saw the 1st appellant's motor vehicle overtaking another motor vehicle causing it to enter the lane on which the motor cycle was. That the deceased tried to swerve to avert the accident but the motor vehicle hit the motor cycle causing her the following injuries: a fracture on the mid shaft left femur, loss of the left 2nd upper incisor, bruises on both knees anteriorly, lacerations on the right side of the chin and a mobile upper incisor tooth.
 9. That she was taken to Embu Level 5 Hospital where she was admitted for 67 days and her medical bill was paid by her guardian before reporting the matter at Kiritiri Police Station. That she sought for legal representation and she incurred expenses towards a doctor's report and other preliminary processes prior to filing the suit. She urged the court to order compensation for the bodily injuries she suffered. She produced documentary evidence in support of her case. On cross-examination, she stated that she was still feeling pain in her leg at the time of the testimony.
 10. At the hearing of MCCC No E11 of 2019, PW1 was Lydia Ndegi Ireri. She stated that the deceased is her 30-year-old son and he died in a road traffic accident. She stated that her son was a bodaboda rider and that he used to make Kshs 500/= daily from this business, which income he used to sustain his wife, son and parents. That following his death, they incurred funeral expenses. She produced documentary evidence in support of her testimony. On cross-examination, she stated that she did not witness the accident and that she did not have the deceased's birth certificate.
 11. PW2 was PC Peter Otieno Auka of Kiritiri Police Station who narrated the circumstances of how the accident occurred and produced the police abstract issued in regards to the deceased. PW3 was the 1st respondent, whose testimony in MCCC No 102 of 2018 was adopted as her evidence in MCCC No E11 of 2019.
 12. DW1 was Cpl. Dennis Ouko of Kiritiri Police Station who produced the occurrence book for the incident which was reported at the station. He stated that the eye witnesses informed them that the motor cycle was being ridden in a zigzag manner. DW2 was the driver of motor vehicle registration number KCJ 584H who stated that the deceased's motor vehicle was being ridden in the opposite direction and that it entered his lane yet he was not overtaking. That the deceased was not wearing reflective gear while riding the motor cycle. On cross-examination, he stated that the motor vehicle belonged to the 1st appellant. That visibility was clear on that day and that there is no feeder road on his side which could have helped him to avert the accident. That after the accident, he informed the 1st



- appellant who reported the incident to the police. That he has been involved in road traffic accidents twice so far. That at the time of the accident he was driving on his rightful lane of the road.
13. In MCCC No 102 of 2018, the trial magistrate relied on the evidence adduced and entered judgment in favour of the 1st respondent, awarding general damages of Kshs 500,000/= and special damages of Kshs 46,100/=. These are the findings that are the subject of appeal in HCCA E021 of 2023 herein.
 14. In MCCC No E11 of 2019, the trial magistrate held the 1st appellant vicariously liable for the accident that resulted in the death of the deceased. He applied the multiplier method in computing loss of dependency using the applicable minimum wage as the multiplicand and multiplier of 25 years and arrived at an award of Kshs 724,000/= under this head, which is the subject of HCCA E024 of 2023. In addition to the award of loss of dependency, the trial court also awarded the 2nd respondents Kshs 20,000/= as general damages for pain and suffering, Kshs 100,000/= as general damages for loss of expectation of life and special damages of Kshs 45,505/=. These findings on quantum and liability are the subject of HCCA E022 of 2023.
 15. Only the 2nd Appellants filed their written submissions.
 16. It was their submissions that the court herein is obliged to re-examine the evidence and cited the case of *Rosemary Mwasya v Steve Tito Mwasya & another* (2018) eKLR. They stated that the trial court erred in finding that the deceased's dependants were all adults and a dependency ratio of $\frac{1}{3}$ was applied in calculating the general damages for loss of dependency, to the 2nd appellants' disadvantage. They urged the court to apply a ratio of $\frac{2}{3}$ in order to attain a fair and just award. They placed reliance on the cases of *Mildred Aori Odunga v Hussein Dairy Limited* (2010) eKLR, *Francis Wainaina Kirungu (suing as personal representative of the estate of John Karanja Wainaina) Deceased v Elijah Oketch Adellah* (2015) eKLR and *Eliud Papoi Papa (Suing as the Legal Representative of the Estate of Brian Afwande Papoi (Deceased) v Jigneshkumar Rameshbai Patel & another* (2017) eKLR.
 17. The issues for determination are:
 - a. Whether liability was properly apportioned by the trial court; and
 - b. Whether the award of damages by the trial court in MCCC No 102 of 2018 and E11 of 2019 is fair and just in the circumstances;
 18. In these appeals, this court is expected to re-evaluate the evidence and make a finding vis-a-vis the finding of the trial court. In the case of *David Njuguna Wairimu v Republic* (2010) eKLR the Court of Appeal held as follows:-

