



**Wanjiku & another v Wambui & another (Suing as the administrator
of the Estate of the Late Charles Irungu Wambui) (Civil Appeal
419 of 2019) [2023] KEHC 22476 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22476 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL 419 OF 2019
AA VISRAM, J
SEPTEMBER 21, 2023**

BETWEEN

KENNEDY CHEGE WANJIKU 1ST APPELLANT

JOSEPH KARANJA WAHOME 2ND APPELLANT

AND

PENINAH NJERI WAMBUI 1ST RESPONDENT

GRACE MUGURE WAMBUI 2ND RESPONDENT

**SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE CHARLES
IRUNGU WAMBUI**

*(eing an appeal from the entire judgment dated 12th July, 2019 of Hon. B.J
Ofisi (Mrs.) Resident Magistrate in Milimani CMCC Case No. 7085 of 2017)*

JUDGMENT

1. This judgment determines the Appellants' appeal filed on February 23, 2023 vide its Memorandum of Appeal dated July 16, 2019. This appeal relates to the issues of liability and quantum.
2. The Respondents are the representatives of the estate of the Plaintiff in the lower court. They pleaded that their late brother was involved in a road accident that occurred on October 28, 2014. According to the Respondents, the 1st Appellant's driver allegedly drove vehicle number KAW 619D negligently, causing the death of their brother. The Respondents pleaded that the 1st Defendant was vicariously liable for the negligent actions of the 2nd Defendant.
3. After a full hearing, the Magistrate awarded liability at 100% in favour of the Respondents against the Appellants and awarded the following damages together with costs of the suit.



- a. Loss of dependency -Kshs 1,200,000/=
 - b. Loss of expectation Life -Kshs 100,000/=
 - c. Pain and Suffering -Kshs 50,000/=
 - d. Special damages -Kshs 75,900/=
- Total-Kshs 1,425,900/=
4. Aggrieved by the said judgment, the Appellants filed this appeal dated July 16, 2019 on the following grounds:-
 - a. That the Learned Magistrate erred in law and in fact by assessing liability at 100% in favour of the Respondent despite the fact that there was no evidence whatsoever showing the Appellants as being wholly to blame for the accident.
 - b. That the Learned Magistrate erred in law and in fact and misdirected herself by making findings on liability and loss of dependency which were not supported by the evidence on record.
 - c. That the Learned Magistrate erred in law and in fact in failing to consider relevant authorities and submissions both on the issues of liability and quantum filed by the Appellants.
 - d. That the Learned Magistrate erred in law and in fact in failing to take into consideration the award under the *Law Reform Act* while making the award under the *Fatal Accidents Act*.
 - e. That the Learned Magistrate erred in law and in fact in failing to take into account the principle on double enrichment when arriving at the award.
 - f. That the Learned Magistrate erred in law and in fact in failing to take into consideration the imponderables and vicissitudes of life whilst awarding the multiplier of 30 years.
 - g. That the Learned Magistrate erred in law and in fact in awarding a multiplicand of Kshs 10,000/= in the absence of any evidence in support thereof.
 - h. That the Learned Magistrate erred in law and in fact in making an award of loss of dependency in complete disregard of the fact that siblings are not entitled to the said Award under the *Fatal Accidents Act*.
 - i. That the Judgment of the Learned Trial Magistrate is against the law and weight of the evidence on record.
 5. The parties disposed of the appeal by way of written submissions. They filed and served their respective submissions dated July 8, 2022, and October 26, 2022.

Appellant's submissions

6. The Appellants submitted that the lower court had erred by shifting the burden of proof from the Plaintiff to the Defendant. They stated that the absence of the Appellants evidence in court did not absolve the Respondent's case, which had not been done on a balance of probability. They relied on the decision of High court case of *Charles Kawai (Suing as the Administrator of the Estate of the Late Kevin Kioko Charles) v Boniface Mutunga & Another* (2020) eKLR where the court stated as follows:-

“Therefore, as a general rule, the Appellant had the duty of proving the facts constituting negligence on the part of the Respondent even if the Respondent chose to remain silent.”



7. They further relied on the decision of the High Court case of *Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another* (2016) eKLR where the Court stated that:-

“I am of the considered view that uncontroverted evidence must bring out the fault and negligence of a Defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A Plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.”

8. The Appellants contended that the Respondents only evidence in relation to the accident was a Police Abstract, which they stated did not blame the Appellant, but rather, merely confirmed that an accident was reported to the police. Neither did the report state what the outcome of the investigation was. They relied on Charles Kawai (supra), where the court stated as follows:-

“A police abstract is merely evidence that a report of an accident has been made to the police. That document could not therefore be the basis of finding liability on the part of the Respondents.”

