



REPUBLIC OF KENYA



**Mwangi v Njogu & another (Civil Appeal 17 of 2020)
[2024] KEHC 9427 (KLR) (23 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9427 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CIVIL APPEAL 17 OF 2020**

**J WAKIAGA, J
JULY 23, 2024**

BETWEEN

BERNARD MUTIE MWANGI APPELLANT

AND

STANLEY NJOGU 1ST RESPONDENT

JOYCE NDUKU MBURU 2ND RESPONDENT

*(Being an appeal from the judgement of Hon. S.K. Nyaga in
Muranga SRM CC NO 161 of 2015 delivered on 17th august 2020)*

JUDGMENT

1. By a plaint dated 29th April 2015, the Respondent sued the Appellant for general and special damages arising out of a road traffic accident on 23rd November 2014 along Thika Kenol road involving motor vehicle registration No KBV 544X owned by the Appellant and motor cycle registration No KMCC 499D which the deceased Joel Mburu Njogu was ridding. It was pleaded that the said accident was wholly caused by the negligence of the Appellant and or his agent.
2. By a defence thereon dated 20th May 2015, the Appellant admitted the occurrence of the accident but denied that the same was caused by the negligence of his driver as alleged and attributed the cause of the same to the negligence on the part of the deceased.
3. By a judgement thereon dated 17th August 2020 the Court found the Appellant liable at 100% and awarded damages as follows:
 - a. Pain and suffering Kshs 10,000
 - b. Loss of expectation of life Kshs 60,000
 - c. Loss of dependency Kshs 1,443,864



- d. Special damages Kshs 42,300
4. Being dissatisfied by the said determination, the Appellant filed this appeal and raised the following grounds of appeal:
 - a. The trial Court erred in law and fact in apportioning liability at 100% in favour of the Respondent against the weight of evidence tendered by the Appellant.
 - b. The award in damages was excessive and inordinately high thereby representing an erroneous estimate.
 - c. The trial Court did not consider the evidence tendered and the Appellant written submissions thereon.

Submissions

5. Directions were given on the disposal of the appeal by way of written submissions which were duly filed. On behalf of the Appellant, it was submitted on liability that the trial Court placed more weight on the Respondent's eye witnesses PW2 who was not considered by the police as a material witness as he did not record any statement with the police and neither was the investigating office called by the Respondent to testify. It was contended that the trial Court failed to consider the Appellant's evidence that the deceased used an illegal short cut to cross the highway in total disregard of the overpass that was available and was therefore the author of his own misfortune. In support of this contention reference was placed on the case of *Stapley v Gypsum Mines Ltd* [1953] AC 663.
6. On damages, it was submitted that the trial Court misapplied the law under the *Fatal Accidents Act* as the Respondent did not produce any document in support of the contention that the deceased was a boda boda rider and that the Court should have used the minimum wage for unskilled worker and for multiplier the Court should have considered the average life expectancy in Kenya by adopting a multiplier of 17 years as was in the case of *Joseph Njuguna Mwaura v Builders Den Ltd and another* [2014] eKLR .
7. It was submitted that the trial Court made a double award under the *law reform Act* which should have been deducted from the award made under the *Fatal Accidents Act* in support of which reference was made to the case of *Transpires Kenya Ltd & Another v SMM* [2015] eKLR.
8. On behalf of the Respondents it was submitted that the appeal did not meet the threshold required for the Court to disturb the otherwise just judgement of the trial Court. It was contended that the use of the multipliers was only one of the methods of assessing damages as was stated in the case of *Albert Odawa v Gichumu Githinji* [2007] eKLR and that it was the most suitable in the circumstances of the case.
9. On multiplicand it was contended that the deceased was earning Kshs. 15,000 per month and that according to PW1 he was earning Kshs.1,500 with which he supported his Dependents and that in the case of *Mosonik & Another v Cheruiyot* [2022] KEHC 11823 the Court adopted a multiplicand of Kshs.12,000 where no proof of earning was presented and that the Court adopted a minimum wage of a skilled labour.
10. On multiplier, the deceased was 33 years as at the time and would have worked beyond 65 years and therefore the multiplier of 20 years as observed by the trial Court would suffice as was stated in the following cases : *Midland Media Ltd & another v Pauline Naukot Aule* [2020] e KLR where ten years was applied to a 57 year old deceased with the Court observing that he could have worked even up to



80 years and Crown Bus Services Ltd & 2 others v Jamila Nyongesa & another [2020] eKLR where 21 years was applied to a 35 year old deceased.

