



**Sinokho (Suing as the legal representative and administrator of the the Estate of Fred Wekesa Wanyonyi) v Mocam Security Services Ltd & 2 others (Civil Appeal 11 of 2020) [2023] KEHC 17774 (KLR) (22 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17774 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL 11 OF 2020**

**DK KEMEL, J**

**MAY 22, 2023**

**BETWEEN**

**CAROLINE NEKESA SINOKHO (SUING AS THE LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE THE ESTATE OF FRED WEKESA WANYONYI) ..... APPELLANT**

**AND**

**MOCAM SECURITY SERVICES LTD ..... 1<sup>ST</sup> RESPONDENT**

**MOTREX LTD ..... 2<sup>ND</sup> RESPONDENT**

**ARISHAW CO LTD ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal against the judgement delivered by Hon S.O. Mogute (SPM) on 16th December 2019 in Bungoma CMCC No. 273 of 2013)*

**JUDGMENT**

1. By an Amended Plaintiff dated June 12, 2013, the Appellant as the Plaintiff sued the Respondents as the Defendants claiming special damages, general damages and costs.
2. The cause of action, according to the Amended Plaintiff, arose on or about February 5, 2013 along Bungoma-Webuye Road. According to the Appellant, the deceased while in the course of his employment with the 1<sup>st</sup> Respondent and was a lawful passenger in the 1<sup>st</sup> Respondent's motor cycle registration number KMCX 009 F Bajaj along Bungoma-Webuye road at Bukembe area, the 1<sup>st</sup> Defendant's motor vehicle registration number KBS 789 P hauling a trailer registration number 8848 and the 2<sup>nd</sup> Respondent's motor vehicle registration number KBC 307 Z hauling a trailer registration number 6995 were so negligently driven by the 3<sup>rd</sup> and 2<sup>nd</sup> Respondent's agent and/or servant that they caused an accident in which motor vehicle registration number KBS 789 P knocked motor cycle



- registration number KMCX 009 F which was thrown into motor vehicle registration number KBC 307Z as a result of which the deceased sustained severe bodily injuries. Both the of negligence, injuries and special damages were pleaded. As a result, the Appellant claimed damages.
3. The 1<sup>st</sup> Respondent's defence was that no such accident occurred and that if the alleged accident ever took place, the same was caused by the negligence of the Appellant particulars whereof were pleaded.
  4. The 2<sup>nd</sup> Respondent's defence was that no such accident occurred and that if the alleged accident ever took place, the same was caused by the negligence of the Appellant particulars whereof were pleaded.
  5. The 3<sup>rd</sup> Respondent's defence was that no such accident occurred and that if the alleged accident ever took place, the same was caused by the negligence of the Appellant particulars whereof were pleaded.
  6. The Appellant testified as PW1 adopted her witness statement and requested the Court to also adopt her deceased husband's witness statement. She stated that the deceased died on March 29, 2016 but prior to his demise he had left the suit pending. She told the Court that the course of action arose out of a road accident that occurred on February 5, 2013 involving the deceased and the Respondents. It was her evidence that at the time of the accident the deceased was working with the 1<sup>st</sup> Respondent and was a pillion passenger on the 1<sup>st</sup> Respondent's motor cycle when the same was knocked by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent's motor vehicles. She told the Court that as a result of the accident the deceased sustained serious personal injuries including amputation of his left leg, cut wounds and blunt injuries. She told the Court that the deceased left behind five children all minors who depended on him and she prayed to be awarded damages.
  7. According to the Appellant, the deceased was aged 37 years and she produced the death certificate of the deceased as PEX1. She further produced the grant of substitution as PEX2 that enabled her to continue the prosecution of this suit upon the death of the deceased. She stated that prior to the death of her husband he experienced a lot of pain leading to her taking him to different hospitals. She produced treatments notes marked as PEX5 and PEX6 from Bungoma District Hospital and Naitiri Hospital respectively. She also produced a medical report by Dr. Cleopas Kubasu as PEX7 and P3 form authored by Dr. Kubasu which she produced as PEX8.
  8. PW2 was CPI Jane Orry who testified that the matter was pending under investigation and on cross examination, she stated that all the Respondents were involved in the accident. She produced a police abstract issued on 23<sup>rd</sup> April 2013 as PEX4.
  9. PW3 was Nahshon Otieno who adopted his witness statement in which he stated that on 5<sup>th</sup> February 2013 at about 7.00 AM he was a passenger in a motor cycle (1<sup>st</sup> Respondent's motor cycle) registration number KMCX 009 F Bajaj driven by the deceased. According to him, they were heading to Webuye and the weather was very clear. On arriving at Bukembe market a motor vehicle registration number KBS 789 P ZD 6995 was pulling from a flash parking from their right and joining the road when it hit their motor cycle pushing them towards another motor vehicle registration number KBC 307Z which was parked on their left side of the road and heading towards Webuye. They fell down and were eventually assisted by other pedestrians and rushed to Bungoma District Hospital.
  10. At the close of the Appellant's case, the 2<sup>nd</sup> Respondent called Zecharia Odero Obiero as DWI who testified that he does insurance claims and that he prepared a report with regard to the accident dated March 29, 2021 which he produced in Court as DEX1.
  11. On cross examination by the Appellant, he told the Court that the accident involved two trailers and a motor cycle leading to the deceased's sustained injuries. According to him, after interviewing the



