



**Marete v Gitonga & another (Civil Appeal E182 of 2023)  
[2024] KEHC 14282 (KLR) (11 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14282 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E182 OF 2023  
CJ KENDAGOR, J  
NOVEMBER 11, 2024**

**BETWEEN**

**NICHOLAS KIMATHI MARETE ..... APPELLANT**

**AND**

**EDWARD GITONGA ..... 1<sup>ST</sup> RESPONDENT**

**JANE KAGWIRA KUNGANIA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal arising from the Judgment of the Honourable E.W Ndegwa  
(P.M) delivered on 16th April, 2021 in Githiongo CMCC No. 15 of 2021)*

**JUDGMENT**

**Background**

1. On 22<sup>nd</sup> September, 2020, Geoffrey Bundi (the Deceased) was involved in a road traffic accident along Meru-Nkubu Road. On that day, the deceased was riding his motor cycle when it collided with the Appellant's Motor Vehicle KCF 435 V. He sustained fatal injuries and died hours later while undergoing treatment at Consolata Mission Hospital. The Respondents, who are the legal representatives of the Deceased, blamed the Appellant for the accident. They sued him in Githiongo CMCC E015 of 2021 and seeking General Damages under the [Law Reform Act](#) and [Fatal Accidents Act](#) for pain and suffering, loss of expectation of life, and loss of dependency. They also sought special damages of Kshs.91, 650/=.
2. The Appellant filed a Defence, denying negligence and liability for the accident. Instead, he asserted that the deceased solely and/or substantially contributed to the accident. The matter went to hearing, and the Respondents called three witnesses. The Appellant did not call any witnesses despite being given several opportunities to.



3. The Court entered judgment for the Respondents against the Appellant on 4<sup>th</sup> October, 2023 in the following terms: Liability at 100% in favor of the Respondents against the Appellant. It also granted the Respondents 50,000/= for pain and suffering and 100,000/= for loss of expectation of life. It also gave them 2,000,000/= for loss of Dependency and 1,700 for special damages. The total award of the damages was Kshs.2,151,700/=.
4. The Appellants were unsatisfied with the Judgment and appealed to this Court vide a Memorandum of Appeal dated 20<sup>th</sup> October, 2023. He listed 6 grounds of appeal which are as follows;
  - i. That the Learned Trial Magistrate's decision was unjust, against the weight and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.
  - ii. That the Learned Trial Magistrate erred in law and misdirected himself when he failed to consider the provisions set out in The Insurance (Motor Vehicle Third Party Risks) (Amendment) Act, 2013, CAP 405.
  - iii. The Learned Trial Magistrate failed and/or neglected to cumulatively and/or exhaustively evaluate the entire Evidence on record and hence failed to capture and decipher the salient issues and/or features of the suit before him (Trial Magistrate) and thus arrived at an Erroneous conclusion, contrary to and in contradiction of the Evidence on Record.
  - iv. The Learned Trial Magistrate erred in fact and in law, in awarding the Respondent global award of Kshs. 2,000,000/= which amount was not only materially excessive but lacked any justification or qualification.
  - v. The Learned Trial Magistrate erred in law in apportioning liability in the ration of 100% as against the Appellant, when the facts and the evidence clearly showed that the Respondent was to blame and/or contributed to the accident.
  - vi. The Learned Trial Magistrate erred in law and fact by overly relying on the Respondent's submissions which were not relevant and without addressing his mind to the circumstances of the case.
5. He asked this Court to set aside the judgment and review, vary and/or reduce the award of Damages granted in favour of the Respondent.
6. The matter was canvassed by way of written submissions.

### **Appellant's written Submissions**

7. The Appellant submitted that the award of Kshs.2,000,000/= for loss of dependency was inordinately high because there was no proof of earnings or employment. He also argued that the award was inordinately high considering the comparable awards. He submitted that the award was too high for a 24 year old. He urged the Court to find that a sum of Kshs.1,000,000/= would be reasonable and sufficient compensation.

