



REPUBLIC OF KENYA



KB Sanghani & Sons v Soita & another (Suing as legal representative of the Estate of Julius Mutua Mwanthi (Deceased)) (Civil Appeal E073 of 2021) [2023] KEHC 19055 (KLR) (15 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19055 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E073 OF 2021
MW MUIGAI, J
JUNE 15, 2023**

BETWEEN

KB SANGHANI & SONS APPELLANT

AND

MERCY NALIAKA SOITA 1ST RESPONDENT

ALEXANDER MWANTHI 2ND RESPONDENT

SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF JULIUS MUTUA MWANTHI (DECEASED)

(Being an Appeal against the Judgment of Hon. E.H Keago, CM on the 5th May, 2021 at Machakos Chief Magistrate's Court Civil Case No. 88 of 2019)

JUDGMENT

Background

1. The Respondents instituted Machakos Magistrates Court Civil Case No 324 of 2009 Mercy Naliaka Soita and Alexander Mwanthi (suing as the legal Representatives of the *Estate of Julius Mutua Mwanthi (Deceased) v K.B. Sanghani & Sons Ltd.*
2. By way of a Plaint dated 26th of October, 2009 and Amended dated 13th October, 2010, against Appellant in which the Respondent claimed that at all material times to the suit the Appellant was the registered owner of Motor Vehicle Registration Number KAS 524W/ZC 5062 Mercedes Benz Trailer.
3. Further that on or about 22/7/2009, the deceased was lawfully travelling in Motor vehicle registration number KBA 617W along the Mombasa-Nairobi Road when at Malili Ranch Area, the Appellant's driver, servant or agent drove or managed the said Motor Vehicle Registration number KAS 524W/



ZC 5062 so negligently that he permitted the same to lose control, veer onto and remain on the lane of motor vehicle registration number KBA 617W and collide therewith.

4. As a result of the road traffic accident, the deceased, Julius Mutua Mwanthi sustained fatal injuries and his estate was put to loss and damage thereof.
5. The Plaintiff prayed for:
 - a. Special damages in the sum of Kshs 156,200.
 - b. General damages under the Fatal Accidents Act and Law Reform Act.
 - c. Costs of the suit.
 - d. Interest on (a) (b) and (c) above at court rates
 - e. Any such other or further relief as this Honorable Court may deem fit and just to grant.

Defence.

6. The Defendant in its defense dated 4TH January, 2010 rejected the Respondents claims denying that the its driver, servant or agent negligently drove, controlled or managed motor vehicle registration number KAS 524W/ZC 5062 as alleged or at all that it lost control or veered onto or remained on the lane of motor vehicle registration number KBA 617W as alleged.
7. The Appellant further averred that the said accident was solely caused or alternatively was materially contributed to by the negligence of the of motor vehicle registration number KBA 617W.
8. The Appellant rejected the particulars of Special damages and the claim for general damages under the Fatal Accidents Act and the Law Reform Act, placing the Respondent to strict proof. The Appellant denied the contents of the plaint and prayed that the Respondent's suit be dismissed with costs and interest thereon

Reply To Defence

9. The Respondents in their reply to defence dated 13th January, 2010 denied the contents of paragraph 8 and 6 of the written Statement of Defence.
10. The matter was canvassed by way of written submissions of the party.
11. By Judgment delivered on 5th May,2021 by Hon. E. H Keago agreed with the Respondent and entered judgment on their favor in which the learned Magistrate entered the said judgement in the following terms.
 - a. Pain and suffering Kshs 50,000/=
 - b. Loss of expectation Kshs 100,000/=
 - c. Loss of dependency
(21,651x 20x2/3 x12 Kshs 3, 464,160/=
 - d. Special damages Kshs 30,200/=Grand total Kshs 3,644,360/=
12. By Notice of Motion dated 25th May,2021, the Respondent sought orders that the Trial Court review its judgment dated 5th May, 2021 at page 12 of the judgment were the court adopted a multiplicand of