- drivers of the motor vehicle he blamed the driver of the motor vehicle registration number KBS 789P ZD 699S for the accident as per his report. He noted that the other motor vehicle was stationary.
12. On cross examination by 3<sup>rd</sup> Respondent, he told the Court he told the Court that he did not witness the accident but from the information as received from the police, the motor vehicle registration number KBS 789P ZD 699S was to blame for the accident as it left the parking bay and entered the main road without ascertaining that it was safe to do so. He reiterated that the motor vehicle registration number KBC 307Z was stationary on the opposite side.
  13. On re-examination, he stated that he got his information from the 2<sup>nd</sup> driver and the police.
  14. In his judgement, the learned trial Magistrate found that from the evidence, the accident did occur and that the 1<sup>st</sup> Respondent's motor cycle rider registration number KMCX 009 F Bajaj and the 3<sup>rd</sup> Respondent's driver of motor vehicle registration number KBS 789P ZD 699S were negligent and equally liable for the accident. He found that the driver of the 2<sup>nd</sup> Respondent's motor vehicle registration number KBC 307Z did not contribute in any manner to the accident in question as he had parked the motor vehicle off the road.
  15. Regarding quantum, he awarded the Appellant Kshs 1, 300,000/= as general damages for pain and suffering and loss of amenities with no orders as to loss of earnings as same was not pleaded in her Amended Plaint and proved by way of evidence. On future medical bills and an artificial leg, no orders were granted as the Appellant who was involved in the accident is deceased. On special damages, he held that the same were simply pleaded but not proved by way of relevant evidence.
  16. Dissatisfied with the judgment and decree, the appellant filed this appeal on the following grounds: -
    - i. That the learned trial Magistrate erred in law and fact in dismissing the case against the 2<sup>nd</sup> Respondent.
    - ii. That the learned trial Magistrate erred in law and fact in failing to appreciate the fact that the 2<sup>nd</sup> Respondent, its agent and/or servant substantially contributed to the accident.
    - iii. That the learned trial Magistrate erred in law and fact in failing to award damages for loss of earning/income.
    - iv. That the learned trial Magistrate erred in law in awarding general damages which are inordinately too low compared with the injuries suffered by the deceased.
    - v. That the learned trial Magistrate erred in law when he applied a wrong principle in awarding general damages.
    - vi. That the learned trial Magistrate erred in law in failing to consider the submission of the Appellant.
    - vii. That the learned trial Magistrate erred in law and fact by considering irrelevant factors and ignoring relevant facts thereby arriving at a wrong decision on quantum of damages.
  17. The Appellant prayed for this Court to allow this appeal; set aside the decision of the lower Court dismissing the case against the 2<sup>nd</sup> Respondent and dismissing the award for loss of earnings and income; that this Court proceeds to make an award on liability against the 2<sup>nd</sup> Respondent and proceed to assess damages payable in respect of general damages and loss of income and earnings; the Appellant be awarded costs for the appeal.



