



REPUBLIC OF KENYA



Njuguna & another (Suing as the Wives and Legal Representatives of the Estate of David Nangendo -Deceased) v Wanjiru & another (Civil Appeal E225 of 2021) [2023] KEHC 1949 (KLR) (7 March 2023) (Judgment)

Neutral citation: [2023] KEHC 1949 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E225 OF 2021
JM CHIGITI, J
MARCH 7, 2023**

BETWEEN

**TERESIA NJERI NJUGUNA 1ST APPELLANT
EUNICE NGINA SIRUNDA 2ND APPELLANT
SUING AS THE WIVES AND LEGAL REPRESENTATIVES OF THE ESTATE OF
DAVID NANGENDO -DECEASED**

AND

**DENNIS HIKA WANJIRU 1ST RESPONDENT
PETER NJIHIA NJOROGE 2ND RESPONDENT**

JUDGMENT

1. The Appellants filed a suit being PMCC No. 417 of 2020 at Ruiru Law Court via a plaint dated 23rd October 2020 under the *Fatal Accidents* Cap 32 laws of Kenya and under Cap 26 of the *Law Reform Act* laws of Kenya seeking compensation on behalf of the estate of the deceased, for the loss suffered, as a result of the untimely death of the deceased being the sole bread winner.
2. The deceased died as a result of road traffic accident when he was knocked down by motor vehicle registration number KCG xxxA, canter while riding on his bicycle along eastern by pass road.
3. The Appellants also sought special damages for burial expenses of the deceased Kshs. 227, 350/= against the Respondents plus costs and interest of the suit.
4. The Respondent filed their defence dated 26th November 2020 denying the claim.



5. The matter proceeded to full hearing before the trial court honourable C.A Omondi (SRM) and by a judgment delivered on 22nd October 2021, the trial magistrate dismissed the Appellants case with costs to the Respondents.
6. During trial the appellants called two witnesses being Sgt Jane Matu Force No. 64219 as PW 1 and Teresia Njeri Njuguna as PW2 The respondents herein called one witness DWI Dennis Mika the driver of the Isuzu Canter, who testified in favor of the respondent and the case was closed.
7. The Appellants being aggrieved and dissatisfied with the said judgment appealed to this court by raising eight (8) grounds of Appeal as detailed in the Memorandum of Appeal filed on 10th June, 2022 as follows:
 - a. That the learned trial Magistrate erred in law and fact on her analysis of the evidence on record as a whole and critically and therefore ended up at the wrong conclusion in terms of liability and quantum of damages awardable.
 - b. The learned trial Magistrate erred in law and in fact by totally misunderstanding the facts of the case leading to erroneous application of the facts into law.
 - c. That the learned trial Magistrate erred in law and in fact by failing to consider that this was a fatal claim and the appellants are only legal representatives of the estate of the deceased and could only give evidence on what they knew of the deceased.
 - d. That the learned trial Magistrate erred in law and in fact by failing to take note that the occurrence of the accident was not disputed and went ahead and held the deceased 100% liability.
 - e. The learned trial Magistrate erred in law and in fact when dealing with the issue of salary of the deceased in absence of prove failed to apply the minimum wage as the earnings per month by the deceased and by doing so arrived at erroneous conclusions.
 - f. The learned trial Magistrate erred in law and in fact in disregarding the appellants evidence on record.
 - g. The learned trial Magistrate erred in law and in fact by dismissing the entire suit with cost to the defendant.
 - h. That the whole judgment on quantum and liability was against the weight of the evidence before the court.
8. The Appellants sought for the court to set aside the Judgment of the trial court and for it to proceed to assess liability and quantum of damages. The Appellants also sought for the costs of the suit in the trial court and costs of this Appeal.



Analysis and Determination;

9. This being the first appellate court, the duty of the court is to reevaluate the evidence adduced in the trial court and arrive at its own conclusion. *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal held:

“This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that 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 allowances in this respect.”

10. The Court further reminded itself of Section 107 and 109 of the *Evidence Act* of Kenya which stipulates that he who alleges must prove their allegation. In Civil cases the litigant must prove its case on the balance of probabilities in civil cases in order to succeed.
11. I have analyzed the Record of Appeal filed on 10th June 2022 and the written submissions by the parties to the appeal.
12. I have looked at their plaint and the defense as well as the proceedings and the judgment as set out in the Record of Appeal. I have also looked at the Memorandum of Appeal and the grounds therein.
13. Two issues for determination that flow from the appeal are:
- a. Who is liable for the accident?
 - b. Should the orders prayed in the Appeal be granted.

The issue of liability.

