



**Maina & another v Mwangi & Wachira & 3 others (Civil Appeal E056 of 2021) [2024] KEHC 12515 (KLR) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12515 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MURANG'A  
CIVIL APPEAL E056 OF 2021  
J WAKIAGA, J  
OCTOBER 17, 2024**

**BETWEEN**

**JAMES KAMARU MAINA ..... 1<sup>ST</sup> APPELLANT**

**JOMOSA KENYA LIMITED ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JANE WANGITHI MWANGI & JOHN KARIMI WACHIRA .. 1<sup>ST</sup> RESPONDENT**

**MARION SCHOOL ..... 2<sup>ND</sup> RESPONDENT**

**GIKUNGU STEPHEN ..... 3<sup>RD</sup> RESPONDENT**

**DANIEL MACHARIA ..... 4<sup>TH</sup> RESPONDENT**

*(Being an appeal arising from the judgement of Hon. M. Nyagah in Muranga CMCC NO 421 of 2014 delivered on 28th September 2021)*

**JUDGMENT**

1. This appeal arises from the judgement of the trial Court in which it found the Appellants together with the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents liable in respect of a road traffic accident on 12<sup>th</sup> April 2014 involving the deceased who was travelling as a pedestrian besides Thika-Sagana road at Kenol and awarded the same general damages as follows: Pain and suffering - Kshs. 50,000 Loss of expectation of life - Kshs. 100,000 Loss of dependency - Kshs. 1,200,000
2. Being aggrieved by the said judgement, the Appellants filed this appeal and raised the following grounds of appeal;
  - a. The trial Court erred in apportioning liability at 100% against all the Defendants despite the weight of evidence tendered by the Appellants.



- b. The Court awarded an inordinately high amount for pain and suffering without considering that the deceased died on the same day.
- c. The Court erred in adopting wrong multiplicand and using a high multiplier in computing damages for loss of dependency without considering that the multiplicand was not proved or supported by the evidence on record and age of the deceased at the time of the accident.
- d. The Court did not analyse the evidence and submissions and therefore arrived at a wrong decision.

### **Submissions**

3. The directions were issued that the appeal be determined by way of written submissions. On behalf of the Appellants it was submitted that the evidence on record was that the deceased was the author of his own misfortunes due to his reckless behaviour by crossing the road where there was no zebra crossing and in total disregard for his own safety and that the evidence of PW2 on the occurrence of the accident was full of inconsistency as the evidence on record shows that the deceased ran into the road and was subsequently hit by motor vehicle registration number KBU 898 Z which impact threw him underneath motor vehicle registration number KBK 772 X , which cannot be blamed for the accident.
4. It was contended that the 1<sup>st</sup> Respondent did not controvert the evidence tendered by DW2, whose evidence was corroborated by PW2 as such the deceased and the driver of motor vehicle registration number KBU 898 Z were wholly to blame for the accident with the deceased at 100% or in the alternative liability to be apportioned between the two.
5. It was submitted that the deceased died immediately after the accident and therefore pain and suffering should have been assessed at Kshs.10,000 in support of which the case of Easy Bus Services & Another v Henry Charles Tsuma & Another [2019] eKLR was tendered.
6. On loss of dependency it was contended that the Court should have adopted the minimum wage for a turn boy as the income of the deceased could not be ascertained with precision. Whereas the deceased died at 32 years, a multiplier of 13 years was proposed as appropriate based on the case of Mary Wanjiru Maina v Lilian W. Macharia & Another [2019] eKLR where a multiplier of 20 years was applied for a 25-year-old deceased.
7. On behalf of the Respondents it was submitted that the trial Court correctly considered the submissions of the parties in arriving at the award and that the Appellant failed to prove the requirements set out in the case of United India Insurance Co Ltd v East African Underwriters (K) Ltd [1985] KLR that is to say that the judge misdirected himself, misapprehended the fact or took into account of considerations of which should not have been taken into account.
8. Further reference was made to the cases of Nina Mweu v Muus Kenya Ltd & Another [2015] eKLR and Mbogo v Shah & Another [1984] EA 93 in support of the contention that the trial Court correctly and lawfully entered judgement and applied discretion correctly.

### **Proceedings Before The Lower Court**

9. This being a first appeal, the Court is required to re-evaluate the evidence tendered before the trial Court to come to its own conclusion thereon while giving allowance to the fact that it did not have the advantage of seeing and hearing witnesses as was stated in the case of Selle & Another v Associated Motor Boat Co Ltd & Others [1968] EA 123.



