



REPUBLIC OF KENYA



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**Wakahiu & another (Suing on behalf of the Estate of Brian Bande) v Kihato (Civil Appeal E013 of 2021) [2023] KEHC 17429 (KLR) (16 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17429 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MURANG'A  
CIVIL APPEAL E013 OF 2021**

**J WAKIAGA, J**

**MAY 16, 2023**

**BETWEEN**

**BEATRICE NJOKI WAKAHIU ..... 1<sup>ST</sup> APPELLANT**

**BEATRICE KEGEHA MBANDE ..... 2<sup>ND</sup> APPELLANT**

**SUING ON BEHALF OF THE ESTATE OF BRIAN BANDE**

**AND**

**KENNETH MUKORA KIHATO ..... RESPONDENT**

*(Being an Appeal against the Judgement of the Chief Magistrate Court in MURANGA  
CMCC NO 313 of 2019 delivered on 29th April 2021 by Hon. S. K Nyaga - RM)*

**JUDGMENT**

1. This appeal arises out of the judgment in which the Court found both the appellant and the respondent liable at 50%; to 50 % on liability and awardee the appellant Kshs 50,000 for pain and suffering, Kshs 100,000 for loss of expectation of life Kshs 1,909,680 loss of dependency and Kshs.17,175 special damages.
2. Being dissatisfied by the said judgement, the appellant filed this appeal and raised the following grounds of appeal
  - a) The magistrate grossly misdirected herself by treating the Plaintiffs evidence and submissions superficially and consequently arrived at a wrong conclusion
  - b) The finding on liability was not supported by the evidence on record
  - c) The award was too low and therefore in error



## Submissions

3. Directions were issued that the appeal be heard by way of Written Submissions. on behalf of the appellant it was submitted that the Court's decision on liability was not supported by the evidence on record and that there was evidence to show that the accident was caused by the respondent's driver by overtaking other motor vehicles without ensuring that it was safe to do so and that the collision occurred on the lawful lane of motor vehicle registration number KBC 904 Z which was being driven by the deceased. It was contended that the appellant had discharged their burden of proof that the respondent was reckless as was stated in the case of Sammy Ngugi Mugo v Mombasa Salt Lake Ltd and another [2014] eKLR
4. On quantum it was submitted that the Court failed to take into account the evidence of PW2 the effect that it took forty minutes before the deceased died. It was contended that the Court should have awarded Kshs 200,000 based on the authority of David Kahuruka Gitau v Nancy Ann Waithithi & another [2016] e KLR where the Court awarded Kshs 100,000, taking into account the rate of inflation. On loss of expectation of life, it was submitted that whereas the Court awarded Kshs 100,000 under this heading, the evidence on record shows that the deceased was aged 26 years at the time of his death which the Court did not take into account. It was therefore submitted that an award of Kshs 200,000 would have been appropriate based on the case of Timesales Ltd v Peter Mbulika & another [2020] e KLR where the Court awarded Kshs.150,000.
5. On loss of dependency, it was submitted that the trial Court erred in adopting a multiplier of 20 years contrary to similar cases where a multiplier of 25 years was adopted, in support the following cases were tendered; Idkn v John Murithi Wahome & another [2014] e KLR, Mwita Nyamohanga & another v Mary Robi Moheria & another [2015] e KLR and Timesales Ltd v Peter Mbuluka (supra). It was further contended that the Court erred on the dependency ration of 1/3 instead of 2/3 contrary to the evidence on record.
6. On behalf of the responded it was submitted that the trial Court did not err as its determination on liability was baes on the evidence on record and in support the case of Hussain Omar Farah vs Lento Agencies [20-6] e KLR was tendered where the Court apportioned liability on the same basis where it was not reasonably possible to decide on the basis of the evidence of the witnesses on whom to blame.
7. On quantum it was it was contended that the same was based on comparable authorities. For loss of dependency it was submitted that in the case of Joseph Kahinga Gathii & another v World Vision & 2 others [ 2014] e KLR, the Court awarded Kshs 60,000 and on the dependency ration it was contended that there was no rule of law on the 2/3 as the same is a question of fact as was stated in the case of FMM & another v Joseph Njuguna Kuria & another [2016] eKLR and Leonard Ekisa & another v Major Birgen [2005] e KLR.
8. On multiplier reference was made to the following case; Michimikuu Tea Factory v Charles Lautani Imunya [2013] e KLR where the Court adopted a multiplier of 13 years in respect of a 22-year-old deceased and Rose Adisa Odari v Wilberforce Egesa Magaba [2009] e KLR where the Court adopted a multiplier of ten years in respect of a 21-year deceased.
9. This being a first appeal, the Court is under a duty to re-evaluate the evidence tendered at the lower Court to come to its own determination, while giving an allowance to the fact that unlike the trial Court, it did not have the advantage of seeing and hearing witnesses.
10. PW1 CPL Dalmas Chai stated that the two motor vehicles were heading towards opposite direction at kenol KBZ 964J overtook a fleet of motor vehicles at a continuous yellow line which the driver was not



