



**Kuria v Gicheru (Suing as the personal representative of the Estate  
of Naomi Njoki Mwangi (Deceased) (Civil Appeal E020 of 2022)  
[2023] KEHC 22491 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22491 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CIVIL APPEAL E020 OF 2022  
FR OLEL, J  
SEPTEMBER 22, 2023  
BEING AN APPEAL FROM THE JUDGMENT OF HON R. LILUMA (RM)  
DELIVERED ON 27TH JANUARY 2022 IN ENGINEER SRMCC NO. E049 OF 2021)**

**BETWEEN**

**DAVID MWANGI GICHERU (SUING AS PERSONAL REPRESENTATIVE  
OF THE ESTATE OF NAOMI NJOKI MWANGI(DECEASED) (PLAINTIFF)**

**VERSUS**

**DICKSON KINYANJUI KURIA (DEFENDANT)**

**BETWEEN**

**DICKSON KINYANJUI KURIA ..... APPELLANT**

**AND**

**DAVID MWANGI GICHERU (SUING AS THE PERSONAL REPRESENTATIVE  
OF THE ESTATE OF NAOMI NJOKI MWANGI (DECEASED) .... RESPONDENT**

*(Being an appeal from the judgment of Hon R. Liluma (RM) delivered  
on 27th January 2022 in Engineer SRMCC no. E049 of 2021)*

**JUDGMENT**

**Introduction**

1. The Appellant was the defendant in the primary suit, where he had been sued as both the registered owner and beneficial owner of Motor vehicle KBC xxxM (hereinafter referred to as “the suit motor vehicle”). It was alleged that on 4<sup>th</sup> January 2021, the deceased herein was a pedestrian walking along Njambini-Engineer Road when the defendant’s authorized driver servant and or agent so negligently, carelessly, recklessly drove and/or controlled the said suit motor vehicle causing it to hit the deceased.



The plaintiff filed the primary suit and sought for compensation under the *Fatal Accidents Act* and *Law Reform Act*, interest and costs of the suit.

2. The appellant did file his statement of defence, wherein he denied occurrence of the accident and the negligence attributed to him. Further in the alternative he did plead that if indeed an accident did occur, then it was the deceased to blame for the same and particularized the deceased negligence.
3. After the hearing, the Trial Court in its judgment delivered on 27<sup>th</sup> January 2022 allowed the respondent's case and awarded them damages of Kshs 2,564,730/= plus cost and interest. The Appellant being dissatisfied by this judgment filed a memorandum of Appeal on 25<sup>th</sup> February, 2022 and raised grounds of appeal namely: -
  - a. That the Learned Trial Magistrate erred both in law and in fact in finding the appellant liable to the tune of 80%.
  - b. That the Learned Trial Magistrate erred both in law and in fact in disregarding the overwhelming evidence tendered by the Defence in apportioning liability between the appellant & the deceased.
  - c. That the Learned Trial Magistrate erred both in law and in fact in failing to find that the deceased was the author of her own misfortune.
  - d. That the Learned Trial Magistrate erred both in law and in assessment of the damages payable.
  - e. That the Learned Trial Magistrate misdirected himself by failing to consider and apply some weight on the evidence and the submissions by the appellant while arriving at the judgement.
  - f. That the Learned Trial Magistrate erred in law and in fact on relying on extraneous evidence in arriving at the decision on liability and quantum.

#### **Facts of the Case**

4. At the trial, the Respondent/Plaintiff called two (2) witnesses. PW1 was Inspector Irungu Mwangi, the in-charge Traffic Base at Kinangop. He confirmed that the accident occurred on 07:30hrs along Njambini – Engineer Road at chuma Area. The accident involved the suit motor vehicle which was being driven by Joseph Mbatia Kibebo and the deceased, who was knocked down while crossing the road from right to left while facing Engineer town. As a result of the accident, the deceased died on the spot.
5. On cross examination, he stated that he was not the investigating officer but participated in the investigations of the accident and blamed the deceased for not being watchful and for crossing the road at undesignated place. The suit motor vehicle driver was not to blame. The police file was forwarded to the DPP'S office for advice and no further action had been taken as against the driver of the suit Motor vehicle.
6. PW2 David Mwangi Gicheru the Respondent, testified and stated that the deceased was his daughter and she died on 04.01. 2021 after being knocked down by the suit motor vehicle. He did not witness the accident but identified the body of the deceased later at the Mortuary. He testified that the deceased was not married and used to sell clothes and would generate an income of between ksh.1200-1500 on a daily basis. He produced all the documents relied upon as Exhibits.
7. PW3 Ruth Njoki Ndung'u adopted her witness statement dated 24<sup>th</sup> March 2021. Therein she stated that she received a call from her friend Lillian who informed her that her sister had been involved in a fatal accident. She rushed to the scene and found her sister lying dead by the roadside. She reported