10. PW1 stated that the deceased was a conductor earning Kshs.15,000 per month with which he supported his mother and sister. PW2 Nicholas Wachira Mwangi was at Kenol area at the junction of Nairobi-Nyeri highway when motor vehicle registration number KBU 898Z approached at high speed and hit the deceased who was standing on the highway by the road side on the left and was run over by motor vehicle registration number KBK 772 X which was joining the highway. He blamed the driver of the van for driving fast and reckless and the lorry for not indicating that it was joining the highway. It was his evidence in cross examination that the lorry was off the road and moving slowly and that the van was trying to avoid something and it veered to the left and hit the deceased.
11. PW3 PC Rodgers Muli produced the police abstract confirming the occurrence of the accident while DW1 John Githinji Mwangi stated that he tried to avoid hitting a pedestrian by veering and applying breaks but the pedestrian was close to the deceased who was hanging on a lorry and was knocked by the left side marrow. He was at the time driving at 40kph. In cross examination he stated that he had not been charged with any traffic offence, he stated that motor vehicle registration number KBK which was trying to join the road gave him way to pass.
12. DW2 Charles Kimani Mwangi stated that he was driving motor vehicle registration number KBK 772 X and had given way to other motor vehicles when KBU 898 Z hit the deceased who was crossing the road who fell underneath his motor vehicle. In cross examination he stated that he did not knock the deceased for had he done so, he would have died instantly on the spot.

### **Determination**

13. From the proceedings and submissions herein, there are only three issues for determination;
  - a. Whether the trial Court arrived at the correct determination on liability.
  - b. Whether the Court ought to have apportioned liability between the Defendants.
  - c. Whether the award on quantum was inordinately too high to be interfered with by this Court on appeal.
14. On the issue of liability, the same is purely a matter of evidence. From the re-evaluation of the evidence herein, it is clear that the contact between the Appellant's motor vehicle occurred after the same had been knocked by the second Respondent's motor vehicle which threw him under the Appellant's motor vehicle, which according to the evidence on record had given way to the second Respondent's motor vehicle.
15. Under Section 119 of the *Evidence Act*, the Court may presume the existence of any fact which it thinks likely to have happened, regard being the common course of the natural events, human conduct and public and private business, in their relation to the facts of a particular case.
16. I therefore make the presumption based on the evidence tendered before the trial Court, to the effect that had the 2<sup>nd</sup> Respondent's motor vehicle not knocked the deceased there would not have been any contact between the same and the Appellant's motor vehicle and as was stated in the old case of *Walker v Goe* [1859] 4H&N 350, there can be no liability unless the damage is the proximate result of the negligence. The trial Court did not decide on the issue of causation and from the evidence it is clear that there was no nexus between the deceased and the Appellant and therefore allow this Ground of Appeal.
17. Since there were two motor vehicles involved herein, the trial Court was under a duty to apportion liability between the same which it failed to so do. Having found that the Appellant did not cause the



accident, then the issue of apportionment can only be between the two Respondents and there being no cross appeal by the Respondents, I shall not make any determination thereon.

18. On quantum the age of the deceased and the fact that he was working as a conductor were not disputed. The only issue in contention is how much he was earning per month as the same was not ascertained by way of documentary evidence. I would therefore agree with the submissions by the Appellant that the Court should have used the minimum wage of Conductor prevailing at that time within Kerugoya County of Kshs.6,029.
19. On the multiplicand, the deceased was aged 32 years as at the time of his death, all factors remaining constant he would have worked up to the age of 60 years before slowing down and therefore the multiplier of 13 years proposed by the Appellant be based on the retirement age of 55 as stated in the case of *Mary Wanjiru Maina v Lilian W Macharia & another* [2029] eKLR as submitted by the Appellant is distinguishable.
20. In the exercise of the Courts powers as a first appellate Court, I am of the considered view and hold that a multiplier of twenty years is very reasonable and would therefore adopt the same.
21. I find no fault with the trial Courts award under the heading of pain and suffering and loss of expectation of life which are with the acceptable range of awards in respect to the age of the deceased and his employment and will therefore not interfere with the same.
22. In the final analysis, I would allow the appeal herein and substitute the trial Court's finding as follows:
  - a. Liability at 100% against the 2<sup>nd</sup> Respondent
  - b. Pain and suffering Kshs. 50,000
  - c. Loss of expectation of life Kshs. 100,000
  - d. Loss of dependency of life  $Kshs. 6029 \times 20 \times 1/3 \times 12 = 482,320$
  - e. Cost of the appeal to the Appellant.
23. And it is ordered.

**SIGNED DATED AND DELIVERED AT MURANGA THIS 17<sup>th</sup> DAY OF OCTOBER 2024**

**J. WAKIAGA**

**JUDGE**

In the present of:

Mr. Nyoike for the Appellant

No appearance by Kebongo for 1<sup>st</sup> Respondent

Mrs Muhia for J.K. Kibicho for 2<sup>nd</sup> Respondent 3<sup>rd</sup> and 4<sup>th</sup>

