



**Mutisya & another (Suing as the legal representatives of the Estate of Mutisya Kitongu Ngali)
v Maina (Civil Appeal 28 of 2020) [2023] KEHC 4079 (KLR) (8 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 4079 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL 28 OF 2020**

TM MATHEKA, J

MAY 8, 2023

BETWEEN

PHILLIES TWILI MUTISYA 1ST APPELLANT

PATRICK MUTISYA 2ND APPELLANT

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF MUTISYA
KITONGU NGALI**

AND

SIMON MAINA ALIAS SIMON MUCHEMI MAINA RESPONDENT

*(Being an Appeal from the Judgment of Hon. K. Mutegi (SRM) in the Senior Resident
Magistrate's Court at Tawa, Civil Case No.36 of 2018, delivered on 20th February 2020)*

JUDGMENT

1. The record shows that the appellants filed a suit in the lower Court seeking general damages under the *Law Reform Act* (LRA) and the *Fatal Accidents Act* (FAA) on behalf of the Estate of Mutisya Kitongu Ngali pursuant to an alleged fatal road accident, involving motor vehicle KBX xxxN, on 20/01/2015 (material day) along Mukimwani-Mbumbuni road. He also prayed for special damages, costs of the suit and interest.
2. The respondent filed a statement of defence, denied each and every allegation of fact in the plaint and called for strict proof of the claim. He averred that if at all an accident happened on the material day, it was wholly due to the negligence of the deceased.
3. The appellants filed a reply to defence, denied all the allegations in the defence and reiterated the contents of the plaint.



4. After the preliminaries; the matter proceeded for hearing and judgment was delivered on the 26th February 2020. The learned trial magistrate found that the appellants had not proved their case and dismissed it with costs to the respondent.
5. Aggrieved by the dismissal, the appellants filed this appeal and listed 7 grounds as follows:
 - a. That the learned trial magistrate erred in law and fact in dismissing the plaintiffs suit with costs to the defendant despite adequate evidence being advanced by the plaintiffs in support of the claim.
 - b. That the learned trial magistrate erred in law and fact in dismissing the plaintiffs suit despite there being adequate evidence that the defendant was wholly to blame for the occurrence of the accident.
 - c. That the learned trial magistrate erred in law and fact by failing to take into consideration the plaintiff's evidence including that of the police officer and dismissing the suit solely based on the defendant's witness unsubstantiated evidence.
 - d. That the learned trial magistrate erred in law and fact by dismissing the plaintiffs suit solely based on the defendant's witness unsubstantiated evidence and failing to take into consideration the nature of injuries sustained which were fatal.
 - e. That the learned trial magistrate erred in law and fact by failing to consider the appellants evidence on record.
 - f. That the learned trial magistrate erred in law and fact by failing to consider the appellants submissions on record on both liability and quantum.
 - g. That the learned trial magistrate's judgment was thus unjust, against the weight of the evidence, submissions and authorities relied upon by the plaintiffs and was based upon misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.
6. Directions were given that the appeal be canvassed through written submissions. Accordingly, the parties complied and filed their respective submissions.

The Appellants' Submissions

7. The appellants submit that the plaintiff was an eyewitness who explained the circumstances of the accident and her evidence was corroborated by the police officer (PW2). He submits that the driver admitted being at the scene and occurrence of the accident on the material day. He contends that the evidence of an eye witness is of very high probative value but the trial magistrate gave more weight to that of the driver and sidelined that of the plaintiff.
8. The appellants further submit that their account of how the accident occurred was more probable in light of the standard of proof in civil cases. He relies on the case of *William Kabogo Gitau v George Thuo & 2 Others* [2010] eKLR where the court (Kimaru J) held that:

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51%



as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is more probable than not that the allegations that he made occurred.”

9. The appellants submit that the deceased was 69 years old and advanced in age it is highly unlikely that he was hanging from a lorry as alleged by the driver. Further, that the driver also admitted having been released on a bond of Kshs 10,000/= hence he was prima facie to blame and cited Mary Njeri Murigi v Peter Macharia & Anor (2016) eKLR where the court (Aburili J) stated:

“a person who is driving a vehicle is under a duty of care to other road user. The vehicle is a lethal weapon and due care is expected of the driver who is in control thereof.”

