



**Chezlut Freight Limited v Misi & another (Suing as the Administrators of the Estate of Patrick Mutie Misi (Deceased)) (Civil Appeal E386 of 2020) [2024] KEHC 14270 (KLR) (Civ) (15 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14270 (KLR)

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

**CIVIL**

**CIVIL APPEAL E386 OF 2020**

**RC RUTTO, J**

**NOVEMBER 15, 2024**

**BETWEEN**

**CHEZLUT FREIGHT LIMITED ..... APPELLANT**

**AND**

**MUTHOKA MISI ..... 1<sup>ST</sup> RESPONDENT**

**CHRISTINE WAVINYA NTHUKU ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS THE ADMINISTRATORS OF THE ESTATE OF PATRICK MUTIE MISI (DECEASED)**

*(Being an appeal from the Judgment of D. W. Mburu (Senior Principal Magistrate) in Nairobi CMCC No. 11427 of 2018, delivered on 4th December, 2020)*

**JUDGMENT**

1. This is an appeal on liability and quantum arising from the judgment and decree in Nairobi Senior Principal Magistrate's Civil Suit No. 11427 of 2018. In the said suit, the Respondent sued the Appellant in his capacity as the registered owner of the motor vehicle registration number KBP 774J/ZD 0335 for general and special damages arising from a fatal road traffic accident.
2. The brief facts of the case are that on 27<sup>th</sup> March 2018 Motor vehicle Reg. No. KBP 774J/ZD 0335 was being negligently driven that it veered off the road and knocked down the deceased a pedestrian who was lawfully walking along Masai Road. Upon hearing the evidence and submission of parties, the trial court found the Appellant 100% liable for the accident. The trial Court also awarded general damages and special damages as follows;
  - a. Pain and suffering Kshs 50,000/-



- b. Loss of expectation of life Kshs 100,000/-
- c. Loss of dependency Kshs 1,901,388.80
- d. Special Damages Kshs 274,879.00

Total Kshs. 2, 326, 267. 80/= costs of the suit and interest at court rates.

3. The appellant being aggrieved by the judgment lodged this appeal setting out the following grounds which I hereby produce in verbatim and seriatim:
- i. The Learned Magistrate erred in both law and fact in failing to weigh and assess the totality of the evidence adduced before him thereby coming to a wrong conclusion on the same.
  - ii. The findings of the Learned Magistrate were based on a misapprehension of the facts and circumstances of the case and the evidence adduced by the Defence.
  - iii. The Learned Trial Magistrate erred in law and fact in failing to appreciate and uphold the credibility of the defence witness.
  - iv. The Learned Trial Magistrate erred in law and fact in holding that the Plaintiffs had proved their case on liability at 100% when there was no such proof.
  - v. The Learned Trial Magistrate erred in Law and in fact in holding that the Plaintiffs had proved their case on special damages when the same were not specifically pleaded and strictly proved.
  - vi. The Learned Magistrate erred in Law and fact in awarding general damages which was excessive and erroneous in the circumstances of this case.
  - vii. The Learned Trial Magistrate erred in Law and fact in awarding damages without any evidence adduced by the Plaintiffs in support thereof.
  - viii. The findings of the Learned trial Magistrate go against the weight and totality of evidence adduced in by both parties thereby coming to wrong findings on both law and fact.
4. This appeal was canvassed by way of written submissions. The Appellant's submissions are dated 3<sup>rd</sup> June, 2024 while the Respondent's submissions are dated 20th May 2024.

### **The Appellants' submissions**

- 5. The appellant summed up its grounds of appeal to two issues liability and quantum.
- 6. The Appellant urged that it was not liable but should this court find it liable then liability should be apportioned equally. In support of this position, the Appellant made reference to *Welch v Standard Bank Limited* [1970] EA 115 and *Lakhamshi v Attorney General* [1971] EA.
- 7. The Appellant faults the prima facie reasoning of the court in arriving at its finding on liability. He terms it erroneous particularly the trial court's finding that DW1 was an interested party who was likely to give self-serving testimony to avoid blame. It was their submission that DW1 had every right to testify as to the facts which were within his knowledge and that during cross examination, it was not suggested he was lying or that his testimony was self-serving.
- 8. The Appellant submitted that under Section 107 of the *Evidence Act* the onus to prove the case against the Appellant was on the Respondent. He submitted that both parties presented differing accounts of how the accident occurred, and that PW3, the police officer, did not bring any significant value to the Plaintiff's case. It was their submission that the Respondent relied solely on the fact that DW1 was



facing traffic offence charges as evidence of negligence; however, this did not shift the burden of proof to the Appellant.

