



Nyagemi (Suing as the legal representative of the Estate of Mercy Abel (Deceased) v Momanyi & another (Civil Appeal E019 of 2022) [2024] KEHC 11132 (KLR) (23 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11132 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CIVIL APPEAL E019 OF 2022
RL KORIR, J
SEPTEMBER 23, 2024**

BETWEEN

**JOSEPH MOMANYI NYAGEMI (SUING AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF MERCY ABEL (DECEASED APPELLANT**

AND

BENJAMIN ONDERA MOMANYI 1ST RESPONDENT

NAROK SAFARIS SACCO 2ND RESPONDENT

*(Being an Appeal from the Judgment of Resident Magistrate, Wamae
M. at the Magistrate's Court at Bomet, Civil Suit Number 102 of 2018)*

JUDGMENT

1. The Appellant (then Plaintiff) as the legal representative of the deceased Mercy Abel, sued the Respondents (then Defendants) for General Damages that arose when the deceased was allegedly involved in a fatal road traffic accident on 13th November 2015 along Bomet-Narok road.
2. The Respondents (then Defendants) failed to enter appearance and further failed to file a defence. Because of this failure, the trial court (Hon. Kibelion) entered Judgement against them on 30th July 2021. The matter then proceeded to formal proof hearing on 3rd February 2022 where the Appellant testified and closed his case.
3. In its Judgment delivered on 17th March 2022, the trial court dismissed the Appellant's/Plaintiff's case stating that the Appellant had not discharged its burden of proof.
4. Being aggrieved with the Judgment of the trial court, the Appellant filed his Memorandum of Appeal dated 5th April 2022 appealing against the whole Judgement. He relied on the following grounds:-



- I. That the learned trial Magistrate erred in law and fact in failing to enter Judgement in favour of the Appellant and in dismissing the above matter.
 - II. That the learned trial Magistrate erred in law and fact by failing to consider the Appellant's testimony and evidence on record.
 - III. That the learned trial Magistrate erred in law and fact in holding that the Appellant failed to prove his case on a balance of probabilities and that the Respondents were not jointly and severally liable for the accident that occasioned the fatal injuries to the deceased.
 - IV. that the learned trial Magistrate erred in law and fact in failing to take into account the principles of the doctrine of *res ipsa loquitur* as pleaded by the Appellant.
 - V. That the learned trial Magistrate erred in law and fact in failing to find the Respondents 100% liable for lack of an eye witness when there was overwhelming evidence which had not been rebutted or challenged.
 - VI. That the learned trial Magistrate misdirected herself in law and in fact in concluding that the Appellant's suit was barred by limitation when it was not.
 - VII. That the learned trial Magistrate erred in law and fact by failing to consider the Appellant's submissions and authorities on record on both liability and quantum.
 - VIII. That the learned trial Magistrate misdirected herself on the evidence on record thereby arriving at the wrong conclusion on liability and quantum.
 - IX. That the learned trial Magistrate erred in law and in fact in dismissing the Appellant's suit when it was obvious that the Appellant had proved his case on a balance of probability.
5. My duty as the 1st appellate court is to re-evaluate and re-examine the evidence in the trial court and come to my own findings and conclusions. This principle was espoused in the Court of Appeal case of *Abok James Odera t/a A.J Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates* (2013) eKLR.

The Plaintiffs'/Appellant's Case.

6. Through his Complaint dated 9th November 2018, the Appellant stated that the deceased Mercy Abel was involved in a road traffic accident on 13th November 2015. That she was aboard Motor Vehicle Registration Number KBN 601R when it was involved in an accident with Motor Vehicle Registration Number KBU 462F. It was his case that the Respondents were the registered or beneficial owners of Motor Vehicle Registration Number KBN 601R.
7. It was the Appellant's case that the Respondents were negligent in the accident. The particulars of the negligence were stated in paragraph 5 of the Complaint. That as a result of the accident, Mercy Abel suffered fatal injuries.
8. The Appellant prayed for special and general damages against the Respondents under the *Fatal Accidents Act* and the *Law Reform Act*.
9. On 23rd November 2023, I directed that this Appeal be canvassed by way of written submissions.