### **Respondents' Written Submissions**

8. The Respondents urged the Court to dismiss the appeal on liability. They argued that the lower Court was right in finding the Appellant 100% liable for the accident. They submitted that the Appellant did not controvert the testimony of their two witnesses (PW2 and PW3) and thus the lower Court should



not be faulted for believing the 2 witnesses. They urged that the evidence of the two witnesses on how the accident occurred was unchallenged because the Appellant did not testify or call any witness.

9. On the issue of quantum, they submitted that the Kshs.2,000,000/= awarded by the trial Court is not so high as to be a wrong estimate of the damages they are entitled to. They argued that the trial Court did not act on an incorrect principle of law and that the award was in line with the prevailing trends in awarding damages in similar cases.

### **Issues for Determination**

10. I have considered the grounds of appeal and submissions by both counsels for the parties, and I am of the view that the issues for determination are;
  - a. Whether the trial court was justified in finding the Appellant 100% liable
  - b. Whether the award of Kshs.2,000,000/= for loss of dependency was a reasonable estimate.
11. It is trite law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate Court both on points of law and facts and come up with its findings and conclusions. As the Court is re-evaluating the evidence, it must bear in mind that it had neither seen nor heard the witnesses. This principle was set out in *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123:

“...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 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 ...”

Whether the trial court was justified in finding the Appellant 100% liable

12. In the Memorandum of Appeal, the Appellant argued that the Learned Trial Magistrate erred in law in apportioning liability in the ratio of 100% as against the Appellant. He argued that the facts and the evidence clearly showed that the Respondent was to blame and/or contributed to the accident. On the other hand, the Respondents argued that the lower Court was correct in finding the Appellant 100% liable for the accident. They submitted that the Appellant did not controvert the testimony of their two witnesses (PW2 and PW3), and thus, the lower Court should not be faulted for believing the 2 witnesses.
13. The Respondents called two witnesses, PW2 and PW3, to testify on the circumstances of the accident. PW2 was a Police Officer who processed the scene of the accident. She testified that, from reading the scene, she had ascertained that the driver of the motor vehicle had left his lane and moved to the wrong side of the road. Her testimony was collaborated by PW3, who was an eye witness who saw the accident happen.
14. PW3 testified that the deceased was on the right side of the road, driving on his lane when the accident happened. He testified that the Motor Vehicle encroached on the bodaboda rider’s lane, causing the accident. He also testified that the motorcycle was not being driven in a zigzag manner and that the driver of the Motor Vehicle was overtaking. I have perused the lower Court record, and it appears that the two witnesses were consistent, even in cross-examination. The lower Court saw the two witnesses testify and believed their version of the story.



15. Importantly, I note that the Appellant did not testify or call any witness despite being given the opportunity to. I find that the Respondent's evidence on how the accident happened remained uncontroverted and unchallenged. I thus find that the lower Court was justified in holding that the Appellant was 100% liable for the accident.

Whether the award of Kshs.2,000,000/ for loss of Dependency was a reasonable estimate

16. In arriving at my decision on whether I should review or interfere with the quantum of damages, I am guided by Court of Appeal's decision in Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55. In the case, the Court held that an appellate Court should exercise caution and restraint where it has been called upon to review the trial Court's award of damages. It stated:

“It is trite law that the assessment of general damages is at the discretion of the trial Court and an 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 first instance. 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 leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

17. Similarly, this Court appreciates the observations of the Court of Appeal in Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47, where the Court outlined the exceptional circumstances on which an appellate court can interfere with the award of damages. The Court said:

“In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate Court is to interfere, whether on the ground of excess or insufficiency.”

18. The above authorities underscore that an appellate Court can interfere with an award of damages if the same is a wholly erroneous estimate of the damage suffered by being so inordinately high or low.

