



**Thuo v Mwangi (Civil Appeal E010 of 2023)
[2024] KEHC 13117 (KLR) (Civ) (15 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13117 (KLR)

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

CIVIL

CIVIL APPEAL E010 OF 2023

AM MUTETI, J

OCTOBER 15, 2024

BETWEEN

HARRISON THUO APPELLANT

AND

CAROLINE WAITHERERO MWANGI RESPONDENT

(Being an appeal from the judgment delivered on 15th December, 2022 by Honourable Grace Omodho, Principal Magistrate at the Chief Magistrate's Court, Nairobi in CMCC NO. 8592 of 2019)

JUDGMENT

Introduction

1. The appellants in these matters were sued by the respondent vide a plaint dated 21st November 2019 which was amended on 17th September 2020.
2. The matter went to full hearing and judgement was entered against the appellants in the sum of Kshs 4,994, 092.00 Plus cost and interests.
3. Aggrieved by the said decision the appellants have moved the Court to set aside the judgment in its entirety.
4. The facts giving rise to the matter were that on 2nd December 2017 the driver of motor vehicle registration number KBU 770S Isuzu Mini Bus parked the motor vehicle at the Globe bus stop along Thika Road and the deceased George Mwangi Kiguoya was tasked to repair the same.
5. The motor vehicle ran over the deceased as he was undertaking the repairs thereby inflicting fatal injuries on him.



6. As a result the respondent filed the suit giving rise to this appeal. The appellants were held 100 % liable for the accident.

Analysis

7. The appellants have set out the following grounds of appeal in their memorandum of appeal:-
 1. That the Learned Magistrate erred in law and in fact in making a finding that the 2nd Appellant was 100% liable for the material accident when no evidence was tendered by the Respondent to support her case on liability or the finding by the trial court.
 2. That the Learned Magistrate erred in law and in fact in dismissing the evidence by the defence through the 2nd Appellant that the deceased was liable for his safety while undertaking the repairs on the subject motor vehicle.
 3. That the Learned Magistrate erred in law and in fact in relying on the conclusion by the police investigations stated in the police abstract report produced by the Appellant in determining the issue of liability yet the investigator was not called as a witness to support the finding.
 4. That the Learned Magistrate erred in law and in fact in failing to determine the issue of liability on the basis of the Appellant's pleadings and evidence and therefore reached a wrong conclusion that the Appellant had discharged the burden of proof.
 5. That the Learned Magistrate erred in law and in fact in applying the minimum wage of Kshs 19,688.30 as at year 2022 instead of Kshs 16,724.00 as at 2017 when the material accident occurred and therefore reached a wrong estimate of general damages for loss of dependency.
 6. That the Learned Magistrate erred in law and in fact in applying the a multiplier of 30 years which was excessive in the circumstances of the case and therefore reached a wrong estimate of general damages for loss of dependency.
 7. That the Learned Magistrate erred in law and in fact in making an award of Kshs 100,000/- in general damages for pain and suffering which was award was excessive in the circumstances of the case.
 8. That the Learned Magistrate erred in law and in fact in failing to give due consideration to the Appellant's submissions in the determination of the issue of liability and quantum of damages and therefore reached a wrong finding that the Respondent had proved her case and was entitled to an award of Kshs 4,994,092.00 plus costs of the suit and interests.
8. The issues for determinations in the appeal are:-
 - i. Whether the learned Honourable Magistrate was correct in finding that the appellants were to blame for the occurrence of the accident.
 - ii. What quantum of damages was the respondent entitled to in the circumstances of this case.

Duty Of The 1st Appellate Courts

9. The duty of this Court as a first appellate Court is to review and reevaluate the evidence tendered before the Lower Court and draw independent conclusions therefrom. However, the Court in doing so must remember that it did not have the advantage of hearing the witnesses unlike the magistrate. See *Selle & another v Associated Motor Boat Co. Ltd* 1968 Er 424.



10. It is upon the evaluation of the evidence that this Court will determine whether the finding of 100 % liability was supported by the evidence tendered by the Respondent.
11. The respondent testified in this matter in support of her case together with one Simon Kag Kimani PW2. The two did not witness the accident but simply testified that they were informed that the deceased was run over by a motor vehicle he was repairing.
12. The appellants called Moses Muriuki Njeru who confirmed in his evidence that they had parked the vehicle and George the deceased was engaged in repairing the same.
13. He says that he was called back to the vehicle by the conductor and it was then that he found the deceased trapped under the vehicle.
14. It was the witness Moses Muriuki who was the driver but he denied running over the deceased but only helped to move the vehicle to have the deceased removed from underneath it.
15. The respondent in her plaint particularized various particulars of negligence but from a reading of the evidence recorded they could not establish the particulars.
16. The witnesses were all not at the scene when the accident occurred thus none of them could narrate the circumstance under which the deceased got trapped.
17. It is not denied by the appellant witness that he was the driver and it is him who parked the vehicle for repairs
18. The witness does not deny that the deceased was working on the vehicle beneath it.
19. It is the responsibility of a driver to ensure that his vehicle that he has control of is well secured before he can allow anyone to go underneath it.
20. It is not simply enough for the driver to say “ I blame the mechanic who had placed jerk on motor vehicle.”
21. The witness was very limited in his narration of events. Simply put he was economical with the truth.
22. The respondent pleaded the doctrine of res ipsa Loquitur and properly so in my view.
23. The undeniable facts in the matter are that the deceased was trapped by the subject motor vehicle while underneath it working on the same with the full knowledge of the driver.
24. He was therefore not a trespasser.
25. The driver and the owner of the motor vehicle owed him a duty of care to ensure that the vehicle remained stationary through out the period he remained under it.
26. Any movement of the vehicle with the deceased beneath it would be a matter of gross negligence on the part of the driver and owner of the motor vehicle.
27. In the circumstances of this case the appellant should have known that any movement of the motor vehicle while the deceased remained under it would most likely lead to harming the deceased and actually have the potential of causing death. The risk of harm was foreseeable and ought to have been mitigated by the driver.