The Appellants' Submissions.

10. Through his Submissions dated 5th January 2024, the Appellant submitted that the Respondents never entered appearance and this evidence stood uncontroverted.



11. The Appellant submitted that the trial court Judgement was flawed as the trial court dismissed an uncontested claim.
12. It was the Appellant's submission that the trial court erred when it held that the claim was filed outside the statutory period of three years. That the cause of action arose on 13th November 2015 and the claim was filed on 12th November 2018 which was within the three year statutory period. It was his further submission that the Respondent did not file a preliminary objection in regards to the suit being filed out of time.
13. The Appellant submitted that the trial court misread and misconstrued sections 4 and 29 of the Limitation of Actions Act. That the trial court failed to address its mind to the provisions of section 4(2) of the Limitation of Actions Act but instead misinterpreted section 29 of the Limitation of Actions Act. He relied on Moses Maina Ndegwa vs Agnes Wangui Nguni & 2 others (2021) eKLR and Jane Muthoni Njiru & another vs Muritu Kinyanjui & another (2011) eKLR. He further submitted that the said section 29 concerned itself with instances of extension of the limitation period in case of ignorance of the material facts in actions for negligence.
14. It was the Appellant's submission that the Respondent failed to enter appearance and file a defence despite having been served summons and as such his claim stood undisputed and uncontroverted. That once an interlocutory Judgement had been entered, the Respondent's question on liability ceased to exist and the court's only role was to assess damages. He relied on Felix Mathenge vs Kenya Power & Lighting Company Ltd (2008) eKLR and Paul Muiyoro t/a Spotted Zebra vs Bulent Gulbahar Remax Realtors (2016) eKLR. It was his further submission therefore that the trial court's dismissal of his claim was erroneous in principle.
15. In regards to the award on damages, the Appellant submitted the trial court erred when it awarded Kshs 10,000/= for pain and suffering. That an award of Kshs 100,000/= would be reasonable as per the evidence he tendered. He relied on Mercy Muriuki & another vs Samuel Mwangi Nduati & another (suing as the legal administrator of the estate of the late Mwangi) (2019) eKLR. On the award on loss of expectation of life, he submitted that the award of Kshs 100,000/= should not be disturbed.
16. In regard to the award on loss of dependency, he submitted that the award of Kshs 1,415,078/= was low and that an award of Kshs 2,400,000/= was fair compensation. He used a multiplicand of Kshs 15,000/=, a multiplier of 40 years and a dependency ration of 1/3 as opposed to the trial court's use of Kshs 10,107/= as the multiplicand, a multiplier of 35 years and a dependency ration of 1/3.
17. The Respondents did not file their written Submissions.
18. I have gone through and carefully considered the Record of Appeal dated 27th July 2023 and the Appellant's written Submissions dated 5th January 2024. The following issues arise for my determination:-
 - i. Whether the suit was filed out of the statutory period.
 - ii. Whether the trial court erred in dismissing the Appellant's suit and the consequences thereof.

i. Whether the suit was filed out of the statutory period

19. The trial court in its Judgement stated that the Appellant's suit was filed out of time. That section 4(2) of the Limitation of Actions Act provided that actions that are founded on a tort may be brought within three years. But in the instant case, the relevant section was section 29 of the Limitation of Actions Act because of the death of the deceased. The trial court stated that according to section 29 of the Limitation of Actions Act, such a suit should be brought within twelve (12) months and that



in the instant case, the cause of action arose on 13th November 2015 and the suit was filed on 12th November 2018 which was more than the said twelve months.

