



REPUBLIC OF KENYA



Nene v Kiruri & 2 others (Suing as the Administrators of the Estate of Peter Kiruri Ngura-Deceased) (Civil Appeal E184 of 2021) [2023] KEHC 3342 (KLR) (20 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3342 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E184 OF 2021**

**PM MULWA, J
APRIL 20, 2023**

BETWEEN

ALEX WAGACAKI NENE APPELLANT

AND

BENSON NGURA KIRURI 1ST RESPONDENT

FLORENCE WARUGURU KIRURI 2ND RESPONDENT

BERNARD MUCHIRA KIRURI 3RD RESPONDENT

**SUING AS THE ADMINISTRATORS OF THE ESTATE OF PETER KIRURI
NGURA-DECEASED**

*(Being an appeal against the judgment delivered by Hon. B.M. Ekhubi,
PM ON 9th January, 2020 in Thika CMCC No. 1202 of 2015)*

JUDGMENT

1. The appeal arises from the judgment in Thika CMCC No. 1202 of 2015 where the Respondents, in their capacity as personal representatives of the deceased filed a suit against the Appellant for general and special damages under the *Fatal Accidents Act* and the Law Reforms Act for the fatal injuries arising from the accident that occurred on 17th February 2015.
2. According to the plaint the deceased was lawfully riding his motor cycle registration number KMCN 867B along Thika Blue Post road near Thika School for the Blind, when Motor vehicle registration number KBA 545M owned by the appellant was carelessly and negligently and/or recklessly driven at a high speed without due care and regard to other road users while overtaking and it lost control and knocked down the deceased causing him to sustain fatal injuries.
3. Denying the averments in the plaint, and the particulars of negligence, the appellant filed a defence wherein he blamed the deceased for the occurrence of the accident.



4. After hearing the plaintiff's case and defence case the trial court found the appellant 100% liable for the accident and awarded the following damages to the respondent;
 - i. Loss of expectation of life -Kshs. 100,000/=
 - ii. Loss of dependency -Kshs. 900,000/=
 - iii. Pain and suffering -Kshs. 70,000/=
 - iv. Special damages -Kshs. 27,275/=Less the award of loss of expectation of life
5. Aggrieved by the trial court's finding the appellant filed a memorandum of appeal dated 24th September 2021, citing the following grounds;
 - a. The learned Magistrate erred in law and misdirected himself when he failed to consider the appellant's submissions on both points of law and facts.
 - b. That the learned Magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.
 - c. The learned Magistrate erred in assessing an award, hereunder, which was wholly erroneous estimate of the loss and damages suffered by Plaintiff.
 - a. Loss of dependency Kshs. 900,000/=
 - b. Loss of expectation of life Kshs. 100,000/=
 - c. Pain and Suffering Kshs. 70,000/=
 - d. Special Damages Kshs. 27,275/=
 - d. The learned Magistrate erred in fact and in law by failing to take into consideration the evidence adduced by the Defendant on liability and finding that the Appellant was 100% liable for the accident.
 - e. The learned Magistrate erred in fact and in law by holding that the Plaintiffs were entitled to General Damages for Loss of Dependency of Kshs. 900,000/= an amount of which is excessive considering the circumstances and evidence tendered by the Appellant.
 - f. The learned magistrate erred in fact and in law by holding that the Plaintiffs were entitled to General Damages for Loss of Expectation of Life of Kshs. 100,000/= an amount of which is excessive considering the circumstances and evidence tendered by the Appellant.
 - dg. The learned Magistrate erred in fact and in law by holding that the Plaintiffs were entitled to General Damages for Pain and Suffering of Kshs. 70,000/= an amount of which is excessive considering the circumstances and evidence tendered by the Appellant.
 - h. The learned Magistrate erred in fact and in law by holding that the Plaintiffs were entitled to Special damages of Kshs. 27,275/= an amount of which was not (sic) is excessive considering the circumstances and evidence tendered by the Appellant.
 - i. The learned Magistrate erred in fact and in law in failing to consider the Appellant's submissions in their entirety.



6. It was proposed that the appeal be allowed with costs and the judgment by the learned trial magistrate be set aside.
7. The appeal was heard by way of written submissions.