11. On pain and suffering Kshs.100,000 was proposed based on the case of Joseph Kivati Wambua v SMM & another [2021] eKLR and on loss of expectation of life kshs 200,000 was proposed supported by the case of *West Kenya Sugar Co Ltd v Philip Sumba Julaya & another Kakamega High Court Civil Appeal No 7 of 2017.*
12. On liability it was submitted that the Respondents availed eye witness who was an independent witness and therefore the Court could not rely on the evidence of the investigating officer.
13. This being a first appeal, the Court is under a duty to re-evaluate the evidence tendered before the trial Court to come to its own determination thereon with the usual injunction that unlike the trial Court, it did not have the advantage of seeing and hearing witnesses as was stated in *Selle v Associated Motor Boat Co Ltd* [1968] E.A. 123.
14. PW1 Joyce Nduku Mburu testified that the deceased was her husband and was aged 33 years as at the time of his death, he was a boda boda operator earning Kshs.1500 per day in cross examination she stated that he used to earn Kshs.45,000 per month. PW2 Simon Ndichu stated that he was an eyewitness to the accident and that the motor cycle has indicated to enter Kabati Road while the Appellants motor vehicle which was being driven speedily from Kenol could not slow down due to the speed. He was able to identify the make of the motor vehicle as a Toyota Premio, silver in colour.
15. He stated that the motor cycle was entering the road at the right entry and that he could not use the bridge since it was far. In cross examination he confirmed that the deceased died at the scene.
16. The Appellant stated that as he was entering the highway, the deceased was on the service line and that he decided to use the short cut on the highway and not the bridge which was 200 meters ahead of him. He stated that an inquest was conducted thereafter which blamed the deceased but did not produce a copy thereof

Determination

17. There are only two issues for determination on this appeal; Whether the trial Court arrived at the Court determination on liability and whether the award for loss of dependency was excessive?
18. The principles upon which an appellate Court will interfere with the determination of a trial Court were stated in the case of *Hellen Waruguru Waweru v Kiarie Shoe Limited* [2015] eKLR where the Court restated that an appellate Court will not disturb an award of damages unless it is shown that it is inordinately so high or low as to represent an erroneous estimate, that the judge proceeded on wrong principles or that he misapprehended the evidence in some material facts so as to arrived at a wrong figure.
19. In finding the Appellant liable at 100% the Court had this to say “this Court is bound to find that the defendant should bear the liability at 100% and on the only basis that he did not bring evidence to prove that the deceased is to blame for the accident whereas the eyewitness (PW2) testified in this Court that the motor vehicle driver was to blame for the accident as he was over speeding PW2 confirmed that the motor vehicle driver DW1 saw the deceased on the motor cycle which he did confirm he did. A driver should be vigilant and most importantly be able to control the vehicle and bring it to a safe stop in case of emergency”



20. Was this finding of fact supported by the evidence on record? from the proceedings I have looked at the evidence of the eye witness called by the Respondent and weighed the same against the evidence of the Appellant and I affirm the trial Courts finding on liability
21. Was the lower Courts award on quantum founded on correct principles? the Court noted that the death certificate produced in Court confirmed that the deceased was a boda boda operator and relied on the case of Beatrice W Murage v Consumer Transport Ltd [2014] eKLR where this Court held that where one dies not prove what the deceased was earning, the Court would base the earning on the minimum wage. I therefore find no fault with the trial Court finding thereon and the use of the minimum wage of a skilled labourer having found as a fact that the deceased was a boda boda operator and therefore find no merit on this ground of appeal.
22. On the submission of double award, under both the law reform and *[fatal accidents act](#)*, the Court is only required to take it into account which does not ordinarily mean that the award be deducted.
23. It is trite law that the appellate Court should not upset the finding of the trial Court merely on the ground that had it been the trial Court it would have arrived at a deferent determination.
24. It follows that the appeal herein lacks merit and is hereby dismissed. The lower Courts finding on liability and quantum is affirmed with cost to the Respondent and it is ordered.

DATED, SIGNED AND DELIVERED AT MURANGA THIS 23RD DAY OF JULY 2024

J. WAKIAGA

JUDGE

In the presence of:

No appearance by Kibunja for Respondent

Mbugua Njuguna for the Appellant

Quinteen – Court Assistant