20. The Appellant on the other hand stated that section 4 (2) of the *Limitation of Actions Act* was the relevant law. That his cause of action was founded on negligence and he ought to bring a suit within three years, which he did. That the trial court misconstrued and misinterpreted the law when it relied on section 29(4) of the *Limitation of Actions Act* and its Judgment was without a basis in law.
21. Section 4(2) of the Limitation of Actions provides:-
An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued.....
22. I agree with the Appellant that his claim was founded on negligence and that on that basis alone, he ought to have brought his suit before the expiry of three years from when the cause of action arose. However in the instant case, the Appellant pleaded that Mercy Abel died as a result of the road traffic accident that occurred on 13th November 2015.
23. Section 29 of the *Limitation of Actions Act* provides:-
- (1) In relation to an action to which section 27 of this Act applies, being an action in respect of one or more causes of action surviving for the benefit of the estate of a deceased person by virtue of section 2 of the *Law Reform Act* (Cap. 26), section 27 of this Act and section 28 of this Act shall have effect subject to subsections (4) and (5) of this section.
 - (2) Subsections (1), (2) and (3) of section 27 of this Act and section 28 of this Act shall have effect, subject to subsections (4) and (6) of this section, in relation to an action brought under the *Fatal Accidents Act* (Cap. 32) for damages in respect of a person's death, as they have effect in relation to an action to which section 27 of this Act applies.
 - (3) In the following provisions of this section, and in sections 27 and 28 as modified by those provisions, "the deceased" means the person referred to in subsection (1) or subsection (2), as the case may be.
 - (4) Section 27(1) of this Act shall not have effect in relation to an action falling within subsection (1) or subsection (2) of this Act, unless the action is brought before the end of twelve months from the date on which the deceased died.....
24. Section 27(1) of the *Limitation of Actions Act* provides:-
Section 4(2) does not afford a defence to an action founded on tort where—
- (a) the action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and
 - (b) the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and
 - (c) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and
 - (d) the requirements of subsection (2) are fulfilled in relation to the cause of action.....



25. In *Kiarie (Suing as the legal representatives and administrator of the Estate of Kelvin Kamau Karanja (Deceased) v Stephen & another (Civil Suit 202 of 2012) [2023] KEHC 2749 (KLR) (Civ) (23 March 2023) (Judgment), Meoli J. held:-*

“.....There appears to be a conflict between the provisions of Section 29(4) and the above provision. It seems that whereas section 27 and 28 of the Act provide for extension of limitation periods in respect of actions founded on tort for damages in respect of personal injuries beyond 3 years, Section 29(4) prescribes the additional condition that for section 27(1) to apply in regard to an action founded on tort brought for damages in respect of death, and not merely personal injuries, the action must have been brought within 12 months of death.

Thus, seemingly introducing a problematic distinction with regard to extension of time in respect of actions founded on tort relating to personal injuries vis-à-vis similar actions relating to death. In my humble view, if it was the intention of Parliament to bar tortious actions arising from death from being brought after the expiry of twelve months after death, or to deny extension of time in respect of such actions, nothing prevented the inclusion of an express provision to that effect.

This court concurs with the observation of Okwengu, J. (as she then was in) *Jane Muthoni Njiru & Another v Muritu Kinyanjui & Another [2011] eKLR* to the effect that:

“Nevertheless I do note that Section 29(4) of the *Limitation of Actions Act* is inconsistent with Section 4(2) of the Limitation Act which provides for causes of action founded on tort to be statute barred after 3 years. In this case, the deceased’s cause of action arose on 13th March 2007 when he was involved in the road accident, and this is the same day the deceased died. Under Section 4(2) the claim being founded on tort, limitation would only set in 3 years later.....”

26. Similarly in *David Mwangi Kibogo (Suing as the Administrator of the estate of the late Scholastica Wamuhu Mwangi) v Benson Ndegwa Waweru & 2 others (2017) eKLR, Sergon J. held:-*

“The death certificate attached shows that the deceased died on 26th September 2011. Under Section 29(4) of the *Limitation of Actions Act*, the application for extension of time is only applicable where the suit is an action for damages in respect of a deceased person’s death, if the action is brought before the end of 12 months from date on which deceased died. Thus the claim would be statute barred after one year from the deceased’s death i.e on 27th September 2012.