14. I have reanalyzed the proceedings and identified the following evidence towards establishing whether or not the trial court arrived at a correct finding on liability or not: PW1 testified that a fatal traffic accident was reported on the 5th day of May 2020 under OB No. 9/5/5/2020 along Eastern Bypass at the Bliss Area around 7:25 a.m involving Motor vehicle Registration number KCG 884A Isuzu canter driven by the First Defendant (DWI) herein and one male adult pedal cyclist namely David Simiyu Nangendo (the deceased).
15. It was his testimony based on the OB extract which was produced as Plaintiff's Exhibit No. 1 that the pedal cyclist was coming from the Ruiru general direction heading towards Ruai directions using the wrong side of the road lane i.e. off right on the pavement. He testified that the driver of the Isuzu Canter was driving motor vehicle registration number KCG 884A coming from Ruai general direction heading towards Ruiru. It was her testimony that the pedal cyclist (the deceased herein) hit a pavement and lost control thereby hitting the front windscreen of the Defendants' aforesaid motor vehicle on the left edge side whereby the pedal cyclist fell down sustaining head injury and died on the spot.
16. This evidence is corroborated by the evidence of the driver of the Isuzu canter registration number KCG 884A. In his evidence he confirmed that the deceased was riding his bicycle on the wrong side of the road when the accident occurred. He testified that he was driving from Ruai towards Ruiru on the left side of the road at 7 AM on the fateful morning. He testified that the deceased bicycle hit his car windscreen on the left side. He also testified that he applied emergency brakes, flashed and hooted



to no avail. It is clear from this that the driver made all efforts to avert the accident. I do not find the driver to have acted negligently in the circumstances.

17. From the evidence of this witness, it is clear that the accident happened as a result of the deceased negligence in using the wrong side of the road.
18. Upon hearing, the evidence as tendered by the parties, the trial Court dismissed the suit.
19. In *Nkube v Nyamiro* [1983] KLR 403, the court stated: A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.
20. Under section 107, and 109 of the *Evidence Act*, it is the duty of the person who is alleging, or who expects a favorable judgment to be issued to tender evidence that would help them to secure a favorable judgment.
21. Section 107(1) of the *Evidence Act* (Chapter 80 of the Laws of Kenya) provides:

107.

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

22. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence (See *Isca Adhiambo Okayo v Kenya Women's Finance Trust* KSM CA Civil Appeal No. 19 of 2015 [2016] eKLR). That is captured in sections 109 and 112 of the Act as follows:

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

23. The well-known aphorism, “he who asserts must prove” was augmented by the Court of Appeal in *Jennifer Nyambura Kamau v Humphrey Mbaka Nandi* NYR CA Civil Appeal No. 342 of 2010[2013]eKLR as follows

“We have considered the rival submissions on this point and state that section 107 and 109 of the *Evidence Act* places the evidential burden upon the appellant to prove that the signature on these forms belong to the Respondent. Section 107 of the *Evidence Act* provides that “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the *Evidence Act* provides, the burden lies on that person who would fail if no evidence at all were given on either side.”



24. I find that PW 1 and DW 1 were credible witnesses. The witnesses gave a credible account of what happened on the fateful day.

The second issue:

25. Having failed to persuade the court on the first issue the rest of the issues fall by the wayside given that they are anchored on nothing.

26. In the case of Joshua Mungathia Evarick Muthuri Ntoiba & another suing as the legal Representative of the Estate of Fredrick Ntoiba Baraya Deceased 2021 KLR the court observed that this grievance in reality ought not be taken seriously when regard is taken of the courts mandate on a first appeal.

27. It bears no premium that the submissions were not regarded when the appellate court is to carry out a re-evaluation in order that it comes to its own conclusion. That is what I have done and I consider it immaterial that the trial court may have not demonstrated having considered the appellants submissions.

28. While I consider it important that parties industry be appreciated, and a court need to appreciate the assistance offered by submissions, I consider it a point that cannot stand on its own to upset a decision on a first appeal. I see no useful purpose in analyzing the general damages and the special damages question.

Disposition:

29. The learned trial Magistrate cannot be faulted in law and fact on her analysis of the evidence on record as a whole in arriving at the conclusion in terms of liability and quantum of damages award-able.

30. The learned trial Magistrate made no mistake in law and in fact nor misunderstand the facts of the case leading to erroneous application of the facts into law.

31. The appellants did not prove the appeal.

Order:

The appeal lacks merit and the same is here dismissed with costs.

SIGNED AND DELIVERED AT KIAMBU THIS 7TH DAY OF MARCH, 2023.

J. CHIGITI (SC)

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

