



**Njagi v Mputhia (Civil Appeal E010 of 2023)
[2024] KEHC 12325 (KLR) (4 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12325 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CIVIL APPEAL E010 OF 2023
LW GITARI, J
OCTOBER 4, 2024**

BETWEEN

JUSTIN MBUBA NJAGI APPELLANT

AND

HENRY MPUTHIA RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment and decree in Chuka Chief Magistrate’s Court Civil Case No.E119/2022 where the respondent had moved the court vide a plaint dated 30/5/2022 seeking Judgment for special damages in the sum of Ksh.150,000/-, general damages for pain and suffering, loss of expectation of life and loss of dependency. He was also seeking costs of the suit. The claim was opposed by the appellant who entered appearance and filed a defence. He denied liability and raised a defence of contributory negligence against the respondent. The learned magistrate entered Judgment in favour of the respondent as follows:-
 1. Liability - 100%
 2. General damages under Fatal Accident Act:
 - a. Loss of dependency: 4,229,391.04
 - b. Pain and suffering Ksh.70,000/-
 - c. Loss of expectation of life Ksh.100,000/-
 3. Interests on general damages at court’s rate from the date of Judgment.
 4. Ksh.150,000/- as special damages with interests at court rates from date of filing suit.
 5. Costs of the suit and interests at Court rates from date of filing suit.



2. The appellant was dissatisfied with the Judgment and decree of the learned magistrate and filed this appeal based on the following grounds listed on the memorandum of appeal.
 1. The learned Resident Magistrate erred in law and in fact in suo moto refusing to consider office of the Director of Public Prosecutions letter dated 6/5/2022 which was introduced by consent and produced as D. Exhibit 2 without any objection from Respondent.
 2. The learned Resident Magistrate erred in law and in fact in failing to appreciate the fact that the said letter was being produced to impeach the evidence of PW1 who was the author of the witness statements and the sketch plan referred to therein; which were contrary to his evidence before the trial court despite being a trained Traffic Police Officer and was as such admissible under Section 68(1) (i) of the *Evidence Act* Cap 80.
 3. The learned Resident Magistrate erred in law and in fact in holding that the said Director of Public Prosecutions' letter (D.Exhibit .1) was not proved while it was positively identified by PW1 who was extensively cross-examined on it, admitting its authenticity, only stating that the document contained the opinion of the Director of Public Prosecutions.
 4. The learned Resident Magistrate erred in law and in fact in correctly finding as a fact at paragraph 36 of the Judgment that the rider (deceased) contributed to the occurrence of the accident and further that comparing the 2 versions of evidence it was more probable that the deceased encroached the plaintiff's (read defendant's) lane but proceeding to apportion no liability to the said rider (deceased).
 5. The learned Resident Magistrate erred in law and in fact in holding at paragraph 39 of the Judgment that he had already determined the issue of liability whereas no such determination had been made thus far; only to proceed to indicate at the tail end of the said Judgment, particularly at paragraph 54 that: Liability- 100% without qualifying his earlier finding at paragraph 36 thereof that the deceased was more probable to have encroached on the Appellant's lane.
 6. The learned Resident Magistrate erred in law and in fact in holding the Appellant 100% liable for the occurrence of the accident while the evidence on record and his own finding at paragraph 36 of the Judgment suggest otherwise.
 7. The learned Resident Magistrate erred in law and in fact in basing the income of the deceased on that of a driver; a fact not pleaded, not supported by the plaintiff's filed witness statement, plaintiff's evidence before court nor the occupation indicated in the death certificate and on the basis of driving licence (P. Exhibit 7) which had expired way back on 22/10/2021 and produced in evidence purportedly to prove that the deceased was a motor cycle (boda boda) rider but without being licenced to drive motor cycles; instead of applying the conventionally accepted minimum gazette wages for unskilled workers.
 8. The learned Resident Magistrate erred in law and in fact in applying a multiplier of 28 (in words expressed to be 30 even) for a 32 year old which was way above the suggested by both the parties to the suit and without taking into account the requisite imponderables of life.
 9. The learned Resident erred in law and in fact in acknowledging at paragraph 46 of the Judgment that the Respondent was claiming Ksh.50,000 for pain and suffering but proceeding to award him sksh70,000/- which was way above the claimed amount and without considering the Appellant's proposal.



10. The learned resident Magistrate erred in law and in fact in arriving a judgment wholly against the weight of evidence before the court, the parties' proposals in the submissions, the applicable law and his own findings at paragraph 36 of the judgment and elsewhere therein.
3. The appellant prays that the Judgment be set aside and be substituted with an order dismissing the plaintiff's case with costs.
4. That in the alternative the court to apportion liability and re-assess the damages payable as is fair and just in the circumstances.
5. That costs be awarded to the appellant. The brief facts of the case are that the respondent filed the suit as the legal representative of the estate of the deceased Justin Muchangi Mputhia having obtained a limited grant of Letter of Administration for the purpose of filing the suit. The appellant was the registered owner of motor vehicle registration number KCF 103 H which was involved in a road Traffic Accident on 28/3/2022 along Chuka Kaanwa road at Matinia area. It was the contention by the respondent that the appellant drove the said motor vehicle carelessly and negligently that he hit the motor cycle registration number KME J 778 N which the deceased was riding. As a result of the collision the deceased sustained fatal injuries. The respondent listed the particulars of negligence at paragraph 5 of the plaint as follows:-Driving the motor vehicle too fast, carelessly and negligently. Driving the motor vehicle, managing and controlling it without due regard to other road users in particular the deceased. Failing to stop or keep proper look out. Driving the said motor vehicle without due and attention. Failing to stop swerve and or act in any other manner to avoid the accident, Causing the accident.
6. The respondent blamed the appellant for the acts, of omissions and commissions which caused the occurrence of the accident. The respondent claimed liability against the appellant and claimed damages under the *Law Reform Act* and *Fatal Accidents Act*. The respondent further claims that the estate of the deceased suffered loss and damages which holds the appellant liable.
7. The appellant denied the claims by the respondent and filed a statement of defence dated 7/7/2022 and admitted the occurrence of the accident but contends that the accident was solely caused or contributed to by the deceased's own negligence. He listed the deceased's particulars of negligence as follows:
 - i. Riding motor cycle KMEJ 778N while talking on phone.
 - ii. Riding the said motor cycle at a speed that was too high and excessive under the circumstances.
 - iii. Riding the said motor cycle on the wrong side of the road
 - iv. Failing to stick to his lane
 - v. Encroaching onto the lane of travel of motor vehicle KCF 103 H.
 - vi. Allowing motor cycle KMEJ 778 N to hit and /or collide with motor vehicle KCF 103 H.
 - vii. Failing to stop, slow down, swerve, apply brakes or in any other manner control the motor cycle so as to avoid the accident
 - viii. Causing the accident
8. The appellant denied the particulars of negligence pleaded by the respondent and pleaded that the deceased was the author of his own misfortune. The appellant urged the court to dismiss the suit with costs. The Appeal was canvassed by way of written submissions.



The appellant's Submissions:-

9. The appellant argued grounds 1, 2-3 together and submits that a letter produced by the DPP dated 6/5/202 which was produced by consent s exhibit D Exhibit 1- was returning the Police Investigations filed which had been sent to the ODPP for perusal and advice stated that:-

“We have looked at the covering report witness statements and postmortem report and finally sketch plan.”

“From the statement it is clear that the witnesses who were in motor vehicle KCE 103 H stated that the deceased (rider) was on the wrong lane. It was only one witness who was a pillion passenger motor cycle KMEJ 778 N who states a contrary opinion- looking at the sketch map the point of impact is on the motor vehicle's lane which was coming from Kaanwa to Mitheru. That is on the left side, as such it means the motor cycle was on the wrong lane.”

10. In the end the D.P.P advised that a public inquest be conducted to establish how the accident occurred. The appellant submits that PW1 admitted that he drew the sketch plan showing the point of impact being on the motor vehicle's lane and it did not veer off towards the right. That PW1 admitted that he shared his opinion with the DPP and how he changed the opinion to state that the driver was to blame was a mystery. The appellant submits that the respondent did not challenge the said letter and it was produced by consent. That the trial magistrate challenged and discredited the letter. The appellant submits that the learned magistrate descended to the arena of conflict and prejudiced the appellant. That the learned magistrate had no basis to state that the letter was hearsay and to disregard the oral evidence adduced in court.

Grounds 4, 5 & 6 :

11. The appellant submits that this grounds deal with a liability. He submits that the learned trial magistrate had stated that it is clear the rider was to blame for the accident and further that comparing the two versions of the evidence tendered, it is more probable that the deceased encroached the defendant lance. That the facts that rider was not licensed to ride a motor cycle and was talking on phone in itself shows contributory negligence on the part of the respondent which the learned magistrate ignored and said it did not contribute to the accident. The appellant submits that the respondent was to blame and should be held liable to the tune of 100%, being the author of his own misfortune under the doctrine of 'volenti non fit injuria'. He appellant further submits that based on the evidence the court to apportion liability.

Ground 7

12. The grounds deals with the aspect of the deceased's income or multiplicand for assessment of quantum of damages. The appellant has argued at length that there was no prove of the respondents income and the best approach would have been to use the minimum wage gazette for unskilled workers. That the learned magistrate erred by applying the wage of a driver without proof of the deceased's earning as a diver. The appellant has urged the court to set aside the assessment by the learned trial magistrate and apply the minimum wage.

Grounds 8 & 9:

13. It is submitted that the respondent had submitted on a multiplier of 25 years and the appellant a multiplier of 20 years. The learned magistrate applied his own multiplier of 28 years and failed to give



any allowance for the imponderables of life and thereby faulting the provision of imponderables of life in assessing the applicable multiplier, thus rendering the same amenable to interference by an appellate court. They urge the court to adopt a multiplier of 20 years.

14. On damages for pain and suffering, the respondent had urged the court to award Ksh.50,000/- while the appellant proposed Ksh.10,000/-. The learned trial magistrate departed from his role and awarded Ksh.70,000/-. The appellant urges the court to award a reasonable figure within the wages proposed by the parties. In conclusion the appellant has urged the court to find that the learned magistrate erred in various aspects of the Judgment, regard had to the pleadings, evidence, submissions and the applicable law principles and practice and set aside the Judgment; re-evaluate the evidence and come up with its own independent finding both on liability and quantum as proposed in the submissions.

Respondent's Submission:

15. The respondent has urged the court to uphold the Judgment by the learned trial magistrate that the appellant did not exercise any duty of care to the respondent and other road users and therefore and guided by the evidence produce by the respondent that was corroborated by the expert witness, that is the police officer and the lower court exercised its discretion fairly when one considers the circumstances of the case. He relies on the case of *Rodgers Kinoti –v Linus Bundi Murithi & Another* (2022) eKLR where the Court of Appeal expressed itself as follows:-

“What is reasonable multiplier in our jurisdiction is a question of fact to be determined from the peculiar circumstances of each case. By way of analogy in *Boru –v- Onduu* [1988-1992] KAR 299, the court was asked to follow the pattern of court decisions showing that in claims for loss of dependency under the *fatal Accidents Act*, the court had, as a rule, taken one third of a deceased net income as his living expenses and two thirds of his net income as dependency rule. The court rejected the rule and re-asserted that dependency is a question of fact. Hancox CJ said in part of page 291:

“ The extent to which the family is being supported must depend on the circumstances of each case. To ascertain it the judge will analyze the available evidence as to how much deceased earned and how much he spent on his wife and family. There can be no rule or principle of law in such a situation.”

To ascertain the reasonable multiplier in each case the court would have to consider such relevant factors as the income of the deceased, the kind of work deceased was doing, the prospects of promotion and his expectation of working life.” (Emphasis mine).

16. The respondent submits that with testimony of PW3 Henry the plaintiff proved that the deceased was a young man and in private employment who could have lived beyond sixty years. That the documents were not challenged.
17. On pain and suffering, the respondent submits that the deceased incurred pain and the amount of Kshs. 70,000/= was painful. He relied on *Hyder Nthenya Musili & Another vs China Wu Yi Ltd & Another* (2017) eKLR.
18. On costs the respondent submits that costs follow the event as provided under Section 27 of the *Civil Procedure Act* (Cap 21 Law of Kenya) and relies on *Thomas Nyaga Njuki v Alexander Ireri Karimi* [2020] eKLR. The respondent submits that the respondent proved his case on a balance of probabilities and the learned Magistrate's judgment should be upheld.



Analysis and determination

19. I have considered the proceedings before the learned trial magistrate and the judgment. I have also considered the submissions by the parties. I find that the issues which arise for determination are:
1. Liability
 2. Quantum
20. This is a 1st appeal and the duties of the first appellate court have been spelt out in authorities of this court and the court of Appeal. This court being the 1st appellate court is obliged to re-evaluate, re-assess as well as re-analyse the evidence on record and come up with its own independent finding but bear in mind that it had no opportunity to see the witnesses when they testified and leave room for that. See *Selle & Another Vs. Associated Motor Boat Co. Ltd.* (1968) E.A 123. A first appellate court has a duty and is empowered to subject the whole of the evidence to a fresh and exclusive scrutiny and make conclusions about it. The duty of the court is not to affirm the decision of the lower court. It must itself come up with its own decision. This is a valuable right to the parties who have a legitimate expectation that the evidence will be subjected to a scrutiny and the appellate court's own decision, based on the facts and the law. Thus the role of the 1st appellate court is to rehear the case or hold a retrial. The appellate court's decision must reflect a clear re-evaluation of the facts and law and its decision.
21. Section 78 of the *Civil Procedure Act* provides:
- (1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—
 - (a) to determine a case finally;
 - (b) to remand a case;
 - (c) to frame issues and refer them for trial;
 - (d) to take additional evidence or to require the evidence to be taken;
 - (e) to order a new trial.
 - (2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”
12. A first appellate court can appreciate the entire evidence and come to a different conclusion.
13. Having this stated, I proceed to consider the appeal on liability.
14. In Halsburys Laws of England 4th Edition Para 662 page 476
- “It is stated that the burden of proof in an action for damages or negligence rests primarily on the plaintiff who to maintain the action must show that he was injured by a negligent act or omission for which the defendant in law is responsible. This involves the proof of some breach of duty and an injury to the plaintiff between which the breach of duty is a casual convection must be established”
15. In this case the question is whether the respondent established that the appellant was 100% liable. In other words, the court is to determine whether the respondent adduced sufficient evidence to prove that the appellant was wholly to blame for the accident.



16. From the record, it is clear that there was no dispute that the accident occurred and that the deceased respondent sustained fatal injuries. So the one issue which the court has to determine is, who between the appellant and the respondent was to blame. This calls on this court to re-evaluate the evidence. The respondent called as his star witness, P. C. Douglas Murithi of Chuka Traffic and the person who investigated the accident. He testified that the accident occurred on 28/3/2022 at around 3.00 pm at Marima area along Chuka-Mitheru-Kaanwa road. Justin Muchangi Mputhia was riding a motor cycle registration number KMJE 778N from Mitheru towards Kaanwa direction and on board was a pillion passenger Dominic Kibaara Mbae. From the opposite direction Justin Mbuba Njagi was driving motor vehicle KCF 103H Nissan Xtrail at the scene the motor vehicle failed to maintain its lane and collided head on with the motor cycle. As a result, the rider and pillion passenger sustained serious bodily injuries and succumbed later in hospital. He visited the scene and documented it. He produced a police abstract as Exhibit 3.
17. On being cross-examined he stated that he was advised by the DPP to proceed by way of an inquest.
18. On being cross-examined by the counsel for the appellant PW1 stated that the letter from ODPP stated that the rider was to blame or was on the wrong. PW1 stated that the only thing that made him to conclude that the accident occurred on the motor vehicle's lane is the skid marks. He observed the skid marks were on the motor vehicles lane. He testified that the vehicle did not veer off towards the right. The role of the Director of Public Prosecution is to recommend the charges which a person would be charged with or to generally advise the police after perusing the file containing the investigations. PW1 admitted that he recorded statements from witnesses and drew the sketch plan of the scene. The DPP arrived at the conclusion that the rider was to blame based on the statements.
19. The purpose of cross-examination is three fold. That is to elicit evidence in support of the party cross-examining, to cast doubts on, or undermine the evidence of the witness to weaken the opponent's case and finally to test and to undermine the credibility of witness. it also gives the party cross-examining an opportunity to introduce its case by putting question to the witness to elicit facts he will end up using in his defence.
20. In this case on being cross-examined PW1 was corned and his attempt to blame the driver of the motor vehicle was thwarted. The testimony of PW1 and the recommendation by the D.P.P. show that the rider was to blame. PW2 testified that the vehicle hit them while they were on their side when the vehicle approached them and they were hit.
21. PW2 testified that he was a pillion passenger on the motor cycle which was being driven by the deceased. That the deceased did not contribute to the accident. That evidence is not borne out by the evidence of PW1 who testified that the accident occurred on the lane of the motor vehicle where he found skid marks.
22. DW1 Henry Mputhia testified that he was driving on the left side and swerved to the left and his vehicle landed in a ditch. That it is the deceased who hit his motor vehicle. He told the court the deceased was speaking on his mobile phone while at a high speed. That he hooted and applied brakes so as to avoid hitting the deceased. He blames the rider for the collition. The testimony was echoed by DW2 who corroborated the testimony of DW1. The learned trial magistrate at paragraph 3 of the Judgment stated that:-

"In my considered view considering the two versions of the accident it is clear that the rider contributed to the accident. Comparing the two versions of evidence tendered, it is more



probable that the deceased encroached on the plaintiff's (defendant's lane considering the deceased was the plaintiff) lane than that the (defendant) encroached the plaintiff's lane."

23. I find that this was a finding of fact which shows that the deceased was to blame. This court cannot dispute a finding of fact unless it is based on no evidence. I find that taking into account all the circumstances of the case, it is clear that the deceased was the author of his own misfortune. The doctrine of 'volenti non fit injuria' applies. This is more so because the deceased was riding at a high speed while talking on phone which clearly interfered with his ability to control the motor cycle at the same time.
24. I find that the learned trial magistrate erred by finding that the appellant was 100% to blame. The finding is not borne out by the evidence even considering that the D.P.P. ordered an inquest which means that he could not place blame on the appellant. The court decides matters on facts and evidence not sympathy. I set aside the finding on liability by the learned magistrate and substitute it with an order of 100% liability against the rider.
25. On damages under the fatal accident, the respondent failed to prove that the deceased was in gainful employment. The trial magistrate ought to have applied the minimum gazetted wage or apply a global figure. I find that the minimum age would have been suitable approach in assessing the damages.-+
26. On general damages for pain and suffering the respondent had submitted Ksh.50,000/- and is what the learned magistrate ought to have awarded.
27. On the multiplier again the plaintiff and proposed 25 and the learned magistrate had no reason to award more.
28. Thus general damages should have been $6,415.55 \times 12 \times 25 = 1,924,655.00$ pain and suffering = 50,000/-
Loss of expectation of life = 100,000/-
The finding on liability shall apply in the related appeal No. E011/2023. I find no reason to interfere with the award of damages in court file No.E011/2023.

Conclusion:

29. For the reasons stated in this Judgment I find that the appeal has merits and is allowed. I order that.
 - 1) The Judgment of the learned magistrate is set aside and substituted as follows:-
 - Liability against the respondent is held to be 100%.
 - General damages under Fatal Accident Act:
 - 1) loss of dependency- 1,924,655.00 pain and suffering 50,000/-
 - 2) Loss of expectation of life Ksh.100,000/-
30. Since the deceased was to blame nothing can be paid to his estate but this court is duly bound to assess the damages.
31. I award the costs of the appeal and the costs of proceedings in the lower court to the appellant.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 4TH DAY OF OCTOBER 2024.

L.W. GITARI

JUDGE

4/10/2024



The Judgment has been read out in open court.

L.W. GITARI

JUDGE