to and met head on with motor vehicle KBC 904 Z which was on its correct lane. He stated that no one was charged with a traffic offence. PW2 Muhia Nzeki was a turn boy in motor vehicle registration no KBC 904 Z driven by the deceased whose evidence was that it was a head on collision. It took forty minutes before they were rescued from the scene. He stated that the deceased just saw the appellants motor vehicle when he overtook the other motor vehicles as there was no motor vehicle a head of them.

11. PW3 Beatrice Njoki Wakahi stated that she was a wife of the deceased and that they had one child, she produced the pay slip and that she did not have receipts in support of funeral expenses save for mortuary expenses. PW4 Eunice Kageha Mbanda stated that she was the mother, while PW5 Charles Mwangi Karanja confirmed that the deceased was employed at a basic salary of Kshs 22,000.
12. DW1 Purity Wangui Irungu was driving motor vehicle registration number KBZ 964 J owned by the appellant when she saw motor vehicle registration number KBC 904 Z which hit her on the right side, she testified that she did not attempt to overtake and was not overspending. In cross examination stated that there as a continuous yellow line at the scene.

### **Determination.**

13. From the proceedings and submissions herein, I have identified the following issues for determination:
  - a) Whether the trial Court arrived at a right determination on liability
  - b) Whether the trial Court used the correct principles in the assessment of damages
  - c) Whether the award was excessively so high that the Court ought to interfere with
  - d) What final order should be made by this Court.
14. The issue of liability is a matter of facts and in arriving at the same, the trial Court is expected to rely on the evidence tendered on a balance of probability. The deceased was the driver of motor vehicle registration no KBC 904Z which collided head-on with motor vehicle registration number KBZ 964J owned by the Respondent and driven by DW1 Purity Wangui Irungu. There were only two eye witnesses to the said accident, being PW2 and DW1.
15. PW2 Muhia Nzeki stated that they just saw the appellant motor vehicle overtaking other motor vehicles on a straight line and that they both had mobile phone. PW1 CPL DALMAS CHAI the investigating officer stated that DW1 improperly overtook a fleet of motor vehicles on a continuous yellow line which she was not supposed to do. He stated that the respondent motor vehicle was on the wrong lane and was therefore to blame for the accident even though it was not on a high speed and was ascending while motor vehicle registration number KBC904Z was descending and had exercised caution.
16. This evidence was contrasted with that of DW1 who stated that she saw the deceased motor vehicle in speed and she tried to hoot and flash lights before the collision, she confirmed that there was a continuous yellow line at the scene of the accident and was not supposed to overtake but that there was space between her and the car in front of her.
17. There was therefore no basis for the trial Court finding that the both drivers were to blame as no one was charged with the traffic offence as the issues of liability in civil claim is independent of the charging of the drivers for a traffic offence where proof is required to be beyond reasonable doubt. Her finding is contradicted with her finding of fact that DW1 improperly overtook a fleet of motor vehicles at a yellow line. The authority submitted by the respondent in support of the trial Courts finding of Hussein Omar Farah (supra) is therefore not relevant to this case and is distinguishable as there was evidence to show who was to bear blame for the accident herein as I have found and held.



