



**Gichia v Mungai & another (Suing as the Administrator of Joseph Warui Mungai) (Civil Appeal E039 of 2022) [2023] KEHC 22411 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22411 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CIVIL APPEAL E039 OF 2022  
FR OLEL, J  
SEPTEMBER 22, 2023**

**BETWEEN**

**CHARLES MWAURA GICHIA ..... APPELLANT**

**AND**

**MACHARIA MUNGAI ..... 1<sup>ST</sup> RESPONDENT**

**CHARLES NGIGI MUNGAI ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS THE ADMINISTRATOR OF JOSEPH WARUI MUNGAI**

*(Being an appeal against judgment decree of Honourable Resident Magistrate  
R. LILUMA delivered in Naivasha CMCC 30 of 2020 ON 7<sup>th</sup> April 2022)*

**JUDGMENT**

1. The respondents herein by a plaint dated March 4, 2020, sued the appellant claiming general damage under *Fatal Accident Act* and *Law Reform Act*, special damage of Ksh.26,130/= plus costs and interest of the suit from a fatal accident which occurred on August 28, 2018 involving their deceased brother and the appellants motor vehicle registration Number KCB 329 V (hereinafter referred to as the suit motor vehicle.)
2. It was alleged in the plaint that on the August 28, 2018, the deceased was lawfully walking off the road as a pedestrian along Njambini- Mugumu road within Njambini township, when the appellant, and/or his driver, servant and/or agent while in the cause of their employment recklessly, carelessly and negligently drove the suit motor vehicle permitted it to veer off the road and violently knocked down the deceased thereby causing him fatal injuries.
3. The appellant on his part did file a statement of defence where he denied owning the suit motor vehicle as well as the facts relating to the occurrence of the accident. The appellant further denied all the particulars of negligence, carelessness and recklessness attributed to him and/or his servant employee or



agents and stated in the alternative that if indeed an accident occurred, it was substantially contributed too by the deceased negligence which were particularized. The appellant also denied that the deceased estate suffered any loss and prayed for the suit to be dismissed.

4. Testifying as PW1, the 1<sup>st</sup> respondent Charles Ngigi Mungai, adopted the witness statement filed and further testified that on August 28, 2018, he was called and informed that his brother had been involved in a road traffic accident. He rushed to the scene of the accident and found that indeed an accident had occurred and that his brother had sustained fatal injuries and died on the spot. He did produce various documents as Exhibit in support of their averments and blamed the appellant for causing the said accident.
5. In cross examination, he confirmed that he did not witness the accident and could not testify as to how the accident occurred. Further he had never been called to testify against the driver of the suit motor vehicle over any traffic related offence and had no document to prove that the deceased earnings. PW1 further confirmed that the deceased was his younger brother and he had not married by the time of his untimely death.
6. PW2 Mwangi Irungu testified that he was the in charge of traffic police base at Kinangop police station. On August 28, 2018 at 8.00 am a fatal road traffic accident was reported at the station. The accident had occurred at 5.00 am along Njambini – Magumu road at Njabini township involving the suit motor vehicle driven by Simon Mwangi Kangethe and a pedestrian. The suit motor vehicle was being driven towards Magumu direction from Engineer, when it knocked the deceased as he was crossing the road from left to right. The victim sustained serious head injuries and was rushed to hospital by a good Samaritan but was pronounced dead on arrival at the hospital. PW2 produced the police abstract into evidence.
7. In cross examination PW2 stated that he was not the investigation officer, who had been transferred and he did not participate in the investigations but had the investigations diary which had all the details relating to the accident and had not been interfered with. The deceased was knocked while crossing the road from left to right while facing the Magumu direction. He had a sketch plan, but the suit motor vehicle and the body were not found at the scene of the accident and they could not establish the point of impact. The driver of the suit motor vehicle too was never charged with any traffic offence.
8. DW1 Constable George Odhiambo stated that he was based at traffic base Kinangop performing general duties and was amongst the traffic officers who investigated this traffic accident which occurred on August 28, 2018 at 5.00 am. He did visit the scene with Cpl Fatuma and they found that, the deceased was crossing the road from left to right while facing Magumu and was knocked down by the suit motor vehicle driven by one Simon Kinyanjui. After the accident, the pedestrian was rushed to Njambini Dispensary, where he was pronounced dead on arrival. They drew the accident sketch map and also subjected the suit motor vehicle to inspection. Visibility in Njambini area at 5.00am in the morning was poor and could be referred to as night time.
9. In cross examination DW1 confirmed that the accident occurred within Njambini township a few meters from Engineer junction towards Magumu. He was familiar with the said area and it had no Zebra crossing marks and the deceased could not be faulted for crossing the road, where he purported to cross. Further DW1 stated that the speed limit when a driver was approaching town should be 40 km/hr and the driver should have been able to stop the suit motor vehicle immediately to avoid the accident.
10. There was no eye witness that saw the accident occur and it is the driver of the suit motor vehicle who stated that the deceased was crossing from left to right. They could also not ascertain the point of impact as the suit motor vehicle rushed the deceased to hospital. In re examination the witness stated



