



Mwaura (Suing in her Capacity as the next of kin and personal representative of the Late Daniel Mwaura Kamau) v Cheruiyot & 2 others (Civil Appeal 67 of 2016) [2023] KEHC 18791 (KLR) (Civ) (15 June 2023) (Judgment)

Neutral citation: [2023] KEHC 18791 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 67 OF 2016

AA VISRAM, J

JUNE 15, 2023

BETWEEN

MONICA WANGUI MWAURA (SUING IN HER CAPACITY AS THE NEXT OF KIN AND PERSONAL REPRESENTATIVE OF THE LATE DANIEL MWAURA KAMAU) APPELLANT

AND

JOSEPH RUTO CHERUIYOT' 1ST RESPONDENT

DL FESTIVE LIMITED 2ND RESPONDENT

DIAMOND TRUST BANK KENYA LTD 3RD RESPONDENT

(Being an appeal from the judgment dated 25th January, 2016 of Hon. S.M Ochieng (Ms) Senior Resident Magistrate in Githunguri PMCC Case No. 4389 of 2007)

JUDGMENT

Introduction

1. This judgment determines the Appellant's appeal filed on November 10, 2020 vide its Memorandum of Appeal dated February 23, 2016.
2. The parties entered into a consent on the issue of liability in the lower court in the ratio of 80:20 in favour of the Respondent. The parties further agreed to dispose of the issue relating to quantum of damages in the lower court by way of submissions. The Trial Magistrate in his judgment awarded the Appellant the following damages together with costs of the suit:-

Under the *Fatal Accidents Act*



- a) Loss of Dependency - Kshs Nil
Under the *Law Reform Act*
 - b) Pain and Suffering - Kshs 10,000/=
 - c) Loss of Expectations of life - Kshs 100,000/=
 - d) Special Damages - Kshs Nil
- Grand Total - Kshs 110,000/=
- Less 20% contributory negligence - Kshs 22,000/=
- Total - Kshs 88,000/=
3. Aggrieved by the said judgment, the Appellant has filed this appeal on the following grounds:-
- a) That the Honourable Learned Magistrate erred in law and fact by failing to rely on the Plaintiff's exhibits filed as evidence.
 - b) That the Honourable Learned Magistrate erred in law and fact by disregarding both damages under the *Fatal Accidents Act* and Special Damages by failing to consider the evidence laid before her.
 - c) That the Honourable Learned Magistrate erred in law and fact by disregarding both damages under the *Fatal Accidents Act* and Special Damages by failing to consider the evidence laid before her.
 - d) That the Honourable Learned Magistrate erred in law and fact by disregarding the Appellant's submissions on both Special and General Damages and applied wrong principals of law.
 - e) That the Honourable Learned Magistrate erred in law and fact by shifting the mistakes of counsel to an innocent litigant who should have been protected by the court.
4. The parties agreed to dispose of this appeal by way of written submissions and accordingly, filed and served their respective submissions dated November 21, 2022, and December 9, 2022.

Appellant's submissions

- 5. The Appellant submitted that the trial court erred by allowing the parties' advocates to dispose of the issue relating to quantum by way of written submissions. The effect of this was that the Appellant did not have an opportunity to present its evidence to the court, and the same amounted to a mistrial of the case.
- 6. Further, that based on the directions of the court, as stated above, the only option available to the Appellant, in the circumstances was to attach the documents it intended to rely on to its submissions, which it did.
- 7. The Appellant submitted that based on Articles 47 and 50 of the *Constitution*, it ought to have been informed that the case would be resolved by way of written submissions, as opposed to offering oral evidence and producing documents in support of the same.



8. The Appellant cited the decision of the High Court in *Hon. Catherine Chepkemai Mukenyang v Hon. Evanson Pkemei Lomaduny & the another* [2022] eKLR, where the court stated as follows:-

“The twin rules of natural Justice that no man shall be a Judge in his own cause (*Nemo Judex in causa sua*) and that no man shall be condemned unheard (*audi alteram partem*) are cardinal principles of law which are fundamental in our Justice system. They are basically an embodiment of the duty to act fairly. However, there is no legal definition or standard regarding what constitutes procedural fairness and each case must be decided on its own merits.”

9. The Appellant contended that award of Kshs 88,000/= as general damages was too low because the deceased had died in a car accident at the age of 45, and because prior to his death, he had been employed as a teacher earning a salary of Kshs 26,880/= per month. This evidence had been placed in the documents attached to the submissions, which were not considered by the Magistrate.

10. The Appellant relied on the decision of the High Court in *MWM v JMN & JDK* –Civil Appeal No 39 of 2020, where the Court quoting the decision in *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR stated as follows:-

“In order to justify reversing the Trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. 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.”

11. Finally, the Appellant submitted that the mistakes of Counsels ought not to be visited upon an innocent litigant. The Appellant cited the decision of the High Court in *Bank of Africa Kenya Limited v Put Sarajevo General Engineering Co. Ltd & 2 others* –HCCCNo 51 of 2017, where the Court quoting the decision of the Court of Appeal in *Philip Chemwolo & Another v Augustine Kubede* [1982-88] KLR 102 at 1040, stated as follows:-

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit.”

The Respondent’s submissions

12. In opposition to the appeal, the Respondent’s submitted that the Appellant had never objected to the lower court’s direction to proceed by way of written submissions in the lower court. The Respondents cited the decision of the High Court in *County Government of Narok v British Pharmaceuticals Limited* [2021] eKLR, where the court stated as follows:-

“In this case, evidence taken has been recorded and typed. There is nothing which has been shown to produce prejudice to the Appellant who was duly represented during the taking of the proceedings. In any case, the Appellant did not raise any objection to the successor magistrate determining the suit on the basis of the evidence recorded by his predecessor.