Going as by the provisions of Section 29 of the *Limitation of Actions Act*, an application for extension of time could only be entertained if the suit had been filed after 27th September 2012. The suit herein was filed on 26th June 2013 after the deceased’s death. However Section 4(2) of the *Limitation of Actions Act*, provides for causes of action founded on tort to be statute barred after 3 years. Consequently, limitation set in on 27th September 2014.....

.....Under Section 29(4) of the Limitations of Actions Act gives 12 Months for a claim to be statute barred i.e 27th September 2012. By virtue of the nature of tort under which the plaintiff claim is brought limitation runs for three years i.e from 26th September 2011 to 27th September 2014.....”



27. I am persuaded by the above authorities in relation to the application of section 4 (2) of the *Limitation of Actions Act* vis a vis section 29 (4) of the *Limitation of Actions Act*. As elaborated in the authorities above, if the intention of Parliament was to bar tortious actions arising from death from being brought after the expiry of twelve months after death, it would have included an express provision to that effect. Barring that, it is my view that a claim resulting in death was a tort and it fell under the ambit of the provisions of section 4 (2) of the *Limitation of Actions Act*.
28. Flowing from the above, it is clear that the accident occurred on 13th November 2015 and the suit in the trial court was filed on 12th November 2018. It is my finding that the Appellant filed his claim within the statutory period of three years and that the suit was properly before the trial court.

ii. Whether the trial court erred in dismissing the Appellant's suit and the consequences thereof.

29. In dismissing the Appellant's suit, the trial court stated that the Appellant was under duty to prove his case and he failed as he had not discharged his burden of proof. That he failed to link the Respondent to the cause of the accident. On the other hand, the Appellant argued that since the matter had an interlocutory Judgement, the trial court was only supposed to concern itself with assessing the damages.
30. From the record, the Respondents failed to enter appearance and file a defence. An interlocutory Judgement was entered against them on 30th July 2021 and a formal proof hearing was conducted on 3rd February 2022 where the Appellant testified and produced evidence.
31. In *Josphat Muthuri Kinyua & 5 others vs Fabiano Kamanga M'etirikia* (2021) eKLR it was held: -

“...When there is some other aspect of the claim besides the claim for pecuniary damages, as a claim for negligence, the Court will have to consider such a claim on the merit and satisfy itself that the same has been proven through ‘formal proof’ proceedings before proceeding to assess damages. This is the course adopted in *Mwatsahu vs Maro*, Civil Case No. 74 of 1996 (1967) EA 42, a case of pecuniary damages for breach of warranty of title which the Court (Harris J) found the registrar could not enter judgment in default of the defence.

The Court does not therefore find that the entry of interlocutory judgement absolved the Appellants from proving liability by way of hearing in Court. This Court thus finds that despite omission by the Respondent to file a defence in the matter, the Court was still required to have the matter heard with respect to liability, in addition to the question of assessment of damages...”

32. Similarly, in *Samson S. Maitai & another v African Safari Club Ltd & another* (2010) eKLR, Emukule J observed:-

“...I have not seen a judicial definition of the phrase “Formal Proof”.”Formal” in its ordinary Dictionary meaning - refers to being “methodical” according to rules (of evidence). On the other hand, according to *Halsbury's Laws of England*, Vol. 15, para, 260, “proof” is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption.”



