



Gitau & another v Mboroki & another (Suing as a legal representative of the Estate of Kaliochi Mboroki (Deceased)) (Civil Appeal E182 of 2021) [2023] KEHC 18838 (KLR) (15 June 2023) (Judgment)

Neutral citation: [2023] KEHC 18838 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E182 OF 2021
PM MULWA, J
JUNE 15, 2023**

BETWEEN

ZACHARY GITAU 1ST APPELLANT

JAMES NDUNGU GACHOYA 2ND APPELLANT

AND

THANIEL KABILU MBOROKI 1ST RESPONDENT

GILBERT THINGAU M'MBOROKI 2ND RESPONDENT

SUING AS A LEGAL REPRESENTATIVE OF THE ESTATE OF KALIOCHI MBOROKI (DECEASED)

(Being an appeal from the judgment of Hon. J.A. Agonda in Ruiru SPMCC No. 459 of 2019 dated 7th September, 2021)

JUDGMENT

1. This appeal arises from the judgment of Hon JA Agonda dated September 7, 2021. The deceased represented by the Respondent filed a suit against the Appellants claiming general under both the Law Reform Act and Fatal Accidents Act and special damages of Kshs 71,725/=, as a result of a road traffic accident which occurred on January 30, 2019, along Eastern Bypass at Gitothua Primary School, involving the deceased as a lawful pedestrian and Motor vehicle KYL 951 which was managed and/or controlled negligently and carelessly by the 1st respondent thereby causing the deceased to sustain fatal injuries.
2. According to the averments in the plaint dated 20th December 2019, the accident was allegedly caused by the negligence of the 1st appellant, who was the driver of the Motor Vehicle KYL 951 and itemized the particulars of negligence thereon.



3. The 1st appellant filed his defence dated February 17, 2020 denying the averments of the plaint. After the hearing of the trial court pronounced judgment as follows:
 - i. Liability 100% against the defendants
 - ii. Pain and suffering Kshs 100,000/=
 - iii. Loss of expectation of life Kshs 150,000/=
 - iv. Loss of dependency Kshs 600,000/=
 - v. Special damages Kshs 71,725/=Plus, costs of the suit and interest.
4. Aggrieved by the judgment of the trial court, the appellants filed the instant appeal vide a Memorandum of Appeal dated September 29, 2021 and filed on October 1, 2021, citing the following grounds:
 - i. That the learned magistrate erred in law and fact in failing to dismiss the suit in its entirety and award costs to the appellant.
 - ii. That the learned magistrate erred in law and fact by finding the Appellants 100% to blame for the causation of the accident.
 - iii. That the learned magistrate erred and misdirected herself in law and in fact in finding the Respondent and awarding the Respondent Kshs 921,725/=.
 - iv. That the learned magistrate erred in law and in fact by erroneously awarding the Plaintiff/ Respondent the sum of one Hundred and fifty Thousand shillings for loss of expectation of life which is excessive.
 - v. That the learned magistrate erred in law and fact by applying a dependency ratio of a half (1/2) for the unmarried deceased with no dependants at the time of his death.
 - vi. That the learned magistrate erred in law and in fact in adopting a multiplier of ten (10) years for the deceased who was fifty-nine (59) years at the time of death.
 - vii. That the learned magistrate erred in fact and in law to consider the evidence and the vast submissions made by the appellant.
 - viii. The learned magistrate erred in law and in fact by applying the wrong and or did not apply the applicable law, tests, doctrine and principles at all or correctly.
 - ix. That the learned erred in law and fact by taking irrelevant matters or not taking relevant matters/ evidence into consideration
5. The Appellants proposed to ask that the appeal be allowed and the judgment delivered on September 7, 2021, be set aside and reassess the issue of liability and general damages.
6. The court directed that the appeal be canvassed by way of written submissions. Each party filed written submissions.