Appellant's Submissions

8. By the submissions dated 20th February 2023, the appellant condensed the grounds in the memorandum of appeal endeavoured to address the issue of quantum.
9. On loss of dependency the appellant submitted there was no evidence tendered to prove the deceased was 55 years, and operating as boda boda and earning a monthly salary of Kshs. 40,000/=.
10. Counsel faults the trial court for adopting a multiplier of Kshs. 15,000/= which inflated the award of loss of dependency. He urged the court to adopt a global sum approach of Kshs 400,000/=. The case cited was *Moses Wetangula & Anor vs Eunice Titika Rengetiang* (2018) eKLR where the court adopted a global sum approach of Kshs 500,000/= for a 42year old retired KDF officer. And in *Rishi Hauliers Ltd vs Josiah Boundi Onyancha* (2015) eKLR the court adopted a global sum approach of Kshs. 500,000/= where the deceased was aged 50 years old.
11. Counsel submits that at the time of death, the deceased had only one dependant aged 17 years. It was argued that the other beneficiaries are adults and can fend for themselves.
12. The court was urged to set aside the judgment of the trial court and uphold the appeal.

Respondent's submissions

13. In the submissions dated 4th March 2023, learned counsel submitted there was no merit in the appeal, and that the respondent proved their case on a balance of probability against the appellant. The appellant failed to controvert the evidence of the respondent, and that the court should uphold the trial court judgment on liability.
14. On quantum, it was contended that the deceased died aged 55 years and earned an average salary of Kshs. 2,000/= per day he was survived by his wife and 6 children.
15. On the issue of pain and suffering counsel submitted that the deceased did not die on the spot but succumbed to the injuries after a few hours having endured serious pain prior to his death and thus the award of Kshs. 70,000/= was justified.
16. It was submitted on behalf of the respondent that the award of Kshs. 100,000/= for loss of expectation of life was fair and reasonable, and the court urged to award the controversial figure of Kshs. 100,000/= which the trial court deducted from the award of damages.
17. On the issue of loss of dependency, counsel submitted that the trial court was justified in adopting Kshs. 15,000/=: a multiplier of 5 years and a multiplicand of 2/3 given that the deceased had a family which he supported. Counsel further submitted that the award of Kshs. 900,000/= was justified and cited the case of *Joseph Kahiga Gathii & Anor vs World Vision Kenya & 2 others* (2014) eKLR where the court used a multiplier of 8 years on a deceased aged 57 years as at the time of death and that a multiplier of 8 years would be appropriate but not the 13 years used by the trial court.
18. It was contended that special damages were pleaded and strictly proved. And further that the appeal lacked merit and the court was urged to dismiss the same with costs.



Evidence

19. During the trial, Pw1, a police officer adduced a police abstract dated 4th March 2015 in relation to OB No. 223/17/2/15, a report on the subject accident, involving motor vehicle KBA 545M and motor cycle KMCN 867B.
20. Pw2 testified on how she got a call from her son who informed her that the deceased was hit by a vehicle. At the hospital she found he had succumbed. She adduced receipts of the expenses incurred in the burial. She testified the deceased was a boda boda operator and giving her Kshs. 2,000/= per day for her personal use. That the deceased had 6 children. She could not tell how much the deceased was earning.
21. Pw3 testified on how on 17th February 2015 he witnessed the accident as he was riding behind the deceased when a Nissan Matatu came from behind as the deceased was entering at Equator and hit him. That the driver of the matatu ran away after the accident.
22. Dw1, a police officer referred to OB No. 23/17/2/15 in respect to the accident and told the court that as per the abstract no one was to blame for the accident.
23. On the issue of liability, the trial court held the only eye witness Pw3 gave credible evidence that the driver of motor vehicle KBA knocked the deceased as he tried to overtake and failed to stop. The court held that Pw3 evidence was not controverted and found the driver of the motor vehicle 100% to blame for the accident.
24. For loss of expectation of life, the trial court found the same should be a conventional figure of Kshs. 100,000/= and that for pain and suffering the same is determined by the length of time the deceased had to endure pain before death and awarded Kshs. 70,000/=.
25. For loss of dependency the trial court adopted a sum of Kshs 15,000, a multiplier of 5 years and a multiplicand of 2/3 and awarded a total sum of Kshs. 900,000/=
26. Trial court held that Special damages were pleaded and strictly proved at 27,275/=.