33. In *Rosaline Mary Kahumbu vs National Bank of Kenya Ltd* (2014) eKLR, the Court held:-
- “In contrast, at a formal proof hearing, if the party with the onus of adducing evidence fails to satisfy the truth threshold, the matter would stand to be dismissed on the basis that it was unmeritorious and did not raise sufficient proof of any issues of fact or law. It would be heard and determined on its merits.”
34. The Court of Appeal took the same binding position in *Gitobu Imanyara & 2 others vs Attorney General* (2016) eKLR held:-
- “...The fact that the respondent admitted liability ab initio does not in any way shift the burden of proof from the appellants. It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side.....”
35. Taking cue from the above authorities, it is my view that the trial court was correct in questioning and assessing the evidence tabled by the Appellant. A court cannot apportion liability and assess damages on the sole reason of an interlocutory Judgement. It is for this reason that after an interlocutory Judgement is entered, a formal proof hearing is scheduled. This is where the Plaintiff would have to discharge his burden of proof and prove his case to the required standard. An interlocutory Judgement does not in any way absolve the Plaintiff (now Appellant) of this burden.
36. I have looked at the Appellant’s evidence in the trial court and with respect to the trial Magistrate, it is my view that she erred when she concluded that the Appellant had not linked the Respondents to the accident. That the Appellant failed to show who drove Motor Vehicle Registration Number KBN 601R in which the deceased was aboard when it was involved in a road traffic accident with Motor Vehicle Registration Number KBU 462F.
37. The Appellant produced a death certificate as P.Exh 3 which showed that the deceased Mercy Abel died on 13th November 2015. He also produced a Police Abstract as P.Exh 4 which showed that the owner of the Motor Vehicle Registration Number KBN 601R was the 1st Respondent.
38. Courts have severally held that in the absence of any other evidence as to the ownership of a motor vehicle, a Police Abstract was prima facie evidence of ownership. In the case of *Wellington Nganga Muthiora vs. Akamba Public Road Services Ltd & Another* (2010) eKLR the Court of Appeal held as follows:-
- “Where a police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even cross-examination challenged it, the police abstract being a prima facie evidence not rebutted could be relied on as proof of ownership in the absence of anything else as proof in civil cases was within the standards of probability and not beyond reasonable doubt as is in criminal cases. However, where it was challenged by evidence or in cross-examination, the plaintiff would need to produce certificate from the Registrar or any other proof such as an agreement for sale of the motor vehicle which would only be conclusive evidence in the absence of proof to the contrary.”



39. In the case of Fredrick Odongo Otieno vs Al-Husnain Motors Limited (2020) eKLR, Aburili J. held that:-

“The court found that the contents of a Police Abstract is sufficient to establish ownership of a motor vehicle.”

40. In Joel Muga Opija vs East African Sea Food Limited (2013) eKLR the court held:-

“...in any case in our view an exhibit is evidence and in this case, the appellant’s evidence that the police recorded the respondent as the owner of the vehicle and Ouma’s evidence that he saw the vehicle with words to the effect that the owner was East African Sea Food were not seriously rebutted by the respondent who in the end never offered any evidence to challenge or even to counter that evidence. We think, with respect, that the learned judge in failing to consider in depth the legal position in respect of what is required to prove ownership, erred on point of law on that aspect. We agree that the best way to prove ownership would be to produce to court a document from the registrar of Motor vehicles showing who the registered owner is but when the abstract is not challenged and is produced in court without any objection, its contents cannot be later denied.”

41. Flowing from the above, it is my finding that since the veracity of the Police Abstract (P.Exh 4) was not challenged, the Appellant proved that the 1st Respondent was the owner of Motor Vehicle Registration Number KBN 601R. He also proved that the deceased was aboard the said vehicle when it was involved in a road traffic accident with Motor Vehicle Registration Number KBU 462F. The net result of the above was that the trial court erred when it dismissed his claim.

42. It is my further finding that as a result of the above, the Respondents were 100% liable for the accident.

Quantum

43. With regard to the award on damages, the trial court awarded damages as follows:-

Pain and suffering Kshs 10,000/=

Loss of expectation of life Kshs 100,000/=

Loss of dependency Kshs 1,415,078/=

44. The principles upon which an appellate court may alter an award by the trial court have been long settled. In the case of Johnson Evan Gicheru vs Andrew Morton & another (2005) eKLR, the Court of Appeal stated that:-

“In order to justify reversing the trial judge on the question of the amount of damages it was generally necessary that the court of appeal should be convinced that either the judge acted upon some wrong principle of law or, that the amount awarded was so extremely high or so very small as to make it, in the judgement of the court, an entirely erroneous estimate of the damage to which the appellant was entitled”.

