



**Maina ((Suing as the Administrator of the Estate of Mary Wanjiku Mwangi)) v Mbaya & another (Civil Appeal 163 of 2019) [2023] KEHC 3335 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3335 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL 163 OF 2019  
TW CHERERE, J  
APRIL 20, 2023**

**BETWEEN**

**JOEL MAINA ..... APPELLANT  
(SUING AS THE ADMINISTRATOR OF THE ESTATE OF MARY WANJIKU  
MWANGI)**

**AND**

**NICHOLAS KIRIINYA MBAYA ..... 1<sup>ST</sup> RESPONDENT  
HENRY MUTUMA GITOBU ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment and decree in MERU CMCC NO.  
258 OF 2016 by Hon. T. Mwangi (SPM) on 21st November, 2019)*

**JUDGMENT**

1. On June 1, 2015, Mary Wanjiku Mwangi (Deceased) was lawfully travelling in 2<sup>nd</sup> Appellant's motor vehicle KBZ 223M (Accident motor vehicle) which was allegedly being driven negligently by the 1<sup>st</sup> Appellant it was involved in a self-involving accident as a result of which deceased suffered fatal injuries. Consequently, Joel Maina filed suit for compensation in his capacity as husband and administrator of deceased's estate.
2. At the hearing, Appellants did not tender any evidence. At the conclusion of the trial, the learned trial magistrate by a judgment dated November 21, 2019 found the case not proved and dismissed it with costs the Appellant.

**The Appeal**

3. The Appellant dissatisfied with the lower court's decision filed this appeal mainly on the ground that the dismissal was not merited.



## Submissions by the Parties

### Appellant's submissions

4. By submission filed on February 6, 2023, Appellant faulted the trial magistrate for disregarding and dismissing the evidence in the police abstract and that of the eye witness even though the Respondents did not tender any evidence to challenge the Appellant's case.

### Respondents' Submissions

5. Respondents by submission dated March 30, 2023 submitted that the trial court's finding that the case was not proved since one of the evidence of the eye witness was not corroborated was justified. Reliance was placed on Section 107 of the *Evidence Act* and in *Bwire v Wayo & Sailoki* (Civil Appeal 032 of 2021) [2022] KEHC 7 (KLR) (24 January 2022) (Judgment) where the court stated that:

“Burden of Proof” is a legal term used to assign evidentiary responsibilities to parties in litigation. The party that carries the burden of proof must produce evidence to meet a threshold or “standard” in order to prove their claim. If a party fails to meet their burden of proof, their claim will fail. The general rule in civil cases is that the party who has the legal burden also has the evidential burden. If the Plaintiff does not discharge this legal burden, then the Plaintiff's claim will fail. In civil suits, the plaintiff bears the burden of proof that the defendant's action or inaction caused injury to the Plaintiff, and the defendant bears the burden of proving an affirmative defense. If the claimant fails to discharge the burden of proof to prove its case, the claim will be dismissed.”

6. Respondents additionally submitted that in the event that the appeal succeeds, Appellant be awarded Kes 10,000/- for pain and suffering, Kes 100,000/- for loss of expectation of life and Kes 700,000/- for loss of dependency and cited the following authorities.

1. *Loice Wanjiku Kagunda -vs- Julius Gachau Mwangi* C A No 142 of 2003 (UR) where the Court held that: -

“We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence, an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those or other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (See *Mariga -vs- Musila* (1984) KLR 257.)”

2. Respondent urged court to find that the proposed award of Kes 50,000/- for pain and suffering was high and urged that a sum of Kes 10,000/- was sufficient and in support thereof relied on *Sukari Industries Limited v Clyde Machimbo Juma* [2016] eKLR where the court found that an award of between 10,000/- to 100,000/- depending on the length of the deceased endured pain was reasonable.
3. In support of Kes 100,000/- for loss of expectation of life, Respondents relied on *Kenya Red Cross v IDS (Suing as the Legal Representative of the Estate of MDR (Deceased))* [2020] eKLR where the court on appeal upheld an award for the sum of Kes 100,000/- for loss of expectation of life