9. The Appellant cited *Embu Public Road Services Ltd v Riimi* [1968] EA 22 and *Postal Corporation of Kenya & Another v Dickson Munayi* [2014] eKLR to emphasize that it presented sufficient evidence to rebut the Respondent's claim.
10. On the issue of quantum, the Appellant submitted that the Respondent did not provide any evidence concerning the deceased's income, level of education, training, or qualifications in relation to the loss of dependency. They fault the trial court for using the multiplicand of Kshs 13,980.80, and argued that the applicable amount should have been Kshs 6,736.30, since the deceased was an unskilled worker. They suggested a multiplier of 15 years, taking into account the accelerated income and the vicissitudes of life.
11. The Appellant further asserted that the trial court failed to recognize that there was no evidence to support and substantiate the classification of the deceased as a general worker. Additionally, that the court did not make reference to the relevant gazette notice for the sum applied nor did it consider the prevailing wage guidelines for unskilled employees at the time in question.
12. The Appellant also argued that the special damages awarded were not specifically pleaded and therefore, were not proved with the requisite exactitude, as the Respondent's evidence indicated expenditures amounting to approximately Kshs 200,000.
13. The appellant urged this court to allow the appeal with costs as prayed.

### **Respondent's submissions**

14. The Respondent submitted on three key issues namely; Whether the trial Learned Magistrate(i) applied the correct principles of law and available facts in finding the Appellant 100% liable (2) applied the correct principles of law and available facts in assessment on damages payable to the Respondents and (3) determination on the amount payable to the Respondent was inordinately high as to present an entirely erroneous estimate of compensation to which the Respondent was entitled.
15. The Respondent submitted that they complied with Section 107 of the *Evidence Act* by producing documentation to support their case. Additionally, they called two other witnesses, including a police officer and an eyewitness, who testified in support of the claim. The Respondent relied on the case of *William Kabogo Gitau v. George Thuo & 2 Others* [2010] eKLR and *Miller v. Minister of Pensions* [1947] ALL ER 372 to affirm that the burden of proof in civil cases, is on a balance of probability, which threshold was satisfied.
16. On the issue of general damages, the Respondent submitted that the methodology adopted for calculating loss of dependency was not in contention. They argued that the trial court did not err in adopting a multiplier of 17 years, noting that the Appellant had proposed a multiplier of 10 years, while the Respondent proposed a multiplier of 22 years. The multiplier adopted by the court was within the acceptable range and therefore could not be deemed erroneous. The Respondent relied on the case of *Innocent Keti Makaya Denge v. Peter Kipkore Cheserek & Another* [2015] Civil Appeal No. 96 of 2016.
17. The Respondent submitted that the compensation awarded to the estate of the deceased, as determined by the trial court, was fair and reasonable. They relied on the cases of *Jacob Ayiga Maruja & Another v. Simeon Obayo* [2005] eKLR and *Mwita Nyamohanga & Another v. Mary Robi Moherai Suing on behalf of the Estate of Joseph Tagare Mwita (Deceased) & Another* [2015]. They asserted that the



proposed amount of Kshs 30,000 by the Respondent was based on the analysis in the aforementioned authorities, while the court applied the minimum general wage of Kshs 13,980.80.

18. It was their submission that special damages were specifically pleaded in the plaint and proven by receipts. The Respondent thus urged the court to uphold the trial court's decision and dismiss the appeal with costs.

### **Analysis and Determination**

19. Section 78(2) of *Civil procedure Act*, provides that the appellate court shall have the same powers and shall perform nearly the same duties as are conferred and imposed by the Act on courts of original jurisdiction in respect of suits instituted herein. Therefore, my duty as the 1st appellate court is to re-evaluate and re-examine the evidence of the trial court and come to my own findings and conclusions. This principle was espoused by the Court of Appeal in *Gitobu Imanyara & 2 others v Attorney General (2016) eKLR* and in *Selle & Anor -Vs- Associate Motor Boat Co. Ltd 1968 EA 123*.
20. Having read the record of appeal and parties' submissions this court discerns the following issues for determination :
- a. Whether the trial court erred in determining that the Respondent was 100% liable for the claim;
  - b. Whether the award on general damages was excessively high;
  - c. Whether special damages were pleaded and strictly proven.