that skid marks usually occur when the driver is at high speed, then breaks suddenly to avoid hitting something. There were skid marks at the scene, but he could not confirm if the driver of the suit motor vehicle was speeding at over 40km/hr nor was there evidence to show that he did not stop immediately. The matter was left pending under investigations as there was no strong eye witness.

11. DW2 Simon Kinyanjui testified that he was a businessman at resided in Magumu. He referred to his witness statement and adopted the same as his evidence. On August 28, 2018, in the morning he started his journey to Nairobi and the whether was foggy and it was dark. As he was driving a pedestrian emerged while running across the road and he knocked him in the middle of the road. He blamed the pedestrian for crossing when it was not safe to do so and failing to check If the road was clear before he could cross. He was never charged before any court and urged the court to dismiss the case as he was not to blame for the accident that occurred.
12. In cross examination, DW2 stated that he saw the deceased while 10 meters away and applied emergency breaks but could not stop instantly. The suit motor vehicle stopped after it had knocked down the deceased. By the time of the accident he was not carrying passengers but he was with his conductor, who could be availed to come testify in court if need be. In reexamination, the witness affirmed that he braked and tried to avoid knocking the deceased.
13. The trial magistrate did consider the entire evidence tendered and in her considered judgment placed liability at 80-20 in favour of the respondents and award them damages as follows;  
Pain and suffering Ksh.20,000/=  
Loss of expectation Ksh.150,000/=  
Special damages Ksh.26,130/=  
Total Ksh.196,130/=  
Less 20% Ksh.156,904/=  
Plus cost and interest.
14. The appellant being aggrieved by the said judgement filed their memorandum of appeal dated May 5, 2022 and raised the following grounds of appeal namely;
  - a. That the learned magistrate erred in apportionment of liability in the face of the evidence on record.
  - b. That the learned trial magistrate erred and misdirected himself as to the extent and nature of the accident and therefore erred in law in his assessment of liability which was not proved against the appellant.
  - c. That the learned trial magistrate erred in law and misdirected himself when he failed to consider the appellants submissions on both points of law and facts.
  - d. That the learned trial magistrate erred in law and in fact in finding that the respondent/plaintiff had proved liability against the appellant in view of the evidence on record.
  - e. That the learned trial magistrate's findings on liability was not supported by facts or law
15. As at the date of writing this judgment only the respondent's submissions were filed. The appellant did not file any submissions to support of this appeal



