



Mairitie v Mwanzia & another (Suing as legal representatives of the Estate of James Mutuku Mwanzia - Deceased) (Civil Case E196 of 2023) [2024] KEHC 13984 (KLR) (11 November 2024) (Judgment)

Neutral citation: [2024] KEHC 13984 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL CASE E196 OF 2023
FR OLEL, J
NOVEMBER 11, 2024**

BETWEEN

DOUGLAS MUNENE MAIRITIE APPELLANT

AND

PAUL NYAMAI MWANZIA 1ST RESPONDENT

ELIZABETH MBITHE NGUMBAU 2ND RESPONDENT

SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF JAMES MUTUKU MWANZIA - DECEASED

(BEING AN APPEAL FROM THE JUDGMENT OF THE HONOURABLE S.KANDIE (RM) DELIVERED ON 28TH July 2023 IN MAVOKO CMCC NO. E17 OF 2022)

JUDGMENT

A. Introduction

1. The Appellant herein was the Defendant in the primary suit, where he had been sued by the respondents, who were claiming special damages of Kshs.87,550/=, general damages for occasioning an accident that fatally injured the deceased, plus costs and interest.
2. The Respondents vide their amended plaint averred that this cause of action arose on or about 27.04.2019 when the deceased, who was the 1st respondent's husband, was lawfully riding his motorcycle registration number KMDY 396V (hereinafter referred to as the suit motorcycle) along Nairobi- Mombasa road when at Makuti area, the appellant's motor vehicle registration number KCQ 292 H (herein referred to as the suit motor vehicle) was managed and/or controlled so carelessly and negligently by the appellant, his servant, agent and/or employee that, they allowed it to lose control and ram into the suit motorcycle, and as a direct result thereof the deceased sustained fatal injuries.



3. The appellant upon service, filed his statement of defence denying all the contents pleaded in the amended plaint and in the alternative averred that if the accident did occur, then the same was caused solely and/or significantly contributed to by the negligence of the deceased, who therefore had to share blame for the said accident. He urged the court to dismiss the claim with costs.

B. Evidence

4. The 1st Respondent was the only witness, who testified in support of her case, while the Appellant called two witnesses in defence. PW1 Elizabeth Mbithe adopted her witness statement dated 13.01.2022, where she reiterated the averments made in the plaint as to how the accident occurred. At the time of, his death, the deceased was aged 27 years and was a motorcycle rider earning about Kshs.30,000/= monthly, which he used to support his family, consisting the respondent, her two children, and the deceased brother.
5. She blamed the Appellant for being vicariously liable for the accident which occurred as his employee and/or driver was negligent while driving and as a result caused the accident resulting in her husband suffering fatal injuries. She thus prayed for compensation. The 1st respondent also produced into evidence all the documents filed in her list of documents as exhibits to support her case. Upon cross-examination, she stated that she did not witness the accident, did not file receipts to prove special damages and the police abstract had not blamed the driver of the suit motor vehicle for causing the said accident.
6. DW1 Michael Wanjohi relied on his witness statement, where he confirmed that he was an experienced driver. On the material date, he was driving the suit motor vehicle along Mombasa road and was from Nairobi heading to Simba cement at a moderate speed of about 20-30km/hr as there was very heavy traffic. Suddenly he saw a hearse coming from the opposite direction, but it was being driven off the road. As it approached, he heard a bang and when he looked in his side mirror he realized that the suit motorcycle had rammed into the suit motor vehicle.
7. He stopped to check what had happened and found out that the deceased was overtaking from the left and when he saw the hearse approach, he tried to join back on the tarmac road. Unfortunately, the road edge was broken and due to its high speed, he hit the edge and was tossed under the suit motor vehicle. The police came and later he recorded his statement explaining how the accident occurred. He subsequently was not charged with any traffic offense.
8. Upon cross-examination, DW1 confirmed that indeed an accident did occur but he was not to blame for the same. He blamed the deceased as he was overlapping on the wrong side, and when he attempted to come back on the road, to avoid the oncoming ambulance, he lost balance, hit the pavement, and fell under the suit motor vehicle.
9. DW2 Edwin Njagi Njiru testified that on the material day, he was aboard the suit motor vehicle driven by the DW1. He adopted his recorded statement, where he reiterated the evidence as narrated by DW1. Upon cross-examination, he confirmed that the accident occurred, as a result of the deceased wrongly overtaking on the left side. When he saw the oncoming ambulance he tried coming back on the road and fell under the right tyre.
10. The Trial court considering the evidence adduced, submissions filed, and issued a judgment in favour of the respondent as as follows;
 - a. Liability at 50: 50 as against the Defendant
 - b. Pain and suffering Kshs .20,000/=



