



Wachira & another v Guchu & another (Suing as personal representatives of the Estate of Samuel Guchu (Deceased)) (Civil Appeal E238 of 2021) [2023] KEHC 2252 (KLR) (6 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2252 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E238 OF 2021
JM CHIGITI, J
MARCH 6, 2023**

BETWEEN

PETER KINYUA WACHIRA 1ST APPELLANT

MIRIAM NJERI KINYUA 2ND APPELLANT

AND

FELISTA NJERI GUCHU 1ST RESPONDENT

HANNAN WANINI KAMAU 2ND RESPONDENT

**SUING AS PERSONAL REPRESENTATIVES OF THE ESTATE OF SAMUEL
GUCHU (DECEASED)**

(Being an appeal from the judgment and decree of the Senior Principal Magistrate's Court at Kikuyu (Hon. D.N Musyoka) delivered on 9/11/2021 in Kikuyu SPMCC No. 17 of 2018)

JUDGMENT

1. On January 26, 2018 the respondents herein sued the appellant in their capacity as the legal representative of the Estate of Samuel Guchu, in Civil Suit No 17 of 2018 Kikuyu for compensation for the loss of life that as a result of a road traffic accident that occurred on August 12, 2017, along Thogoto- Gikambura road.
2. During the trial the respondents alleged that the driver of motor vehicle registration number KCJ 961V managed and controlled the said motor vehicle negligently causing it to lose control and to veer off the road into the pedestrian walkway knocking down the deceased who sustained fatal injuries.
3. After hearing the suit, the learned trial court rendered judgment in favour of the Respondents on 9th November 2021 for damages as follows:



- a. Pain and suffering -Kshs 20,000/=
- b. Loss of expectation of life - Kshs 100,000/=
- c. Loss of Dependency -Kshs 3,360,000/=
- d. Funeral Expenses -Kshs38,500/=

The award was subject to 40% contributory negligence.

4. Aggrieved by the trial court's judgment the Appellants filed a Memorandum of Appeal on 9th December 2021 citing the following 4 grounds:
 - i. The learned trial magistrate misdirected himself and erred both in law and in fact by adopting a multiplier of 35years for a person who died at the age of 25 years without considering the vicissitudes of life and the nature of work the deceased was engaged in and hence arrived at an erroneous decision on quantum.
 - ii. The learned trial magistrate misdirected herself and erred both in law and fact by adopting a multiplier of 35 years for a person who died at the age of 25 years without considering the benefit of lump sum payment and hence arrived at an erroneous decision on quantum.
 - iii. The learned trial magistrate misdirected himself and erred in law and in fact by using the wrong salary scale of Kshs 12,000/= for a general worker instead of Kshs 6,896.15 which was is basic monthly wage applicable for the area the deceased hailed from and hence arrived at an erroneous decision on quantum.
 - iv. That the learned trial magistrate misdirected himself and erred in law and in fact by failing to consider the Appellant's submissions on record thus arrived at an erroneous finding on liability and quantum.
It was proposed to ask this court for orders that;
 - a. The appeal be allowed.
 - b. The judgment of the trial court be set aside.
 - c. Damages awarded against the appellant be set aside and this Honourable court does assess the proper damages payable to the Respondents
 - d. Costs of the appeal be awarded to the appellants
 - e. Any other relief deemed fit.
5. The respondents filed a Cross-Appeal on December 20, 2021 on the ground that the learned trial magistrate erred in law and fact by apportioning 40% liability against the Respondents against the weight of evidence adduced at the trial court.
6. The Respondents are seeking the orders that;
 - i. The Cross appeal be allowed.
 - ii. The trial court's judgment on liability be set aside and be substituted with 100% against the Appellants.
 - iii. Costs of appeal to the appellant.



- iv. Any other reliefs.
7. The appeal was heard by way of written submissions.

Analysis and determination

8. In the case of *Selle & another –Vs- Associate Motor Boat Co. Ltd* 1968 EA 123 it was held that:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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...”

9. Article 165 (6) of *The Constitution* provides that;

“The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.”

