



**Yusuf & another v Mutua & another (Suing as legal representatives  
of the Estate of Shadrack Kioko Kyengo - Deceased) (Civil Appeal  
E163 of 2021) [2024] KEHC 10708 (KLR) (16 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10708 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E163 OF 2021  
FR OLEL, J  
SEPTEMBER 16, 2024**

**BETWEEN**

**ALIAS ZUBRI ZUBAID YUSUF ..... 1<sup>ST</sup> APPELLANT**

**ZAYCOM ENTERPRISES LTD ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JACINTA MUENI MUTUA & WINFRED KAVINI KIOKO (SUING AS LEGAL  
REPRESENTATIVES OF THE ESTATE OF SHADRACK KIOKO KYENGO -  
DECEASED) ..... RESPONDENT**

**JUDGMENT**

**A. Introduction**

1. The Appellants in this case were the Defendants before the Trial Court where they had been sued for general damages for loss of dependency, loss of expectation of life, pain and suffering under the *law reform Act* & *Fatal Accidents Act*, special damages, costs of the suit and interest from the date of filing. The cause of action is said to have arisen on the night of 17<sup>th</sup> – 18<sup>th</sup> June 2019 where the deceased was lawfully travelling as a passenger on motor vehicle registration Number KAD 990E (hereinafter referred to as the 1<sup>st</sup> suit motor vehicle) along Mombasa -Nairobi road, when near Luqman petrol station, the Appellant's motor vehicle registration Number KBV 811F (hereinafter referred to as the 2<sup>nd</sup> suit motor vehicle) driven by their authorized driver, agent and/or servant was so negligently and/or carelessly driven managed and/or controlled that it was allowed to collide with the oncoming 1<sup>st</sup> suit motor vehicle, thereby occasioning fatal injuries to the deceased and extensively damaging the said 1<sup>st</sup> suit motor vehicle.
2. The 1<sup>st</sup> Appellant upon service, filed his statement of defence dated 27.12.2019 denying all the contents of the Plaintiff and in the alternative did contend that if the accident did occur, it was as a result of the



negligence, carelessness and/or recklessness of driver of the 1<sup>st</sup> suit motor vehicle and the deceased. The appellant urged the court was to dismiss the claim with costs.

## **B. The facts of the case**

3. The Plaintiff called two witnesses, who testified in support of her case, while the Defendant called one witness. PW1 Jacinta Mueni Mutua, the wife of the deceased stated that her deceased husband died on the night of 17<sup>th</sup> – 18<sup>th</sup>.06.2019 as a result of injuries sustained in a road traffic accident which occurred along Mombasa Nairobi road at around luqman petrol station. She relied on her witness statement where she stated that the deceased worked at Spinners Co ltd in Ruiru and on the material day had come home at about 9.00p.m to drop school fees for his children and was accompanied by his driver known as Benjamin Mwangangi. At about 10.00pm her late husband left home to go back to his work place at Ruiru and she got concern when by the following day he had not called to report if he had arrived safely.
4. They did make report about his disappearance at Machakos police station and eventually got to know that he had been involved in a road traffic accident and had died as a result of the injuries sustained. The deceased earned a salary Kshs.29,300/=, which he used to sustain his family as the soul bread winner. The respondent produced all her claim supporting documents, except the police Abstract as Exhibits and prayed to be compensated for the loss suffered as her children had lost parental support and also compensation for the salvage value of the 1<sup>st</sup> suit motor vehicle, which was owned by her husband. In cross examination, the Appellant confirmed that she was not present at the scene of the accident but had been informed that her husband had died on the spot due to the accident impact. The payslip produced also did not have the stamp of her husband's employer, but she believed it was genuine as she had found the said pay slip from amongst his documents.
5. PW2 PC Stephen Kirui testified that he was attached to Kyumbi police station and was the investigating officer assigned to this accident which occurred on 18.06.2019 at about 1.00am involving the two suit motor vehicles. He did not witness the said accident occur, but went to the scene immediately thereafter after a report had been made at their police station at about 12.10am. At the accident scene, he found that the 1<sup>st</sup> and 2<sup>nd</sup> suit motor vehicle had been involved in an accident and two passengers in the 1<sup>st</sup> suit motor vehicle had succumbed to injuries sustained and had been removed from their motor vehicle and placed on the side of the road.
6. From his assessment of the accident scene and position of the two suit motor vehicles, he noted that both motor vehicles were travelling towards Nairobi on the right side of the dual carriage way and the 2<sup>nd</sup> suit motor vehicle had rammed into the 1<sup>st</sup> suit motor vehicle from the back/rear back side, completely damaging it. He did not have the original sketch map of the accident scene as it had been forwarded to the ODPP but from the point of impact, he noted that the 1<sup>st</sup> suit motor vehicle had landed about 30 meters away, while the 2<sup>nd</sup> suit motor vehicle had landed 10 meters away from the said point of impact. His assessment was that the 2<sup>nd</sup> suit motor vehicle had hit the 1<sup>st</sup> suit motor vehicle while at high speed and the massive impact threw off the 1<sup>st</sup> suit motor vehicle off the road.
7. PW2 also confirmed that the accident which occurred was not a head on collusion, and the driver of the 2<sup>nd</sup> suit motor vehicle had to be blamed as he was not able to keep distance and control his motor vehicle in good time. He produced into evidence the police abstract and the accident scene sketch plan. Upon cross examination he affirmed that the police abstract showed that the matter was pending under investigations and reconfirmed that the 2<sup>nd</sup> suit motor vehicle had rammed into the 1<sup>st</sup> suit motor vehicle from behind and that was a fact not an assumption.



