



REPUBLIC OF KENYA



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**Waithaka v Savatia (Suing as legal representative of the Estate of Arthur Mulindi Chonelwa)
(Civil Appeal E038 of 2022) [2023] KEHC 3550 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3550 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E038 OF 2022**

PM MULWA, J

APRIL 20, 2023

BETWEEN

SIMON NDEGWA WAITHAKA APPELLANT

AND

**ERNEST CHONELWA SAVATIA (SUING AS LEGAL REPRESENTATIVE OF
THE ESTATE OF ARTHUR MULINDI CHONELWA RESPONDENT**

*(Being an appeal against the judgment delivered by Hon. P. Nyota,
SRM on 25th February, 2022 in Ruiru SPMCC No. E279 of 2021)*

JUDGMENT

1. The appeal before the court for determination emanates from judgment of the Senior Principal Magistrates court at Ruiru in SPMcc no. E279 of 2021 delivered on 25th February 2022.
2. In the trial court the Respondent filed a suit by way of Plaint against the Appellant, seeking damages under the *Fatal Accidents Act* and the *Law Reform Act*. In the plaint dated 28th June 2021, the particulars are that on or about the 6th November 2020, the deceased was a pedestrian along Thika Highway at Kenyatta University area when the defendant so negligently drove, controlled and/or managed motor vehicle registration number KBJ 838R that it knocked the deceased killing him instantly.
3. After the trial, the learned magistrate found on liability at the ratio 50:50 and awarded the respondent damages as follows;
 - a. Pain and suffering -Kshs. 50,000/=
 - b. Loss of expectation of life -Kshs. 150,000/=
 - c. Loss of dependency -Kshs. 3,500,000/=



- d. Special damages -Kshs. 245,550/=
- Total -Kshs. 3,945,550/=
- Less 50 % contribution -Kshs. 1,972,775/=
- Total payable -Kshs. 1,972,775
- Plus 50% costs and interest

4. Aggrieved by the judgment the appellant filed a memorandum of appeal citing the following grounds:

- i. The learned trial magistrate erred in law and in fact in holding that both the Appellant and the deceased were equally to blame for the accident when the evidence on record shows that the deceased was solely to blame for the same.
- ii. That the learned trial magistrate erred in law and in fact in holding against the evidence on record, that the footbridge was under repairs and could not be used by the deceased.
- iii. That the learned trial magistrate erred in law and in fact in holding that the Appellant failed to take appropriate steps to avoid hitting the deceased.
- iv. The learned trial magistrate findings on liability goes against the weight of evidence adduced by both parties.
- v. The learned trial magistrate erred in law and in fact in failing to give due weight to the fact that the deceased was crossing the highway at an undesignated place after jumping over several guard rails.
- vi. The learned trial magistrate erred in law and in fact by awarding special damages when the same had not been strictly proved.
- vii. The learned trial magistrate erred in law and in fact in awarding excessively high sum for loss of dependency when no evidence was adduced by the Respondent to justify the same.
- viii. The learned trial magistrate erred in law and in fact in using speculative figure of Kshs. 35,000/= as a multiplicand with a multiplier of 60 years without any basis in law or in fact.
- ix. The learned magistrate erred in law and in fact in failing to appreciate that the Respondent was not a dependent of the deceased and could not have become a dependent for 25 years.
- x. The learned trial magistrate erred in law and in fact in failing to appreciate that the right approach for the assessment of damages for loss of dependency herein should have been the global award approach.
- xi. The learned trial magistrate erred in law and in fact in applying wrong legal principles in the award of damages thereby awarding excessively high awards.
- xii. The findings of the learned trial magistrate go against the weight and totality of the evidence adduced by all parties thereby coming to wrong findings on both law and fact.



The court was called upon to allow the appeal and set aside the judgment of the lower court and substitute thereof with a favorable judgment.