### **Whether the trial court erred in determining that the Respondent was 100% liable for the claim**

21. As regard the determination of liability by an appellate court, the Court of Appeal in *Ephantus Mwangi & Another v Duncan Mwangi, Civil Appeal No 77 of 1982* [1982-1988] 1KAR 278 stated as follows:

“A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

22. The burden of proof as per Section 107 (1), 109 and 112 of the *Evidence Act*, Cap 80 Laws of Kenya is outlines as;

“Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.”

23. The scope and extent of the fundamental legal principles on who is to blame for negligence are settled. In the cases of *Nandwa v Kenya Kazi Ltd* [1988] KLR 488 and *Regina Wangechi v Eldoret Express Co. Ltd* [2008] eKLR the Court held that:

“In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. However, if in the course of the trial there is proved a set of facts which raises a prima facie case inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in the plaintiff's favour unless the defendant provides some answer adequate to displace that inference.”



24. From the Record of Appeal the Respondent's witness PW1 testified that he witnessed the accident. His evidence was that the deceased was walking off the road when he was hit from behind by the driver of the Appellant. According to him, the driver was to blame. He also stated that the Appellant was an electrician working at a construction company. The evidence of PW1, on the accident, was corroborated by that of PW2 who stated that the police file indicated that the motor vehicle knocked the pedestrian who was walking off the road. Further that the driver of the motor vehicle was charged with a traffic offence in Traffic case no 2879 of 2018 which was still pending in court.
25. On the other hand, the Appellant's witness stated that, the pedestrian was walking off the road, when he slid and fell down under the track, he applied the emergency breaks and the rear wheels of the motor vehicle ran over the deceased. On cross examination he confirmed not seeing the deceased before the accident, that he only saw him after the accident when people called him out to stop and he was charged with the criminal offence of causing death by careless driving.
26. A total evaluation of the above evidence shows that it is not disputed that the deceased was walking off the road on the left side when he was hit by the Appellant's vehicle. This was the testimony of PW1 the only independent witness which was corroborated by PW2 the police officer who, while relying on the police file, confirmed that the deceased was off the road. Further, in the Appellant's driver's own testimony, he confirmed he did not see the deceased before the accident and only noticed him, after running over him, when people shouted at him to stop.
27. In *Masembe v Sugar Corporation and Another* [2002] 2 EA 434, it was held that:

“When a man drives a motor car along the road, he is bound to anticipate that there may be things and people or animals in the way at any moment, and he is bound not to go faster than will permit his car at any time to avoid anything he sees after he has seen it... 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. He takes reasonable steps to avoid hitting or colliding with the object.”
28. Guided by the above case, this court notes that the Appellant driver did not show any steps that a reasonable person could have done in the circumstance to avoid the accident. In his own words he stated that the deceased was walking off the road, he did not see him before the accident and only became aware when people shouted to stop him. From this, it is evident that the Appellant's driver was not attentive and did not pay regard to other road users.
29. This court also notes that the Appellant did not present any evidence before the trial court to demonstrate that the deceased should bear any responsibility for the accident or that he took any reasonable steps to avert the accident. Moreover, this court has not been shown any indication that the trial magistrate erred in apportioning liability or that the finding on liability was based on insufficient evidence or an incorrect principle. The trial court upon evaluating the evidence held that DW1 owed the deceased and other road users a duty of care. The fact that DW1 was unable to brake, swerve, slow and/or stop to avoid hitting the deceased clearly suggest that he was either over speeding or simply negligent.
30. In the circumstances therefore, I find that the Plaintiff in the lower court successfully proved her case on a balance of probability and there is no reason to disturb the trial court's finding on liability.