- 15 but proceeded to use a multiplicand of 20 thus erroneously arriving at the sum of Kshs 3,464,160 for the claim of loss of dependency instead of Kshs. 2,598,120; that pending the hearing and determination of this application the Court be pleased to order a stay of execution of the judgment and decree made by this Court on 5/5/2021; that Court be pleased to order stay of execution of the judgment made on 5/5/2021 pending the hearing and determination of the Appeal filed in the High Court stating among other grounds that the Applicant has an arguable appeal with the high chance of success; that the Applicant stands to suffer loss unless stay of execution is granted; that if the stay is not granted, the Applicant's Appeal will be rendered nugatory; that unless the application is granted the Respondent threatens to levy execution against the Applicant.
13. By Replying Affidavit dated 31st May, 2021, the Respondent herein stated that the Application by the Appellant herein is an afterthought, misadvised, lacks merit and an abuse of court process; that the Applicant has no knowledge of the Respondent's income and cannot therefore say that the Respondent is incapable of refunding the decretal sum if the pending Appeal succeeds; that the pending appeal has no chances of success at all; that orders for review are not available to a party who has Appealed against the same judgment hence ought to elect to Appeal or apply for review of judgment but not both; that substantial loss has not been established in the application hence no reason to be kept away from the fruits of the Respondent's lawfully obtained judgment.
14. By the Application and opposition to the application was canvassed by way of written submissions.
15. By a ruling delivered on 30th June,2021, the Court ordered the stay of the judgment delivered on 5th May 2021 pending the hearing and determination of Machakos HCCA No E73 of 2021 subject to payment of half of the reviewed decretal sum which now stands at Kshs 1,854,275/= be granted.

The Appeal

16. Dissatisfied with the Ruling the Appellant vide Memorandum of Appeal dated 21st May, 2021 sought orders to have the Appeal allowed with costs and the Trial Court Judgment set aside on the grounds that: -
- i. The learned Magistrate erred in awarding excessive general damages under the head of loss of dependency.
 - ii. The learned Magistrate erred in law in failing to correctly appreciate the fact that no negligence was proved as against the Appellant.
 - iii. The learned Magistrate failed to appreciate and consider the testimony evidence by the Respondent's eye witness Mr. Elija Kanaka given at Kilungu Traffic No 303 of 2009 which evidence had exonerated the Appellant from any blame.
 - iv. The learned Magistrate erred in law and fact in relying on the evidence of the Respondent eye witness Mr. Elija Kanaka in the civil case yet the said evidence was contradictory and lacked credibility. He thus arrived at a manifestly unjust decision.
 - v. The learned Magistrate misdirected himself on the principles applicable in determining liability by failing to appreciate and consider the proceedings and judgment in Kilungu Traffic Case No 303 of 2009.
 - vi. The learned Magistrate erred in Law in failing to hold that the evidence adduced the Respondent had failed to establish a case on the balance of probability.
 - vii. That in all the circumstances of the case, the findings of the Learned Magistrate are insupportable in law and there was no basis laid to justify the grant of the orders.



17. The Appeal was disposed by way of written submissions.

Submissions

Appellant's Submissions

18. On its submissions dated 14th January, 2023, and filed on 16th January, 2023, the Appellant raised the issue of liability in which it was submitted that the Trial Court found the Appellant 100% liable in which the Trial Court found:

'I do in the circumstances find and hold the only evidence before the court to determine the issue of liability is by the plaintiff for reasons that the defence evidence blames a stranger for the accident. From the evidence on record and the submissions it is clear that the accident involved two motor vehicles and the eye witness in this case blame the driver of motor vehicle KAS 524W ZC 5062'

19. It was contended that the Trial court completely ignored how it was possible that a witness could give two completely different accounts on oath in reference made to page 151, 152 and page 16 of the record which according to the Appellant had two conflicting evidence.