9. Further, on the issue of quantum, they stated that the court had erred in its interpretation of Section 4 of the *Fatal Accidents Act*, which excludes brothers and sisters from claiming dependency. They stated that the various decisions of the court clearly show that brothers and sisters are not dependents for the purpose of the statute. In the present matter, the Respondent had clearly stated that she was the sister of the deceased, and therefore could not benefit under the Act.
10. Further to the above, the Appellant stated that loss of dependency was a fact to be proved in the lower court, and this had not been done.

Respondent’s submissions

11. The Respondents submitted that the lower court had not erred in its decision. As regards the issue of dependency, they relied on Section 29 of the *Law of Succession Act*, which they stated recognizes a sister of a deceased person as a dependent, so long as she was being maintained by the deceased.
12. They submitted that the deceased was not married at the time of his death, his parents had also passed away, and therefore, the only dependants who could benefit from him were his siblings.
13. They relied on the decision of the High Court in *Micheni Haphazard Nyaga & another v Robert Njue & Another* (2013) eKLR.

Analysis and Determination

14. I have reviewed the record in entirety. I have also read the submissions of the parties and I have considered the various grounds of appeal raised by the Appellants. The issues that arise for determination are essentially two:-

- I. Was the lower court correct in its finding on liability?
- II. Did the lower court arrive at the appropriate award of damages?



15. 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 Versus 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.”

16. Looking at the record before me, there are two contrasting accounts of events. The question I must answer is, which one is more probable? Looking at the record, I am immediately struck by the lack of evidence available.
17. PW 1 testified that “I was called and informed by my friend, Salim, that my brother, the deceased had been involved in an accident”. Further, during cross examination, she testified “I did not witness the accident. I do not know what happened prior to the accident” and finally, “I found the deceased’s body at the scene of the accident”. That was essentially the totality of her testimony. No witness who actually saw the accident take place was presented to testify on behalf of the deceased.
18. The second witness for the Plaintiff did not add much value either. PW2, a police officer testified “I do not know how the accident occurred. I am not the investigating officer hence I cannot tell who’s to blame.” And further, “the investigating officer may have done a conclusive report. He is in a better position to explain the progress of the matter to its logical conclusion”.
19. The Defendants in the lower court did not call any witness whatsoever. Accordingly, the Magistrate reached this conclusion in the following terms: “it is not in dispute that an accident occurred and that the deceased’s succumbed due to the injuries he sustained. I find that the Plaintiff’s evidence is uncontroverted...the Defendants are therefore held 100% liable for the accident”
20. To my mind, this is where the Magistrate went wrong. He based his decision primarily on the fact that the Plaintiff’s evidence was uncontroverted rather than applying his mind to whether or not the Plaintiff had proved its case on the balance of probability as is required, see *Charles Kawai* (supra).
21. Further, I ask myself what exactly was the uncontroverted evidence before the Magistrate? Based on the record, the only “uncontroverted evidence” before him was that PW1 testified that she had been “called” and told that her brother was involved in an accident; further, and based on PW2’s evidence, that an accident had occurred. Neither of the witnesses’ testimony spoke to the cause of the accident. I do not think that the test as set out above in *Kenya Power and Lighting Company Limited* (supra) has been satisfied. The evidence was simply insufficient to reach a conclusion that the Appellants had actually caused the accident.
22. Further to the above, I do not think that the Magistrate ought to have equated the fact of the death with proof of negligence and a finding of liability. He ought to have applied the relevant test and principles applicable to a finding of negligence before reaching a conclusion that the Appellants were to blame on a balance of probability.



23. This court has often said that negligence must be proven. It is more than a mere word; it is a legal concept which refers to a failure to exercise reasonable care that results in harm, or death to the victim. In order to succeed, the Plaintiff ought to have proved (by way of evidence in the lower court) that there was a duty (on the part of the Appellants), that the Appellants breached that duty; and in doing so, caused the death of the deceased. In the present matter, no evidence whatsoever has been placed before this court to show that the Appellants actually caused the death of the deceased. Causation is critical and cannot simply be wished away.
24. In the end, I do not think that the Respondents discharged the burden of proof to establish their case on a balance of probability in the lower court. Having found for Appellants, the second issue is accordingly moot.
25. The orders of this court are as follows:-
- I. The Trial Court’s judgment dated July 12, 2019, of Hon BJ Ofisi (Mrs) Resident Magistrate in Milimani CMCC Case No 7085 of 2017) is hereby set aside in its entirety and the Respondents’ suit is dismissed with costs.
 - II. The appeal is allowed and the judgment and decree in CMCC No 7085 of 2017 is set aside.
 - III. Costs of the suit in the lower court and costs of the appeal are awarded to the Appellants.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 21ST DAY OF SEPTEMBER 2023

ALEEM VISRAM

JUDGE

In the presence of;

.....For the Appellant

.....For the Respondent