10. They also relied on Mgao v Wokabi & Anor Mombasa HCCC no 165 of 1990[1993]EA 685 where the court found that it was not uncommon for people in this country to board public service vehicles while they were in motion and the duty lay on the driver to be patient and to allow the passengers to board
11. On quantum, it is submitted that it was erroneous for the trial magistrate not to assess damages even after dismissing the suit and cite Lei Masaku v Kalpama Builders Ltd [2014] eKLR where the Court (Mabeya J) held that:

“ 13. There is the issue of failure to assess damages. It has been held time and again by the Court of Appeal that the court of first instance must assess damages even if it finds that liability has not been established. To have casually dismissed the suit and fail to address that issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appellable and the Appellate Court needs to know the view taken by the court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behoves this court to assess quantum.”

12. On loss of expectation of life, the appellants seek kshs 300,000/= that the deceased was married with children and worked hard to provide for them ‘that his future prospects of happiness with his family were unceremoniously cut short by the defendant’s negligence.
13. On pain and suffering, it is submitted that the deceased died a few hours after the accident and must have gone through a lot of physical pain. Appellants cite Sukari Industries Ltd v Clyde Machimbo Juma [2016] eKLR where the deceased died immediately after the accident and the court awarded 50,000/=.
14. On loss of dependency, the appellants submit that a dependency ratio of 2/3 should be adopted as the deceased was survived by 8 children. For multiplicand, they submit that the deceased was a carpenter and part time farmer earning an average of Ksh. 50,000/= per month. Citing Jacob Ayuga Maruja & Another v Simeom Obayo CA Civil Appeal 167 of 2002 [2005] eKLR they submit that although there is no documentary proof of the earnings, this court should not cause an injustice to the beneficiaries by requiring strict proof from them. As for multiplier, they submit that the deceased was a healthy man in the prime of his life and would have worked for at least 10 more years. They contend that he was not involved in any hazardous work and would have lived long. For this proposition they rely on VKM(Legal representative of SMI) v Alfonso Muteria & County Council of Tharaka Meru HCCC 133 of 2006
15. Consequently, their calculation worked out as follows; $50,000 \times \frac{2}{3} \times 12 \times 10 = 4,000,000/=$.



16. As for special damages, they submit that they pleaded and proved an amount of Kshs 30,850/=

Respondent's Submissions

17. The respondent submits that the appellants did not prove their case to the required standard. That the evidence of PW1 was uncorroborated and marred with inconsistencies. That PW2's evidence was unreliable and the attendance of the investigating officer was not procured. He contends that PW2 did not have the police file or sketches to corroborate his oral testimony. He relies on the case of *Treadsetters Tyres -vs- John Wekesa Wepukbulu* (2010) eKLR where the court (Ibrahim J) quoted Charles Worth & Percy on Negligence 9th edition at p. 387 as follows:

“In an action for negligence, as in every other action, the burden of proof falls upon the plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, (1) whether on that evidence, negligence may be reasonably inferred and (2) whether, assuming it may be reasonably inferred, negligence is in fact inferred.”

18. On the standard of burden of proof they rely on the words of Lord Denning J in *Miller v Minister of Pensions* (1947) 2 ALL ER 372- that the degree is well settled in that it carries a reasonable degree of probability and not so high as required in criminal cases.

19. Further, they rely on section 109 of the *Evidence Act* for the submission that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence unless it is provided by law that the proof of that fact shall lie on any particular person.

Duty of Court

20. It is now settled that the duty of a first appellate Court is to analyze and re-evaluate the evidence on record in order to reach its own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses. See *Selle & Another v Associated Motor Boat Co Ltd & Others* [1968] EA 123 and *Peters v Sunday Post Limited* [1958]EA 424.

21. Having considered the evidence on record, grounds of appeal, the rival submissions the following issues arise for determination:

- a. Whether the appellants established their case on liability?
- b. What is the quantum of damages is assessable on the evidence before court.