5. The appeal was heard by way of submissions.

Appellant's submissions

6. In submissions filed on 26th January 2023, it was submitted for the appellant that the apportionment of 50:50 liability was erroneous as the deceased was not supposed to be crossing the road but ought to have used the footbridge. The appellant urged the court to apportion 100% liability to the deceased as he jumped on the busy dual highway at night and was thus fully contributed to the accident.
7. The appellant cited the case of Joseph Muturi Koimburi v Mercy Wahaki Mugo [2006] eKLR where the court opined that: "...having found the Respondent was hit while crossing the road, the lower court then was wrong in apportioning liability and finding the appellant 70% to blame. In my view, the Respondent was fully to blame for her reckless, behavior in attempting to cross a busy dual carriage way at the time of the night, when in fact the footbridge was available for that purpose. In fairly close proximity, any driver of ordinary prudence is not expected to find pedestrians on that part of the road at that hour of the night, and the appellant could not possibly be blamed for the accident."
8. On the issue of damages, the appellant submits the award of pain and suffering and loss of expectation of life is not contested. He however contends that special damages were not specifically proved. Counsel submits the award of Kshs. 3,500,000/= was based on the wrong principles and was inordinately high.
9. Counsel further submitted that the trial court applied a wrong principle by using a speculative figure of the jobs advertised by the County Government of Makueni. He urged the court to adopt the global award approach and award a global sum of Kshs.1,000,000/=.
10. In conclusion counsel urged the court to allow the appeal, set aside the trial court's judgment on loss of dependency and special damages and award costs of the appeal as well as set aside the apportionment of liability.

Respondent's submissions

11. In submissions filed on 1st February 2023, learned counsel for the respondent submits that the trial court did not err in apportioning liability at the ratio 50:50. It was contended that the appellant had failed to prove through evidence that the footbridge was not under repair. The case cited was that of Butich Mildred vs Ronald Agesa Ombima (suing as the administrator of the estate of Judith Agisa Ombima (deceased) (2019) eKLR where the court found the appellant 80% liable for the accident. In the cited case, just like the instant case, the deceased was knocked down and died instantly while crossing the road.
12. Counsel urged the court not to interfere with the trial court's apportionment of liability.
13. On the issue of special damages counsel submits the respondent in the plaint pleaded special damages of Kshs. 265,550/= while the trial court awarded the proved damages of Kshs. 245,550/= and urged the court not to interfere with the award as the special damages were properly proved.
14. On the issue of loss of dependency counsel submits the deceased was 23 years if age at the time of his death and was about to be employed upon graduation earning a monthly salary of Kshs. 35,000/=. He submitted that the award of Kshs. 3,500,000/= was not excessive and neither did the trial court err in adopting the multiplicand of Kshs. 35,000/= and a multiplier of 25 years.



15. Counsel urged the court to dismiss the appeal as the appellant has not justified why the court should adopt the global award approach.

Analysis and determination

16. I have considered the appeal, submissions and the trial court's record, as well as the impugned judgment. This being a first appeal, it is by way of a retrial, the court is to reconsider, reanalyze and reevaluate the evidence afresh and reach its own conclusion. The court should however bear in mind that it did not see the witnesses testify and give due allowance for that. I am guided by the case of Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR where the Court of Appeal stated as follows:that

“The primary role of a first appellate court is to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the trial court are to stand or not and give reasons either way”.

17. I will start by analyzing the evidence of the trial court.
18. PW1 (Mourice Okoth), a police officer stationed at Kahawa Sukari Police Station produced police abstract in respect of the road traffic accident. He testified that the accident occurred at about 2131hrs and was reported at about 4.00 am. He stated the deceased was a student at Kenyatta University and the accident involved KBJ 538R. He said the deceased was knocked down while crossing the road from left to right. The matter had been referred to the DPP and advise was still being awaited.
19. In cross examination he testified that at the scene of the accident there is footbridge and guard rails and the deceased may have jumped the rails in order to get to the other side.
20. PW2 (Ernest Chonelwa Saviatia), a farmer from Lugari filed the suit on behalf estate of the deceased, his son. He adopted his witness affidavit and adduced documents. He testified that the deceased would be employed by Makueni County Government as per exhibit 14. He said the figures as claimed had not been exaggerated as the deceased was moved to different mortuaries.
21. Moses Akello (PW3) testified that at the time of the accident he was a student at Kenyatta University. He testified there was no zebra crossing, during the incident the deceased and him were trying to cross the road and catch some transport to town as the bridge was under construction.
22. DW1 (Simon Ndegwa Waithaka) adopted his witness statement and testified that he is the owner of motor vehicle KBJ 838R. That he was driving the accident vehicle at the time, at about 90 kph. He stated that there is no bus stage on the opposite side of the road. He told the trial court that he saw two people jumping into the road and he tried to swerve to the right to avoid hitting them, but unfortunately, he hit one of them who had hesitated on crossing. According to him he blamed he deceased for the accident, he denied he was rushing home as the curfew was at 10.00 pm.
23. During cross examination he said the footbridge was not under construction as there was no sign. He told the court he saw the deceased at a distance of 10 meters. He said after the accident he did not stop to avoid other accidents and for his own safety. He said when he first saw the pedestrians, he applied brakes to avoid hitting them.
24. The trial court found both the deceased and the Appellant responsible for the accident and apportioned 50:50 liability.