Analysis and determination

27. This being a first appeal, this court has the duty to analyze and re-examine the evidence adduced in the lower court and reach its own conclusions but always bearing in mind that it neither saw nor heard the witnesses testify and make allowance for the said fact.
28. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court stated as follows-

“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.”
29. I have considered the record of appeal, the trial court file and the submissions filed by the parties in support of their respective arguments. I isolate the following issues for determination: -
 - a. Whether this court should disturb the issue of liability?
 - b. Whether the trial court erred in adopting a multiplier rather than a global sum approach in determining the quantum of damages, and



- c. Whether this court should interfere with the quantum as awarded.
30. The Court of Appeal in *Mkubv v Nyamuro* [1983] LLR at 403, Kneller JA & Hancox AgJJA held that:
- “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.”
31. From the record of the lower court, I find that the Respondent proved on a balance of probability, that indeed a road traffic accident occurred involving motor cycle registration Number KMCN 867B and Motor vehicle registration number KBA 545M occurred along Thika Blue Post road near Thika School for the Blind. Pw3, the only eye witness informed the court of the circumstances of the accident. However, I note that he told the trial court that he was riding his motor cycle behind the deceased but there two vehicles between him and the deceased.
32. Pw3’s evidence was not contravened by the appellant and no evidence was adduced by the appellant to fault the deceased for the accident.
33. In *Khambi and Another vs. Mabithi and Another* [1968] EA 70, it was held that:
- “It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.”
34. In the circumstances, I find the trial court did not err in finding the appellant 100% liable for the accident. I therefore uphold the trial court apportionment of liability.
35. On the issue of loss of dependency, the appellant submitted that the respondent did not adduce evidence to show that the deceased worked as a boda boda rider and the monthly income the he earned and urged the court to adopt a global approach. The trial court when addressing this issue gave reasons for adopting a multiplier approach.
36. In instances where no documentary evidence is adduced as proof of the deceased earning the trial court has the discretion to either adopt a global sum approach or a multiplier. The trial court adopted the multiplier approach and gave reasons for the same. The trial court adopted the wage of 15,000/= and a multiplier of 5 years with a multiplicand of 2/3 as the deceased was married and with 6 children who depended on him.
37. I thus do not find the trial court erred in adopting a multiplier approach and thus I will not interfere with the sum of Kshs. 900,000/= awarded under this head.
38. On the issue of pain and suffering and loss of expectation of life, from the evidence of Pw3 who witnessed the accident, after the deceased was knocked down, he and other riders took the deceased to hospital where he later succumbed to the injuries. It is therefore evident that the deceased did not die on the spot but he endured some pain before his death.
39. The trial court awarded the respondents kshs. 70,000/= for pain and suffering and Kshs. 100,000/= loss of expectation of life. The conventional award for loss of expectation of life is Kshs. 100,000/= while for pain and suffering the awards range from Kshs. 10,000/= to Kshs. 100,000/= with higher damages being awarded if the pain was prolonged before death as was stated in the case of: *Hyder*



Nthenya Musili & Another v China Wu Yi Limited & Another [2017] eKLR, where the court stated as follows-

“As regards damages awarded under the *Law Reform Act*, the principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death...The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs. 100,000/= while for pain and suffering the awards range from Kshs. 10,000/= to Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.”

40. In my view, the trial court was proper in awarding damages under the two heads. In the circumstances I uphold the award of the sum of kshs. 70,000/= for pain and suffering and Kshs. 100,000/= loss of expectation of life.
41. I will not belabour on the issue that the trial court deducted the damages awarded for loss of expectation of life from the total damages awarded. The learned magistrate very clearly enumerated the findings of the Court of Appeal in *Hellen Waruguru Waweru (suing as the Legal Representative of Peter Waweru Mwenja (deceased) v Kiarie Shoe Stores Limited* [2015] eKLR, as to duplication of awards.
- 42.

FINAL ORDERS:

The appeal herein lacks merit and is dismissed. The Respondent will have the costs of the appeal.

JUDGMENT DELIVERED VIRTUALLY, SIGNED AND DATED AT KIAMBU THIS 20TH DAY OF APRIL, 2023

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P.M. MULWA

JUDGE

In the presence of:

Kinyua/Duale – Court Assistants

Mr. Ng'ang'a - for Appellant

Ms. Akasi - for Respondent