18. The appeal was canvassed by way of written submissions. It is only the Appellant, 2<sup>nd</sup> Respondent and the 3<sup>rd</sup> Respondent who filed and exchanged their submissions.
19. The Appellant submitted that the award of Kshs 1,300,000/= for pain and suffering was very low in the circumstances and that the sum of Kshs 2,800,000/= ought to have been reasonable.
20. On loss of earnings/income, the Appellant submitted that under the Fatal Accident Act the estate of the deceased is entitled to what the deceased would have been awarded if he was alive. Counsel urged the Court to make an award of Kshs 1,443,660/=
21. The 2<sup>nd</sup> Respondent submitted that the Appellant failed to demonstrate the 2<sup>nd</sup> Respondent's negligence on a balance of probabilities and sought for the dismissal of the appeal.
22. The 3<sup>rd</sup> Respondent submitted that the deceased was significantly liable for the accident and that the investigative report by DW1 ought not to have been given probative value as the investigator was not at the scene of the accident. Counsel submitted that the Appellant's submission that the 3<sup>rd</sup> Respondent ought to have been apportioned at least 70% liability for the accident should be rejected and that in the event this court forms the opinion that it should reverse the findings of the trial court then it should hold that the 2<sup>nd</sup> Respondent significantly liable for the accident and maintain the quantum of damages by the trial court.
23. It was submitted that the trial Court applied the correct principles in the assessment of damages and urged the Court to frown upon the Appellant's invitation to interfere with the trial Court's findings on quantum.
24. Having considered the submissions of the parties in this appeal, this is the view i form of this matter. This is a first appeal. The duty of the first appellant Court was well stated in *Selle and another v Association Motor Boat Co. Ltd and other* 1968 EA 123 where the Court of Appeal stated: -

“ Briefly put this court must consider the evidence evaluate itself and draw its own conclusion though it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance in this respect.”
25. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as present in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial court had the advantage of hearing the parties.
26. However, as was appreciated in *Peter v Sunday Post Ltd* [1958] EA 424 the Court stated: -

“ While an appellate court has jurisdiction to review the evidence, to determine whether conclusion of the trial judge should stand, this jurisdiction is exercised with caution. If there is no evidence to support a particular conclusion or it's shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved or had plainly gone wrong, the appellant court will not hesitate to decide....”
27. In this appeal, it is clear that the determination of the appeal revolves around the question of liability and what ought to have been the quantum of damages. That the burden of proof was on the appellant



to prove his case is not in doubt. Section 107 (1) of the Evidence Act, Cap 80 Laws of Kenya provides that:

“Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.”

28. There is however evidential burden of proof which is captured in Sections 109 and 112 of the same Act as follows:

109. 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 any law that the proof of the fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.

29. It follows that the general rule is that the initial burden of proof lies on the Plaintiff, the Appellant in this appeal, but the same may shift to the Defendants, the Respondents in this appeal depending on the circumstances of the case.

30. The question then is what amounts to proof on a balance of probabilities? Kimaru, J in William Kabogo Gitau v George Thuo & 2 Others [2010] 1 KLR 526 stated 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 probable than not that the allegations that he made occurred.”

31. Similarly, Lord Nicholls of Birkenhead in Re H and others (Minors) [1996] AC 563, 586 held that;

“The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities, the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.....”