18. I therefore find and hold that the trial Court finding on liability was in error as the same was not supported by the evidence on record and having re-evaluated the evidence on record I hereby set aside the said holding and substitute the same with a finding on liability at 15% 85% based on the evidence of PW1 that the deceased was on phone at the time of the accident and DW1 evidence that there was space between her and the next motor vehicle and that she hooted and flashed her lights to the deceased which lead me find that there was some contributory negligence on the part of the deceased .
19. On quantum, the principles upon which an appellat Court may interfere with the trail Courts assessment are well settled from a line of decisions of the Superior Courts that is to say the judge in assessing the damages took into account an irrelevant factor or left out of account a relevant factor and that the award was either inordinately so low or so high.
20. I must add for effect purposes that there is no scientific formula for the assessment of damages save that the Court should try as much as possible to have similar cases attract similar award and that the appellate Court should not interfere with the award simply because it would have reached a different award had it been the trial Court and that the award of damages is not to be an enrichment of the claimant.
21. I take the view that excessive and high award of damages is what has led to the collapse of insurance industry in Kenya and the Courts should in assessing damage take into account the insurance industry growth, the economy and other factors including the use of actuary and assessors and not just pluck figures out of the blue in what I consider as the Courts unstated question “if I have been given this pecuniary jurisdiction of this much money then why must I not award this much sum”
22. The question for this Court to answer is whether the award to the appellant was so low that the Court ought to interfere with? I am afraid to answer this question on the negative upon assessing the reasoning of the Court and in line with the authorities which supported the same. It is not what the appellant desired and expected that should be awarded but that the Court in arriving at the assessment used the correct principles and relied on relevant authorities on the grounds that similar cases get similar award and each case is decided based on the circumstances thereof.
23. I however find fault with the trial Courts use of 1/3 in dependency ratio having found as a fact that the deceased was married with one child whom he used to take care of together with his mother as the lines of authorities supports the ration of 2/3 which he was using in supporting the dependants leaving him with 1/3 and therefore what the appellants have lost is the 2/3 which was going into their support and not the 1/3 which was left for the deceased. I would therefore allow the appeal on this aspect.
24. I therefore find no merit on the appellant’s appeal on quantum save for the dependency ration as stated herein, which I hereby dismiss and affirm the trial Court’s finding on pain and suffering, loss of expectation of life and special damages as pleaded and proved.

### **Disposition**

25. In the final analysis I allow the appeal on liability which I hereby substitute with a finding of 15%: 85% in favour of the appellant and dismiss the appeal on quantum save for loss dependence ration on which I allow and make the following order:
  - a. Liability 15%: 85%
  - b. Pain and suffering Kshs.50,000
  - c. Loss of expectation of life Kshs.100,000



- d. Loss of dependency Kshs.23,871x12 x 20 x 2/3 =3,819,360
- e. Special damages Kshs.17,175  
Total Kshs.3,986,535  
Less 15% Kshs.597,980.15  
Grand total Kshs.3,388,554.75

26. The appellant is entitled to half cost of the appeal having partially succeeded and the cost at the lower Court together with interest thereon until payment in full and it is ordered.

**DATED SIGNED AND DELIVERED AT MURANGA THIS 16<sup>TH</sup> DAY OF MAY 2023**

**J. WAKIAGA**

**JUDGE**

**In the presence of:**

Ms. Nyamu for Mahugu for Respondent

Mr. Ondari for Mr. Kibiku for Appellant

Court Assistant - Jackline