the incident to Kinangop police station and the body was preserved at Engineer Hospital. In cross Examination she reiterated that the deceased was not married and was carrying out cloths business which would earn her Kshs.25,000/= monthly from selling cloths. She was 32 years at the time of the accident.

8. DW1 Joseph Mbatia Kibebo adopted his statement filed in court on 23<sup>rd</sup> September 2021 as his evidence in chief. He stated that 04.01. 2021 was driving towards Nyahururu at a speed of about 50-60 km/hr. As he approached Engineer town, he overtook a Toyota probox which was ahead of the suit motor vehicle and as he returned to his lane, he saw a pedestrian suddenly cross the road from behind a matatu she had alighted from. He applied emergency breaks so as to avoid the accident but unfortunately hit the pedestrian who died. He blamed the deceased for crossing the road, when it was not clear for her to do so.
9. In cross examination, DW1 denied being in a hurry to drop the goods he was carrying and insisted he was at a speed of about 50km/hr when the accident occurred. Upon re-examination, he stated that the accident occurred after he had finished overtaking and that the probox he had overtaken was in motion and that he was driving at a speed of 50km/hr.

### Appeal Submissions

10. The Appellant filed submissions on 19.12.2022 where he urged the court to consider the principle of law that comparable injuries- should receive comparable awards. He relied on [\*Arrow car Limited v Elijah shamall Bimomo & 2 others\*](#) (2004) eKLR
11. As to the issue of Liability, it was submitted that PW1 Inspector Mwangi Irungu testified that as a result of the investigations he conducted, it was established that the deceased was to be blamed for causing the accident because she crossed the road without looking out for oncoming traffic and other road users. That he also affirmed to the court that the appellant's driver was not to blame for the said accident and there was no zebra crossing at the point where the accident took place. DW1 also confirmed that the deceased had suddenly ran across the road from behind a matatu and put herself in harm's way by crossing the road that was clearly busy. The trial court's judgement on apportionment of liability was thus wrong as it contradicted the evidence which stood unchallenged.
12. Further courts had mostly found that in instances where it was difficult to establish blameworthiness, the court apportions liability equally at 50:50. Reliance was placed in the case of [\*Domitila Wangui karugu & another v Dagu Hidris Haide\*](#)[2020] eKLR. The court was urged to find that the deceased was liable for the accident and it was an error to apportion any liability on the appellant.
13. Secondly on the issue of Quantum, it was submitted that on loss of dependency, the multiplicand of Ksh. 18,319.50 as applied by the trial court was wrongly applied because the respondent never pleaded the work done by the deceased nor her earnings. Parties are bound by their pleadings and it was erroneous for the respondent to submit on an issue that was not specifically pleaded and for the trial court to rely on unled assertions. It was submitted that there was no evidence tendered to show or prove the deceased earnings and thus the court should use minimum wage guidelines and proposed Kshs 7,240.95 per month as provided in the schedule for General labourer.
14. The dependency ration of 2/3 and multiplier of 25 years was not challenged as age of the deceased was proved and she left behind four children under the care of the Respondents and this court was urged to calculate and reduce the award based on minimum wage provided. Reliance was placed on the case of [\*Ndungu Wambui Christine & 2 others v Muusi Nzivo Maingi & another\*](#)[2020]eKLR & [\*Odinga Jacktone Ouma v Moureen Achieng Odera\*](#) (2016) eKLR



15. The Court was urged to find that the deceased was 100% liable and/or in the alternative further assess downwards the trial Court's award on liability and damages. The appellant also prayed for costs of this appeal.