32. In this case, the evidence by the Appellant was that on or about February 5, 2013 along Bungoma-Webuye Road Accor, the deceased while in the course of his employment with the 1<sup>st</sup> Respondent and was a lawful passenger in the 1<sup>st</sup> Respondent’s motor cycle registration number KMCX 009 F Bajaj along Bungoma-Webuye road at Bukembe area, the 1<sup>st</sup> Defendant’s motor vehicle registration number KBS 789 P hauling a trailer registration number 8848 and the 2<sup>nd</sup> Respondent’s motor vehicle registration number KBC 307 Z hauling a trailer registration number 6995 were so negligently driven by the 3<sup>rd</sup> and 2<sup>nd</sup> Respondent’s agent and/or servant that they caused an accident in which motor vehicle registration number KBS 789 P knocked motor cycle registration number KMCX 009 F which was thrown into motor vehicle registration number KBC 307Z as a result of which the deceased sustained severe bodily injuries. What is disputed is how the accident occurred. While the Appellant contended that the motor vehicle registration number KBS 789 P collided with them after joining the road from the parking carelessly without checking whether the same lane had any oncoming motor



vehicles or motor cycles. The Appellant contended that the collision took place after the vehicle had joined the lane without confirming that it was safe to do so. The trial Court observed that the rider failed to control or manage the said motor cycle registration number KMCX 009 F Bajaj at the material time when he noticed the motor vehicle registration number KBS 789 P entering the road from the parking bay. That showed that the rider was operating the motor cycle at a high speed when the collision occurred otherwise he would have applied brakes to avoid the collision, prompting him to crash into the 2<sup>nd</sup> Respondent's motor vehicle registration number KBC 307Z that was parked off the tarmac road at the same place taking note of the fact that this accident occurred at Bukembe market area a busy trading centre with a lot of human and motorist traffic.

33. From the foregoing, it is clear that the Appellant did not establish her case against the 2<sup>nd</sup> Respondent on balance of probability. I do uphold the trial Court's holding that the case against the 2<sup>nd</sup> was not proved as the 2<sup>nd</sup> Respondent's vehicle was at the parking and not on the road or in motion. The appellant's invitation to rope in the 2<sup>nd</sup> Respondent in the accident must be rejected.
34. In *Kenya Horticultural Exporters Ltd v Julius Munguti Maweu* Civil Appeal No 9 of 2004, the Court of Appeal held that:

“On a first appeal the Court has the duty of re-evaluating the evidence, assess it and make its own conclusions without overlooking the conclusions of the trial court and bearing in mind that unlike the trial court it neither saw nor heard the witnesses...As regards the cause of the accident, there is evidence on record that the driver was over-speeding and that at some stage he cautioned him to no avail. He negotiated a bend at high speed. That evidence clearly showed the driver was to blame for the accident. It was immaterial that there could have been a tyre burst. If the burst arose while the motor vehicle was being driven at high speed, that can be inferred from the evidence. The accident vehicle was found after the accident with a tyre burst. There is no basis for interfering with the Superior Court judgement on liability.”

35. Therefore, if the accident occurred due to the lack of regard of other road users by the Appellant, 1<sup>st</sup> and 3<sup>rd</sup> Respondents, then the collision between the motor cycle registration number KMCX 009 F Bajaj and motor vehicle registration number KBS 789 P shows that both parties failed the requisite steps of care and due regard of other road users. This must mean that both the Appellant and the 1<sup>st</sup> and 3<sup>rd</sup> Respondents failed in their obligation under sections 109 and 112 of the *Evidence Act*. In this case, there was evidence that the accident was caused by the negligence of the driver of the motor vehicle registration number KBS 789 P and the rider of the motor cycle registration number KMCX 009 F Bajaj. Whereas the driver of the said vehicle blamed the rider of the motor cycle, the trial Court considered the two versions and believed both road users were negligent and careless in their use of the road during that material date. Furthermore, nothing stopped the Appellant from applying his brakes and stopping his motor cycle on seeing the 3<sup>rd</sup> Respondent's vehicle enter the road. Additionally, he collided with the 2<sup>nd</sup> Respondent's motor vehicle which was on the correct side of the road. It is therefore crystal clear that the Appellant was riding at an excessively high speed in the circumstances of this case. It is equally clear that the driver of the motor vehicle registration number KBS 789 P did not keep a proper look out given that the spot of the accident was at a busy trading centre with a significant amount of human and motor vehicle traffic. This is not a case where there was no evidence at all to support the findings of the learned trial magistrate. It therefore follows that the apportionment of liability by the trial Court is not supported by the evidence. I therefore reject the submission of counsel for the 3<sup>rd</sup> Respondent in this regard. I have reassessed the entire evidence as required of a first appeal Court. Furthermore, in assessing the liability of the parties, I am required according to *Isabella Wanjiru Karanja v Washington Malele* [1983 eKLR], to bear in mind that two elements are involved, namely