19. Courts have gone ahead and established parameters that should help a Court determine whether a particular award of damages is an erroneous estimate of the damage suffered. In Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another [2017] eKLR, the court held:

1. An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.
2. The award should be commensurable with the injuries sustained.
3. Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.
4. Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.



5. Similarly, in the case of *Penina Waithira Kaburu v LP* [2019] eKLR, the Court outlined factors that should guide a Court in arriving at the correct estimate of quantum of damages. It held:

“While no injuries occurring in different circumstances can be similar in every respect and hence the possibility of varied awards in general damages, the trial court must always make a comparative analysis of the injuries sustained and the extent of the awards made for similar injuries in previous decisions. As I have stated elsewhere, if not for anything else, the comparison is necessary for purposes of certainty and uniformity; the award, must, as far as possible, be comparable to any other award made in a previous case where the injuries for which the award are relatively similar.”

20. One principle runs across the above authorities: generally, the Courts should make similar awards for persons who have suffered similar injuries. The principle calls upon the Court to conduct a comparative analysis of injuries sustained and the extent of the awards made for similar injuries in previous decisions. The Court of Appeal in *Odinga Jacktone Ouma V Moureen Achieng Odera* [2016] eKLR summarized this principle in the following terms; “comparable injuries should attract comparable awards”
21. Some of the undisputed facts are that; the deceased was 24 years old at the time of his death, he was unmarried, he had no children, but his parents depended on him. He was a bodaboda operator, but there was no prove of earning.
22. The Court looked at how other Courts have previously assessed damages in cases whose factual circumstances were similar to this one. The case of *Jackson Chege Kamau & another v James Theuri Wachira (Suing as the Administrator of the Estate of John Mwaniki Theuri (Deceased)* [2020] eKLR, has striking similarities with the current case and the Court awarded 1,000,000/= under of Loss of Dependency.
23. In *Jackson Chege Kamau*, the deceased was 24 at the time of the death, he was unmarried, he had no children, but he used to support his family members. Importantly, he was in the motorcycle transport business, popularly referred to as ‘boda boda’ and there was lack of proof of earnings. These facts are very similar to the facts of this case. In this case, the deceased was 24, unmarried, with no children, and used to support his parents. He was also a ‘boda boda’ operator, and they could not produce proof of earnings.
24. The case is also similar to the case of *Geoffrey Obiero & another v Kenya Power & Lighting Corporation Limited & another* [2019] eKLR, where the Court awarded a global sum of Kshs.1,200,000/= under the head of Loss of Dependency. In that case, the Deceased was 25 years old at the time of his death and he was providing for his siblings and stepmother. There was no mention of the deceased either having been married or having children. I take note that the case was decided 6 years ago.
25. This case is also similar to the more recent case of *Isaac Muriira M’wanie & another v Misheck Mutuma M’kuchina* [2021] eKLR, where the Court awarded Loss of Dependency of Kshs.2,500,000/=. In this case, the deceased was 24 years old, and the claimant did not have proof of earnings or monthly income. He also used to support his parents. These facts are very similar to the circumstances of the case because they were both at 24, and there was no proof of their earnings.
26. I take note that the deceased was supporting his parents. I also note that the Deceased was the only child of the Respondents. Considering these special circumstances of the case, I am inclined to agree with



the more recent decision of the Court in Isaac Muriira M’mwani (Above). I thus find no justifiable reasons to disturb the lower Court’s assessment of the Loss of Dependency.

**Disposition**

- 27. In the premises, the Court finds that the appeal lacks merit, and the Trial Court Judgment is upheld.
- 28. The Appeal is dismissed with costs to the Respondents.
- 29. It is so ordered.

**DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 11<sup>TH</sup> DAY OF NOVEMBER, 2024.**

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**C. KENDAGOR  
JUDGE**

In the presence of:

Court Assistant: Beryl

Kabita Advocate (present) holding brief for Njuguna Advocate for Appellant

Kaberia Advocate (present) for Respondent

