



**Mwangi v Kamanda & 3 others (Civil Appeal 170, 171 & 172 of 2020
(Consolidated)) [2024] KEHC 10615 (KLR) (7 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10615 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL 170, 171 & 172 OF 2020 (CONSOLIDATED)
CJ KENDAGOR, J
AUGUST 7, 2024**

BETWEEN

JANE WANJIKU MWANGI APPELLANT

AND

JONES WAWIRA KAMANDA 1ST RESPONDENT

**NDUNGU NJERU (SUING AS ADMINISTRATORS AD LITEM OF THE
ESTATE OF SIMON MURITHI NDUNGU – DECEASED) 2ND RESPONDENT**

AMOS MUIRURI 3RD RESPONDENT

LUCY WAMBETI NJUE 4TH RESPONDENT

*(Being an appeal against the judgment resulting from Milimani
CMCC Civil Case No. 513 of 2012 delivered on 30th April, 2020)*

JUDGMENT

1. The deceased, Simon Muriithi Ndungu, died in a road traffic accident that occurred on 24th July, 2009 along Makutano Makuyu Road. The accident involved the Appellant’s motor vehicle registration KAW 873V, driven at the time by the appellant’s agent, which collided with motor vehicle registration number KAS 514K, owned by the 4th Respondent. The motor vehicle KAW 873V is registered in the name of the 3rd Respondent. The 1st and 2nd Respondents, as administrators ad-litem of the deceased’s estate, sued the Appellant and the 3rd Respondent for general and special damages in Milimani CMC Civil Case No. 513 of 2012. Interlocutory judgment was entered against the 3rd Respondent. The 4th Respondent was enjoined as a Third Party.
2. Upon hearing the claim, the trial court held the Appellant and the 3rd Respondent herein 100% jointly and severally liable for the accident and awarded the 1st and 2nd Respondent damages as follows: Kshs. 50,000/= as general damages for pain and suffering, Kshs. 220,000/= for loss of expectation of life,



Kshs. 1,72, 933/= for loss of dependency and Kshs. 820/= as special damages, together with the costs of the suit plus interests.

3. The Appellant lodged an appeal in this court, aggrieved by the said decision. The appeal challenges the trial court's finding on liability and assessment of the quantum of damages.
4. In her memorandum of appeal dated May 21st, 2020, the Appellant raised 11 grounds of appeal which can be summarized as follows:
 1. That the learned magistrate erred in law and in fact in giving a narrow interpretation of the facts, leading to an erroneous assessment of the issue of liability.
 2. That the learned magistrate erred in law and in fact as she failed to take into account the issue of liability which was not proved by the Respondents against the Appellant.
 3. That the learned magistrate erred in failing to consider the law on negligence and thereby erroneously finding the Appellant to blame at 100% liability.
 4. That the learned magistrate erred in law and in fact because she found as a fact that two different vehicles were to blame equally for the accident, and yet she proceeded to blame the Appellants at 100% in her final findings.
 5. That the learned magistrate erred in law and in fact in awarding general damages when there was no legal basis for the award.
 6. That the learned magistrate erred in law and in fact in awarding general damages that were so excessive as to amount to abuse of discretion.
 7. That the learned magistrate erred in law and in fact in applying wrong principles in awarding general damages.
 8. The learned magistrate erred in law and in fact in totally ignoring the law and the submissions put in by the appellant thereby arriving at a wrong decision on quantum of damages.
 9. That the learned magistrate misdirected herself on the applicable measure of award of general damages in favor of the Respondents.
 10. That the learned magistrate erred in law and fact in awarding damages that were so excessive as to represent an erroneous estimate of the loss suffered.
 11. That the judgment of the learned magistrate is against the law and weight of the evidence on record.
5. The appeal was canvassed by written submissions, which this court gave due consideration to.

Issues for determination

6. The issues for determination are whether the learned trial magistrate erred in holding the Appellant liable, the apportionment of liability, and whether the damages awarded by the trial magistrate amount to an erroneous estimate.
7. Being a first appeal, the court relies on a number of principles as set out in *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123:

“...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 ...”

Whether the learned trial magistrate erred in apportioning liability against the Appellant and 3rd Respondent jointly and severally?