- (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice

10. Counsel for the appellants submitted that the vocation of the deceased was not proved. Counsel pointed out that the multiplier of 35 years was high given the vagaries and risks that come with the nature of the work of the deceased. Counsel cited the case of *Mary Kerubo Mabuka Vs Newton Mubeke Mburu & 3 others* (2006) eKLR where the court adopted a multiplier of 20 years where the deceased was 26 years old.
11. Counsel submitted that the trial magistrate erred in using the wrong multiplicand. He states that as per the Legal Notice, 112 of 2017 the deceased fell under general labourer and the proper multiplicand is Kshs. 6,896.15.
12. On the issue of liability, the appellants contend that the deceased was equally to blame for the accident and urged the court to apportion liability at 50:50. Counsel relied on the case of *Nicholas Nyagwenchi Miyogo Joseph vs James Nyakundi Nyamari & 2 others* (2019) eKLR where the court interfered with the judgment of the court on the liability of 90:10 and apportioned liability equally between the parties at 50:50.
13. On its part the respondents counsel submits that the trial magistrate exercised its judicial discretion based on the evidence adduced by the Plaintiff.
14. Further, counsel submits that the trial court erred in apportioning liability in the ratio of 60:40 in favour of the respondents as against the appellants, which was against the weight of the evidence adduced.
15. According to him, there was no evidence to prove that the deceased and his pillion passenger were drunk or that the deceased was driving an uninsured motorcycle with no helmet or reflective jacket.



16. Counsel urges this court to set aside the trial court's judgment on liability and apportion 100% liability against the Appellants.
17. The court has identified two issues for determination:
 - A. Who should shoulder liability.
 - B. Whether the court erred in assessing general damages.

Liability:

18. At paragraph 4 of the plaint the respondents set out the particulars of negligence on the part of the Appellant as follows:
 - a. Driving motor vehicle registration number KCJ 961V at a speed that was too fast in the circumstance.
 - b. Failing to have any or any proper control of the motor vehicle registration number KCJ 961V.
 - c. Driving without any due care and attention.
 - d. Failing to have any or any sufficient regard for the safety of other road users and in particular the deceased.
 - e. Failing to brake, to swerve, to slow down or in any other manner to so manage and control the said motor vehicle so as to avoid knocking down the deceased.
 - f. Failing to have any or any adequate control of the said motor vehicle.
 - g. Failing to warn the deceased of his approach.
 - h. Failing to see the deceased in sufficient time or at all so as to avoid knocking him down.
 - i. Failing to keep any proper lookout.
 - j. Driving motor vehicle registration number KCJ961V in a careless, reckless and dangerous manner.
 - k. Failing to observe the Highway Code.
 - l. Causing motor vehicle registration number KCJ961V to veer off the road onto the pedestrian walk thereby knocking down the deceased.
19. The appellants denied the allegations of negligence.
20. The appellants then pleaded that the deceased rider of motor cycle Registration No. KMDL 811B was to blame in line with the particulars as laid out in paragraph 6 a – L.
21. In his reply to defence dated 26/2/18 the Respondent denied the allegations.
22. The court heard the witnesses and delivered its judgment on 9/11/2021 apportioning liability 60:40% in favour of the Respondents as against the Appellant.
23. Upon reassessing and reanalyzing the evidence, PW1 a Traffic officer testified that the accident occurred on 12/8/2017 at around 1.30 AM at Kiambu Area along Thogoto Gikambura area.
24. The accident involved motor vehicle KCJ961V and KMDM811B Bajaj motor cycle and that Samuel Njoroge Guchu died on the spot as a result of the accident.