- c. Loss of expectation of life Kshs.100,000/=
- d. Special damages Kshs .8000/=
- e. Loss of dependency Kshs 2,504,540
- f. Total Kshs.2,632,450/=
 - Less 50% contribution Kshs.1,316,270
 - Net total Ksh.1,316, 270/=
 - Plus cost and interest of the suit.

C. The Appeal

11. Being dissatisfied by this judgment, the appellant filed his memorandum of appeal on 04.12.2023. The same was premised on the grounds that;
 - a. The learned Trial Magistrate erred in law and in fact by failing to find that the respondents bore the burden of proving their case and that they failed to discharge that duty on a balance of probability.
 - b. The learned Trial Magistrate erred in law and in fact by finding the appellant 50 % liable.
 - c. The learned Trial Magistrate erred in law and in fact by shifting the burden of proof from the respondents to the appellant.
 - d. The learned Trial Magistrate erred in law and in fact by failing to find that the respondents had not discharged their burden to the required standard and thereby dismiss the suit for want of proof.
 - e. The learned Trial Magistrate erred in law and in fact by finding that the plaintiff had proved liability at 50% without any direct evidence or proof.
 - f. The learned Trial Magistrate erred in law and in fact in apportioning equal liability between the deceased rider and the appellant without any legal rationale or basis.
 - g. The learned Trial Magistrate erred in law and in fact by failing to be guided by the doctrine of stare decisis on the issue of liability and burden of proof.
 - h. That the learned Trial Magistrate erred in law and in fact in failing to consider the collective weight of testimonies by the appellant's witnesses at trial pointing to the significant negligence of the respondents.
 - i. That the learned Trial Magistrate erred in law and in fact by misapprehending the facts leading to erroneous determination on both liability and quantum.
 - j. That the learned Trial magistrate erred in law and in fact by failing to consider and sufficiently appreciate the appellant's written submissions filed on 14th July 2023 and the appurtenant cited authorities.
 - k. That the learned Trial Magistrate erred in law and in fact by awarding exorbitant damages in the premises.
 - l. That the learned Trial Magistrate erred in law by adopting a high multiplier and dependency ratio.



- m. That the learned Trial magistrate erred in law and fact in awarding an exorbitant sum of kshs.2,504,540/= under the loss of dependency without giving any reasoning for it or supporting it with a precedent.
12. The Appellant urged this court to find that the appeal had merit and the same be allowed. The Appeal was canvassed by way of written submissions.

D. Submissions

13. The Appellant submitted that the 1st respondent had failed to substantiate her allegations of negligence as pleaded against him. Reliance was placed on sections 107 and 109 of the *Evidence Act*, which called on a party to prove, what he/she alleged. The 1st respondent had not call an eyewitness to clarify the circumstances surrounding the accident and further, the police abstract produced by PW1 did not blame his driver for causing the said accident thus the assertion that he was to blame was not proved. Reliance was placed on the case of Alexander Mwendwa Mwova vs Attorney General [2021] e KLR, James Ithale Akothe vs Abdiwele Ali Abdi & another Alfred Kioko Muteti vs Timothy Miheso & another [2015] eKLR, and Benter Atieno Obonyo vs Anne Nganga & another [2021] eKLR.
14. It was further submitted that the trial court based its judgement on facts that were not pleaded and proceeded to award the respondents exorbitant damages, which he urged this court to reduce. Reliance was made to the case of Francis Mburu v Moses Omuse & 3others [2015]e EKlr, David Ogol Alwar vs Mary Atieno Adwere & another [2021] Eklr, Bon Ton Limited vs Beatrice Kanaga Karega suing as administrators of the estate of Richard Alembi Ochenga (deceased) [2018] eKLR.
15. The Appellant thus urged this court to find that the Appeal filed had merit and prayed that the finding on liability and quantum be set aside, reversed and/or reassessed.
16. The Respondents on the other hand submitted that the trial court was right in apportioning liability as 50:50. Reliance as placed on the cases of Elvis Kiprop Mutai v Bernard Kibera Gachoki [2020] e KLR, Jumaa Mwarua Kaphutsu v Pallet Logistics Limited[2020], the Supreme Court in Carlburg v Wesley Hospital & Nurse Training School (Kansas), Tipper Hauliers Limited v Salim Jalala Mwaita v Mercy Chepngeno Towet & Another [2021] e KLR and Valley Bakery Ltd & another Musyoki[2005].
17. As regards Quantum, the respondent submitted that the Appellant had not shown that the trial magistrate erred by misapprehending the facts or took into account irrelevant considerations and thus arrived at a wrong figure. The trial court had used the right parameters to assess damages and she urged the court not to interfere with the same. Reliance placed on the case of Said Sweilem Gheithan Saanum v Commissioner of lands & 5 others [2015] Board of Governors of Kangubiri Girls High School & another [2014] eKLR and Anerlisa Muigai vs Beatrice Waithera Gitiri & another [2020].