Analysis and determination

On Liability

22. PW1 was Philles Twili Mutisya, the deceased's wife. She adopted her statement filed on 25/ 04/2018 as her evidence in chief. She stated that on the material day, she arrived home and found that the deceased had harvested mangoes. When the vehicle arrived, they started carrying the mangoes to it with the help of the deceased. As she took cattle feeds to the livestock, she heard the accused (sic) tell her husband to accompany them in order to collect his balance of kshs 300/=. The deceased entered the vehicle, and when he boarded the driver started to drive away and that is when her husband fell down. She said the door had not been closed. She said she saw him falling from the co-driver's seat. The owners of the



- vehicle drove off and were followed by her son-in-law up to where they were collecting more mangoes for sale. They returned and took him to the hospital where he was pronounced dead.
23. On cross examination, she said that she was not far from the accident scene and that her husband boarded the lorry from behind then the driver drove off in a hurry.
 24. PW2 was Corporal David Amino and he produced the police abstract. He said that on the material day, the driver of KBX xxxN was collecting mangoes and the deceased was offered a lift to go and collect his balance of Kshs 300/= . As he tried to board the vehicle, he lost balance as the driver moved forward. The lorry was traced about 3km away.
 25. On cross examination, he said that the matter was still pending under investigation and that he had taken over from Corporal Vincent Simiyu who had since retired.
 26. The defence called John Ngamwa Kamau, the driver. He testified that he had gone to Mumbuni area to collect mangoes. That he collected from the first homestead which belonged to the deceased and as he was entering the second homestead, he was told by people that someone had fallen from the truck. He returned to the homestead and found the deceased sitting up without talking. He took him to Tawa Sub-County hospital. He blamed the deceased for hanging from behind where he could not see him. He said that he was not authorized to carry unauthorized passengers.
 27. On cross examination, he said that he had been driving for 14 years and was an employee of Simon Maina who owned the vehicle. That the lorry had side mirrors and the deceased was an old man. That he did not hear the deceased complain that he had not been given his change. That he was told that a person had fallen from his vehicle and it had taken him about 20 minutes to move from the deceased's homestead to the next homestead. He denied that he was trying to escape and said that after taking the deceased to the hospital, he reported the accident to Mumbuni police station.
 28. That is the evidence which should guide the court in making a determination on liability.
 29. The appellant's claim in the plaint is that the deceased as a passenger who was lawfully travelling aboard the lorry registration number KBX xxxN. That the lorry was negligently controlled by the defendant's authorized agent and as a result, the deceased fell off the vehicle.
 30. On the other hand, PW1 said that she actually saw the deceased falling from the co-driver's seat after he had been offered a lift to go and collect his change. On cross examination, she changed and said that her husband boarded the lorry from behind. PW2 was not an eye witness hence could not authoritatively testify on how the accident occurred. In fact, he took over the investigations from his colleague who was not called as a witness.
 31. The testimony of PW1 is that the deceased was in the co driver's seat, and at the same time that he boarded the lorry from behind where the lorry had loads. She stated that the door was not properly closed, and at the same time that as the deceased was boarding the lorry the driver drove off in a hurry. If indeed he was in the co passenger's seat then the issue of him boarding from behind where there were loads of Mangos would not arise and if indeed he boarded at the back, then this story of being the passenger seat would also not arise.
 32. This was not a public service m/v to warrant the driver to stop and wait. If the deceased was at the back the driver may not have seen him getting onto the lorry.
 33. It is not disputed that the respondent's driver drove the lorry to the home of the deceased to buy mangoes. He testified that it is the deceased who sold them the mangoes and even though there was a buyer, he the driver dealt directly with the deceased. He said he did not hear the deceased complain that he had not been given his change. However, PW1 heard this. It is not in dispute that the deceased



was an old man aged 69 years old. He would not just go hanging on lorries like a small boy for fun. So if he was getting onto the lorry then there was reason for the same. From the defence statement DW1 stated that he was not the one actually buying the Mangoes went and but they bought mangoes from him. The DW1 says he did not hear the deceased complain about his balance but whoever was in the m/v with the DW1 told him to get in the m/v to get his balance from ahead. That can only be the explanation as to why the deceased boarded the lorry. That in my view is the reasonable explanation. The reason why the driver did not see him it is because it was from behind the lorry.