I have also found there is no prejudice that will be suffered by the Appellant. Basing this appeal on such objections is stealth and an attempt to steal a match from the other party.”

13. Further, that lower court had based its decision to disallow the Appellant’s documents to be filed together with its submissions on the basis that the same are photocopies, and had never been produced and admitted in court as exhibits. Accordingly, there was no evidence on the record in support of the Appellant’s various claims for damages.
14. The Respondents submitted that the Appellant ought to have satisfied three factors in order to establish the appropriate quantum of damages for loss of dependency: namely, the age of the deceased; the income of the deceased; and the level of dependency on the deceased by his dependents. None of which had been established. Further, they submitted that special damages ought to be pleaded and proved. The Appellant had pleaded the sum of Kshs 81,640/= but had not adduced any evidence in support of the same by way of receipts or otherwise.

Analysis and Determination

15. I have read the record in its entirety and considered the grounds of appeal raised by the Appellant and the submission of the rival parties. The issues that arise for determination are essentially two:-
 - a) Whether the conduct of the case in the trial court amounted to a mistrial?
 - b) Was the lower court correct in its award of damages?

Whether the conduct of the case in the trial court amounted to a mistrial?

16. As this is a first appeal, I have a duty to re-evaluate the evidence before me. This principle as set out in the Court of Appeal decision of *Selle and Another v Associated Motor Boat Company Ltd & Others* [1968] EA 123, where the court stated that:-

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion. Though 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, this Court is not bound necessarily to follow the Trial Judge’s findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence on the case generally.”

17. Looking at the record, it is evident that the Magistrate directed, and Appellant did not oppose, directions that the parties canvass the appeal by way of written submissions. No trial took place whatsoever in relation to the issue of quantum of damages. The parties simply filed their respective submissions, and the lower court reached its conclusions based on the submission of the parties.
18. The Magistrate appreciated the fact that there was no evidence on the record when it found the following at paragraph three of the judgment:-

“this court notes that no documents were produced in court” and once again, when the court stated that “there was no death certificate, birth certificate of the deceased and his dependants, no certificate of marriage, no proof that the deceased was employed as a teacher,



or at all, or any evidence by any witness that indicates the age of the deceased person at the time of his death”

19. Yet, having stated the above, the court went on to make findings in relation to the appropriate quantum without any reference to evidence. This is where it went wrong. Without any evidence whatsoever, there was no basis upon which the lower court could apply an appropriate multiplier or multiplicand. In short, it reached its conclusions based on no evidence at all.
20. In *Avenue Car Hire & Another v Slipha Wanjiru Mutbegu* Civil Appeal No 302 of 1997 the Court of Appeal held that no judgment can be based on written submissions alone, and held that such a judgment is a nullity since written submissions are not a mode of receiving evidence set out under Order 17 Rule 2 of the *Civil Procedure Rules* (now Order 18 rule 2 of the Civil Procedure Rules).
21. I am guided by the above authority, and I am persuaded that by basing its decision purely on the submissions of the parties, the lower court missed a vital step in the trial process. In short, the Magistrate ‘jumped the gun’ when she directed the parties to file written submission before first setting down the matter for formal proof.
22. The above error was fatal because there was no basis upon which the lower court reached its conclusions in the total absence of evidence.
23. Further, it is trite that submissions are not evidence and cannot take the place of evidence. In this regard, Mwera, J (as he then was) in *Erastus Wade Opande v Kenya Revenue Authority & Another* Kisumu HCCA No 46 of 2007 stated as follows:-

“Submissions simply concretize and focus on each side’s case with a view to win the court’s decision that way. Submissions are not evidence on which a case is decided.”
24. The Court of Appeal in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another* [2014] eKLR, stated the following:-

“Submissions cannot take the place of evidence. The 1st Respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavoring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.”
25. Similarly, in *Socfinaf Company Limited v Peter Mbugua Njoki* [2020] eKLR, the court held as follows:-

“it is clear that whichever way one looks at it, it is a requirement that evidence be produced in support of the issues in contention whether at the hearing or by consent. The decision of the trial court to not conduct a hearing or call for the production of evidence and instead order the parties to canvass the issue of quantum by way of written submissions was a fatal error and rendered the whole trial a nullity. There was in fact no trial at all as contemplated by the law.”
26. Based on the law as stated above, I am satisfied that the lower court failed to hold a trial. In *Mumias Agricultural Transport vs. Sony Agricultural Ltd.* Civil Appeal No 201 of 1997, the Court of Appeal held that where no trial is carried out, the matter ought to be remitted back for hearing.
27. Having found the above in relation to first issue, the second issue is moot.



- 28. Based on the reasons as stated above I find that the appeal is with merit and ought to be allowed. Accordingly, I hereby allow the appeal and set aside the entire judgment of the trial court.
- 29. I further direct that the matter be remitted back to the lower court for hearing and determination in accordance with the law but before a magistrate other than Hon. S.M Ochieng (Ms) on the issue of quantum. Additionally, the consent on liability shall remain undisturbed.
- 30. As regards costs of this appeal, based on the reasons set out above, I order that each party shall bear its own costs.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 15TH DAY OF JUNE, 2023

ALEEM VISRAM

JUDGE

In the presence of;

.....For the Appellant

.....For the Respondent