Appellant's submissions

7. Counsel filed submissions on November 3, 2022, contesting issues of liability and quantum of damages. Counsel submits the place where the accident occurred did not have a zebra crossing and thus the deceased ought to have exercised extreme care. He urged the court to be guided by the police abstract which indicates liability was not established as to who exactly was to blame for the accident. He pleaded with the court to disturb the award of 100% liability and award some contributory negligence to the deceased. To buttress this point, he cited: *Julius M. Kimaiyo & Another vs Fidelis Silingi Musila* (2019) eKLR where the appellate court overturned the trial courts liability apportioned at 100% on the appellant and apportioned 20% liability to the respondent.
8. Counsel pleaded with the court to find the award of Kshs 100,000/= for pain and suffering and Kshs 150,000/= for loss of expectation of life to be excessive as the deceased died on the same day of the accident. He further submitted that the awards of Kshs 50,000/= under the head pain and suffering and Kshs 100,000/= for loss of expectation of life would be sufficient compensation considering comparable awards.
9. Counsel faulted the trial court for awarding Kshs 600,000/= for loss of dependency as the deceased was unmarried with no dependants. The brother did not prove dependency; brothers are not recognized as dependants under the *Fatal Accidents Act*. He submits the ratio of 1/3 would suffice as the deceased had no wife or child.
10. Further counsel submits the trial magistrate erred in adopting a multiplicand of 10 years for the deceased age 59 years, who only had 1 year to the age of retirement. Urged the court to disturb the same and adopt 6 years and the calculation to be as follows: $1/3 \times 6 \times 10,000 \times 12 = 240,000 \neq$

Respondent's submissions

11. In the submissions filed on February 2, 2023, counsel for the respondent submitted that the trial court did not err in apportioning liability and urged the court to find the appeal lacks merit. Urged the court not to disturb the apportionment of liability and the awards on quantum as the same were not excessive in relation to comparable awards. He submits that the ratio of $\frac{1}{2}$ on an unmarried was proper. The deceased being a watchman could have worked up to 75 years and considering the vagaries of life the multiplier of 10 years is sufficient.
12. Counsel submits that the trial magistrate was guided by principles of law and urged the court to dismiss the appeal with costs.

Analysis and determination

Trial court evidence:

13. Pw1 (Gilbert Thingau) adopted his witness statement and list of documents. He testified the deceased was his brother who died aged 59 years and was unmarried. That before his death the deceased worked as a watchman earning a monthly salary of Kshs 10,000/=. He stated that the deceased used to support him financially. He did not adduce evidence as proof of earnings. He learnt of the accident involving his brother through a good samaritan and was told he had been rushed to Thika Level 5 Hospital, but was pronounced dead on arrival.
14. Pw2 (Sergeant Jane Matu), a traffic police officer stationed at Ruiru, adduced the OB No. 69/302/1/2019 in respect of an accident which occurred at 1800 hours along the Eastern Bypass. She informed the court the deceased was crossing the road, and when he reached the middle of the road



he went back and that is when the accident occurred. The deceased died on arrival at the hospital. She stated that was the investigation officer and she did not get any eye witness and the information given to the court was from the driver.

15. Pw3 (Geoffrey Kaithemia) testified that he witnessed the accident on January 30, 2019. He adopted his witness statement. He stated that the deceased was not crossing the road. According to him, the Motor vehicle was going around the roundabout when it lost control and hit the deceased on the roadside. He blamed the driver of the motor vehicle for the accident.
16. Dw1 (Zachary Gitau) testified he was the driver of motor vehicle KYL 951 Canter. That on January 30, 2019, he was driving at a moderate speed when he found 10 people standing on the roadside. One pedestrian crossed the road at a high speed. He denied he lost control and knocked the deceased.

Analysis

17. This is the first appellate court, the court is to re-evaluate, re-assess, and re-analyze the evidence of the trial court bearing in mind it did not have the benefit of hearing the witnesses first-hand.
18. In *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, the court stated concerning the duty of the first appellate court;

“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.”

19. The first issue in contention is liability. The appellant submits the deceased owed a duty to other road users and thus should be held liable for the accident as he crossed the road unexpectedly thereby causing the accident. The appellant proposes that the deceased be apportioned 20% liability.
20. From the record, Pw3 who was the eye witness, told the trial court the driver of Motor vehicle KYL 951 when negotiating the roundabout vehicle lost control and hit the deceased who was off the road. Dw1 the driver of the motor vehicle denied the averments of Pw3 and according to him the deceased crossed the road unexpectedly and was accidentally hit. His evidence is mirrored by Pw2 the police officer who adduced the abstract report. He informed the trial court the information he adduced in court was based on the information given by Dw1 when he reported the incident at the police station. The evidence of Pw2 does not give a clear picture of what transpired. Pw2 did not find any eyewitness to narrate the incident as she was conducting her investigations.
21. The deceased being a pedestrian who was lawfully by the roadside was hit by the motor vehicle when it lost control. I thus do not find any contributory negligence on the part of the deceased.
22. This court finds the evidence of the eye witness was uncontroverted and proceeds to uphold the trial court apportionment on the liability of 100% to the appellant.
23. An appellate court will only interfere with an award of the trial court in general damages if certain circumstances are satisfied. In *Butt vs. Khan* [1981] KLR 349 at page 356 Law JA stated:

“...an appellate court will not disturb an award of damages unless it is so, inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”



24. At the trial court, the respondent prayed for Kshs 100,000/= for pain and suffering while the appellant submitted an award of Kshs 10,000/= would suffice. Under the head loss of expectation of life, the respondent pleaded for an award of Kshs 200,000/=:, while the appellant submitted an award of kshs 20,000/=:, would suffice. The learned trial magistrate proceeded to find the deceased endured serious pain before his death based on the injuries and awarded Kshs 100,000/= for pain and suffering and Kshs 150,000/= for loss of expectation of life.
25. 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. Very nominal damages are awarded if death is followed immediately after the accident.
26. The deceased died shortly after the accident, he was pronounced dead on arrival at the hospital. The deceased suffered pain before he died. I thus find nominal damages would suffice. In the case of *Hyder Nthenya Musili & Another v China Wu Yi Limited & another* [2017] eKLR, 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 were prolonged before death.”
27. In the instant appeal the appellant urged the court to award a conventional figure of Kshs 50,000/=:, while the respondent urged the court to find the award by the trial court was proper and uphold the same.
28. Given the above, the deceased died shortly after the accident. The trial court awarded Kshs 100,000/= under the head pain and suffering which was within the law. But I find the award was excessive as the pain and suffering were not prolonged. In the circumstances, this court reviews the award of Kshs 100,000/= and substitutes the same with Kshs 50,000/= as sufficient compensation.
29. Under the head loss of expectation of life, the conventional award is Kshs 100,000/= the trial court awarded the Respondent Kshs 150,000/=:. In the instant appeal, the appellant urged the court to award Kshs 100,000/= while the Respondent urged the court to uphold the trial court’s award.
30. I find the award of Kshs 150,000/= is excessive and in the circumstances, I substitute the same with a conventional figure of Kshs 100,000/= which would suffice.
31. On the last issue of loss of dependency, the appellant submits the trial magistrate erred in adopting the ratio of $\frac{1}{2}$ as the deceased was unmarried with no children. According to the appellants Pw1 failed to adduce evidence to prove he was a dependant of the deceased. Counsel also argued that the *Fatal Accidents Act* does not provide for brothers as dependants. He urged the court to adopt a ratio of $\frac{1}{3}$.
32. This court finds as the deceased was unmarried, with no child, his estate is entitled to $\frac{1}{3}$ of his salary. I thus find the trial magistrate erred in adopting the ratio of $\frac{1}{2}$ and I accordingly find the ratio of $\frac{1}{3}$ as proper.
33. The appellant pleaded with the court to adopt a multiplier of 6 years considering the deceased died aged 59 years and would retire at 60 years. The trial court opined based on the vagaries of life that the



deceased would have died at the age of 75 years. And adopted a multiplicand of 10 years. I will not interfere with the multiplier of 10 years.

34. The court finds the multiplicand of Kshs 10,000/= is not opposed and as such proceed to calculate damages under the head loss of dependency as follows:

$$10,000 \times 10 \times \frac{1}{3} \times 12 = 400,000$$

35. The award on special damages is not disputed and this court upholds the trial court's award.

36. In the end, this appeal partially succeeds and the judgment of the trial court on quantum is set aside.

37. Final Orders;

Liability 100% against the defendants

Pain and suffering Kshs 50,000/=

Loss of expectation of life Kshs 100,000/=

Loss of dependency Kshs 400,000/=

Special damages Kshs 71,725/=

38. Each party to bear its own costs in the appeal.

39. Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU ON THIS 15TH DAY OF JUNE 2023.

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P.M. MULWA

JUDGE

In the presence of:

Mr Kinyua – Court assistant

Ms Odero – for the appellant

Ms Gathoni – for the respondent