34. My conclusion from the evidence is that the deceased was not in the passenger seat. Despite the contradiction in PW1's evidence, the fact is that the deceased lost his life after getting into contact with the vehicle and the respondent cannot escape liability for the actions of the persons who were entrusted with his m/vehicle on the material day. The deceased also owed himself a duty at his age not to attempt such a feat. The greater blameworthiness would be borne by him at 60: 40.

On Assessment of Quantum of Damages

35. It is established that even where the trial Court dismisses a suit for failure to establish negligence on the part of a plaintiff, the court should assess the damages that it would have awarded had the plaintiff established their case. It goes without saying that to that extent the trial magistrate here was in error.

Award under Law Reform Act

36. In this appeal the respondent did not make any submissions on the issue of assessment quantum.
37. On pain and suffering, PW1 testified that he was pronounced dead on arrival at the hospital and the death certificate confirms that indeed the deceased died on the same day. It is trite that the consideration to be borne in mind while awarding damages under this head is the length of time that a person suffers before succumbing to injuries.
38. I find relevance in the words of Majanja J. in *Sukari Industries Limited v Clyde Machimbo Juma*; Homa Bay HCCA NO. 68 of 2015 [2016] eKLR where he stated that:

“(5) 5] On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased's estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs 10,000 to Kshs 100,000 over the last 20 years.....”

39. Consequently, an award of Kshs 30,000/= would be reasonable under this head.
40. With regard to loss of expectation of life, the conventional award is Kshs. 100,000/=.

Award under the Fatal Accidents Act

41. In the trial Court, the plaintiff had proposed an award of kshs 4,500, 000/= using the global sum approach while the respondent proposed an award of kshs 360,000/= using the multiplier approach. The respondent used a multiplicand of 15,000/=, multiplier of 3 years and dependency ratio of 2/3.



42. Neither the deceased's occupation nor what his earnings were was pleaded. PW 1 testified that the deceased was a farmer but she did not indicate his earnings. This is evidenced by the events of the material day when the respondent's lorry came to his home for someone to purchase his mangoes.
43. Further, it was her evidence that the deceased had 8 children and the first born was 44 years while the last born was 30 years. Accordingly, it is evident that all the children were adults. Clearly, the deceased's earnings were not proved but there is evidence to show that he was a farmer.
44. Dependency is a question of fact and the probability herein is that the deceased was receiving assistance from his adult children and not vice versa. Be that as it may, my view is that the global award approach is appropriate in this case. I agree with the sentiments of Mabeya J in *Eston Mwirigi Ndege & another v Damaris Kairiari (suing as the Legal Representative of the Estate of Felix Kibiti (Deceased))* [2018] eKLR. He stated that:

“ 11. It is not in dispute that the deceased was a farmer. It was however, not clear how much income the deceased was making from his said economic activity. I agree with the appellants that in circumstances where the amount of income and profession of a deceased cannot be accurately ascertained, the best approach would be to adopt a global award.”

45. I have looked at awards in comparable cases and in the case of Eston Mwirigi (supra), the award of kshs 216,576/= was upheld for a 69 year old deceased who was married and had children.
46. That was five years ago. Taking into account inflationary rates I am of the view that a global award of Kshs 450,000 is sufficient for loss of dependency.
47. Special damages of Kshs 30,850/= were pleaded and proved.
48. The judgment of the learned trial magistrate is set aside and substituted with the following:

Liability60:40% in favour of the respondent
Pain & suffering.....Kshs 30,000/=
Loss of expectation of life.....Kshs 100,000/=
Loss of dependency.....Kshs 450,000
Special damages.....Kshs 30,850/=
Total.....Kshs 610850
Less 60%.....Ksh 366510
Net Total.....Ksh 264340

The appellant will have 40% of the costs and interest at court rates from the date of this judgment.

Orders Accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 8TH DAY OF MAY 2023

.....
MUMBUA T MATHEKA

JUDGE

Appellant's Advocates Ms. Mutua



Mulyungi & Mulyungi Associates

Respondent's Advocates: Kioko holding brief for Kithuka for Respondent

O.N Makau & Mulei Advocates