Determination



On liability

25. From the record, Pw3 testified that he witnessed the accident. He and the deceased were crossing the road together as the footbridge was under repair. The appellant on the other hand contends there were no repairs on the foot bridge and the deceased ought to have used same. That he was driving at a speed of 90 kph and using the center lane when he suddenly saw the deceased on the road.
26. The trial court found both the appellant and the deceased liable for the accident and apportioned liability of 50: 50. Both the appellant and the deceased owed a duty of care when using the road. The appellant ought to have driven the motor vehicle with due care and attention.
27. The Court of Appeal in *Kneller & Hancox Ag JJA in Mkube Vs Nyamuro* [1983] KLR, 403-415, at 403 stated as follows: - “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.”
28. Before interfering with the trial court’s award, the court must be satisfied that the trial court misapprehended the evidence in arriving at the determination.
29. Going by the above decision and the reasons aforementioned I find the appellant failed to exercise due care while driving and thus knocked down the deceased. The appellant failed to stop after the incident. There is nothing to demonstrate that the trial court erred in apportioning liability in the ratio of 50:50. In the upshot therefore I find no reason to interfere with the apportionment of liability.

Loss of dependency

30. The Court of Appeal in *Catholic Diocese of Kisumu v Sophia Achieng Tete Civil Appeal No. 284 of 2001* [2004] 2 KLR 55, held that: -

“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.”
31. The Appellant in faulting the trial court award on loss of dependency award of Kshs. 3,500,000/= submitted that the same was erroneous and excessive. It proposed that the trial court ought to have adopted a global sum of Kshs 1, 000,000/= for the claim of loss of dependence as opposed to adopting a multiplicand.
32. The court of Appeal in the case of *Francis Righa v Mary Njeri* (Suing as the Legal Representative of the estate of James Kariuki Nganga [2021] eKLR, held that: -

“...on the choice of a multiplier and multiplicand, we take it from the decision of the court in the case of *Roger Dainty versus Mwinyi Omar Haji & Another 2004* that to ascertain a reasonable multiplier in each case, the court should consider relevant factors like the income of the deceased, the kind of work he was engaged in before his death, the prospects of promotion and his expectations of working life.”
33. The trial court having relied on the advertisement from the County Government of Makueni calling for applicants for various positions found the deceased would have been employed after graduation



and earn a basic salary of kshs. 35,000/= and consequently adopted a multiplicand of Kshs. 35,000/=, a multiplier of 25 years and a dependency ratio of 1/3 as it was expected the deceased would have helped his parents until a certain age.

34. I find the trial court properly took into consideration the relevant factors in adopting the multiplicand and multiplier and the dependency ratio before computing the award of Kshs. 3,500,000/= for loss of dependency.
35. In the circumstances I find no reason to interfere with the trial award on loss of dependency.

Special damages

36. In Provincial Insurance Co. EA Ltd v Mordekai Mwanga Nandwa KSM - Civil Appeal No 179 of 1995 the court stated: "It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead."
37. In the plaint the Respondent pleaded special damages of Kshs. 265,550/= while the trial court awarded an amount of Kshs. 245,550/= which was strictly proved.
38. I therefore find no reason to interfere with the courts finding on special damages.
39. **Final Orders:**

The appeal lacks merit and is dismissed with costs to the respondent.

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. Ochieng Omollo - for Appellant

Mr. Nyegenye - for Respondent

