



REPUBLIC OF KENYA



Gichui & another v Kamau (Suing as Personal Representative of the Estate of Paul Kimotho Kamau) (Civil Appeal E155 of 2022) [2024] KEHC 8100 (KLR) (8 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8100 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E155 OF 2022**

**AM MUTETI, J
JULY 8, 2024**

BETWEEN

GEORGE GICHUI 1ST APPELLANT

PETER MWANGI 2ND APPELLANT

AND

ALICE WANJIKU KAMAU RESPONDENT

**SUING AS PERSONAL REPRESENTATIVE OF THE ESTATE OF PAUL
KIMOTHO KAMAU**

JUDGMENT

1. The appellant in this matter challenges the decision of the learned honourable magistrate vide a memorandum of appeal dated 8th July 2022.
2. In the said memorandum, the appellants have set out 9 grounds of appeal basically challenging the decision on both liability and quantum.
3. The appeal came up before me on the 3rd June 2024 when counsel for the appellants informed the court that they had filed submissions on 12th June 2023 dated the 26th May 2023 and the Respondents had filed their submissions on 31st May 2023 dated the 30th May 2023. It was agreed by counsel that there was no need for highlighting and they elected to take a date for judgement.
4. Upon retiring to write the judgement, I perused the submissions written by both parties in order to distill the issues for determination. The appellants submissions focus solely on the issue of liability thus despite raising grounds on the quantum, the appellants opted to leave that to the wise decision of this court.
5. The appellants held the position that the deceased owed himself a duty of care and that when he decided to cross the road he ought to have observed that there was no pedestrian crossing at the point he crossed



- and thus he was the author of his own misfortune. The appellant further urged that since the driver of the motor vehicle that knocked down the deceased was not charged, the learned honourable magistrate ought to have taken that into account and not found the appellant 100% liable.
6. The appellants further urged that the respondent did not prove dependency thus the finding by the learned honourable should be disturbed on that account. It is this aspect of want of proof of dependency that in my view, should have influenced the appellants decision to raise grounds on quantum. The submissions in this regard are however very limited to be of any meaningful assistance to this court.
 7. The Respondent on the other hand has defended the quantum awarded by the magistrate. The Respondent's counsel has urged this court to find that there is no basis advanced by the appellants to warrant interfering with the learned honorable magistrate's exercise of discretion.
 8. In *Mbogo & Another - v- Shab* (1968)EA93, the court held that in an appeal challenging exercise of discretion, the appellate court should not interfere with the exercise of discretion unless satisfied that the lower court misdirected itself on some matter and thereby arrived at a wrong decision or it manifest from the case as a whole that the lower court made a wrong decision. The appellant was under duty to persuade this court that the learned honourable magistrate acted on wrong principles of law or simply that the decision was plainly wrong.
 9. The assessment of quantum by a court is plainly a matter of discretion. The best judge of this would be the trial court that heard the witnesses and has had the benefit of seeing them. Although the appellate court has the duty to review the evidence, re-evaluate it and make its own independent conclusions, the court must defer to the trial court's assessment of the demeanor of witnesses. The appellate court must remain alive to the fact that it did not have the advantage of hearing the witnesses; see *Mbogo v Shab* (1968) EALR. 93
 10. In this appeal the appellants' counsel has given the court very limited material to review on the aspect of liability.
 11. It is an uncontested fact that the deceased was hit by a motor vehicle and as a consequence thereof died. The appellants did not present any set of facts that could have shown the deceased as having been so negligent that he could have been blamed for the accident. The driver of the motor vehicle ought to have known that there are other road users who should be borne in mind by any qualified driver whenever he drives. To suggest that any pedestrian who crosses the road anywhere where there is no zebra crossing should be solely blamed is to give drivers a blanket cheque as they drive to knock off any pedestrian they find crossing the road where such zebra crossings do not exist. The argument by the appellants is thus not sustainable. The Appellant did not demonstrate any effort that the driver made to avoid causing the accident.
 12. We live in this country and we all understand our road conditions. It is a matter of common notoriety that majority of our roads even in urban centres are unmarked. The submissions by the appellants' counsel on that score must fail. It cannot be the law that those who cross roads at sections that have no zebra crossing must be blamed for any accident that happens. It would be near suggesting if no zebra crossing please do not cross. Life would come to a standstill.
 13. The fact that the driver was not charged with a traffic offence cannot by itself be a reason to hold that the deceased was wholly to blame. It is the duty of the police to investigate all accidents and forward their investigation files to the Director of Public Prosecutions for his decision to prosecute. To blame victims of accidents on account of drivers not being charged would be to set a dangerous precedent. All that vehicle owners would do is to ensure one is not charged in all accident cases to avoid liability.



14. The criminal justice system is well equipped to deal with matters crime. It is not the business of victims of crime to ensure that those that commit crimes are charged. The appellants' argument in that regard does not find favour with this court. The court was not told in what respect the learned Honourable magistrate failed in the exercise of discretion. What irrelevant considerations the court took into account or in what sense the court misdirected itself on the law. It cannot also be argued that the magistrate was plainly wrong. In declining to review the award this court's guided by the decision in *Bashir Ahmed Butt v. Uwais Ahmed Khan* (1982-88 KAR 5).
15. The appellants have therefore not put forth material compelling enough to persuade this court to interfere within the learned Honourable Magistrate's decision.

In the end this appeal is dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 8TH DAY OF JULY 2024.

HON. A.M MUTETI

JUDGE

In the presence of:

Yussuf: Court Assistant

.....for the Respondent

.....for the Appellant

.....Appellant