Reliance was placed on Section 34 (1) *Evidence Act* Cap 80 which states that:

"Evidence given by a witness in a judicial proceeding is admissible in a subsequent judicial proceeding or at a later stage in the same proceeding, for the purpose of proving the facts which it states, in the following circumstances—

- (a) where the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers unreasonable,"

In the case of *Captain Moses Kariuki Wachira v Joseph Mureithi Kanyita & 3 others* (2013) e KLR where J. B Havelock J said

"The admissibility of evidence taken in criminal proceedings and the judgments arising therefrom, in subsequent civil proceedings, is provided for under various Sections of the *Evidence Act* Cap 80 of the Laws of Kenya. The admission of any such evidence before the Criminal Court may not be conclusive of facts, but may be used by a Plaintiff in civil case by evidence way of establishing a prima facie case as against a Defendant being the accused person(s) in the criminal suit. Section 34 (1) of the *Evidence Act* allows for the admission of evidence in judicial proceedings in subsequent proceedings, including those of a civil nature but in the following circumstances"

20. Reliance was further made to Section 34 (b) (d) read together with Section 45 of the *Evidence Act*, Sections 3 A, 1A and 1B of the *Civil Procedure Act*.

21. It was the position of the Appellant that the Trial Court also completely ignored to rely on the evidence of the driver Motor Vehicle KAS 524W ZC 5062 that were part of the proceedings in Kilungu Traffic Case 303 of 2009. The Appellant witness- DW clearly stated that the driver at the time of the accident could not be found and he did not know his whereabouts as such the traffic proceedings were admissible as *Evidence Act*. Reference was made to page 150-151 of the record which contains the statement of Joseph Kimani Nganga.



22. Averring that the court in Kilungu Traffic Case No 303 of 2009 found the driver of Motor Vehicle KBA 617W guilty of causing death by dangerous driving contrary to Section 46 of Traffic Act, hence the Appellant was not liable for accident. Reliance was made on Benter Atieno Obonyo v Anne Nganga & another (2021) e KLR and urge that the Respondent had the burden of proof by adducing credible evidence for negligence to be inferred on the Appellant.
23. On the issue of Quantum it was contended that the learned Magistrate erred in awarding excessive general damages under the head of loss of dependency. Submitting that under page 50-51 of the record, the Trial Court adopted a salary of Kshs 21,651 and dependency ratio of 2/3. With respect to multiplicand, the Court noted at page 61 of the record that “having regard to vagaries of life I will use the multiplicand of 15” in which the total result is sum of 2,598,120 instead of Kshs 3,464,160 and urged that court should not disturb the finding on the multiplicand of 15 years as was clearly expressed in the trial’s court judgment. Reliance was made on Alex Koech & Another v Mary N. Odhiambo HCCA NO. 42 of 2016 (2018) e KLR where the Court affirmed a multiplier of 15 years for the deceased who was aged 35 years at the time of death.
24. Finally, it was submitted on behalf of the Appellant that the deceased herein was a married man and the wife has an income as a teacher hence she equally supported the family. It was urged that dependency ratio of 1/3 should be adopted and further relied on the case of Alex Koech & Another v Mary N. Odhiambo HCCA NO. 42 of 2016 (2018) e KLR.
Hence calculation should be as below $15 \times 12 \times \frac{1}{3} \times 21,651 =$ Kshs 1,299,060/-
25. It was submitted that the appeal be allowed with costs.

Respondents’ Submissions

26. Respondents filled their submissions on 9th February,2023 and dated on 8th February,2023 submitted on the following issues;
27. On the issue of liability it was contended on behalf of the Respondent that the judgment delivered on 5/5/2021, the Trial court held the Appellant 100% liable for occasioning the accident upon evaluating evidence on both parties. Reference was made pages 14, 15, 22 and 23 of the record of appeal. That the Appellant called one witness who testified that he was not present at the scene of the accident. He further testified that he was not present and did not testify in the traffic case. Averred that it was the evidence of the Appellant that 3rd party the driver of motor vehicle registration number KBA 617W was to blame for the occurrence of the accident. Reliance was made on Order 1 Rule 15 of Civil Procedure Rules which provides that: -
 - (1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party) —
 - (a) that he is entitled to contribution or indemnity;
 - (c) that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.