4. In support of Kes 700,000/- for loss of dependency, Respondents relied on *Gilbert Kimatare Nairi & another (suing as personal representatives of the Estate of Lemayian Richard Kimatare (Deceased) v Civiscope Limited* [2021] eKLR where a global sum of Kes 600,000/- was awarded under this heading

### **Analysis and Determination**

7. I have considered the evidence at the trial and the submissions filed on behalf of the parties.
8. Appellants did not tender any evidence at the trial. That averments in pleadings are not evidence was appreciated in *Francis Otile vs Uganda Motors Kampala* HCCS No 210 of 1989 where it was held that the court cannot be guided by pleadings since pleadings are not evidence and nor can they be a substitute therefor. Before that, the then East African Court of Appeal held in *Mohammed & Another vs Haidara* [1972] EA 166 where that the contents of a plaint are only allegations, not evidence. According to *Edward Muriga Through Stanley Muriga vs Nathaniel D Schulter* Civil Appeal No 23 of 1997, where a defendant does not adduce evidence the plaintiff's evidence is to be believed as allegations by the defence is not evidence. In *CMC Aviation Ltd vs Cruisair Ltd (No 1)* [1978] KLR 103; [1976-80] 1 KLR 835, Madan, J (as he then was) expressed himself as hereunder:

“Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of “evidence” as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth.”

9. The consequences of a party failing to adduce evidence was considered in the case of *Motex Knitwear Limited vs Gopitex Knitwear Mills Limited Nairobi (Milimani)* HCCC No 834 of 2002, Lesiit, J (as she then was) citing the case of *Autar Singh Bahra and Another vs Raju Govindji*, HCCC No 548 of 1998 appreciated that:

“Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1<sup>st</sup> plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”

10. Again in the case of *Trust Bank Limited vs Paramount Universal Bank Limited & 2 Others* [2009] eKLR Lesiit, J (as she then was) citing the foregoing decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings.
11. From the foregoing, I find that there was no defence that the court could consider to dismiss the Appellant's case that was not controverted. By entering into the arena of the suit and making up a defence for the Respondents, the trial magistrate defied the fundamental principle that ours is an adversarial system where courts decide only those matters that have been properly laid out in evidence.
12. From the foregoing, I find that the trial court fell into error in dismissing Appellants case and ought to have found Respondents liable at 100% which I hereby do.



13. The trial magistrate proposed to award the following:
  1. Pain and suffering Kes 25,000
  2. Loss of Expectation of life Kes 150,000
  3. Loss of Dependency Kes 1,350,000
  4. Special damages Kes 131,000
14. The principle on which a court can interfere with an award for damages was stated by Kneller JA in *Kemfro Africa Limited t/a Meru Express Services (1976) & Anor vs Lubia & Anor, No 2* [1987] KLR 30 at page 35 that:

“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 judge 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.”
15. Respondents did not file a cross-appeal and the attempt to discredit the award proposed by the trial magistrate is therefore rejected. It has not been demonstrated that the proposed award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. The proposed award is in my considered view reasonable.
16. In the final analysis, this appeal succeeds and it is hereby ordered:
  1. The judgment dated November 21, 2019 dismissing the Appellant’s case is set aside in its entirety
  2. Judgment is entered for the Appellant as against the Respondents jointly and severally at 100% as following:
    - i. Pain and suffering Kes 25,000.00
    - ii. Loss of Expectation of life Kes 150,000.00
    - iii. Loss of Dependency Kes 1,350,000.00
    - iv. Special damages Kes 131,000.00
    - v. Costs of the suit and of the appeal
    - vi. Interest at court rates

**DATED AT MERU THIS 20<sup>th</sup> DAY OF April 2023**

**WAMAE. T. W. CHERERE**

**JUDGE**

**Appearances**

Court Assistant - Morris Kinoti

For Appellant - Ms. Kaume for M.G.Kaume & Co. Advocates

For Respondents - Mr. Njuguna for Kairu & Mc Court & Co. Advocates