8. The general rule is that a trial court's finding on apportionment of liability should not be interfered with save in exceptional cases as it is an exercise of discretion. In *Khambi and another v Mahithi and another* [1968] EA 70, it was held thus: -

“It is well settled that where a trial judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial judge.”

9. The Appellant disputes the trial court's finding that apportioned liability at 100% jointly and severally against the Appellant and the 3rd Respondent. She argues that this finding was erroneous because the OB extract and the police officer who testified in court indicated that the motor vehicle, KAS 514K, was to blame. Based on this evidence, the Appellant argues that the lower court should have placed liability on the driver of motor vehicle KAS 514K. She contends that the court should have found the 4th Respondent (third party) solely liable for the accident as per the police abstract and the testimony of the police officer. In the alternative, the Appellant has asked the court to apportion liability equally between herself and the 4th Respondent.

10. I have examined the evidence before the trial court. It was established that an accident occurred involving the two vehicles, KAS 514K and KAW 873V. The deceased died as a result of the accident; he was a passenger in motor vehicle KAS 514K. The police officer who testified and produced the police abstract could not explain why any driver should carry more blame than the other. The police OB extract noted, in brackets, that the motor vehicle KAS 514K was to blame. However, the police officer who produced the report did not give the basis for that entry.

11. The trial court observed as follows;

“The court has read the OB extract it comprises of a report by officers who visited the scene of accident. In the report, it is stated that the two motor vehicles met head on. There are no further reasons or circumstances given for the accident. Even the point of impact is not stated. In the police abstract, it is stated that the accident is still pending under investigations. In summary, the only evidence before the court is that the vehicles met and collided. It is obvious that the accident occurred for a reason. The reasons are not explained to court by either party. The court thus concludes that both drivers were at fault and contributed to the accident vide negligence. The defendants are therefore found to have caused the accident and found to be 100% liable.”

12. It was also held in *Mwangi v Wambugu* [1984] KLR 453 that;

“An appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the



court has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence”.

13. Although the police suggested that the motor vehicle, KAS 514K, was to blame solely, the lower court concluded that both drivers were at fault and contributed to the accident. This is because the police did not give any explanation to support the entry when the same abstract indicated that the case was pending investigations. In addition, the police officer told the court that both drivers died on the spot, and the police were unable to get an independent witness in their investigations.
14. In *Peter Kanithi Kimunya vs. Aden Guyo Haro* [2014] eKLR it was held:

“A police abstract is not proof of occurrence of an accident but of the fact that following an accident, the occurrence thereof was ‘reported’ at a particular police station.”
15. The Appellant has taken issue with the learned trial magistrate’s failure to apportion liability in a ratio of 50: 50 between her and the fourth Respondent.
16. In the judgment delivered by the trial court on 30th April, 2020, the learned magistrate held the Appellant and 3rd Respondent 100% jointly and severally liable for the accident. The Appellant faulted the trial court for holding that the Appellant and the 3rd Respondent were jointly and severally liable. Instead, the Appellant argues that liability ought to have been apportioned equally between the Appellant and 4th Respondent on a 50:50 basis.
17. The High Court in the *Nzioka* (Suing on her own behalf and as *Administrator of the Estate of Gideon Mwanthi Nguyo - Deceased*) v *Mwangangi & another* (Civil Appeal 283 of 2021) [2022] KEHC 15711 (KLR) (Civ) (28 November 2022) (Judgment) held as follows:

“From the above authority, it is evident that by holding the respondents herein 100% jointly and severally liable for the accident, the learned magistrate meant that the Appellants can recover the full judgment sum against either of the Respondents then the one who paid can seek reimbursement from the other. Should that be the case in road traffic accident cases where parties are held equally liable? Definitely not...The record is clear that none of the drivers testified in the trial court and no evidence was tendered from which this court can reasonably determine who was to blame for the accident. In the premises and guided by the above authority I hold the respondents herein liable for the accident in the ratio of 50:50”.
18. In *Lakhanshi v Attorney General* [1971] EA 120, Lutta, JA cited with approval the judgment of Lord Denning in *Baker v Market Harborough Industrial Co-operative Society Ltd* [1953], where it was held that:

“In a situation where a collision had occurred, and it was not reasonably possible on the evidence adduced to decide who was to blame, that liability should be apportioned at 50:50 % as between the two motor vehicles.”
19. In the present case, the fatal accident occurred in the middle of the road. The facts before the court could not reasonably help the court determine who was to blame for the accident. The trial court observed that;

“It is the police officer’s testimony that the motor vehicles met head on and collided at the middle of the road. She told the court that both drivers died on the spot, and the police were unable to get an independent witness in their investigations”.