### Respondents Submissions

16. The Respondent filed submissions on 20.01.2023. On the question of liability, it was submitted that PW1 testified that the deceased was knocked down as she was crossing the road from the right to the left side, DW1 testified that he had just finished overtaking a vehicle that was ahead of him and returned back to his lane when he suddenly saw a pedestrian, thus the deceased pedestrian had the right of way by virtue of being on the road first in time. Reliance was placed on *Imperial Bank Limited v David Kamanza Nguta* [2017] eKLR where it was held that
- “the rule of the road is that he who is already on the road has a right of way even if he be there unlawfully. In equity the maximum first in time is stranger in law would apply”.
17. It was also submitted that the testimony by DW1 that he knocked down the pedestrian by the side mirror at the speed of 50km/hr was incredible because that cannot be sufficient to cause death on the spot unless the driver was at a very high speed and that most rural areas, the roads are not specifically marked with pedestrian crossing areas leaving them to cross anywhere. It was submitted that DW1 owed the pedestrian a higher duty of care by virtue of being in control of a lethal machine. The Court was urged to uphold the trial court's finding on liability.
18. On the issue of Quantum, it was submitted that the issue of the deceased selling second hand clothes was not disputed and that the sale of second hand clothes did not fall under a general laborer and that the trial court was right in adopting ksh.18,319.50 as the multiplicand instead of ksh. 7,240.95/= The court was urged to dismiss the Appeal with costs.

### Analysis & Determination

19. I have considered the pleadings, evidence presented and submissions of the parties in this appeal, this court has a duty to subject the whole proceedings to fresh scrutiny and make its own conclusions. see *Selle & Another v Associated Motor Boat Co Ltd & others* (1968) EA 123 where it was stated that;
- “I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the high court is by way of retrial and the principals 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 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. (*Abduk Hammed saif v Ali Mohammed Sholan* (1955), 22 EACA 270”
20. In *Cogblan v Cumberland* (1898) 1 Ch, 704 , the court of appeal of England stated as follows;
- “Even where, as in this case, the appeal turns on a question of fact, the court of appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the material before the judge with such other material as it may have decided to admit. The court must



then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong ... when the question arises, which witness is to be believed rather than the other and that question turns on manner and demeanour, the court of appeal always, is and must be guided by the impression made on the judge who saw the witness. But there may obviously be other circumstance's quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court had not seen."

## A. Liability

21. With regards to road traffic accidents, the Court of Appeal in *Micheal Hubert Kloss & Another v David Seroney & 5 Others* [2009] eKLR observed as follows:

"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..."

22. Further 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.
23. 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 v 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)
24. The both PW1 and DW1 blamed the deceased for the accident by crossing the road when it was not safe to do so. While PW1 stated that he was part of the investigations team, his evidence was shallow. He did not produce the accident scene sketch plan nor did he specifically state the basis of conclusions or his role in the said investigations. DW1 evidence on the other hand was not consistent. He could not have be overtaking the Toyota probox at 50km/hr and at that speed he would have been able to



see the deceased on time and braked to avoid the accident. The deceased died on the spot, which is indicate of the impact of the collusion as being heavy and thus he too would have to shoulder part blame for the accident.

25. In *Lakhamshi v Attorney General* (1971) EA 118 it was held that:

“A judge is under a duty when confronted with conflicting evidence to reach a decision on it and inmost traffic accidents , it is possible on a balance of probability to conclude that one or 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 obstruction or other traffic affecting their 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 centre of the road, the other must be negligent in failing to take evasive action. It is usually possible, although extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence but where it is not possible, it is proper to divide the blame equally between them.”

26. The issue of apportionment of liability was also discussed in *Khambi and another v Mahithi and another* (1968) EA 70 where 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.”

Similar decisions have been reached in *Mahendra M Malde v George M Angira* Civil Appeal No 12 of 1981.

27. The trial court did find that the appellant was 70% liable for the accident. This apportionment was manifestly erroneous based on reexamination of the evidence presented at trial. Both parties were to blame and an apportionment of liability at 50:50 would have fair. The award of the trial court is thus set aside and reduced accordingly.

## **B. Quantum**

28. In *Woodruff v Dupont* [1964] EA 404 it was held by the East African Court of Appeal that:

“The question as to quantum of damage is one of fact for the trial Judge and the principles of law enunciated in the decided case are only guides. When those rules or principles are applied, however, it is essential to remember that in the end what has to be decided is a question of fact. Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality and too rigidly applied. The court must be careful to see that the principles laid down are never so narrowly interpreted as to prevent a judge of fact from doing justice between the parties. So to use them would be to misuse them...The quantum of damages being a question of fact for the trial Judge the sole question for determination in this appeal is not whether he followed any particular rules or the orthodox method in computing the damage claimed by the plaintiff, but whether the damages awarded are “such as may fairly and reasonable be considered as a rising according to the usual course of things, from the breach of the contract itself.” The plaintiff is not



entitled to be compensated to such an extent as to place him in a better position than that in which he would have found himself had the contract been performed by the defendant.