- (2) A copy of such notice shall be filed and shall be served on the third party according to the rules relating to the service of a summons.
- (3) The notice shall state the nature and grounds of the claim, and shall, unless otherwise ordered by the court, be filed within fourteen days of service, and shall be in or to the effect of Form No. 1 of Appendix A with such variations as circumstances require and a copy of the plaint shall be served therewith.
28. It was the position of the Respondents that the Appellant throughout the hearing of the main suit never filed or served a 3rd party notice. No 3rd party was ever joined in the proceeding. The owner of motor vehicle registration number KBA 617W in the suit was never made a party to these proceedings. Order 1 Rule 17 of the *Civil Procedure Rules* was cited and provides: -
- “If a person not a party to the suit who is served as mentioned in rule 15 (hereinafter called the third party) desires to dispute the plaintiff’s claim in the suit as against the defendant on whose behalf the notice has been given, or his own liability to the defendant, the third party must enter an appearance in the suit on or before the day specified in the notice; and in default of his so doing he shall be deemed to admit the validity of the decree obtained against such defendant, whether obtained by consent or otherwise, and his own liability to contribute or indemnify, as the case may be, to the extent claimed in the third-party notice: Provided that a person so served and failing to enter an appearance within the period fixed in the notice may apply to the Court for leave to enter an appearance, and for good cause such leave may be given upon such terms, if any, as the court shall think fit.”
29. Submitting that it is apparent from the proceedings that directions on the issue of liability between the 3rd party and the Appellant were never taken. The affidavit of service was filed as proof that service of 3rd party notice was effected for the court to pronounce itself on the issue.
30. It was the position of the Respondent that the Appellant raised an issue of admissibility of evidence and sought the Honorable Court to consider the evidence tendered by its driver during the trial of the traffic case. That Appellant purports to do so at this stage when the same was not done during the hearing. Contending that the Appellant ought to have made a formal application requesting the court to consider the evidence of the driver of the ill-fated motor vehicle as he could not be traced hence the Appellant could not bring that up now when the same was never brought up during trial.
31. As to the issue of quantum the Respondents opined that quantum is the multiplicand used under the provision of loss of dependency. It was urged that the Respondents in their submissions dated 10/3/2021 before the trial court proposed a multiplicand of 23 years and placed reliance on the following authority
- Silvanus William Okwengu & Another v National Hospital Insurance Fund Nairobi* HCCA NO. 782 of 2003.
32. Submitting that the deceased was aged 32 years old and a multiplier of 20 years was adopted, hence will work out as follows $54,775 \times 12 \times 23 \times \frac{2}{3} = 10,078,600/=$.



33. Contending that the role of the Appellate court is moot. Reliance was placed on the case of *John Wamae & 2 Others v Jane Kituku Nziva & Another*, where the decision of Court of Appeal in *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5 was reiterated thus: -

“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.”

34. It was finally submitted on behalf of the Respondents that the amount awarded as General Damages and more specifically the multiplicand was well tabulated and the law per Fatal Accident Act followed and the minimum amount reached as compensation enough to repay death. Contending that this appeal lacks merit and ought to be dismissed with costs to the Respondents.

Determination

35. The Court considered the memorandum of appeal, record of appeal written submissions by respective parties through Counsel and the issue(s) that emerge for determination is/are;

Whether the appeal is upheld or dismissed on the issue of liability and quantum as determined by the Trial Court’s judgment of 5/5/2021.

36. This being a negligence claim against Appellant, the standard of proof required is on balance of probabilities hence the two issue for determination are namely; whether the Appellant proved his case on a balance of probabilities that the Appellant was not liable directly or vicariously for the fatal accident that resulted in the death of the Respondent. Secondly, whether the quantum as assessed was/ was not adequate excessive or appropriate in the circumstances.

37. In *Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another* [2015] eKLR, Court of Appeal relied on :-

“Denning J, in *Miller v Minister of Pensions* [1947] 2 All ER 372 discussing the burden of proof had this to say;-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties... are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

38. Hon. L. Kimaru J. (as he then was) 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.”

39. It is trite that the legal burden of proof lies with the person who alleges. Section 107 (1) of the *Evidence Act*, Cap 80 Laws. Once the Plaintiff discharges the legal burden of proof, the burden is then shifted to the Defendant to adduce evidence against the Plaintiff’s claims. This burden and standard of proof is well captured under Sections 109 and 112 of the same Act.

