



REPUBLIC OF KENYA



**KENYA LAW**

THE NATIONAL COUNCIL FOR LAW REPORTING

Where Legal Information is Public Knowledge

**Mwirigi & another v Kithure (Suing as the legal representative of  
the Estate of Silas Kithure M’Ncebere - Deceased) (Civil Appeal  
E057 of 2022) [2023] KEHC 1998 (KLR) (2 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1998 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E057 OF 2022  
TW CHERERE, J  
MARCH 2, 2023**

**BETWEEN**

**KENNETH MWIRIGI ..... 1<sup>ST</sup> APPELLANT**

**KIEGOI TEA FACTORY LTD T/A IGEMBE TEA FACTORY ..... 2<sup>ND</sup> APPELLANT**

**AND**

**GEORGE KITHIRI KITHURE (SUING AS THE LEGAL REPRESENTATIVE OF  
THE ESTATE OF SILAS KITHURE M’NCEBERE - DECEASED) . RESPONDENT**

*(Being an Appeal from the Judgment and Decree in Maua  
CMCC 135 of 2018 by Hon. T.Gesora (CM) on 13th April, 2022)*

**JUDGMENT**

1. George Kithiri Kithure (Respondent) (suing as the legal representative of the Estate of Silas Kithure M’Ncebere (deceased) filed suit in the lower court against Kiegoi Tea Factory Ltd t/a Igembe Tea Factory (Appellant) seeking damages for fatal injuries suffered by his father Silas Kithure M’Ncebere (Deceased) who was on 27<sup>th</sup> May, 2017 fatally injured after he was knocked down by Appellant’s M/ V KBJ 033R which was allegedly driven negligently along Athi-Maua Road.
2. Appellants had in its statement of defence denied the claim and blamed the deceased for crossing the road negligently and recklessly.
3. By a judgment dated 13<sup>th</sup> April, 2022, the learned trial magistrate found Appellants liable at 100% and awarded Respondent damages in the sum of Kshs 6,335,930/- plus costs and interests.



## The Appeal

- Appellants being dissatisfied by the lower court's decision preferred this appeal and on 07<sup>th</sup> November, 2022 filed the Memorandum of Appeal which sets grounds of appeal which challenge liability, the multiplicand and award on loss of dependency. By submission filed on 23<sup>rd</sup> January, 2022, Appellant reiterated the grounds of appeal and urged that the appeal be allowed.

## Analysis and Determination

- This being the first appellate court, its duty is to re-evaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. (See *Selle & another v Associated Motor Boat Co. Ltd & another* (1968) EA 123.
- I have considered the entire record of appeal and considered the submissions of counsels for both parties and I will address the issues of liability and quantum as hereunder.

## Liability

- The evidence on record as narrated by the Respondent and PW2 was that deceased was walking off the road when he was knocked down from behind by Appellant's motor vehicle.
- Kenneth Mwangi, the 1<sup>st</sup> Appellant who was driving 2<sup>nd</sup> Appellant's M/V KBJ 033R on the material date denied that it was involved in an accident.
- Evidence that deceased was walking off the road when the accident occurred was corroborated whereas the particulars of negligence attributed to the deceased by Appellants were unproved. Faced with this evidence, the trial magistrate found Appellant liable at 100%.
- In *John Onyango & another v Samson Luwayi* [1986] eKLR the Court of Appeal expressed itself as follows: -

“This court will not interfere with the findings of fact of the two lower courts unless it is clear that the magistrate and the judge have so misapprehended the evidence that their conclusions are based on incorrect bases: *Abdul v Rubia* 1917/1918 7 EALR 73.”
- The evidence on record clearly indicates that the trial court was not faced with instances of conflicting evidence as to how the accident happened. The evidence clearly disclosed that the 1<sup>st</sup> Appellant was on the wrong. In the circumstances of this case, I find that the trial court's decision finding 1<sup>st</sup> Appellant liable and 2<sup>nd</sup> Appellant icariously liable for the negligent acts of 1<sup>st</sup> Appellant was well founded.

## Quantum

- The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial court were held by the former court of appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. (See *Kemfro Africa Limited t/a Meru Express Services (1976) & another v Lubia & another, No 2* [1987] KLR).



