



Mwalenga v Kilogho (Suing as the Administrator of the Estate of Rophus Mwadime Kilogho - Deceased) (Civil Appeal E015 of 2023) [2024] KEHC 11149 (KLR) (18 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11149 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E015 OF 2023
GMA DULU, J
SEPTEMBER 18, 2024**

BETWEEN

VIVIAN MMBONE MWALENGA APPELLANT

AND

MACKRINA SHIGHARE KILOGHO (SUING AS THE ADMINISTRATOR OF THE ESTATE OF ROPHUS MWADIME KILOGHO - DECEASED) RESPONDENT

(From the decision in Voi CM Civil Case No. E134 of 2021 delivered by Hon. A. M. Obura (Mrs.) (CM) on 29th August 2022)

JUDGMENT

1. In a judgment delivered on 29th August 2022, the learned Magistrate found in favour of the plaintiff (now respondent) on 100% liability against the defendant (now appellant) and concluded as follows:-

“Reasons wherefore, I hereby enter judgment for the plaintiff as against the defendants jointly and severally as follows:-

Pain and suffering Kshs. 30,000/=

Loss of expectation of life Kshs. 100,000/=

Loss of dependency Kshs. 434,457/=

Special damages Kshs. 20,000/=

Total Kshs. 584,400/= (Five hundred and eighty-four thousand four hundred shillings only)

Plus costs of the suit and interest thereon at court rates.”



2. Dissatisfied with the above decision of the trial court, the appellant (who was the defendant in the trial court) has come to this court on appeal through counsel Kimondo Gachoka & Company Advocates on the following grounds:-
 1. The learned trial Magistrate erred and misdirected herself by relying on wrong principles when determining liability thereby arriving at a wrong decision.
 2. The learned trial Magistrate erred and misdirected herself and failed to apply precedents and tenets/principles of the law on liability in the circumstances occasioning a miscarriage of justice.
 3. The learned trial Magistrate erred and misdirected herself and failed to apply precedents and tenets/principles of the law on failing to call an eye witness in fatal matters which occasioned a miscarriage of justice.
 4. The learned Magistrate erred in law and in fact by failing to adequately evaluate the evidence on record especially for the expert witness/police which was contradicting exhibits and thereby arrived at a wrong decision unsustainable in law.
 5. The learned trial Magistrate erred and misdirected herself by ignoring the defendant's submissions on record hence arriving at a wrong decision in determining liability.
 6. The learned trial Magistrate erred and misdirected herself by ignoring the evidence of witnesses on record especially the police officer hence arriving at a wrong decision in awarding damages.
3. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Kimondo Gachoka & Company Advocates for the appellant, as well as the submissions filed by Wachenje & Mariga LLP Advocates for the respondent. I have to acknowledge that both sides relied upon decided court cases.
4. This being a first appeal, I am bound to apply the settled principle applicable in first appeals as highlighted in the case of *Selle =Versus= Associated Motor Boat Company Ltd (1968) EA 123*, in which, the defunct Court of Appeal for East Africa stated as follows:-

“An appeal to this court from the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that 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 testify and should make due allowance in this respect....”
5. In determining this appeal also, I have to bear in mind that the burden was on the plaintiff (now respondent) to prove the allegations against the appellant. This legal burden is codified under Section 107, 108 and 109 of the *Evidence Act* (Cap.80).
6. This being a civil case, the standard of proof was on the balance of probabilities which means the version of evidence that is more likely to be what occurred than not, carries the day.
7. At the trial, the respondent called three (3) witnesses. On their part, the appellant called one (1) witness.
8. I have re-evaluated the evidence on record on both sides.
9. On the issue of liability, PW1 Police Constable Benard Mwangi of Voi Police Station stated in evidence that three motor vehicles were involved in the fatal road traffic accident, and that the deceased was a pedestrian who was hit by another vehicle and thereafter hit by KCM 856Z, at 9p.m. in the night.