### **Whether the award on general damages was excessively high.**

31. In the present suit, the issue of damages arises on the calculation of loss of dependency and not the methodology adopted by the trial court. The Appellant's submission is that no evidence was provided concerning the deceased's income, level of education, training, or qualifications in relation to the loss of dependency. He faults the use of the multiplicand of Kshs 13,980.80 and proposes a sum of Kshs 6,736.30 which is the Gazetted minimum wage for unskilled employees and a multiplier of 15 years, taking into account the accelerated income and the vicissitudes of life.
32. I now turn to consider whether the multiplicand of Kshs 13,980.80 and the multiplier of 17 years were appropriate. I note that the trial court justified the use of Kshs 13,980.80 on the ground that the deceased was a general worker. The evidence of PW1 was that the deceased was an electrician and worked at a construction company. It was also the evidence of PW3 that the deceased was a supervisor at a construction company earning kshs.30,000 per month. In adopting the multiplicand, the trial court while making reference to the case of *Wambua v Patel & Another* [1980] eKLR held that a person's professional earnings need not be proven by documents only. The court then proceeded to find that the deceased was engaged in some kind of income generating activity and hence adopted the minimum wage of a general worker of kshs 13,980.80.
33. This court notes that the appellant faults the trial court for not referencing the appropriate gazette notice for the sum applied nor did it consider the prevailing wage guidelines for unskilled employees at the time in question and proceeded to attach Gazette notice dated 19<sup>th</sup> December 2018. This court notes that the Gazette notice referred to by the Appellant is titled *The Regulation of Wages (Agricultural Industry) Amendment Order, 2018*. It is meant for the skilled and semi-skilled employees in the agricultural sector and hence not applicable herein.
34. This court is guided by the Court of Appeal in *Bashir Ahmed Butt vs. Uwais Ahmed Khan* (1982-88) KAR as follows:

“ An appellate court will not disturb an award for general 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...”
35. In *Roger Dainty v Mwinyi Omar Haji & Another* MSA CA Civil Appeal No. 59 of 2004 [2004] eKLR, the Court to Appeal observed that;

“To ascertain the reasonable multiplier or multiplicand in each case, the court would have to consider such relevant factors as the income or prospective income of the deceased, the kind of work the deceased was engaged in, the prospects of promotion and his expectation of working life.”
36. In *Marko Mwenda vs. Bernard Mugambi & Another* Nairobi HCCC No. 2343 of 1993 held that:

“In adopting a multiplier the Court has regard to such personal circumstances of both the deceased and the dependants as age, expectations of earning life, expected length of dependency and vicissitudes of life. The capital sum arrived at by applying the multiplicand to the multiplier is then discounted to allow for the fact of receipt in a lump sum at once rather than periodical payments throughout the expected period of dependency. The object of the entire exercise is to give the dependants such an award as would when wisely invested



be able to compensate the dependants for the financial loss suffered as a result of the death of the deceased...The multiplier approach is just a method of assessing damages and not a principle of law or dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the ages of the dependants, the net income of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are unknown or are knowable without undue speculation. Where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a court of justice should never do. Such sacrifice would have to be made if the multiplier approach was insisted upon in this case.”

37. In this instance therefore, and being guided by the above decisions I do find that the trial court was well guided in arriving at its decision. As for the multiplier of 17 years, the Appellant has not provided substantive reasons to justify a reduction in the number of years. I see no reason to interfere with the trial court’s determination on this issue.

### **Whether special damages were pleaded and proved**

38. It is trite law that special damages must be specifically pleaded and strictly proved, before they can be awarded by the court. See the decision of the Court of Appeal in Hahn V. Singh, Civil Appeal No. 42 Of 1983 [1985] KLR 716, where it was held: “Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”
39. In this instance the Respondent pleaded Special damages of kshs. 274,879/= and from the record numerous receipts to support this claim were supplied. I have carefully perused and evaluated the evidence presented in support of special damages by the Respondent. I find that, the trial magistrate cannot be faulted for awarding the said sum of Kshs. 274,879/= as this is what was specifically pleaded and proved through the receipts produced before the court.
40. The upshot of the above is that the appeal is dismissed with costs

Orders accordingly.

**RHODA RUTTO**

**JUDGE**

**DELIVERED, DATED AND SIGNED THIS 15<sup>TH</sup> DAY OF NOVEMBER 2024**

For Appellants:

For Respondent:

Court Assistant:

