



**Cherengani Hills Limited v Kavazika & Adekhera (Suing as the legal representatives and administrators of the Estate of the Late Derick Mengesha Avudanya) & another (Civil Appeal 30 of 2022) [2023] KEHC 1818 (KLR) (2 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1818 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL APPEAL 30 OF 2022  
JWW MONG'ARE, J  
MARCH 2, 2023**

**BETWEEN**

**CHERENGANI HILLS LIMITED ..... APPELLANT**

**AND**

**MARIKI AVUDANYA KAVAZIKA & MILDRED AKANI ADEKHERA (SUING AS THE LEGAL REPRESENTATIVES AND ADMINISTRATORS OF THE ESTATE OF THE LATE DERICK MENGESHA AVUDANYA) 1<sup>ST</sup> RESPONDENT**

**SAMUEL KARIUKI MBAI ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal against the judgment and decree in Eldoret  
CMCC No. 137 of 2019 delivered on 11th January 2022)*

**JUDGMENT**

1. The Respondent initiated the suit in the trial court vide a plaint dated 1<sup>st</sup> April, 2019 seeking damages and costs of the suit for an accident that occurred on 25<sup>th</sup> November, 2018 along Eldoret – Nakuru road. The cause of action was that on the said date the Appellant parked a Motor Vehicle Registration No. KBU xxxD in the middle of the road thereby causing an accident which resulted in the Respondent sustaining injuries as a passenger in Motor Vehicle Registration No. KBX xxxD.
2. The Appellant entered his defence and third-party proceedings were taken against the driver of the motor vehicle who also entered his defence. The matter proceeded to full hearing and upon conclusion, the trial court entered judgment against the defendant as follows;
  - a. Liability 100%
  - b. Pain and suffering Kshs. 50,000/-



- c. Loss of expectation of life Kshs. 100,000/-
  - d. Lost years Kshs. 1,500,000/-
  - e. Special damages Kshs 22,000/-
  - f. Costs and interests of the suit
3. Being dissatisfied with the judgment and decree, the Appellant instituted the present appeal vide a memorandum of appeal dated 1<sup>st</sup> March 2022. The appeal is premised on the following grounds;
- 1. That the learned trial magistrate erred in law and in fact in holding the Appellant 100% liable without taking into consideration the evidence adduced.
  - 2. That the learned trial magistrate erred in law and in fact in failing to take into account the evidence on record hence arriving at an erroneous decision on the issue of liability.
  - 3. That the learned trial magistrate erred in law and in fact in failing to apportion liability on the part of the Respondent(s) and in particular the 2<sup>nd</sup> Respondent in view of the evidence on record.
  - 4. That the learned trial magistrate erred in law and in fact by failing to consider the submissions by the Appellant thereby arriving at an erroneous decision.
  - 5. That the learned trial magistrate erred in law and in fact in adopting the wrong principles in the assessment of damages payable to the 1<sup>st</sup> Respondents thereby arriving at an erroneous decision.
  - 6. That the learned trial magistrate erred in law and in fact in awarding damages which were erroneous in the circumstances in view of the evidence adduced.

The parties filed submissions on the appeal.

### **Appellant's Case**

- 4. The Appellant submitted that the driver of the motor vehicle registration no. KBX xxxD was to blame for the occurrence of the accident as he rammed into KBU xxxD from behind. Further, that he failed to notice the life saver signs that had been placed on the road and was speeding thus he was unable to avoid the accident. That he admitted in cross examination that visibility was poor and that he was speeding and tried to overtake KBU xxxD and rammed into it in order to avoid a head on collision.
- 5. Learned counsel submitted that the trial magistrate adopted the wrong principles in awarding damages and failed to consider the relevant factors and authorities with comparable injuries. He urged the court to substitute the award of the trial court with one of Kshs. 900,000/- to 950,000 for lost years and cited the cases of *JNK (suing as the legal representative of the estate of MMM (deceased) vs The Chairman Board of Governors (...) Boys High School* – Meru High Court Civil Suit No. 12 of 2013 and *Kenya Wildlife Services vs Geoffrey Gichuru Mwaura (suing as the legal representative pf the estate of Joshua Kamau Gichure* – Kajiado High Court Civil Appeal No. 6 of 2018 in support of his submissions.

### **1<sup>st</sup> Respondent's Case**

- 6. The 1<sup>st</sup> Respondent opposed the appeal and submitted that the Appellant's evidence was tailored towards absolving the Appellant from the liability but no credible or tangible evidence was tendered to prove that there were life savers on the road to warn the driver of the third-party vehicle coming from behind as required by law. He urged that the trial court properly found the Appellant liable. Further,



that the third-party notice was incompetent for having been filed without leave of the court as the same was filed out of time.

7. The 1<sup>st</sup> Respondent supported the findings of the trial court on damages for loss of dependency as the deceased died at 16 years of age. Further that the award on loss of expectation of life was reasonable as the deceased was young and would have lived longer. He also stated that the deceased suffered pain and suffering before his death and Kshs. 50,0000/- was adequate compensation. He urged the court to dismiss the appeal for lack of merit.

### **Analysis & Determination**

8. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in *Selle –Vs- Associated Motor Boat Co.* [1968] EA 123 in the following terms: -

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

9. Upon considering the memorandum of appeal, record of appeal and the submissions of the parties, the following issues arise for determination;
  1. Whether the trial court erred in apportionment of liability
  2. Whether the award for damages was excessive

### **Whether the trial court erred in its apportionment of liability**

10. The Appellant contended that the 2<sup>nd</sup> Respondent was liable for the accident as he drove the vehicle registration no. KBX xxxD and rammed into motor vehicle registration no. KBU xxxD from behind. I have perused the record of appeal and it reveals that the cause of the accident was the vehicle belonging to the Respondent having been parked partly on the road. I have considered the evidence tendered and I am in agreement with the finding of the trial court on liability. I find that the Respondent failed to provide cogent and credible evidence to support the allegation that there were warning signs placed on the road. In the premises, the Respondent was in contravention of section 53 of the *Traffic act* and was rightfully held 100% liable.



## Whether the award for damages was excessive

11. The principles guiding an appellate court in determining whether to interfere with an award for damages were set out in the celebrated case of *Butt v Khan* {1981} KLR 470 where the court pronounced itself as follows;

“An appellate court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low”.

The trial court awarded the Respondent Kshs. 50,000/- under the head of pain and suffering. The awards for pain and suffering are usually nominal but each case must be determined on its own merits. In the case of *Mercy Muriuki & another v Samuel Mwangi Nduati & another (Suing as the Legal Administrator of the Estate of the late Robert Mwangi)* [2019] eKLR, the court observed: -

“The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs. 100,000/- while for pain and suffering the awards range from Kshs. 10,000/= to Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.”

The deceased died on the same day while undergoing treatment therefore the award was not excessive in the circumstances. I find no reason to disturb the same.

12. The trial court awarded Kshs. 100,000 for loss of expectation of life. In the case of *Hyder Nthenya Musili & Another v China Wu Yi Limited & another* [2017] eKLR, the Court stated as follows-

“As regards damages awarded under the *Law Reform Act*, the principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death.... The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs. 100,000/= while for pain and suffering the awards range from Kshs. 10,000/= to Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.” (emphasis added).

I am guided by the foregoing and in the premises, I find that the award for damages under the head of loss of expectation of life was not excessive.

13. The trial court awarded the Respondent Kshs.1,500,000/- under the head of lost years. In arriving at this award, the court decided to use a global award as the deceased was a minor aged 16 years old thus it was difficult to speculate his future. In the case of *Moses Mairua Muchiri v Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased))* [2016] eKLR, the Court held as follows-

“It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make



a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case.”

Similarly, I find no reason to disturb the award for damages under this head.

14. Taking into consideration all the above, it therefore follows that the appeal herein fails in its entirety. The same is dismissed with costs to the Respondents. It is so ordered.

**DELIVERED DATED AND SIGNED VIRTUALLY ON THIS 2<sup>nd</sup> DAY OF MARCH 2023**

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**J.W.W.MONGARE**

**JUDGE**

In the presence of;

1. Matekwa for the Appellant
2. Nyabuto for the Respondent
3. Brian Kimathi- Court Assistant

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**J.W.W.MONGARE**

**JUDGE**