“The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the facts to satisfy itself on the correctness of the decision.”
 19. On the first issue for determination, the trial court found that the respondent is not liable for the accident. liability should be determined through evidence adduced and according to Section 107 and 109 of the *Evidence Act* which provides that the burden to prove a fact lies on the party that alleges it. In evaluating the evidence, it is upon the court to subject the evidence to the relevant standard of



proof, which, in this case, is on a balance of probabilities. In the case of *Palace Investment Ltd v Geoffrey Kariuki Mwenda & another* (2015) eKLR, it was held that:

“Denning J. in *Miller Vs Minister of Pensions* (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained.”

20. During the hearing in Siakago MCCC No 102 of 2018 and MCCC No E11 of 2019, the parties testified on the circumstances leading to the accident. The 1st appellant testified that he was driving along the said road when the deceased’s motor cycle veered into his lane. That he did not have any way out since there was no feeder road on which he could divert to get out of the road in order to avert the accident. The 1st respondent also testified in the subsequent case and adopted her statement. The Court of Appeal in *Micheal Hubert Kloss & another v David Seroney & 5 others* [2009] eKLR observed:

“The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in *Stapley v Gypsum Mines Ltd (2)* (1953) A.C. 663 at p. 681 as follows:

‘To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it... The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally...’”

21. From the testimonies in both cases, the witnesses told divergent stories. The trial court found the 1st appellant 100% liable for the accident. On a balance of probabilities, and from the available evidence, both the 1st appellant and the deceased are to blame for the accident thus a 70%:30% liability ratio applies to this case, the ratio applying against the 1st appellant.
22. The second issue is that of quantum. Usually, an appellate court will not disturb the trial court’s findings on quantum unless the trial court proceeded on incorrect principles thereby arriving at an award that is inordinately high or low. In the case of *Kemfro Africa Limited t/a “Meru Express Services*



(1976) v another v Olive Lubia v another [1983] eKLR, the Court of Appeal made the following guiding observations;

“The principles to be applied by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that 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 have been a wholly erroneous estimate of the damages.”

23. The trial court in Siakago MCCC No 102 of 2018 awarded general damages of Kshs 500,000/= and special damages of Kshs 46,100/= to the 1st respondent. The 1st respondent stated that she sustained a fracture on the mid shaft left femur, loss of the left 2nd upper incisor, bruises on both knees anteriorly, laceration on the right side of the chin and a mobile upper incisor tooth. These injuries were confirmed through the medical report authored by Dr. Njiru G.N. dated 15th June 2018. It is important that before a court awards general damages, the nature of injuries must be compared to other cases. These were the sentiments of the court in the case of *Stanley Maore v Geoffrey Mwenda* NYR CA Civil Appeal No 147 of 2002 (2004) eKLR that:

“Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”