Liability

40. The Court in discharging its mandate, this being a 1st appeal, it is trite law, that the court evaluates and reconsiders the evidence on record and draws its own conclusion while bearing in mind that the Court has neither seen or heard the witnesses and should make allowances in this respect. See *Peters v Sunday Post Ltd* [1958] E.A.424.
41. This being the first appeal court, its duty is well expressed in *Selle v Associated Motor Boat Co* [1986] EA 123 where court held as follows:-

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal from the trial court by the high court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions through it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect in particular the court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

Trial Court Pleadings & Evidence

42. On 29/1/2010, the Plaintiff amended the Plaintiff and specifically pleaded special damages Kshs. 156,200/- included General damages under the *Law Reform Act* and *Fatal Accidents Act*.
43. On 28/7/2010 3rd Party Notice was issued by the Defendant to the intended 3rd Party, Margaret Wangare Wanyoike for indemnity and/or contribution as the registered owner of motor vehicle Reg KBA 617 W which collided with Defendant’s motor vehicle Reg KAS 524 W/ZC5062 due to negligent driving by servant/agent one George Mwai Kimondo or alternatively by his contributory negligence.

Hearing

44. PW1 Mercy Naliaka Soita, widow of the deceased Julius Mutua Mwanthi who testified on 12/2/2020 and confirmed that she was married to her late husband in 2004 and they lived together for 7 years before his fatal demise from the fatal accident that occurred on 22/7/2019. He died at the age of 37 years old.
45. PW1 confirmed that they had 2 children of the marriage; Joy Ndanu Mutua who at the time was aged 15 years old and was a student in St Joseph Girls High School Kitale. The daughter’s birth Certificate was produced as PW1-Exh -1a
46. PW1 confirmed the 2nd daughter, Bernadette Mutua who at the time was aged 11 years old studying at St John Kachibora School in Class 7 then. Her Birth Certificate was produced as PW1-Ex-1b.



47. PW1's late husband was the breadwinner of the immediate and extended family. He was employed as Principal /District Agricultural Officer, Makueni County and he paid rent, subsistence, school fees clothing and he provided for his parents. She produced his Payslip as PW1-Ex 2.
48. On 22/7/2019, the deceased, Julius Mutua Mwanthi boarded motor vehicle Reg KBA 617W and travelled along Machakos-Salama-Mombasa-Nairobi Road and an accident occurred with motor vehicle Reg KAS 524W and the deceased died. PW1 was informed of the accident and she identified her late husband at the Mortuary. PW1 produced Police abstract PW1-3 and obtained Copy of Records PW1-Ex 4 (a) & (b) and sued the registered owner of the vehicle-the Defendant. PW1 produced documents to confirm expenses incurred for the deceased's funeral at about Ksh 100,000/- PW1 Ex- 6 1-7; Death Certificate PW 1Ex 7, Grant of Letters of Administration PW1Ex-5; Radio Funeral announcement payment PWEx-8.
49. PW2 Elijah Kanake alias Parketura Kanake Koipaton testified that on 22/7/2019 he was in motor vehicle Reg KBA 617 W travelling from Kitengela to Emali along Mombasa_Nairobi Road. He sat in front between the driver and passenger on the left who he learnt later is the deceased herein.
50. On reaching Malili area, he saw 2 vehicles following each other, one lorry overtook the other lorry and the lorry in front swerved and came to their lane and knocked their matatu. On impact, the said lorry went off the road on the left lane. They were stuck in the cabin until another vehicle was brought and pulled him and he deceased out the cabin and they were rescued after they were stuck for 25-30 minutes. PW2 was injured on the leg which was amputated. PW2 stated that the deceased died instantly as they waited to be removed from the cabin.
51. PW2 stated that the lorry was to blame for the accident as the lorry overtook when it was not safe to do so. The vehicle that caused the accident was/is Motor Vehicle Reg KAS 524W.
52. Despite service the Defendant failed to appear in court and failed to offer any evidence. Both Plaintiff and Defendant cases were closed. Plaintiff's advocate filed written Submissions. Judgment was delivered on 25/6/2020.
53. The Defendant through Advocate set to have the Judgment set aside and allowed to participate in the proceedings. The Trial Court allowed the Defendant's application.
54. On 18/2/2021, PW1 & PW2 were recalled and were subjected to cross-examination by the Defendant's advocate; in a nutshell, PW1 confirmed she did not witness the accident PW2 confirmed he testified in Kilungu Court where the driver of the matatu; the vehicle they in was charged with traffic offence. PW2 did not know the outcome of the matter in Kilungu. PW2 insisted the driver of the lorry was to blame for the accident.
55. DW1- Mahindra Kumar Karasan Sandare, testified and relied on his statement dated 1/12/2020 as evidence in Court. DW1 produced Court proceedings of Traffic Case 303/2009 which he stated the driver of the matatu was found guilty of the traffic offence and was to blame for the accident. DW1 admitted he was not at the scene of the accident but visited the scene the next day. He admitted that the matatu driver was not enjoined to the proceedings buy 3rd Party Notice was issued to owner of the vehicle.
56. The Trial Court by the judgment of 5/5/2021 found on liability 100% against the Defendant.
57. The thrust of Appellant's appeal is that no negligence was proved against the Appellant as the Trial Court failed to consider the evidence of PW2 Elijah Kanake, in the civil proceedings had also testified Traffic Case 303/2009 and his evidence was/is different from the evidence in the civil proceedings that