20. The court is bound by the precedent established in *Nzioka (Suing on her own behalf and as Administrator of the Estate of Gideon Mwanthi Nguyo - Deceased) v Mwangangi & another (supra)* and finds no reason to depart from them. The two motor vehicles are both to blame for the accident.
21. The appellant initiated third-party proceedings against the 4th Respondent. The third-party did not enter an appearance. Third party proceedings are provided for in Order 1, rule 15 of the Civil Procedure Rules;

Notice to third and subsequent parties

“15

- (1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)—
 - (a) that he is entitled to contribution or indemnity; or
 - (b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or
 - (c) that any question or issue relating to or connected with the said subject matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.
 - (2) A copy of such notice shall be filed and shall be served on the third party according to the rules relating to the service of a summons.
 - (3) The notice shall state the nature and grounds of the claim, and shall, unless otherwise ordered by the court, be filed within fourteen days of service, and shall be in or to the effect of Form No. 1 of Appendix A with such variations as circumstances require and a copy of the plaint shall be served therewith.”
22. On 18th July 2017, the lower court granted leave for service of the third-party notice dated 15th May 2017. An affidavit of service was duly filed by the appellant. The Appellant complied with the requirements for the initiation of third-party proceedings. It is thus a valid third-party notice within the provisions of the Civil Procedure. The third-party failed to enter an appearance, and the rules have provided for the implications of third-party default in entering an appearance.

Order 1, rule 17 provides that;

“If a person not a party to the suit who is served as mentioned in r. 15 (hereinafter called the “third party”) desires to dispute the plaintiff’s claim in the suit as against the defendant on whose behalf the notice has been given, or his own liability to the defendant, the third party must enter an appearance in the suit on or before the day specified in the notice; and in default of his so doing he shall be deemed to admit the validity of the decree obtained against such defendant, whether obtained by consent or otherwise, and his own liability to contribute or indemnify, as the case may be, to the extent claimed in the third party notice:



Provided that a person so served and failing to enter an appearance within the period fixed in the notice may apply to the Court for leave to enter an appearance, and for good cause such leave may be given upon such terms, if any, as the court shall think fit.”

(the emphasis is mine)

23. The trial court delivered a ruling on the Appellant’s application dated 06th September, 2018 and held that the Appellant’s recourse under Order 1 Rule 17 of the Civil Procedure Rules is stipulated in Rule 19.

Order 1, rule 19 provides as follows;

“Judgment against third party in default.

19. Where a third party makes default in entering an appearance in the suit, or in delivering any pleading, and the defendant giving the notice suffers judgment by default, such defendant shall be entitled, after causing the satisfaction of the decree against himself to be entered upon the record, to judgment against the third party to the extent claimed in the third-party notice; the court may upon the application of the defendant pass such judgment against the third party before such defendant has satisfied the decree passed against him:

Provided that it shall be lawful for the court to set aside or vary any judgment passed under this rule upon such terms as may seem just.”

24. The recourse available to the appellant (as the party who has taken out third-party proceedings) is dependent on the court’s determination of liability and quantum. I agree with the trial court that it could not issue directions on the motion dated 6th September, 2018 because the 4th respondent had not entered appearance. Directions are taken where the third party has entered an appearance.
25. Additionally, my interpretation of Order 1 Rule 17 is that despite a third party failing to enter an appearance, they are formally joined to the suit by the filing and service of the third-party notice pursuant to leave being granted by the court.
26. The deceased was travelling in the 4th respondent’s motor vehicle. The evidence before the court is that the 4th respondent (third party in the lower court case) is partially liable for the accident that claimed the deceased’s life. This court has not found fault in the lower court’s finding that the Appellant and the 3rd Respondent were liable for the accident.
27. Accordingly, the appeal is found to be meritorious on the issue of apportionment of liability. The trial court’s order that the Appellant and the 3rd Respondent are held 100% jointly liable is hereby set aside and substituted with an order that liability is apportioned between the appellant and the 3rd respondent jointly and severally at the ratio of 50% and the 4th respondent at the other ratio of 50%.

