



REPUBLIC OF KENYA



**Kitheka (Suing on behalf of the estate of Florence Nthambi Kitheka (Deceased)) v Ndiritu (Civil Appeal E051 of 2022) [2023] KEHC 18756 (KLR) (Civ) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 18756 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
CIVIL APPEAL E051 OF 2022  
DO CHEPKWONY, J  
APRIL 20, 2023**

**BETWEEN**

**WINFRED MUNANIE KITHEKA ..... APPELLANT**

**SUING ON BEHALF OF THE ESTATE OF FLORENCE N'THAMBI KITHEKA  
(DECEASED)**

**AND**

**JOHN GITONGA NDIRITU ..... RESPONDENT**

*(Being an Appeal against the judgment and decree of Hon. E. Wanjala  
(PM) in Nairobi CMCC No. 1502 of 2020 delivered on 4th February, 2022)*

**JUDGMENT**

**Background**

1. By way of a plaint dated March 5, 2020 and filed in court on March 9, 2020, the appellant suing on behalf of the estate of Florence Nthambi Kitheka (deceased), as the administrator and daughter sought for judgment against the respondent for the following prayers:-
  - a. Special damages Kshs 2,359,546/=;
  - b. General damages for future earning, pain and suffering, loss of dependency and loss of expectation of life under the [Fatal Accidents Act](#) and [Law Reform Act](#);
  - c. Costs of this suit;
  - d. Interest on (1) (2) and (3) above at court rate.



2. In her plaint, the appellant pleaded that on February 21, 2019 at around 1540hours, the deceased was a lawful pedestrian along Eastern bypass road when by reason of the negligence of the respondent, by himself, his driver, agent and or servant in the manner he managed, controlled and or drove motor vehicle registration number KAN 676J Toyota saloon that as a consequence permitted the said motor vehicle to violently knock down Florence Nthambi Kitheka thereby occasioning her fatal injuries.
3. The appellant pleaded negligence on the part of the respondent by himself, his driver and or agent as particularized and pleaded in paragraph 4 of the plaint as follows;
  - a. Driving motor vehicle registration number KAN 676J at an excessive speed in the circumstances.
  - b. Failure to keep any or proper control of motor vehicle registration number KAN 676J as to causing accident.
  - c. Failure to stop or to slow down so as to avoid the accident.
  - d. Deliberately knocking down the deceased on a public road.
  - e. Driving off the road endangering pedestrians.
4. The appellant also pleaded special damages amounting to Kshs 2,359,546/= as particularized in paragraph 4 of her plaint.
5. The deceased is survived by two dependents namely Winnie Mwanie Kitheka and Daisy Mutheu who are both her daughters. She further pleaded that the deceased was 49 years at the time of the accident and was a business lady with an average gross income of Kshs 50,000/=.
6. By reason of the foregoing, the deceased's life was shortened in consequence of which her estate suffered loss and damage.
7. The appellant claimed for general damages for lost years, pain and suffering, loss of dependency, loss of expectation of life and special damages as pleaded in paragraph 4 of the plaint.
8. The respondent entered appearance and filed his statement of defence dated July 6, 2020. In his response, the respondent denied the contents of the appellant's plaint and put her to strict proof thereof.
9. The respondent also denied the applicability of the doctrine of *res ipsa loquitur* as pleaded by the appellant and he relied on the doctrine of contributory negligence and [Traffic Act](#).
10. In his defence, the respondent pleaded that in the alternative and without prejudice, if at all any accident occurred, which allegation is denied, the same was not in any way due to the negligence of the respondent as alleged.
11. The respondent pleaded particulars of negligence of the deceased under paragraph 8 of his statement of defence as follows;
  - a. Failing to heed to the warning of the driver of motor vehicle registration number KAN 676J.
  - b. Failing to keep proper look out to other road users particularly motor vehicle registration number KAN 676J.



- c. Walking on the road in a zigzag manner on the lawful path of motor vehicle registration number KAN 676J.
  - d. Walking without caring about other road users particularly motor vehicle registration number KAN 676J.
  - e. Playing on the road without caring about other road users particularly motor vehicle registration number KAN 676J.
  - f. Engaging in an animated conversation while walking on the road.
  - g. Contributing to the occurrence of the accident.
12. The matter was certified ready for hearing on January 20, 2021 and the same proceeded *ex parte* on February 17, 2021, whereby PW1 and PW2 testified on that day.
13. Later on March 4, 2021, the respondent filed an application seeking to set aside the ex-parte proceedings. The application dated March 4, 2021 was allowed by consent of the parties.

