



**Mwangi v Kangethe & another (Civil Appeal E038 of 2021)  
[2024] KEHC 12289 (KLR) (15 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12289 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MURANG'A  
CIVIL APPEAL E038 OF 2021  
J WAKIAGA, J  
OCTOBER 15, 2024**

**BETWEEN**

**WILSON KAMAU MWANGI ..... APPELLANT**

**AND**

**KABUI KANGETHE ..... 1<sup>ST</sup> RESPONDENT**

**THE HON ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgement of Hon. S.K. Nyaga RM delivered on 12th July 2021 in the Senior Principal Court Civil Case No 420 of 2018 Muranga)*

**JUDGMENT**

1. By a judgement dated 12<sup>th</sup> July 2021 the trial Court the Appellant liable at 100% jointly with the 2<sup>nd</sup> Respondent in respect of a road traffic accident that occurred on 15<sup>th</sup> January 2012 involving the Appellants motor vehicle and the deceased Samuel Ngekenya Kibui and warded Kshs 100,000 for loss of expectation of life, Kshs 50,000 for pain and suffering, Kshs 1,600,000 for loss of dependency and Kshs 19,280 in special damages.
2. Being dissatisfied by the said judgement, the Appellant filed this appeal and raised the following grounds of appeal:
  - a. The Court erred in finding the Appellant liable at 100%.
  - b. The Court erred in awarding the 1<sup>st</sup> Respondent damages amounting to Kshs 1,769,280.
  - c. That the quantum of damages was excessive and an erroneous estimate of damages considering the circumstances of the case.
  - d. That there was no ground for grant of leave to file suit out of time.



## Submissions

3. Directions were granted for the disposal of the appeal by way of written submission. On behalf of the Appellant, it was contended that the accident occurred on 12<sup>th</sup> January 2012 and the suit was filed in 2018 after six years without leave and that the Respondent failed to establish the nexus between the Appellant negligence and the accident as there was no direct evidence by the Appellant on how the accident occurred noting that the Appellant was acquitted of the traffic offence as per the Appellants evidence on record which was not controverted.
4. It was the Appellant's case that the traffic police officers were to blame for the accident and therefore the second Respondent who filed a defence but failed to participate at the trial should have been blamed for the accident. In support of the submissions, reliance was placed on the case of *Sally Kibii & another v Francis Ogaro* [2012] eKLR to the effect that the Plaintiff must prove facts which give rise to what may be called *res-ipsa loquitor* situation.
5. It was contended that the 1<sup>st</sup> Respondent did not prove his case on a balance of probability and that on the authority of the case of *Statpack Industries v James Mbithi Munyao* [2005] eKLR the Respondent failed to prove the causal link between the Appellant negligence and his injuries.
6. On quantum, it was submitted that the deceased died on the same day and therefore should have been awarded Kshs 10,000 based on the case of *John Mureithi Kariuki v George Mwangi* [2012] eKLR, loss of expectation of life, Kshs 70,000 was proposed based on the case of *Caroline Anne Njoki Mwangi v Paul Ndungu Muroki* [2004] eKLR and *John Mureithi Kariuki v George Mwangi* [2012] eKLR.
7. On the award under *Fatal Accidents Act*, it was submitted that the deceased was aged 27 years at the time of his death, working at a quarry, which was a risky one and therefore a multiplier of 18 years was proposed supported by the case of *Rose Munyasa & Another v Daphton Kirombo & another* [2014] eKLR where the Court took judicial notice of the fact that the life expectancy of an average Kenyan had gone down in the recent years due to disease. It was contended that the Court rightly adopted a ratio of 1/3.
8. On the multiplicand it was contended that the Court was in error in using Kshs 20,000 while there was no evidence in support of the earnings of the deceased of Kshs 2,000 per day. It was proposed that the Court should have adopted the minimum wage of Kshs 3,765 for unskilled employee which was in force at the time, thus an award should be made as follows:  $3,765 \times 18 \times 12 \times 1/3 = \text{Kshs } 271,080$ .
9. It was proposed that the award under the law reform should be deducted as was held in *Kiarie Shoe Stores Ltd v Hellen Waruguru Waweru* [2013] eKLR to avoid benefitting under both Acts.
10. On behalf of the 1<sup>st</sup> Respondent it was submitted that leave to file suit out of time was issued on 3<sup>rd</sup> August 2017 in Misc. Application No 187 of 2017. On liability it was contended that the same is at the discretion of the trial Court which the Appellant Court may only interfere with when the Court acts on wrong principles and that the evidence on record shows that the Appellant was not in control of the motor vehicle as at the time of the accident in support of which reference was made to the case of *Benson Dulo v Joseph Waire Njoroge* [2022] eKLR.
11. On quantum, it was submitted that the deceased owned a quarry earning an average income of Kshs 2000 per day and was aged 27 years and that production of certificates is not the only means of proof of income as was stated in the case of *Jacob Ayiga & another v Simon Obayo*.