culminated to the judgment of the Trial Court. The Appellant takes issue with the fact the Trial Court relied on the evidence of PW2 as an eye witness who now blamed the Defendant /Appellant through his agent/servant/driver of KAS 524 W.

58. The Appellant took the view, liability ought to be visited wholly on and/or apportioned based on finding of liability in Traffic Case 303/2009 which proceedings are admissible by virtue of Section 34 of the *Evidence Act*, where the driver of motor vehicle Reg KBA 617 W who was as found liable and guilty of causing death by dangerous driving.
59. The Appellant attributed that PW2 herein testified as PW3 in the Traffic proceedings thus;

While descending a hill our vehicle encroached into the climbing lane. In front I saw an oncoming vehicle on its lawful lane. It flashed its lights. Our driver kept going down leading to a collision with the lorry which was at the middle lane. Our driver attempted to apply emergency brakes but it was too late.....The trailer's driver attempted to swerve to the right lane but it was too late. Both vehicles collided on the left side.
60. The record confirms that the eye witness PW2 herein and PW3 in Traffic Proceedings are one and the same person. The same witness in different Courts gave contradictory evidence; in the Trial Court proceedings he blamed the lorry driver for the collision/fatal accident and in the Traffic proceedings blamed the driver of the matatu Toyota KBA 617 Was per his evidence outlined above.
61. During the civil proceedings, PW2 was cross examined and apart from admitting he testified in Kilungu Court, he did not explain how or why he gave contradictory evidence in both forums. His credibility as a witness was brought into question and he was not considered either a hostile or refractory witness under the *Evidence Act*. Although he testified as eye witness giving direct evidence as to the events that led to the fatal accident the versions are contradictory and unreliable in light of the traffic proceedings produced.
62. On the other hand, during the civil proceedings, during filing of pleadings, 28/7/2010, the Defendant took out 3rd Party Notice but never served the intended 3rd Party to be joined to these proceedings as the Affidavit/Return of Service was not filed. Therefore, after the statutory period, the Defendant did not request for default judgment to be entered against the 3rd Party and the directions were not taken under Order 1 Rule 22 CPR 2010 and/or await Formal Proof proceedings thereof.
63. From the Trial Court record/proceedings, on 2/12/2020 when the Trial Court reopened the hearing to allow the Defendant advocate to cross examine the Plaintiff, PW1 & Eye Witness PW2 who were recalled and the Defendant to testify, the Trial Court again granted the Defendant opportunity to issue and serve 3rd Party Notice as required by Order 1 Rule 15 & 17 *CPR* 2010 within 21 days before the hearing on 18/2/2021. Clearly, this was not taken up by the Defendant.
64. It is therefore the role of the Trial Court to determine the dispute between the parties as per the pleadings filed. The evidence adduced against a 3rd Party who was not joined to these proceedings even if admissible by virtue of Section 34 of *Evidence Act*, the 3rd intended party cannot be condemned unheard without the opportunity of a fair hearing. The Court adjudicates disputes on/to parties to suit or their agents, servants or representatives as principals or with regard to liability through vicarious liability.