28. Lord Wright in *North Western Utilities Ltd v London Guarantee and Accident Co. Ltd* 1936 AC 108 at 126 stated:-
- “the degree of care which that duty involves must be proportioned to the degree of risk involved if the duty of care should not be fulfilled.”
29. A mechanic once he is assured by the driver of the motor vehicle that the same is securely parked would have no hesitation to go underneath it. The driver of the motor vehicle knew or ought to have that he was exposing the deceased to the risk of grave harm thus he was under duty to ensure that the deceased remained safe while he undertook the repairs.
30. The driver in defense was under duty to demonstrate how he had secured the vehicle from moving. He failed to do so.
31. It is therefore reasonable for this Court to draw the inference or raise a presumption of negligence on the part of the driver and the owner of the motor vehicle who would certainly be held vicariously liable.
32. The Doctrine of *res ipsa loquitur* is an appropriate form of circumstantial evidence enabling a plaintiff in particular cases to establish the defendant’s likely negligence. It does not entail any covert act or form of strict liability.
33. The *Blacks Law Dictionary* the principle is defined as follows:-
- “Latin: “the thing speaks for itself” Torts. The doctrine providing that in some circumstances, the mere fact of an accident’s occurrence raises an inference of negligence so as to establish a *prima facie* case. Often shortened to *res ipsa*.”
34. The appellants argue that the respondent did not discharge the burden of proof on a balance of probabilities. I do not agree.
35. It is common sense that a person lying underneath a vehicle has no way of controlling the motor vehicle above him. Any movement of the vehicle must therefore be blamed on the driver who had the control of the same.
36. In my considered view, the circumstances of this case point irresistibly to the appellant as being responsible for the accident.
37. By asking the mechanic to go under the vehicle the appellants assumed the duty of care to ensure that he remained safe below their motor vehicle.
38. The appellants have urged this Court to find that it was the deceased’s responsibility to secure the vehicle while he worked on it.
39. I do not think that a mechanic busy working underneath a motor vehicle would be in a position to secure the motor vehicle by himself. The appellants in my view are desperately trying to run away from their responsibility.
40. The deceased work was simply to repair the vehicle and the driver was responsible for ensuring that the vehicle remained stationary.
41. I therefore decline to set aside the magistrate’s finding of 100% liability as against the appellants.
42. The appeal on liability fails.



Quantum

43. On quantum this Court finds that the evidence presented by the respondent on the earnings of the deceased was wanting. The Court in place thereof adopted the minimum wage for a mechanic since it was an agreed fact the deceased was a mechanic.
44. The evidence of age was also tendered. The Court was in my view right in adopting the age at which the deceased would have retired.
45. I do agree with the appellants that the question of multiplicand ought to have been approached with some measure of caution.
46. The relevant minimum wage would have been the wage payable to the deceased as a mechanic at the time of the accident.
47. The issue of assessment of damages being a matter for the exercise of judicial discretion, this court is bound to interfere with the finding of the learned Honourable Magistrate only where it is clear that the court took into account irrelevant consideration. This Court is guided by the case of *Kanga v Manyoka* [1961] EA 703 and *Paul Kipsang & another v Titus Osule Osore* [2013] eKLR.
48. The irrelevant consideration in this matter being the adoption of a minimum wage applicable after the accident had already happened.
49. I am persuaded for that reason alone to interfere with the sum awarded by magistrate in damages.
50. The court adopts the multiplicand applicable at the time of the accident being Kshs 16,724.75 as opposed to Kshs 19,688.30. The figure of Kshs 16, 724.75 was the relevant minimum wage applicable to the deceased at the time of the accident.
51. The award under the loss of dependency should therefore be $16,724.75 \times 30 \times 12 \times \frac{2}{3} = 4,013,940$.
52. I find all other sums awarded by the Court to be within reasonable range considering the inflation rate in the country.
53. I therefore decline to interfere with any of them.

Determination

54. In the end the orders of this Court are: -
 - a. The appeal on liability is dismissed.
 - b. The appeal on quantum is allowed and the figure of Kshs 4,725, 192 is hereby set aside and substituted therefore with a figure of Kshs 4,013,940.
 - c. Special damages upheld.
 - d. Each party shall bear their own cost of this appeal.
55. It is so ordered.

DATED, SIGNED AND DELIVERED IN VIRTUAL COURT AT NAIROBI THIS 15TH DAY OF OCTOBER 2024.

A. M. MUTETI

JUDGE



In the presence of:

Kiptoo: Court Assistant

Kimondo Gachoka Absent for the Appellant

Mwaura holding brief Ms Kimathi for the Respondent