E. Analysis and Determination

18. I have considered this appeal, submissions and the impugned judgment. I have also considered the decisions relied on and perused the trial court's record. This being a first appeal, it is by way of a retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence afresh and draw its own conclusions on it. The court should however bear in mind that it did not see the witnesses as they testified and give due allowance for that. (see *Selle v Associated Motor Boat Co Ltd & Others* [1968] EA 123).



19. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal held:

“This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and 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 conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect”.

20. In *Nkube v Nyamiro* [1983] KLR 403, the same court stated that :

“A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion”.

21. The main issue for determination herein is whether liability was rightly apportioned and secondly whether the quantum awarded was exorbitant as awarded.

Liability

22. The 1st Respondent confirmed that she did not witness the accident occur, but both of the respondent's witnesses confirmed that indeed an accident did occur involving the suit motor vehicle and the suit motorcycle driven by the deceased and as a result, he sustained fatal injuries.

23. DW1, who was the driver of the suit motor vehicle was categorical that the deceased was to blame for the accident. He was driving from Nairobi to Simba Cement and had kept to his left lane at a moderate speed of about 20-30km/hr due to heavy traffic. He saw a hearse/ambulance approach from the opposite direction on the far left, while driving off the road from his lane and suddenly heard a bang. When he looked at his left side mirror, he saw a motorcycle under his vehicle and that made him stop.

24. He then discovered that the deceased had been riding also off the road and overtaking on his left side, when he saw the ambulance approach, he tried to join back onto the tarmac road, but the road edges were broken and due to the motorcyclist high speed, he hit the rough edges and was tossed on the right side of the suit motor vehicle. DW2 also testified that he was a passenger in the suit motor vehicle and confirmed that DW1's version of events was correct. He confirmed that the deceased was crushed by the right tyre, which caused him to suffer fatal injuries.

25. In *Khambi and Another vs. Mahithi 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.”

26. That seems to have been the position in *Isabella Wanjiru Karangu vs. Washington Malele* Civil Appeal No. 50 of 1981 [1983] KLR 142 and *Mahendra M Malde vs. 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.



27. The respondent did indeed prove that her husband died as a result of injuries sustained in a road traffic accident that occurred on 27.04.2019 along the Nairobi- Mombasa road at Makuti Area. DW1 and DW2 versions as to how the accident occurred though uncontroverted, did not fully explain the circumstances as to how the deceased who was off the road, on the left side of the suit motor vehicle, ended up being crushed by the suit motor vehicle right back tyre yet logically, he should have been crushed by the left back tyre.
28. Secondly, DW1's version of events, confirms that he did not see how the accident occurred, but only heard a bang and on checking the left side mirror saw the motorcycle under his motor vehicle. DW1 hypothesis that the deceased hit the road edge and lost control while riding at high speed, cannot be confirmed as he only noticed the presence of the rider after the accident had occurred. He had not noticed him earlier. Therefore, while his explanation is plausible, it does not rule out other extenuating circumstances that could have contributed to the said accident.
29. The court when faced with a set of circumstances that are not fully explained is still duty-bound to decide thereon however difficult the circumstances are. This was appreciated by Madan, J (as he was then) in *Welch Vs Standard Bank Limited (1970) EA 115* where he expressed himself as hereunder;

“When there is no material to generate actual persuasion in the court's mind, still the court cannot un-concernedly refuse to perform its allotted task of reaching a determination. The collision is a fact. Any one of the alternatives mentioned may provide the right answer as to how it happened. The court's sense of impartiality prevents the choosing of the alternatives of individual blame against either driver. It would be just to say, and it is as likely the explanation that both drivers were to blame equally as that only one of them was wholly to blame. Accidents do not happen but they are caused. It is an explanation which offers a solution of impartial practicability.

Every day, proof of collision is held to be sufficient to call on the two defendants to answer. Never do they both escape liability. One or the other is held to blame. They would not escape simply because the court has nothing by which to draw and distinction between them. So, also, if they are both dead and cannot give evidence enabling the court to draw a distinction between them, they must both be held to blame, and equally to blame.....justice must not be denied because the proceedings before the court failed to conform to conventional rules provided, in it judgment, the court is able to discern that which is right owing to it being fair and just in the circumstances, without jeopardizing the vital task of doing justice. Provided there is no transgression of this sacred duty, the court will act justly in coming to a decision even if there is no evidence capable of procreating actual persuasion.....There being nothing to enable the court to draw a distinction between the two drivers, it is consonant with probabilities, and it is not repugnant aesthetically to a logical judicial mind, to hold that both were to blame, and equally to blame. The court does so in this case.

30. In the absence of a proper explanation by both parties as to how the accident occurred, the trial court on a balance of probabilities cannot be faulted for apportioned liability at 50%- 50%.

Quantum

31. The principles upon which the Appellate Court will interfere with an award of damages are set out in the case *Khambi & Another v Mahitu & Another (supra)*. Further, the Court of Appeal in the case



Coast Bus Service Ltd v Sisco E. Muranga Ndanyi & 2 Others Civil Appeal Case No. 192 Of 1992 stated:

“Those principles were well stated by Law, J.A in Bashir Ahmed Butt vs. Uwais Ahmed Khan, By M. Akmal Khan [1982-88] I KAR 1 at pg 5 as follows-

‘An Appellate Court will not disturb an award of 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 ...”

32. On loss of dependency, it was held by the Court of Appeal in *Gerald Mbale Mwea vs. Kariko Kibara & Another Civil Appeal No. 112 of 1995* that the issue of dependency is always a question of fact to be proved by he who asserts. Further I am guided by the observation of the Court of Appeal for East Africa in the case of Chunibhai J Patel and Another vs PF Hayes and Others [1957] EA 748, observed that:

“The court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependent’s, the net earning power of the deceased (i.e. his income less tax) and the proportion of his net income which he would have made available for his dependent’s. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years’ purchase.”

33. Also, in Marko Mwenda vs. Bernard Mugambi & Another Nairobi HCCC No. 2343 of 199 Ringera J (as he was then) held that:

“In adopting a multiplier, the Court has regard to such personal circumstances of both the deceased and the dependents 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 dependents such an award as would when wisely invested be able to compensate the dependents 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 dependents, 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.”

34. In this case, the deceased died at the age of 28 years and worked as a motorcycle rider. Though no evidence was tendered to support his actual earnings, the trial court cannot be faulted for Adopting the minimum wage bill of kshs.12,522.70/= for a general worker in Mavoko area as provided for under the Regulation of wages (General), (Amendment) Order, 2022.
35. The deceased was survived by his wife and children, who depended on him for upkeep. The dependency ratio of 2/3 used was therefore appropriate and I find no reason to interfere with the same.



Finally, the deceased died at 28 years, and the trial court used a multiplier of 25 years. There was no error in the court's discretion to use this said multiplier.

F. Determination

36. Having considered all the grounds raised in this Appeal, I do find that this Appeal has no merit. Accordingly, the Appeal fails and the same is dismissed.
37. Each Party will bear their own cost of this Appeal.
38. It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 11TH DAY OF NOVEMBER, 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 11TH DAY OF NOVEMBER, 2024

In the presence of: -

No appearance for Appellant

No appearance for Respondent

Susan/ Sam Court Assistant