Quantum

28. The Appellant argued that the trial court erred in law and fact in awarding quantum as it did when there was no legal basis for the award. She opines that the trial court’s award for pain and suffering, loss of dependency, and loss of expectation of life was so excessive as to amount to an abuse of discretion.
29. On pain and suffering, the Appellant urged the court to set aside the award of Kshs. 50, 000/= and replace it with an award of Kshs. 10,000/=. She bases her argument on the fact that the deceased’s death was instantaneous. She relies on the case of Harjeet Singh Pandal v Hellen Aketch Okudho (2018) eKLR where the court set aside an award of Kshs.30,000/- under pain and suffering and substituted it with Kshs.10,000/-



30. In the case of *Mercy Muriuki & another v Samuel Mwangi Nduati & another* (Suing as the legal Administrator of the Estate of the late Robert Mwangi) [2019] eKLR, the court observed that
- “Awards for Pain and Suffering range from Kshs 10,000/- to Kshs 100,000/- and higher damages would be awarded if the pain and suffering was prolonged before death (Emphasis by Court)”.
31. This ought to be contrasted with the court’s finding in *Nzioka* (Suing on her own behalf and as Administrator of the Estate of Gideon Mwanthi Nguyo - Deceased) v *Mwangangi & another*, where the deceased had died on the spot. In the case, the court refused to upset the lower court’s award of 50,000/= for Pain and Suffering. It held that;
- “Given that the sums awardable under this head have ranged from Kshs 10,000/- to Kshs 100,000/- from past precedents, I cannot say that the sum of Kshs. 50,000/- awarded by the trial court is inordinately high or unreasonable as to warrant interference”.
32. A similar position was held by the High Court in *Sukari Industries Limited v Clyde Machimbo Juma* [2016] eKLR, where the deceased had died on the spot. The lower court had awarded him Kshs. 50,000/= for pain and suffering, which was challenged at the High Court on the grounds that the amount was unreasonable. The Court held thus;
- “According to various decisions of the High Court, the sums have ranged from Kshs 10,000 to Kshs 100,000 over the last 20 years hence I cannot say that that the sum of Kshs 50,000 awarded under this head is unreasonable.”
33. Based on the above precedents, I find that the Lower court’s exercise of discretion in this issue was reasonable, and, therefore, I decline to upset the lower court’s finding on the same.

Loss of expectation of Life

34. Appellant urged the court to take into account that any award made for loss of expectation of life under the *Law Reform Act* ought to be deducted from the award made under the *Fatal Accidents Act*. She argued that, in arriving at its decision, the trial court erred by failing to deduct the award noting that the 1st and 2nd Respondent would have benefited under two Acts. She argued the court to find that failure by the trial court to deduct the award was erroneous in the circumstances. She submitted that the 200,000/= awarded by the court was inordinately high and persuaded this court to substitute the amount with 80,000/=.
35. As this is an appeal on quantum of damages, the general principal is that the assessment of damages is within the discretion of the trial court and the appellate court will only interfere where trial court, in assessing damages, erred in principle and either took into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is based on no evidence (see *Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another* [1982-88] 1 KAR 727, *Peter M. Kariuki v Attorney General* CA Civil Appeal No. 79 of 2012 [2014]eKLR.) and *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5).
36. Regarding the Appellant’s argument that the Respondents could benefit from two Acts, I believe that the issue of double compensation does not arise in this present case. I associate myself with the High



Court's decision in *Sukari Industries Limited v Clyde Machimbo Juma* [2016] eKLR, where that court observed that;

“As regards the argument that the respondent was awarded double compensation, I would do no better than quote what the Court of Appeal stated in *Hellen Waruguru Waweru* (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited NYR CA Civil Appeal No. 22 of 2014 [2015] eKLR that;

[20] This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the *Law Reform Act* and dependants under the *Fatal Accidents Act* are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the *Fatal Accidents Act* should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the *Law Reform Act*, hence the issue of duplication does not arise.”

37. Thus, based on the above precedent, I uphold the trial court's award of Kshs. 200,000/- and the prayer to have it substituted with 80, 000/- is hereby disallowed.