## Analysis and Determination

12. This being a first appeal, the Court is duty bound to re-evaluate the proceedings before the trial Court and to come to its own determination thereon as was stated in the case of Sidi *Kazungu Gobu v Fatuma Abdi Mohamed* [2022] eKLR submitted by the 1<sup>st</sup> Respondent.
13. The Respondent testified as PW1 and stated that he was the father of the deceased who was on a motor cycle which had been stopped by the police when it was knocked by the Appellant motor vehicle, who was subsequently acquitted of the traffic offence. He stated that the deceased was unmarried and working at a Quarry at the time, earning Kshs 2,000, but did not have any supporting documents as he was being paid in cash. He stated that he was waiting for the traffic case to be concluded, before filing the civil case.
14. The Appellant testified that he was a priest in Thika and on the material day was driving home when the police suddenly stopped the motor cycle on the road at a bend where they had erected a road block. He was charged in the traffic Court but was acquitted. He blamed the police for the accident. In cross examination, he stated that he could not stop the motor vehicle but never lost control of the same before hitting the motor cycle.
15. From the proceedings herein, I have identified the following issues for determination :-
  - a. Was the Court right in her determination on liability.
  - b. What order should the Court make on quantum.
16. Liability is an issue of pleadings and evidence in support thereof. It is not in dispute that the accident leading to the death of the deceased occurred on 15<sup>th</sup> January 2012 and as per the plaint, the police had stopped the motor cycle in the middle of the road when it was knocked by the Appellant. The 1<sup>st</sup> Respondent attributed negligence on the part of the police for stopping the motor cycle in the middle of the road at unsafe area without adequate warning at a safe distance.
17. This pleading was supported by the Appellant's evidence on record in which he wholly blamed the 2<sup>nd</sup> Respondent for the accident and which was never rebutted by either the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents at the trial. In finding the Appellant liable, the Court held that he breached the duty of care to the deceased leading to the accident but failed to determine whether there was a warning sign of the road block erected by the police and whether the emergency so created could be avoided, having found as a fact that the police stopped the motor cycle in the middle of the road.
18. It is therefore clear that the trial Court finding on liability against the Appellant, was not supported by evidence on record, which shows that the 2<sup>nd</sup> Respondent's agents created the circumstances upon which the Appellant was unable to control the motor vehicle and therefore ought to bear greater liability. In exercising the powers of this Court as a first Appellant Court, I am satisfied that the Court was in error on the finding on liability and therefore allow the appeal on liability by setting aside the Court's determination on the same and substitute it with a finding of liability by apportioning the same between the Appellant and the 2<sup>nd</sup> Respondent at 40% ; 60% as a warning to the police not to erect road blocks, as they always do, at places they create danger to road users.
19. On quantum, I find no fault with the awards of the Court under the heading of loss of expectation of life and pain and suffering, as the same were cases from the Supreme Court in respect of similar loss but have difficulty in upholding the award under the heading of loss of dependency. Whereas the Plaintiff pleaded that the deceased was a quarry owner without supporting documents, the evidence of the 1<sup>st</sup> Respondent was that he was working at the quarry and was being paid per day and therefore



in plucking the figure of Kshs 20,000 on the basis that the deceased incurred some expenses, the Court missed the principles for assessment of damages for which her decision cannot stand.

20. Whereas the lack of documents is not a basis for interfering with an award, for it to stand, the Court must justify the same. As submitted by the Appellant, use of minimum wage is one of the procedures the Court can adopt in assessing loss of dependency and in this case in the absence of any evidence to the contrary, I am satisfied that it is the most suitable approach that the Court should have adopted and consequently adopt the same and set aside the trial Court's finding on this heading and substitute the same with use of minimum wage as at the time, thus loss of dependency is substituted as follows  $3765 \times 18 \times 12 \times 2/3 = 542,160$ .
21. I find no justification in the Court using 1/3 while the loss of dependency is to the support of the deceased parent, the fact that he was not married notwithstanding and would therefore interfere with the Court's finding thereon, the fact that the Respondent did not cross appeal notwithstanding. I would therefore adopt 2/3 ratio.
22. In the final analysis I allow the appeal herein, set aside the judgment and substitute the trial finding as follows:
  - a. Liability 40%: 60% between the Appellant and 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 Kshs 542,160
  - e. Special damages Kshs 19,280Total Kshs 711,440
23. The Appellant raised a fundamental issue as to whether the Respondent satisfied the conditions for the grant of extension of time to file suit out of time but I note that the same was not raised before the trial Court for determination and will therefore not exercise my Appellant mind on the same but to mention that the disability mentioned by the 1<sup>st</sup> Respondent might not have passed the test had the Appellant taken the same for determination before the trial Court.
24. The Appellant is entitled to cost of the appeal.

**DATED SIGNED AND DELIVERED AT MURANGA THIS 15<sup>TH</sup> DAY OF OCTOBER, 2024**

**J. WAKIAGA**

**JUDGE**

In the presence of:

Mrs Sanya for the Appellant

No appearance by the AG for 2<sup>nd</sup> Respondent

No appearance by R.M. Njiraini for 1<sup>st</sup> Respondent

Jackline – Court Assistant