causation and blameworthiness. I have done so in the course of re-evaluating the evidence tendered at trial. I find that it is the Appellant and the 1<sup>st</sup> and 3<sup>rd</sup> Respondents driver who caused the accident. I proceed to apportion liability as follows: Appellant at 20%; 1<sup>st</sup> and 3<sup>rd</sup> Respondent at 80%

36. On quantum, the trial Court considered the authorities cited by counsels in respect of quantum of damages. The authorities cited by the Appellant and his submissions in this Court clearly indicate that the assessment of damages is in the discretion of the trial Court.
37. Furthermore, this Court may interfere with the amount of damages awarded if the amount is so inordinately low or manifestly high that it represents an entirely erroneous estimate in the light of the injuries sustained by the deceased. The deceased suffered a cut wound to the left per-orbited region, multiple cut wounds to the left hand, blunt injury to the chest and crush injury to the lower limb. As a result of the injuries the deceased died in the course of the trial. The injuries sustained were classified as grievous harm as per the medical report by Dr. Kubasu. In this regard, the trial Court took into account the injuries sustained by the deceased and the comparable quantum of damages awarded by the authorities cited in that Court. Learned counsel for the Appellant has sought for a sum of Kshs 2,000,000/ as general damages and relied on the case of *C.M (minor suing through the mother and Next Friend MN Vs Joseph Mwangi Maina* [2018] eKLR. I have looked at the said case and note that the victim had suffered amputation of right leg and had been awarded a sum of Kshs 1million in damages which were enhanced on appeal to Kshs 2 million. The award by the trial court in the sum of Kshs 1,300,000/ as general damages for pain and suffering was still within that range. I find the amount was not inordinately low as contended by the Appellant.
38. Loss of income and/or future earnings must be pleaded and proved as they are in the nature of special damages, whereas loss of earning capacity is in the nature of general damages and need not be pleaded though it has to be proved on a balance of probability. It is well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. Upon perusal of the Appellant's Amended Plaint, no such figures are pleaded as the particulars of loss of earnings were not pleaded. Hence, the Appellant's ground of appeal in that regard must be rejected.
39. In regard to special damages, the law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved before they can be awarded by the Court. In Court of Appeal in *Hahn v Singh*, Civil Appeal No 42 of 1983 [1985] KLR 716, at P 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni, Ag JA - held:

“Special damages must not only be specifically claimed (pleaded) but also strictly proved... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

It is noted that the Appellant did not avail documentary evidence before the trial court regarding the special damages and that the trial magistrate rejected the claim. As the same were not specifically pleaded, then no award will be made in that regard.

40. The upshot of the foregoing observations is that the appeal succeeds only to the extent that liability apportioned against the Appellant is reduced from 50% to 20%. Consequently, judgement on liability as between the Appellant and the 1<sup>st</sup> and 3<sup>rd</sup> Respondents is hereby set aside and substituted with judgement on liability in favour of the Appellant as against the 1<sup>st</sup> and 3<sup>rd</sup> Respondents in the ratio



of 20% to 80%. Judgment on general damages remains at Kshs 1,300,000/- which is subjected to 20% contribution thus giving a net sum of Kshs 1, 040,000/=. Each party to bear their own costs of this appeal while the Appellant will have costs in the lower court.

It is so ordered.

**DATED AND DELIVERED AT BUNGOMA THIS 22<sup>ND</sup> DAY OF MAY, 2023**

**D. KEMEI**

**JUDGE**

**In the presence of:**

Wekesa for Mwebi for Appellant

No appearance Andia for 1ST Respondent

Wekesa for 2nd Respondent

Wekesa for 3rd Respondent

Kizito Court Assistant