Parties are bound by their pleadings.

66. In *Galaxy Paints Company Limited v. Falcon Guards Limited* Court of Appeal Case Number 219 of 1998, the Court of Appeal stated that:

“issues for determination in a suit generally flow from the pleadings and unless the pleadings are amended in accordance with the Civil Procedure Rules, the trial court by dint of the aforesaid rules may only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court’s determination.”

67. In *Joseph Mbuta Nziu v Kenya Orient Insurance Company Ltd* [2015] eKLR where the court referring to a decision of Nigerian Supreme Court the Court of Appeal stated-

“In *Adetoun Oladeji (nig) Ltd v Nigeria Breweries PLC* S.C. 91/2002, Judge Pius Aderemi J.S.C. expressed himself, and we would readily agree, as follows;

‘... it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.’

Proof of negligence- against Plaintiff who sued Defendant.

68. Liability is proved on the basis of standard and burden of proof. The evidence on record is by PW1 the deceased’s widow and PW2 whose testimony is legally challenged by the conflicting evidence on the events leading to the accident. The Plaintiff filed the suit and lodged her claim against the Defendant and attributed actions that were carried out by the Defendant’s driver that amounted to negligence and was the cause of the fatal accident that caused her late husband’s death.

69. The claims were not rebutted or controverted by the Defendant. Both the Plaintiff and Defendant as they testified did not witness the accident nor the events leading up to the accident. The evidence of PW2 was challenged as being contradictory by blaming the matatu driver in the Traffic proceedings and the lorry driver in the civil proceedings.

70. The evidence on record PW1, PW2 & Police Abstract produced as exhibit by PW1 confirm that on 22/7/2009 at 10 am a fatal accident occurred at Malili Ranch area Mombasa-Nairobi Road between KBA 617W Toyota matatu & KAS 524W/ZE 5069 which resulted in the death of the deceased. The case was pending investigations. However, the evidence by PW2 eye witness is in question only as to who caused the fatal accident all the other events were identical.

71. On the other hand the Respondent submitted that the Trial Court determined the matter according to pleadings and evidence adduced and no new evidence could be introduced especially where 3rd Party Notice was not taken out and directions were not taken on the issue of liability between the Defendant and the 3rd Party. The Trial Court could not apportion liability to a stranger to the proceedings before it.

72. In the case of *Motex Knitwear Limited v Gopitex Knitwear Mills Limited* Nairobi (Milimani) HCCC No.834 of 2002, Lesiit, J. citing the case of *Autar Singh Babra And Another v Raju Govindji*, HCCC No.548 of 1998 appreciated that:-

‘Although the Defendant has denied liability in an amended Defense and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st plaintiff’s case stand unchallenged but also that the claims made by the



Defendant in his Defense and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”

Joinder/Misjoinder of Parties/3rd Party Notice

73. In the case of *Zephir Holdings Ltd v Mimosa Plantations Ltd, Jeremiah Maztagaro and Ezekiel Misango Mutisya* (2014)eKLR, the Court held:

“A proper party is one who is impleaded in the suit and qualifies the thresholds of a plaintiff or defendant under Order 1 rule 1 and 2 respectively, or as a third party or as an interested party and whose presence is necessary or relevant for the determination of the real matter in dispute or to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. And the court has a wide discretion to even order suo moto for a party to be impleaded whose presence may be necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. Accordingly, a suit cannot be defeated for mis-joinder or non-joinder of parties.”

74. Therefore, the Trial Court relied on the evidence of PW1 & PW2 and found the Defendant 100% liable through vicarious liability of his driver who drove his vehicle on the fateful day.

75. In light of the admission of proceedings and judgment of the Traffic case and alleged conflicting versions of the accident by PW2 the only eye witness, the Court finds that there is no direct evidence of negligence or liability or res ipsa loquitor circumstances to attach liability on any of the drivers. The evidence on record confirm the occurrence of the accident by the 2 vehicles resulting in the death of the deceased Julius Mutua Mwanthi. Therefore, in light of conflicting evidence, negligence/liability shall be visited both drivers of the respective vehicles KBA 617W Toyota matatu & KAS 524W/ZE 5069 lorry that collided and caused fatal accident that resulted in the death of the Plaintiff.