8. DW1, Julius Otieno Obat relied on his filed witness statement, where he stated that on the material day he was driving from Wote and was headed to Nairobi at about 11.45pm and when he arrived at Kyumbi junction there was ongoing road construction at Luqman petrol station. He kept to his lane on the extreme left facing Nairobi direction and was following a trailer which was in front of the 2<sup>nd</sup> suit motor vehicle. Suddenly the trailer hooted and swerved to the right, when it did so, he came face to face with another motor vehicle coming towards him, he tried to swerve, but unfortunately the said motor vehicle was too close and a head on collision ensued.
9. After the impact the 2<sup>nd</sup> suit motor vehicle rolled off the road, and he managed to wriggle out, just in time as the said motor vehicle burst into flames. Fortunately, the car following him belonged to his employer and they rescued him and rushed him to hospital. He also saw two persons lying dead on the side of the road and blamed the driver of the 1<sup>st</sup> suit motor vehicle for causing the said accident by veering into his lawful lane and thereby causing the said accident. He insisted that the 1<sup>st</sup> suit motor vehicle was coming from the opposite direction and was being driven with full lights on, while on his rightful left lane. Upon cross examination the witness recanted his statement that the oncoming suit motor vehicle had hit his motor vehicle head on and confirmed that the saloon car (1<sup>st</sup> suit motor vehicle) was parked on his lane and due to the accident impact both motor vehicles rolled off the road and two persons died.
10. In re examination DW1 stated that both the oncoming motor vehicle and the stationary motor vehicles were saloon cars and the car wreckage that he had seen was of the 1<sup>st</sup> suit motor vehicle that had stalled on the road. He was not able to tell if there was an impact between his motor vehicle and the other motor vehicle and also denied driving at high speed.
11. The trial court after hearing the parties and considering submissions filed issued a judgment in favour of the respondents as follows; Pain and suffering Kshs.100,000/=, loss of dependency Kshs.2,811,848/=, loss of expectation of life Kshs.100,000/=, Special damages Kshs.240,450/=, loss of motor vehicle Kshs.215,000/= ( Total Kshs.3,467,398/=), plus costs and interest at court rate from the date of filing the suit for special damages and on general damages and loss of motor vehicle from the date of Judgement.

### **C. The Appeal**

12. Dissatisfied by this judgment, the appellant filed a memorandum of appeal dated 07.10.2021, premised on the grounds that;
  - a. The learned Trial Magistrate erred in law and in fact by failing to appreciate and consider the evidence adduced by the Appellant and finding the Appellants 100% liable for the accident.
  - b. The learned Trial Magistrate erred in law and in fact by failing to find the deceased contributed to and was 100% liable for the accident.
  - c. The learned Trial Magistrate erred in law and in fact in failing to consider the defendants submissions and authorities thereto while assessing general damages.
  - d. The learned Trial Magistrate erred in law and in fact in awarding special damages which were not specifically pleaded and or proven
13. The Appellant urged this court to find that this Appeal was merited, proceed to set aside the entire award of the trial court made in favour of the respondents and to dismiss the suit as against the Appellants. This Appeal was canvassed by way of written submissions.