## Respondent's Submissions

16. The respondent's did file their written submissions on January 23, 2023. They submitted that the trial magistrate did not err in her considered judgement and rightly apportioned liability after considering all the facts, evidence adduced and applicable law to find that the appellant's driver was driving at high speed and was not in a position to stop the suit motor vehicle in time to avoid the accident. Reliance was placed on *Mary Njeri Murigi Vs Peter Macharia & another* (2016) eKLR
17. On liability, the court had severally held that a pedestrian cannot simply be faulted for crossing the road, as roads are used by motorists and pedestrians as well. It was the duty of motorist to drive with due care and attention as well as observe traffic rules and regulations including giving right of way to pedestrians at designated places. A motor vehicle driver also had to anticipate that things, people or animals might stray onto the road and he is bound not to drive at high speed so as to avoid accidents occasioned by such persons/animals.
18. In other words, a reasonable person driving a motor vehicle on a highway with due care and attention, does not hit every stationary object on his way, merely because the object is wrongfully there. Reliance was placed on *Masembe vs Sugar Corporation & another* (2002) 2 EA 434, which was cited with approval in the case of Kennedy *Muteti Musyoki v Abedinego Mbole* (2021) eKLR & *Osoro & 2 others v Msango & another 9 suing as legal representative of the Estate of Nicholas Brown Mwangemi( deceased)* ( Civil Appeal 65 of 2019)(2022) KEHC 212(KLR)
19. The respondents documentary and oral evidence were consistent and pointed towards negligence of the appellant and/or his driver as the cause of the accident as he was driving at high speed within a township area and could therefore not stop at once on application of the emergency breaks. The trial magistrate adequately considered all the evidence and parties' submissions and rightly apportioned liability. There was no evidence that the learned magistrate based her decision on wrong principles or parameters and therefore there was no basis to interfere with the trial courts discretion. Reliance was placed on *Stephen Obure Onkanga vNjuca Consolidated Limited*(2013) which was cited with approval in the case of *Matthew Thuku v Cyrus Ndungu* (2021) eklr.
20. The Respondent's prayed that this appeal be dismissed with costs.

## Analysis and Determination

21. I have considered the pleadings, evidence presented and submissions of the parties before the trial court and the respondent's submissions filed in this appeal. This court first and foremost is enjoined to subject the whole proceedings to fresh scrutiny and make its own conclusions.
22. A first appeal offers a valuable right to the parties and unless restricted by law, the whole case therein is open for rehearing both on the question of fact and law. The judgment of the appellate court must therefore reflect its conscious application of mind and record the findings supported by reasons, on all issues arising along with the contentions put forth and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the appellate court had discharged the duty expected of it. See *Santosh Hazari v Purushottam Tiwari (Deceased) by L.Rs* (2001) 3 SCC 179.
23. A first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of



law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the Civil Procedure Act a court of first appeal can appreciate the entire evidence and come to a different conclusion. See *Kurian Chacko v Varkey Joseph* AIR 1969 Keral 316

24. The issue in this appeal is whether the driver of the suit motor vehicle ought to have been found 80% liable. The court is being called upon to interfere with the trial court's finding of liability. In *Khambi and another v Mabithi and another* [1968] EA 70, It was held that;

“It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.”

25. That seems to have been the position in *Isabella Wanjiru Karangu v Washington Malele* Civil Appeal No 50 of 1981 [1983] KLR 142 and *Mahendra M Malde v George M Angira* Civil Appeal No 12 of 1981, where it was held that apportionment of blame represents an exercise of a discretion with which the appellate court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle.

26. However, as also held by the Court of Appeal in *Micheal Hubert Kloss & another v David Seroney & 5 others* [2009] eKLR:

“The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in *Stapley v Gypsum Mines Ltd (2)* (1953) AC 663 at p 681 as follows: ‘To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it...The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally...’”

27. There is no doubt that an accident did occur on 28<sup>th</sup> August 2018, at 5.00am along Njambini -Magumu road within, Njambini township where the deceased was knocked down by the suit motor vehicle while trying to cross the road, and sustained fatal injuries. This was confirmed by all witnesses who testified and especially PW2, DW1 and DW2 the driver of the suit motor vehicle.