29. Also in *Kemfro Africa Limited T/A Meru Express service, Gathogo Kanini v A.M.M Lubia & Another* which was cited with approval in *Mutungu v David Muasya Ndeleva* {2015} eKLR as follows;

“ ... It must be satisfied that either the judge, in assessing damages, took into account an irrelevant factor, or left out of account a relevant one, or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.”

“ ... It is trite law that the assessment of general damages is at the discretion of the trial court and the 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 the first instant”

30. However, in the same citation the court went further to state that;

“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 taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehending the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

31. For loss of dependency it is not in doubt that no evidence was lead to prove the deceased earning, though she was alleged to have been a businesswoman selling second hand clothes. Both parties relied on the *Regulation of wages (General), (Amendment) order*, 2018 to base the sum applicable for the multiplicand. The Respondent proposed Kshs 18,319.50/= which was the minimum wage of shop Assistant under the said regulations, while the appellant proposed that a multiplicand of Kshs 7,240/= being wages applicable to general laborers be used.

32. The trial Magistrate did consider both proposition and did find that the deceased by the nature of her job was not doing unskilled manual work using her hands. Her nature of business involved exchange of money and was similar and/or close to work of a shop assistant though she was the business owner. She therefore proceeded to use Kshs 18,319.50/= as the multiplicand.

33. The trial Magistrate finding on this issue cannot be faulted as the deceased was not a General worker, which the *Concise Oxford English Dictionary twelfth Edition* 2011, defined as a laborer undertaking unskilled manual work. The evidence adduced was that she was a businesswoman trading in second hand clothes, though no proof in form of statement of accounts were produced to prove the amount that the deceased was earning. However, in *Jacob Ayiga Maruja & Another v Simeon Obayo* (2005) eKLR the court held:-

“ ... we do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving his earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways ... we reject any contention that only documentary evidence can prove these things.”



34. Regarding documentary proof, the Court of Appeal in *Wambua v Patel & Another* [1986] KLR 336 appreciated that in that case the evidence of the deceased earnings was:

“... a very poor account. Although he appeared to be a man of enterprise and somehow exposed to banks and did business with a state commission, that is, the Kenya Meat Commission, he kept no books of account or any business book. So all his income and expenditure were all stored up in his memory. He has apparently not heard of income tax and never paid any in his 24 years cattle trade. It should require no ingenuity to see that figures he gave as his earnings supplied from his memory bank, may well be exaggerated. The figures he gave as his business earnings and expenditure must be considered with great care. Nevertheless, the court is satisfied that he was in the cattle trade and earned his livelihood from that business. A wrongdoer must take his victim as he finds him and the defendants ought not to be heard to say that the plaintiff should be denied his earnings because he did not develop more sophisticated business methods. Whereas damages for loss of earnings must be established by satisfactory evidence and the evidence should appreciate that, the court should approach the consideration of the plaintiff's evidence with caution and must not allow him to “pluck a figure from the air”, a victim does not lose his remedy in damages merely because its quantification is difficult.”

35. The trial magistrate did use the Minimum wage regulations, in determining the deceased earnings and further could not be faulted for using the earnings of a shop assistant as specified therein to determine the minimum wage applicable to the deceased who was a business lady dealing in second hand clothes. There is thus no error of principle or misapprehending of the evidence shown to enable this court interfere with the same.

### **Disposition**

36. Accordingly, the award that ought to have been made to the Respondents was as hereunder:

- (a) Liability with respect to the accident ; 50: 50
- (b) Pain and Suffering Kshs 20,000.00
- (c) Loss of Expectation of life; (Not awarded by the trial court)
- (c) Loss of dependency Kshs  $18,319.50 \times 12 \times 25 \times \frac{2}{3} = \text{Ksh.}3,663,900/=$
- (d) Special damages -Nil

37. This brings the total to Kshs 1,841,950 after taking into account the 50% contribution. In the premises the appeal succeeds to that extent. The general damages will accrue interest from the date of the judgement of the lower court at court rates.

38. The appellant is partially successful in this appeal and is awarded half costs of this appeal which is assessed at Ksh.150,000/= all inclusive.

39. 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