### **Evidence**

14. On June 2, 2021, the matter proceeded for hearing with the appellant calling a total of 3 witnesses to testify in support of her case. PW1- Sgt Philip Kazungu testified that on February 21, 2019 an accident occurred along the Eastern bypass involving motor vehicle registration number KAN 676J and a pedestrian (hereinafter referred to as the “deceased”) Florence Nthambi Kitheka. He produced the a police abstract marked as P Exhibit1 and stated that the pedestrian was crossing from the right side when she was hit by the said vehicle, a result of which she sustained serious injuries from which she later succumbed. According to the occurrence book, it was indicated that the driver of the vehicle was to blame because the pedestrian was crossing from the right to the left whereby the driver had an open view of the pedestrian crossing who was knocked when she had almost finished crossing the road. Further, it was stated that it is impossible for one to drive at 40 km/ph and knocked a pedestrian as this is a manageable speed to control the vehicle and avoid an accident. He finally stated that as the driver was approaching the area which was a commercial area, he ought to have driven at a slow speed, which is 50 km/ph.
15. On cross examination, PW1 stated that in the police abstract it was indicated that the result of investigation is that the case is pending under investigation. According to the occurrence book, it was indicated that the pedestrian was crossing from the right to left. PW1 confirmed that he was not the investigating officer and neither did he visit the scene of the accident, nor have the police file with him. He also reiterated that for a commercial place the speed limit is 50km/ph.
16. PW2 - Winfred Munanie Kitheka adopted her witness statement and produced list and bundle of documents as exhibits. It was her evidence that the deceased was her late mother and she filed the suit on her own behalf and that of her younger sister. She stated that on February 21, 2019, she received calls from strangers who informed her that her mother had been involved in an accident along the Eastern bypass and had been rushed to Komarock clinic for first aid. She went and found her mother in the emergency room and saw she had injury on the hand and her leg was broken. She went on to state that they could not raise Kshs 250,000/= required at Komarock clinic since she needed to be in ICU, and her mother was transferred to St. Mary’s Hospital and later booked in another hospital in Eastleigh where she was put in ICU. According to PW2, after 3 days, her mother was not getting better and they took her to Shalom Hospital where they said she had fractured her diaphragm and had water in the lungs. She was referred to Kenyatta National Hospital for treatment and on February



- 22, 2019, she succumbed. PW2 said that they are two siblings in the family. That her mother was self-employed earning a monthly income of Kshs 50,000/=. She was responsible for all their needs, school fees, accommodation and anything they needed. She stated that she was taking a Diploma while her sister was at Egerton University, which they discontinued after the death of their mother.
17. On cross-examination, she stated that it is indicated in the police abstract that the accident happened at 3.20pm. She also stated that when she got to hospital, the officer told her to go and report the accident to the police. She stated that the accident happened at 2.00pm. PW2 told court that the deceased was earning an estimate of Kshs 50,000/= but there was no evidence to support the income. She went on to state that the deceased was paying rent of Kshs 15,000/=. She confirmed that the certificate of death indicates that the occupation for deceased as unknown. She also confirmed that there is a sister. She admitted that she did not file any prove that she was enrolled in any institute and that she and her sibling are over 18 years of age and are able to procure employment. In re-examination, PW2 relied on the chief's letter to prove that Daisy was her sister, both are unemployed and that before the demise of their mother, they were both students.
  18. PW3 - PC Samuel Sahuri attached at Ruai Police Station testified that he was the investigations officer having taken over the case from another officer who had gone on transfer. He confirmed the occurrence of the accident along Eastern bypass involving motor vehicle registration number KAN 676J driven by John Gitonga. He stated that the driver was from Kangundo and was about to join Eastern bypass at pork manenos when he hit the deceased as she was crossing the road from the right to the left side. He also stated that no one was to blame for the accident and it was indicated that the case was under investigations. According to PW3, the pedestrian was crossing and the driver ought to have seen the pedestrian as the accident happened at a service lane where it joins the main road. He explained that when the driver is joining the main road, should slow down and give way. On cross-examination, he stated that he could not tell what time the accident happened but it was reported around 3.40pm. He also stated that he is well acquainted and there is no pedestrian path. He confirmed that he did not see the deceased crossing the road and neither did he visit the scene of the accident. He also confirmed that from the abstract, no one was blamed and the driver was never charged.
  19. The defence called one witness John Gitonga Nderitu, the respondent who testified as DW1 and adopted his witness statement as his evidence in chief and stated that the accident happened at about 2.30pm. He said that he was from Ruai and was to join Eastern by pass uphill towards Utawala and go to Mombasa road. He said that the weather condition was good as he was joining the main road from the service lane, he was careful. He contended that there was no vehicle on the road and was driving at 40km/hr so that he could stop without problems though one cannot stop instantly. According to DW1, the deceased suddenly emerged from behind another vehicle that was from Kangundo road intending to join Thika road on the right side. He denied that he was drunk on the date of the accident. He told court that he heard a bang and applied emergency brakes. They took her to Komarock hospital. He reiterated that he was driving at 40 km/hr and was 600 metres to joining the main road. On re-examination, he said that the accident happened on the main road and that the deceased emerged from the right side of the road and he did not see her.
  20. On February 4, 2022, the trial court delivered its judgment in the following terms:-  
Liability: plaintiff 50%: defendant 50%
    - a. Damages under Law Reform Kshs 220,000/=
    - b. Loss of dependency Kshs 1,628,748/=
    - c. Special damages Kshs 1,227,980/=