## D. Analysis and Determination

14. This court has examined the Record of Appeal, the grounds of appeal and given due consideration to the submissions by the parties' respective Counsel. This being a first appeal, this court has the duty to analyze and re-examine the evidence adduced in the lower court and reach its own conclusions but always bearing in mind that it neither saw nor heard the witnesses testify and make allowance for the said fact. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court stated as follows-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

15. A first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the *civil procedure Act* a court of first appeal can appreciate the entire evidence and come to a different conclusion. See *Kurian Chacko Vs Varkey Joseph* AIR 1969 Keral 316

## I. Liability

16. The court in *Ndatho v Chebet (Civil Appeal 8 of 2020)* [2022] KEHC 346 (KLR) quoted with approval the case of;

“In *Stapley –v- Gypsum Mines Limited (2)* (1953) A.C 663 at P. 681 Lord Reid reasoned that:

“ To determine what cause an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law, this question must be decided as a properly instructed and reasonable jury would decide it.....

The question must be determined by applying common sense to the fact of each particular case. One may find that a matter of history, several people have been at fault and that if anyone of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes, it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly cause the accident. I doubt whether any test can apply generally.”

17. Further Section 68 (3) of the *Traffic Act*, (Cap 403 Laws of Kenya) provides as follows:

“(3) A failure on the part of any person to observe any provisions of the highway code shall not of itself render that person liable to criminal proceedings of any kind, but any such failure may in any proceedings (whether civil or criminal, and including proceedings for an offence under this Act) be relied upon by any party to the proceedings as tending to establish or to negative any liability which is in question in those proceedings.”



18. It is not in dispute an accident did occur on the night/ early morning of 18.06.2019 involving the 1<sup>st</sup> and 2<sup>nd</sup> suit motor vehicle and as a result the 1<sup>st</sup> respondent's husband died. PW2 was the investigating officer, who visited the accident scene immediately after the said accident had occurred and it was his testimony that the he had no doubt that it was the 2<sup>nd</sup> suit motor vehicle which was to blame for the said accident as it had failed to keep distance and rammed into the 1<sup>st</sup> suit motor vehicle from behind and as a result of the impact threw it off 30 meter away from the point of impact and it burst into flames.
19. DW1, the Appellants driver gave completely contradictory evidence, which made the trial magistrate to view him as a witness who was unreliable and whose evidence could not be relied on. He gave three versions of how the accident occurred. First and foremost, DW1 adopted his witness statement where he stated that that he was following a trailer enroute to Nairobi, when suddenly the trailer hooted and swerved to the right, when it did so, he came face to face with the motor vehicle coming towards him. He tried to swerve to avoid the said accident but the said motor vehicle was too close and an accident occurred.
20. During his evidence in chief DW1 changed his story and stated that as he was driving towards Nairobi a vehicle come from the opposite direction with full lights on and it was being driven on his lane, so he swerved to the left and the 2<sup>nd</sup> suit motor vehicle rolled off the road and burst into flames. At that point he also saw a salon car parked besides the road. He blamed the trailer driver for driving on the wrong side of the road. In cross examination he denied that any head on collusion occurred as indicated on his adopted witness statement and averred that the 1<sup>st</sup> suit motor vehicle was parked on his left lane as one was heading to Nairobi. He again admitted that, "there was impact between my vehicle and the other then my vehicle rolled."
21. In the case of *Ndungu Kimanji v Republic* [1979] KLR 282 this Court said:-

"The witness in a case upon whose evidence it is proposed to rely should not create an impression in the mind of the Court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence."
22. It is clear beyond any peradventure that DW1 was an evasive and untruthful witness and his account as to how the accident occurred was inaccurate. PW2 who visited the scene immediately after the accident confirmed that the 2<sup>nd</sup> suit motor vehicle rammed into the back of the 1<sup>st</sup> suit motor vehicle, while both motor vehicles were travelling towards the same Nairobi direction. As a result of the accident impact, the 1<sup>st</sup> suit motor vehicle was thrown about 30m away from the point of impact while the 2<sup>nd</sup> suit motor vehicle landed about 10m away. Both motor vehicle burst into flames and the deceased lost his life instantly as a result of the said accident.
23. The photographs of both suit motor vehicles, which were in the assessment report of Dante Technical Agencies dated 05.07.2019, (which report was admitted into evidence) clearly show that 1<sup>st</sup> suit motor vehicle was hit on the back-right side, which was extensively damages and as a result of the said impact burst into flames. It was incumbent upon DW1 to keep safe distance and to drive with caution and proper outlook for other road users. The accident took the life of two persons instantly, which attest to a high impact accident, which further discounts DW1's accession that he was driving at a speed of 50km/hr.