25. During cross-examination the witness told the court that “there were feeder roads where accident occurred”.
26. PW2 testified that they were going to celebrate the win of the president when the accident occurred.
27. Just like PW 1, he confirmed that there are feeder roads and that the vehicle hit them at midnight at the scene of the accident.
28. PW3 confirmed that the deceased was boda boda rider of motor cycle No. KMDL 811B.
29. DW1 Peter Munyua admits that an accident took place on 12/8/2017 at night. He was the third witness to confirm that there was a junction at the scene of the accident. I have taken note of the fact that he told the court that he saw the motor cycle and that he tried to swerve but it was too late.
30. It was his evidence that the motor cyclist and the passenger had no helmets or reflector jackets at the time of the accident. He further told the court that he had heard that the bike didn’t have an insurance cover.
31. During cross examination he told the court that he was driving at a speed of between 50 – 60 KPH. He further confirmed that the car rolled as a result of the accident. He apologized that he did not record the fact that the motor cyclist had no helmets or jackets, in his statement.
32. From the Judgment, it is clear that the Magistrate mis appreciate the evidence as tendered by the witnesses. In particular in determining the issue of liability, the magistrate relied on the allegation that the deceased failure to wear a helmet and a reflector jacket and the fact that the motor bike was not insured when arriving at the conclusion of apportionment of liability.
33. I have analyzed and reviewed evidence and noted the following:
 - i. DW2 apologized that he did not record the fact that the motor cyclist and his passenger had no helmets or jackets on at the time of the accident in his statement.
 - ii. He testified that he “heard” that the motor bike did not have an insurance cover.
34. The court should have paid attention to the fact that the three witnesses confirmed that the motor vehicle hit many other pedestrians. Had the Magistrate laid emphasis to the above as read alongside the fact that the car rolled, then he would have safely concluded that the driver of motor vehicle Registration No. KCJ 961V was negligent in the way he drove the car.
35. The driver testified that he knew the road well. All the witnesses confirmed that there was a junction.
36. In my assessment, The appellant drove dangerously knowing very well that he owed the Respondent a duty of care which he breached.
37. I have reanalyzed, reassessed and re-evaluated the aforementioned evidence and I am persuaded that the trial magistrate based his finding on the issue of liability on hearsay and on evidence that lacked veracity.
38. It was not conclusively proved that the motor cyclist and his passenger had no helmet or reflector jackets. The magistrate fell into error when she relied on hearsay evidence when he concluded that the motor bike wasn’t insured.
39. The only evidence that was availed to the court was what they tendered to prove that the insurance cover was word from third parties who were not called to testify. The Court should not have considered the issues of the lack of helmet, Jackets, and the insurance cover when assessing liability.



40. Informed by the foregoing, I am satisfied that the Respondent proved her case on a balance of probabilities and that the Appellant drove the car negligently and he shall shoulder 100% liability.

General damages:

41. In the case of *Catholic Diocese of Kisumu v Sophia Achieng Tete* Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 it was held 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 leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”
42. An assessment of damages is at the discretion of the trial court, the appellate court can only interfere with the discretion of the trial court if it applied the wrong principle and the award is inordinately too high or too low as cited *Kemfro Africa Ltd Vs Gathogo Kanini Vs A.M.M Lubia & another* as follows: - “I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
43. On the issue of the Multiplicand, the Appellant submits that there was no evidence adduced to demonstrate the deceased earned Kshs 22,000/= being a Boda Boda rider and urged the trial court to adopt a multiplicand of Kshs.5, 000/=.
44. The respondent had urged the trial court to adopt a multiplicand of Kshs 15,000. The trial court in its judgment adopted a multiplicand of Kshs 12,000/= based on the minimum wage regulations.
45. The appellant submits that adopting the minimum wage regulation of 2017, the multiplicand is Kshs.6,896.15/= under the category of a general labourer, and not the Kshs. 12,000 adopted by the trial court.
46. The court of appeal in *Jacob Ayiga Maruya & Another V. Simeon Obaya* [2005] held-
- “We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things. In this case, the evidence of the Respondent and the widow coupled with the production of school reports was sufficient material to amount to strict proof for the damages claimed. Ground one of the grounds of appeal must accordingly fail.”
47. Pw3 testified that the deceased took home Kshs 30,000/= and cater for food, rent and school fees which is on a balance of probabilities plausible as guided by the case of *Jacob Ayiga*.
48. I find that there is high probability that the deceased used to support his family by sending the funds as testified by the widow and I am convinced that a multiplicand of Ksh. 12,000/- is reasonable for a Boda Boda rider. I do not find a basis to interfere with the trial court’s finding in the circumstances.



Multiplier

49. The appellants submits that the trial court erred in adopting a multiplier of 35 years and that the trial court failed to consider the risk involved in the deceased nature of work. The appellant urged the court to adopt a multiplier of 20 years.
50. Pw3 testified the deceased died aged 25 years. According to the trial court the Respondent's retirement age was 60 years and adopted the multiplicand of 35 years, considering the vicissitudes of life and the nature of the work involved in my view 20 years would have been more appropriate.

Disposition:

51. The Appellant shall shoulder 100% liability.

The Respondents are awarded the following:

- a. Loss of dependency – $12,000 \times 12 \times 20 \text{ years} \times 2/3 = \text{Ksh. } 1,920,000$
- b. Pain and suffering upheld at Ksh. 20,000.
- c. Loss of expectancy at Ksh. 100,000.
- d. Special damages-Kshs38,500/=
- e. Costs.

DATED AND DELIVERED AT KIAMBU THIS 6TH DAY OF MARCH, 2023.

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J. CHIGITI (SC)

JUDGE