13. The court in *Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & another* Nairobi HCCC No 1638 of 1988 (UR) set out the guidelines applicable in assessment of damages under the Fatal Accident's Act as follows:

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. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependents and the chances of life of the deceased and dependents. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature.

14. The general rule is that in the absence of prove of earnings, courts have adopted the minimum wages guidelines in calculating the award for loss of dependency. (See *Beatrice W Murage v Consumer Transport Ltd & another* [2014] eKLR; *Monica Njeri Kamau v Peter Monari Onkoba* [2019] eKLR and *Patrick Barasa v Serah Wambui Karumba (Suing as the legal representative to the estate of the late Albert Chebaya)* [2019] eKLR).
15. There being no evidence of deceased's earnings from his miraa business, I find that the trial magistrate erred in applying the multiplicand of Kshs 50,000/- that was not proved. It is not the duty of the court to stage-manage cases for any party nor is it the duty of the court to endeavor to make a case against a party where there is none. The only duty of the court is to hold the scales to see that justice is done according to law on the evidence before it.
16. The global sum of Kshs 1,000,000/- proposed by Appellant on the basis of the case of *Moses Muthuri v Mercy Nkirote (suing as the legal representative of the Estate of Luka Kirimi (Deceased))* [2021] eKLR where a global award of Kshs 1,300,000/- was confirmed on appeal for a 38-year-old deceased is in my considered view reasonable.
17. At the hearing, Respondent asked for Kshs 200,000/- for pain and suffering and cited *Benedeta Wanjiku Kimani v Changwon Cheboi & another* [2013] eKLR where the sum of Kshs 200,000/- was awarded for pain and suffering for deceased who died four months following the accident in my considered view was not comparable the deceased in this case having died immediately after the accident.
18. The case of *Harjeet Singh Pandal v Hellen Aketch Okudho* [2018] eKLR cited by the Appellant was comparable and considering that it was a 2018 case, I find that the award of Kshs 50,000/- under this heading was reasonable.
19. Under the heading loss of expectation of life, Respondent prayed for Kshs 150,000/- and cited *Henry Waweru Karanja & another v Teresiab Nduta Kagiri (suing as the legal representative of the estate of Francis Wainaina Ng'ang'a (deceased))* [2107] eKLR where an award was made for Kshs 150,000/- for loss of expectation of life for a young person. Appellant offered Kshs 80,000/- and cited *James Gakinya Karienyé & another (suing as the legal Representative of the estate of David Kelvin Gakinya (deceased) v Perminus Kariuki Gitinji* [2015] eKLR where a similar sum was awarded for a 55-year-old deceased.
20. The judgment of the trial court as was rightly pointed by the Appellants does not give reasons for the award of Kshs 200,0000/- for loss of expectation of life but after considering the cited cases, the sum does not appear out of the ordinary.



21. The multiplier of 12 years, dependency ratio of 2/3<sup>rd</sup> and the award for special have not been challenged and shall remain as awarded by the trial court.
22. In *Catholic Diocese of Kisumu v Tete* [2004] eKLR the Court of Appeal the Court of Appeal identified the circumstances under which an appellate court can interfere with an award of damages as follows:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an Appellate Court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The Appellate Court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to present an entirely erroneous estimate.”
23. From the foregoing and having found that the multiplicand of Kshs 50,000/- was not supported by evidence, I find that this is a proper case for disturbing the quantum of damages awarded by a trial magistrate.
24. Accordingly, I find that the appeal succeeds only on the issue of the loss of dependency and it is ordered as follows:
  - a. The award of Kshs 6,000,000/- for loss of dependency be and is hereby set aside and substituted with a global sum of Kshs 1,000,000/-
  - b. Having partially succeeded, Appellant will get half costs of the appeal.

**DATED AT MERU THIS 02<sup>ND</sup> DAY OF MARCH 2023**

**WAMAE. T. W. CHERERE**

**JUDGE**

Appearances

Court Assistant - Morris Kinoti

For Appellant - Mr. Kamotho for Kamotho Njomo & Co Advocates

For Respondent - Mr. Njindo for Michael Ngunjiri & Co. Advocates