24. The plaintiff in *Kenyatta University v Isaac Karumba Nyuthe* NRB HCCA No 193 of 2012 (2014) eKLR was awarded Kshs 350,000/- in 2014 for sustaining a fracture of the right femur, soft tissue injuries to the head and bruises on the right knee. In the case of *Ibrahim Kalema Lewa v Esteel Company Limited* NBI HCCA No 475 of 2012 (2016) eKLR the High Court upheld an award of Kshs 300,000/- on appeal in 2016 where the plaintiff sustained a fracture on the left femur and was admitted to hospital for 2 months. In the case of *Jitan Nagra v Abidnego Nyandusi Oigo* [2018] eKLR where the court in a judgment reduced an award of Kshs 1,000,000/= to Kshs 450,000/= for a Respondent who had sustained lacerations on the occipital area, deep cut wound on the back, right knee and lateral lane, bruises at the back extending to the right side of the lumbar region, blunt trauma to the chest, bruises on the left elbow, compound fracture of the right tibia/fibula, segmental distal fracture of the right femur.
25. Given the exigencies of economic inflation, the award of general damages by the trial court in Siakago MCCC No 102 of 2018 of Kshs 500,000/= is fair and need not be disturbed.
26. In Siakago MCCC No E11 of 2019, the court awarded Kshs 724,000/= as general damages for loss of dependency, Kshs 20,000/= as general damages for pain and suffering, Kshs 100,000/= as general damages for loss of expectation of life and special damages of Kshs 45,505/=. The 1st appellant challenged this quantum generally while the 2nd appellant challenged the award of loss of dependency, terming the same as inordinately low. From the evidence adduced, the deceased died on the spot therefore, the award of Kshs 20,000/= for pain and suffering is reasonable. Kshs 100,000/= for loss of expectation of life is also reasonable. In the case of *Mercy Muriuki v another v Samuel Mwangi*



eKLR, the court observed:

“The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs 100,000/- while for pain and suffering the awards range from Kshs 10,000/= to Kshs 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.”

27. As for the award of loss of dependency, the court applied a ratio of $\frac{1}{3}$ and stated that the deceased had adult dependants only. I do note that the widow of the deceased did not testify and there is no way of telling the age of the child of the deceased who was mentioned by the mother of the deceased. The trial magistrate worked with the available evidence and reached his findings thus:

$Kshs\ 7,240 \times 12\text{months} \times 25\text{years} \times \frac{1}{3} = Kshs\ 724,000/=$

28. A dependency ratio of $\frac{2}{3}$ applies when the deceased for instance, was survived by a spouse and children of tender years who heavily relied on his earnings. A dependency ratio of $\frac{1}{3}$ is sufficient where the dependants are parents of the deceased and who did not completely depend on the deceased for sustenance. In the case Leonard O. Ekisa & another v Major K. Birgen (2005) eKLR it was held:

“Dependency is a matter of fact. It need not be proved by documentary evidence. In an African family setting, it is not unusual for parents to be dependants. There is no social welfare system that caters for old people in this country. Expenses on children also do not need to be proved by documents. It is not possible to keep receipts for each of such expenditures. Each case has to depend on its own circumstances.”

29. I do applaud the trial magistrate for his reasoning in application of the multiplier method and employing the applicable minimum wage. It is my view that the dependency ratio adopted by the court is reasonable and the award is neither too high nor too low. Therefore, quantum in this matter need not be disturbed.

30. Therefore, I find that the appeals partially succeed with orders as follows

- a. In HCCA No E021 of 2023
Liability 70%:30% against the 1st appellant
General damages Kshs 500,000/=
Proven special damages Kshs 46,100/=
Grand Total Kshs 546,100/=
- b. In HCCA No E022 of 2023
Liability 70%:30% against the 1st appellant
General damages
Pain and suffering Kshs 20,000/=
Loss of expectation of life Kshs 100,000/=
Loss of dependency Kshs 724,000/=
Proven special damages Kshs 46,505/=



Grand Total Kshs 890,505/=

- c. In HCCA E024 of 2023
 - Liability 70%:30% against the 1st appellant
 - General damages
 - Pain and suffering Kshs 20,000/=
 - Loss of expectation of life Kshs 100,000/=
 - Loss of dependency Kshs 724,000/=
 - Proven special damages Kshs 46,505/=
 - Grand Total Kshs 890,505/=

- d. Each party to bear its own costs of the appeal.
- It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 24TH DAY OF JULY, 2024.

L. NJUGUNA

JUDGE

.....for the 1st Appellant

.....for the 2nd Appellant

.....for the 1st Respondent

.....for the 2nd Respondent

..... for the 3rd Respondent