Total Kshs 3,076,728/=

Less 50% (1,538,364/=)

Net award Kshs 1,538,364/=

The plaintiff is awarded costs of the suit. Interest from the date of judgment till payment in full.

### The Appeal

21. The appellant was dissatisfied with the judgment of the trial court and appealed to this court *vide* a memorandum of appeal dated February 11, 2022. The appellant has proffered the following grounds of appeal:-

- a. That the learned trial magistrate erred in fact and law by considering the defence filed out of time without leave of the court and after entry of a regular default judgment which was not set aside and thus considered a defence which was null and void *ab initio*.
- b. That the learned trial magistrate erred in fact and law by failure to consider the reply to defence which challenged the validity of the defence that was filed out of time and when there was on record a regular default judgment.
- c. That the learned trial magistrate erred in fact and law in finding and holding that the deceased was 50% liable in contributing to the occurrence of the accident while the expert evidence of the police and their investigations blamed the respondent for causing the accident the subject matter of the proceedings before her.
- d. That the learned trial magistrate erred in fact and law as she did by awarding special damages special damages of Kshs 120,000/= which was manifestly low thereby making an award which was contrary to the pleaded and proven special damages to the prejudice of the plaintiff.
- e. That the learned trial magistrate erred in law and fact by arriving at a decision that was not based on the evidence on record and thus erroneously made wrong findings on both liability and damages to the detriment of the appellant.

The appellant has sought for the following reliefs:-

- a. The appeal be allowed and an order be made that the defence filed out of time and without leave of the court and when there was a regular judgment is null and void *ab initio*.
- b. That in the result, the honourable court do find the respondent 100% liable on liability.
- c. That judgment on special damages of Kshs 1,227,980/= be set aside and be substituted with judgment in the sum of Kshs 2,359,546/=.
- d. That costs of the appeal be granted to the appellant.



22. The appeal was canvassed by way of written submissions following directions issued by this court on May 13, 2022. The appellant complied with the directions and filed her submissions dated September 9, 2022. There are no submissions on record filed on behalf of the respondent.

### **Analysis and Determination**

23. To determine this appeal, I have read through the record of proceedings from the trial court and the submissions alongside the cited authorities by the appellant.
24. To begin with, I am mindful of the duty required of this court as the first appellate court and alive to the law that requires this court to re-evaluate, re-asses and re-consider the evidence afresh and come up with its own independent inference. (See the case of *Selle & another v Associated Motor Boat Co Ltd & others* (1968) EA 123), where the court restated the principles of required of a first appellate court.
25. The same position was reiterated in *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR, where the court held that:-
- “This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”
26. I have considered the grounds in support of the appeal, the submissions by the appellant as well as the authorities relied upon. The issues for determination are;
- a. Whether the trial court erred in considering the defence which was filed out of time?
  - b. Whether the trial court erred in apportioning liability at 50%?
  - c. Whether the award of special damages was manifestly too low?
27. In considering the first issue of whether the trial court erred in considering the defence which was filed out of time, the appellant submitted that the trial court erred by considering the defence which was filed out of time without leave of the court and after entry of interlocutory judgment. I am in agreement with the appellant in terms of order 6 rule 1 of the *Civil Procedure Rules* which requires a defendant to enter appearance within 15 days.
28. The record shows that the respondent filed a memorandum of appearance and statement of defence dated July 6, 2020 which elicited a reply to defence by the appellant dated September 24, 2020. Later, the respondent filed an application dated March 4, 2021 seeking stay and setting aside the proceedings of February 17, 2021 and all consequential orders, recalling the witnesses who testified on February 17, 2021 and for the court to re-open the defence case and allow the defendant’s witnesses to testify. On March 4, 2021, by consent of the parties the application was allowed and a hearing date was fixed.
29. With regard to the issue of the statement of defence having been filed out of time, I am of the view that article 50 of the *Constitution* recognizes the right of any party to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. Further, article 159(2)(d) of the *Constitution* mandates the courts to administer justice without undue regard to procedural technicalities. The argument being advanced by the appellant is intended to lock out the respondent from defending himself in this matter which is not what the *Constitution* envisioned in the wording of articles 50 and 159 of the *Constitution*.