24. The Appellants therefore obviously and miserably failed to prove any negligence on the part of the driver of the 1<sup>st</sup> suit motor vehicle. The trial Magistrate finding on liability thus cannot be faulted and she rightly held that the Appellant's driver was negligent and therefore 100% liable for the said accident.

**(ii) Quantum**

25. The Appellant urged this court to reduce the trial Magistrate finding on pain and suffering to Kshs.20,000/= and also urged the court to use a multiplier of 10 years when considering the award under loss of dependency. It is now a well-established principle of law, that before the court can interfere with trial magistrate assessment of damages awarded, it must be shown that the said court proceed on wrong principles or that he/she misapprehended the evidence in some material aspect and that lead to an inordinately high or low award as to represent an erroneous estimate of damages. See Kenya Breweries Ltd vrs Saro (1991) Eklr , Butt Vrs Khan (1981) KLR 349 & Jane Chelagat Vrs Andrew Otieno Onduu (1988-92) 2 KAR; (1990-1994) EA 47.
26. The evidence on record only proved that the deceased died at the scene of the accident, but it was not clear if he died instantly or after a few minute while at the accident scene and after they had been rescued from the burning 1<sup>st</sup> suit motor vehicle. There is therefore no basis to interfere with the award of Ksh.100,000/= awarded under pain and suffering.
27. With regard to the award under loss of dependency, this court is guided by the finding of Ringera, J (as he then was) in Beatrice Wangui Thairu –vs- Hon. Ezekiel Barngetuny & Another – Nairobi HCCC. No.1638 of 1988 (unreported), held that:

“The principles applicable to an assessment of damages under the *Fatal Accidents Act* are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased... I am constrained to observe that there is no rule of law that two thirds of the income of a person is taken as available for his family expenses. The extent of dependency is a question of fact to be determined in each case. Where a trial court adopts two thirds of the income to value of dependency, this is no more than a finding of fact that such is reasonable in the particular case. Unfortunately those findings of fact have for long masqueraded as holdings on points of law and counsel appearing before courts may be forgiven for assuming them to be the law. They are not. It takes a discerning court to put the law back to track. If I may say with admiration, such was the appellate bench in Boru Onduu [1982-1992] 2 KAR 288...

.....

When a court adopts any fraction that must be taken as its finding of fact in the particular case and in considering the reasonable figure, commonly known as the multiplier, regard must be considered in the personal circumstances of both the deceased and the dependant such as the deceased's age, his expectation of working years, the ages of the dependants and the length of the dependant's expectation of dependency. The chances of life of the deceased and the dependants should also be borne in mind. The capital sum arrived at after applying the annual multiplicand to the multiplier should then be discounted by a reasonable figure to allow for legitimate concerns such as the widow's probable remarriage and the fact that the award will be received in a lump sum and if otherwise invested, good returns can be expected”



28. The same court in the case of Grace Kanini vs. Kenya Bus Services Nairobi HCCC No. 4708 of 1989 where it was held that:

“The court must find out as a fact what the annual loss of dependency is and in doing so, it must bear in mind that the relevant income of the deceased is not the gross earnings but the net earnings. There is no conventional fractions to be applied, as each case must depend on its own facts. When a court adopts any fraction that must be taken as its finding of fact in the particular case.

29. The deceased was 47 years years old, worked at Spinners Ltd, as a supervisor and he was earning a monthly salary of Ksh.29,500/= which he used to entirely support his family as the sole bread winner. His dependants included his wife and four daughter and this was also confirmed by letter dated 21.07.2019 from the area chief Kathekakai location. The deceased payslip too was produced as Exhibit P8 and the trial Magistrate did consider all the relevant parameters and correctly calculated the level of dependency. No error of principle has been shown, which can negate the said finding.

#### **E. Disposition.**

30. The upshot having made the above analysis on the evidence adduced, I do find that this appeal is not merited and dismiss the same with costs to the Respondents.

31. The said costs are assessed at Kshs.250,000/= all inclusive.

32. It is so ordered.

**JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 16<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

Delivered on the virtual platform, Team this 16<sup>th</sup> day of September, 2024

In the presence of: -

Mr Waithaka for Appellant

Mr. Gichuki for Respondent

Susan/Sam Court Assistant