76. Spry, V P in *Lakhamshi v Attorney General*, (1971) E A 118, 120 where the court stated as follows;

“It is now settled law in East Africa that where the evidence relating to a traffic accident is insufficient to establish the negligence of any party, the court must find the parties equally to blame. A judge is under a duty when confronted by conflicting evidence to reach a decision on it. In the case of most traffic accidents it is possible on a balance of probabilities to conclude that one other party was guilty or both parties were guilty of negligence. In many cases as for example where vehicles collide near the middle of a wide straight road in conditions of good visibility with no courses, there is in the absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the center of the road, the other must have been negligent in failing to take evasive action. Although it is usually possible, but nevertheless often extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence, yet where it is not possible it is proper to divide the blame equally between them.

Quantum

77. The Appellant also contested the award of excessive damages under Loss of dependency.

78. The Court in *Leonard O. Ekisa & Another v Major K. Birgen* [2005] eKLR stated as follows:

“Dependency is a matter of fact. It need not be proved by documentary evidence. In an African family setting, it is not unusual for parents to be dependants. There is no social welfare system that caters for old people in this country...”



Section 4(1) of the *Fatal Accidents Act* provides as follows:-

Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused...”

Section 2 (1) of the same Act provides:-

“child” means a son, daughter, grandson, granddaughter, stepson or stepdaughter; “parent” means a father, mother, grandfather, grandmother, stepfather or stepmother.

79. PW1 testified she was married to the deceased Julius Mutua Mwanthi deceased who died on the fateful day 22/7/2009 from the road traffic accident between the 2 vehicles between KBA 617W Toyota matatu & KAS 524W/ZE 5069. The deceased died at the prime age of 37 years and left his widow, 2 daughters, parents and siblings all who depended on him for subsistence. This fact of dependency by the deceased’s family was not controverted/challenged.
80. PW1 produced copy of the deceased’s payslip- Principal Agricultural Officer Makueni. Total Earnings at Ksh 54,775/- and Net Pay Ksh 21,651, which sum the Trial Court used to calculate the loss of dependency and considered his age was 37 years and would have worked to 60 years and the dependency ratio was 2/3 with a multiplicand of 15 taking into account the vagaries of life $21,651 \times 20 \times \frac{2}{3} \times 12 = 3,464,160/-$.
81. This Court finds that apart from the error of multiplicand of 15 but in calculation used 20 the rest of the workings was in line with the principles of law and the amount was /is not excessive, especially considering the years the estate of the deceased has waited since 2009 and appreciation of the currency to date. This Court finds no legal basis to interfere with the damages awarded under loss of dependency.
82. The Court of Appeal in *Catholic Diocese of Kisumu v Sophia Achieng Tete* Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

“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 considering 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.”

83. With regard to special damages, the Trial Court attributed the special damages specifically pleaded and proved was Ksh 30,200/- However, as per the Court record the Amended Plaintiff of 29/1/2010 where special damages were pleaded as Ksh 156,200/- and proved Ksh 97,640/- as per documents PEX 6 (1) –(7).

Disposition

84.

1. The appeal partly succeeds on liability 50% / 50% to both the owners/drivers of motor vehicles Reg KBA 617W & Reg KAS 524W/ZC.



2. The Appeal on quantum partly succeeds and partly is dismissed and remains as assessed by the Trial Court as follows;
 1. Pain & SufferingKshs 50,000/-
 2. Loss of Expectation.....Kshs 100,000/-
 3. Loss of Dependency.....Kshs 3,464,160/-
(21,651x20x2/3x12)
 4. Special Damages.....Kshs 97,640/-
Kshs.3,711,800/-
3. Less 50%Interest & Costs.

**DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 15/6/2023,
(VIRTUAL/PHYSICAL CONFERENCE)**

M.W. MUIGAI

JUDGE

In The Presence/Absence Of:

Ms Mbilu H/b Mr. Mulu - for the Appellant

No/appearance - for The Respondent

Geoffrey/Patrick - Court Assistant(s)