45. It is also a principle of law that awards must be reasonable and comparable to awards in similar cases. The Court in Odinga Jactone Ouma v Moureen Achieng Odera (2016) eKLR held:-

“.....In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it



must be recalled that no two cases are exactly alike as the Court of Appeal observed in *Simon Taveta v Mercy Mutitu Njeru CA Civil Appeal No. 26 of 2013 [2014] eKLR* thus:

The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.”

46. In regard to the pain and suffering, the trial court awarded Kshs 10,000/=. The trial court stated that the basis of the award was that the deceased instantly which limited her suffering. The Appellant proposed an award of Kshs 100,000/=.
47. From the Appellant’s testimony, the Appellant died on the spot. In the circumstances thereof, I am convinced that the deceased suffered some pain when the impact occurred. I find the award of Kshs 10,000/= by the trial court for pain and suffering as reasonable and I thus uphold.
48. On the loss of expectation of life, the trial court awarded the Respondents Kshs 100,000/=. The Appellant submitted that this award was sufficient. I thus uphold the award of Kshs 100,000/= for the loss of expectation of life.
49. On the issue of loss of dependency, Section 4 of the *Fatal Accidents Act* provides as follows:-

Every action brought by virtue of the provisions of this act shall be for the benefit of the wife, husband, parents and the child if the person, whose death so caused and shall , subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased, and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought, and the amount so recovered, after deducting the cost not recovered from the defendant shall be divided amongst those persons in such shares as the court by its judgment shall find and direct.
50. The trial court awarded the Respondents Kshs 1,415,078/= under this head. The trial court used a monthly wage of Kshs 10,107.70/=:, a multiplier of 35 years and a dependency ratio of 2/3. The Appellant proposed an award of Kshs 2,400,000/= using Kshs 15,000/= as the monthly wage, a multiplier of 40 years and a dependency ration of 1/3.
51. I have considered the evidence and it was stated by the Appellant that the deceased was a farmer and her approximate income was Kshs 15,000/= per month. The same was pleaded in the Plaint.
52. There was no proof of income from the exhibits that the Appellant produced in court. The trial court stated that it used the Regulation of Wages (General Amendment) Order 2015 in determining the deceased’s income. I have looked at the Regulation of Wages (General Amendment) Order 2015 and I am satisfied that the trial court correctly awarded the amount of Kshs 10,107.70/= as the deceased’s monthly income and I thus uphold.
53. The Appellant stated that the trial court’s use of the dependency ratio of 1/3 was just and fair. I therefore uphold this ratio.
54. On the issue of the multiplier, I concur with the trial court’s use of 35 years as I find the same to be reasonable as the deceased was not in formal employment.
55. Flowing from the above, it is my finding that the trial court applied the correct principles and did not err when it assessed the general damages.
56. In light of the foregoing, the amount awarded to the Appellant is as follows:-
 - i. Pain and Suffering Kshs 10,000/=



- ii. Loss of expectation of life Kshs 100,000/=
- iii. Loss of dependency Kshs 1,415,078/=
- Kshs 1,525,078/=

57. In the end, the Appeal dated 5th April 2022 succeeds as the Appellant is awarded Kshs 1,525,078/= as general damages.

58. The Appellant shall have the costs of this Appeal as well as the costs in the trial court.

JUDGEMENT DELIVERED, DATED AND SIGNED THIS 23RD DAY OF SEPTEMBER, 2024.

.....

R. LAGAT-KORIR

JUDGE

Judgement delivered in the absence of the parties and in the presence of Siele (Court Assistant)