Loss of Dependency

38. The Appellant faulted the lower court's approach to the calculation of the damages for loss of dependency. She urged the court to set aside the multiplicand adopted by the trial court of Kshs.6,461/= and adopt that of Kshs 4,156/=. Here, the argument was that the trial court erred in law by adopting the minimum wage of a turn boy in a municipality, yet no evidence was found that the deceased worked as a conductor within a municipality.

39. I have reviewed the evidence before the trial court and found that the 1st and the 2nd Respondents had produced enough evidence to show that the deceased was a conductor. The KRA identity card issued on 20th June, 2005 was produced as evidence that the deceased was employed by Neno Sacco Ltd. as a conductor. In addition, in arriving at the wages of the deceased, the trial court was rightly guided by the minimum wage (monthly) for a conductor within a municipality, which was Kshs.6, 461/= On the point of multiplier, I find that the trial court rightly exercised its discretion in setting the multiplier at 20.

40. Lastly, the Appellant faults the lower court's approach to the dependency ratio. She argues that there was no evidence at the lower court to prove dependency because the 1st and the 2nd Respondents did not produce birth certificates showing that the deceased had 2 children. The courts have settled the issue of using birth certificates to prove dependency, especially where the dependants are children. The jurisprudence shows that the Respondents did not have to produce birth certificates.

41. In *Bash Hauliers v Dama Kalume Karisa & another* [2020] eKLR, the High Court held that:-

“37. Although no birth certificate was produced to show that the deceased was the father of Suleiman Charo Katana, no evidence was called to controvert the said assertion. This court takes judicial notice of the fact that not every child of 4 years of age has a birth certificate as some Kenyan parents do not obtain birth certificates immediately following the birth of their children. This Court therefore finds nothing extraordinary in the said child not having a birth



certificate. The burden of proof in this case was on a balance of probabilities and not proof beyond reasonable doubt”.

42. Similarly, the Court in *Nation Media Group Limited v Thuo & another (Suing as the Administrators of the Estate of Josephat Nduati Kungu – Deceased) (Civil Appeal 157 of 2019)* [2024] KEHC 4058 (KLR) (26 April 2024) (Judgment) held that;

“With due respect, and unless the Appellant’s Counsel does not live in this very society, his submission that evidence of marriage was not proved simply because no marriage certificate was produced cannot be a serious one. The same goes to the allegation that paternity of the 1-year-old son was not proved simply because no birth certificate or notification of birth were produced. In any event, it must always be recalled that in civil cases, unlike in criminal proceedings, proof is not on a beyond reasonable doubt basis, but on the basis of balance of probabilities”.

43. The Court went on to state that;

“In the circumstances, I am satisfied that even though the evidence presented was not watertight, survivorship and dependency were sufficiently proved to an acceptable standard. The choice of the 2/3 dependency ratio by the Magistrate, though not explained, was therefore, nevertheless, still the correct one. I will also not therefore interfere with it”.

44. At the lower court, the Appellant did not controvert the 1st and 2nd Respondent’s assertion that the deceased had left behind a widow and 2 children. Thus, I find no good reason to disturb the trial magistrate’s court’s discretion to use the 2/3 dependency ratio. Special damages were pleaded and proved at Kshs.820/=

45. From the foregoing, I find that;

- a. The Appellant’s appeal only succeeds on liability.
- b. The trial court’s decree that the appellant and 4th respondent are held 100% jointly and severally liable is hereby set aside and substituted with a decree that liability is apportioned between the Appellant and 3rd Respondent jointly and severally at the ratio of 50% and the 4th Respondent at the ratio of 50%.
- c. The appellants’ appeal on the quantum of damages lacks merit and is hereby dismissed.

46. Since the appeal has partly succeeded, each party will bear it’s own costs of the appeal.

It is so ordered.

DELIVERED, DATED, AND SIGNED AT NAIROBI ON THIS 7TH DAY OF AUGUST, 2024.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM

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C. KENDAGOR

JUDGE

In the presence of:

Court Assistant - Beryl

Advocate for the Applicant – Mr. Muthie h/b for Opondo Advocate



Advocate for the Respondent -Ms. Kanana h/b for Kaburu Advocate