30. In my humble view, the appellant having agreed to have the application dated March 4, 2021 allowed by consent, which in essence vacated the proceedings of February 17, 2021, meant that she allowed the defence as filed and this technically set aside the default judgment. Therefore, this issue was overtaken by events immediately the respondent testified before the trial court and same cannot be revisited at this stage of the proceedings.
31. Be that as it may, no prejudice was suffered by the appellant before the trial court in considering the statement of defence. In any event, the trial court reserved the discretion to admit the same so as not to infringe on the respondent's right of fair hearing under the *Constitution*.
32. Secondly, on whether the trial court erred in apportioning liability at 50:50%, it was submitted that the appellant proved her case on a balance of probability and the defence ought not have been considered. She urged the court to find the respondent 100% liable and consequently order that the apportionment of liability at 50:50 was bad in fact and law.
33. The respondent pleaded contributory negligence and testified in support of the same. It should be noted that, in order to successfully plead and establish contributory negligence, a defendant must prove that the plaintiff due to his own negligence, contributed to the accident.
34. In circumstances where the evidence is not clear on which party to blame for the accident, this court is guided by the in *Lakhamshi v Attorney General* (1971) E A 118-120, where Spry, V P stated as follows thus:-

“It is now settled law in East Africa that where the evidence relating to a traffic accident is insufficient to establish the negligence of any party, the court must find the parties equally to blame. A judge is under a duty when confronted by conflicting evidence to reach a decision on it. In the case of most traffic accidents it is possible on a balance of probabilities to conclude that one other party was guilty or both parties were guilty of negligence. In many cases as for example where vehicles collide near the middle of a wide straight road in conditions of good visibility with no courses, there is in the absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the center of the road, the other must have been negligent in failing to take evasive action. Although it is usually possible, but nevertheless often extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence, yet where it is not possible it is proper to divide the blame equally between them. Where, however, there is a lack of evidence, the position is different. It is difficult to see how a party can be found guilty of negligence if there is no evidence that he was in fact negligent and if negligence on his part cannot properly be inferred from the circumstances of the accident.”

35. I am alive to the fact that every person using the road has a duty of care towards himself and other road users. In this instance, it was the evidence before the trial court that the accident occurred on the service lane as the respondent was about to join the main road. In his evidence, the respondent stated that he was driving at a speed of 40kph. In my view, with this kind of speed, it is not possible that the respondent could not have seen the deceased crossing the road. I say so because the deceased was crossing from the right side of the road to the left. In my considered view, I find the respondent was negligent and ought to have been considered partly at fault for the fatal injuries on the deceased. I therefore find that the trial court erred in making a finding on liability at 50%:50%. For the aforesaid reasons, I am inclined to interfere in the apportionment of liability and enhance the respondent liability to 80% and the appellant's liability to 20%.



36. However, based on the evidence adduced before the trial court, I attribute a higher percentage of liability on the respondent than the appellant. I must also point out that both parties were expected to have taken measures to avoid the occurrence of the accident.

37. On the issue of special damages, the trial court awarded a sum of Kshs 1,227,980/= as special damages which was specifically proved and I do find no need to interfere with the said award.

38. The upshot of the foregoing is that the appeal succeeds in the following terms:-

Liability: appellant 20%: respondent 80%

i. Damages under Law Reform Kshs 220,000/=

ii. Loss of dependency Kshs 1,628,748/=

Total Kshs 1,848,748/=

Less 20% (Kshs 369,749.60)

Kshs 1,478,998.4

iii. Special damages Kshs 1,227,980/=

Net award Kshs 2,706,978.40/=

39. Each party shall bear its own costs of the appeal but the appellant shall have costs in the lower court.

40. It is so ordered.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS ...20<sup>TH</sup> ... DAY OF ...APRIL... 2023.**

**D.O CHEPKWONY**

**JUDGE**

**In the presence of:**

Mr. K. A. Nyachoti counsel for Appellant

Appellant present in perso

No appearance for and by Respondent

**Court Assistant - Mwenda**