28. DW1 Simon Kinjanjui stated that he was driving at 30km/hr and the weather was foggy and dark. A pedestrian emerged from the side of the road and started running across the road and he knocked him in the middle of the road. He blamed the pedestrian for the accident as he had failed to check and confirm if the road was clear before crossing. Further he was never charged before any court with the offence of causing death by dangerous driving.

29. DW2 Cpl George Odhiambo was part of the investigation team together with cpl Fatuma. He confirmed that the accident occurred a few meters after Njambini – Engineer junction as one headed



- towards Magumu. The area did not have zebra crossing and the deceased could not be faulted for crossing the road at that area. The accident was within Njambini township and the normal driving speed within the said area should have been 40km/hr. At the time of the accident visibility was poor and 5.00am could be referred to as night time. There was no eye witness to the accident, but the driver of the suit motor vehicle should have been able to bring it to a stop immediately. He also confirmed that the driver applied emergency breaks and at the scene there were skid marks.
30. The trial magistrate did consider the entire evidence adduced and found as a fact that the deceased was indeed crossing the road, when he was knocked down and was fatally injured. The deceased had a duty to exercise great care while crossing the road. The appellant's driver too had to adhere to the highway code and anticipate that he was bound not to go faster than will permit his stopping, or defecting his course so as to avoid hitting anything he sees, after he has seen it. The trial magistrate placed reliance on *Annstacia Nduku John v Aggrey oguttu oyugi* (2020) eKLR. *Jesse Muriithi v John Cichunge Baqituru & another* (1992) eKLR, *Stanley oguti Attai v Peter chege Mbugua* (2019) eKLR & *Silvester Meuma Musyoka v Anna Kamantha Nyamai & ano* (2021) eKLR.
  31. In all the above cases, the victims were knocked down, while crossing the road and the courts held that the drivers ought to be more careful as they were in control of the motor vehicle. The facts herein, are that the accident occurred at 5a.m within Njambini township area. DW1 who visited the scene confirmed that visibility was poor and the appellants driver ought not to have been travelling at more than 40km/hr, which speed would have enabled him to stop immediately to avoid the accident and bring the suit motor vehicle to an immediate stop.
  32. The victim died instantly and there were skid marks on the scene, which implies that the appellants driver was speeding within a township area and applied sharp breaks at high speed before hitting the pedestrian. The appellants driver should not have been driving at more than 40km/hr (within a township area), at which speed he would have been able to comfortably control the suit motor vehicle and the impact/ injuries sustained by the victim would not have been fatal.
  33. In *Stephen Obure Onkanga v Njuca Consolidated Limited* (2013) eKLR which was cited with approval in the case of *Mathew Thuku v Cyrus Ndungu* (2021) eKLR the court stated that;
 

“General apportionment of liability is an exercise of discretion by the judge. This court can only interfere with apportionment of liability made by the superior court where it is satisfied that the same was based on no evidence or on wrong principle and is, therefore, wrong,”
  34. There is therefore no basis upon which the finding on liability by the trial magistrate can be faulted as the deceased was made to shoulder 20% liability for failure to keep a proper look out for the motor vehicles using the said road and failing to exercise due care.
  35. All the appellants' grounds of appeal were based on liability and they all fail, as it has not been shown, which error in principle or the apportionment made by the trial court was manifestly erroneous to enable this court interfere with the same.

### **Disposition**

36. Taking all relevant factors into consideration I do find that this appeal is wholly unmerited and the same is dismissed with costs to the respondent.
37. The costs are hereby assessed at Ksh.150,000/= all inclusive.
38. It is so ordered.



**JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2023.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

**Delivered on the virtual platform, Teams this 22<sup>nd</sup> day of September, 2023.**

**In the presence of:**

.....for Appellant

.....for Respondent

.....Court Assistant