10. On his part, PW3 Gideon Munyao a co-worker of the deceased (a mason), testified in court that the deceased had gone to buy food across the road, and was hit by KCM 856Z a Nissan Matatu, at Manyani (Maungu) on the Nairobi Mombasa highway. He testified that the Nissan matatu hit the deceased and threw him to the middle of the road, where shortly thereafter another vehicle ran over him.
11. On their part, the defence called one police officer, who testified regarding the circumstances of the accident, DW1 PC Mathew Okindo of Voi Police Station. His evidence was that the deceased was initially hit by an unknown trailer, and later hit by KCM 856Z a Nissan Harrier vehicle. It was his evidence that no traffic case was instituted in court against the driver of the Nissan Harrier matatu KCM 856Z.
12. I note that in evaluating the evidence on record, the learned trial Magistrate found that DW1 was not one of the investigating officers; and that he did not produce the police OB entry report which he relied upon in court; and that PW1 who was one of the investigating officers, had testified that the Nissan Harrier matatu was the first vehicle to hit the deceased. The trial Magistrate thus found liability in negligence to the extent of 100%, against the operator of the Nissan Harrier vehicle.
13. Having myself perused and re-evaluated the evidence on record, I find that the deceased was a pedestrian and that three vehicles were at the scene at the time of accident. He was hit by one of the trailers and thrown to the side of the road where he was then hit and killed by the Nissan matatu. It is also clear from the police evidence that no traffic charges have so far been suggested or proposed against the driver of the Nissan matatu, and further that the identity of the other two trailers involved has not yet been established.
14. In those circumstances and the fact that this was a traffic accident which occurred at night on a public highway, the victim being a pedestrian not a passenger, the involvement of more than one vehicle in the fatal accident, and the absence of any suggestion of proposed traffic charges being preferred against the driver of the Nissan matatu vehicle, in my view, the finding of liability by the trial court to the extent of 100% in negligence, was not justified.
15. Considering the totality of the evidence on record, and the fact that the driver of the Nissan Harrier did not come to court to testify and explain how the accident occurred, I will reduce the liability in negligence to 50%, as in my view if the Nissan driver was on proper lookout and speed, in my view he would have swerved to avoid hitting and killing the deceased.
16. I now turn to the quantum of damages. On the assessment of quantum of damages, I note that there is the evidence of PW2 Mackrina Sighare relating to her relationship with the deceased. She was a sister of the deceased. There is also on record the medical evidence relating to the cause of death of the deceased, which has not been controverted or shaken in cross-examination.
17. I note that on pain and suffering, the appellant's counsel asked the trial court to award Kshs. 10,000/=, as the deceased died on the spot. The trial Magistrate however awarded Kshs. 30,000/=. Since there is no evidence that the deceased died instantly in my view, this was a reasonable and judicious exercise of discretion by the trial court, as the deceased must have suffered some pain and anxiety before death. I will uphold this award subject to 50% contributory negligence.
18. With regard to loss of expectation of life for a person who died at 43 years, the trial Magistrate awarded Kshs. 100,000/=. In my view, that award is within the range of recent conventional awards made by courts within Kenya. I will retain the award subject to 50% contribution.



19. With regard to loss of dependency, the trial Magistrate found that only the deceased's parents were his dependants under Section 4 of the *Fatal Accidents Act*. The trial Magistrate relied upon the Regulation of Wages (General) (Amendments) Order 2018 and applied the minimum salary of a casual labourer Kshs. 7,240.95 per month and assessed loss of dependence as Kshs. $7,240/95 \times 12 \text{ months} \times 15 \text{ years} \times 1/3 = \text{Kshs. } 434,457/=$. I find this assessment of damages under this head to be reasonable and within the trial Magistrate's exercise of judicial discretion. I will thus uphold the award subject to 50% contribution.
20. Finally, on special damages, I find that the Magistrate's award of Kshs. 20,000/= for special damages was within what was pleaded and proved. I will also uphold this award, subject to 50% liability in negligence. I thus uphold the amount of award of damages as assessed, subject to 50% contribution.
21. Consequently, I allow the appeal in part by varying the findings on 100% liability to negligence 50%. I uphold the amounts of award of damages as assessed, subject to 50% contribution.
22. In conclusion, the final orders in this appeal are as hereunder:-
- i. Liability in negligence is 50%
 - ii. Pain and suffering Kshs. 30,000/=
 - iii. Loss of expectation of life Kshs. 100,000/=
 - iv. Loss of dependency Kshs. 434,457/=
 - v. Special damages Kshs. 20,000/=
- Sub Total Kshs. 584,457/=
- Less 50% contribution Kshs. 292,229/=
- (Two hundred and ninety two thousand, two hundred and twenty nine shillings only).
23. The parties will each bear their respective costs of this appeal, but costs of the suit and interest will be as ordered by the trial Magistrate.

DATED, SIGNED AND DELIVERED THIS 18TH DAY OF SEPTEMBER 2024 IN OPEN COURT AT VOI VIRTUALLY.

GEORGE DULU

JUDGE

In the presence of:-

Alfred/Trizah – Court Assistants

Mr. Nganga for the appellant

Mr. Wachenje for the respondent

