REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CIVIL APPEAL NO. E050 OF 2022

BETTY KANGAI VICTOR (SUING AS THE LEGAL REPRESENTATIVE OF GAEL VICTOR MUNENE-DECEASED…… APPELLANT

VERSUS

ANTHONY MUGAMBI GITARI……1ST RESPONDENT

JOSEPH WAGURA GICHUKI……2ND RESPONDENT

(Appeal from the judgment of the Senior Resident Magistrate's court at Murang'a delivered by Hon. S.K Nyaga on the 26th August 2022 in Civil Suit No. E130 OF 2021)

JUDGEMENT

1. This appeal is against both liability and quantum awarded following a traffic accident claim.

2. By a Plaint dated 14th July 2021, the Appellant averred that on or around 24th December 2020 along Kenol Murang'a road, the 1st Respondent, being the driver of motor vehicle registration number KCW 594B and in which motor vehicle one VICTOR MUNENE (deceased) WAS aboard drove and managed the subject motor vehicle so negligently and carelessly that the motor vehicle veered off its lane and crashed with an oncoming motor vehicle and as a result of which Gael Victor Munene was fatally injured. The Appellant had been born on 31st January 2018.

3. It was averred that the 1st Respondent's negligence was evident in the manner in which he controlled the subject motor vehicle without due regard to other road users as he was both fast and reckless.

4. Therefore, the appellant sought special damages of Kshs. 365,550.00 comprising:

    i. Copy of motor vehicle records Kshs. 550

    ii. Kshs. 10,000 demand notice

    iii. Kshs. 10,000 legal fees for seeking grant of letters of administration ad litem

    iv. Kshs. 30,000 hospital charges

    v. Kshs. 15,000 for post mortem

    vi. Kshs. 30,000 for funeral expenses.

5. Additionally, the appellant sought general damages for pain and suffering and damages for loss of expectation of life.

6. The 1st Respondent denied the claim through the statement of defence dated 1st April 2021. The 1st Respondent specifically denied ownership of the subject motor vehicle and in the alternative pleaded contributory negligence by the driver of motor vehicle registration number KBN 018T for driving at an excessive speed and failing to keep any proper control of the motor vehicle.

7. The matter proceeded to trial where PW1 Betty Kangai Victor testified that on 24th December 2020 at around 8.00pm she was traveling from Nairobi to Chuka through Murang'a in the company of *Gael Victor Munene* (deceased), *Victor Munene* and her son *Anthony Mugambi* and *Maureen Kambura*. She was on the co-driver's seat when an oncoming vehicle hit the vehicle, she was travelling in. There was heavy traffic and the oncoming vehicle was moving in high speed. The motor vehicle she was traveling in was not keeping to its lane as there were motor vehicles on both sides of the vehicle, a number of vehicles had overlapped. She unbuckled after the accident and realized that the deceased was unconscious. With the

help of a good Samaritan, she was taken to Murang'a County Hospital for medical attention. However, the deceased could not be treated as he had been fatally injured. He was two years and 11 months at the time of death. She clarified that the motor vehicle that hit them was in the middle of the road, and that their vehicle was hit on the driver's side. She blamed the 1st Respondent as she was a fare paying passenger and the said 1st Respondent could have avoided the accident.

8. PC Jaafar Nyamohanga, No. 82290, testified that on 24th December 2020 he learnt of an accident along Kenol-Murang'a Road at Summer View junction area. The accident involved motor vehicle registration number KCW 594B Nissan Blue Bird driven by the 1st Respondent and Motor vehicle registration number KBN018T Toyota Astilla driven by *Moses Mwaura Gichuki*. He established that KBN 018T was travelling from Murang'a to Kenol and on reaching the scene of the accident, he was overtaken by another motor vehicle and collided head on with motor vehicle KCW 594B. according to the OB extract, the matter was listed as PUI as no specific person could be blamed for the accident. he clarified that he was not the investigating officer. According to the abstract, the driver of KBN 018T was to blame for the accident. he had been charged and the matter was pending in Kigumo Law courts.

9. DW1 Anthony Mugambi Gitari testified that on 24th December 2022 he left Nairobi at 5.00pm with PW1 and the deceased. The traffic was heavy along Thika road and it took them around 4 hours to get to the point of impact. The oncoming motor vehicle was unseen and there is nothing he would have done to prevent the accident. he was the driver of Motor vehicle KCW 594B and he has never been charged of any traffic offence arising from the accident. The accident within a month of being issued with a driving license.

10. The trial court found that the 1st Respondent could not avoid the accident as the road was busy and traffic was heavy despite trying his best. Therefore, the court dismissed the case against the 1st Respondent. However, the trial court found that the 2nd Respondent was to blame for the accident and had in fact been charged accordingly.

11. Aggrieved and dissatisfied with the judgment of the trial court, the appellant lodged the instant appeal on grounds that;

    i. The learned magistrate erred I law and fact in the manner she apportioned no liability on the 1st Respondent which was against the weight of evidence.

    ii. The learned magistrate erred in law and fact in finding no liability on the 1st Respondent despite the 1st Respondent admitting while testifying on oath that at the time of the accident, his motor vehicle had left its lawful lane (Kenol- Murang'a) and had encroached on the opposite lane (Murang'a- Kenol)

    iii. The learned magistrate erred in law and fact by dismissing the Plaintiff's suit while blaming the 2nd Respondent for causing the accident and failing to enter judgment on liability and quantum against the 2nd Respondent despite the 2nd Respondent having been enjoined as a party to the suit.

    iv. The learned magistrate erred in law and fact by arriving at a finding that the 2nd Respondent was charged at Kigumo law courts with careless driving without any evidence to the same effect.

    v. The learned magistrate erred in law and fact in the manner she apportioned all liability on the 2nd Respondent despite the Occurrence Book extract stating that the matter is pending under investigation

and the investigating officer who visited the scene of accident had indicated that he could not determine the person who caused the accident.

vi. The learned magistrate erred in law and fact by relying solely on the evidence of the police abstract to arrive at her finding and which abstract was filled without any investigations as to who caused the accident being carried out.

vii. The learned trial magistrate erred in law by awarding the 1st Respondent the costs of the suit.

12. Reason wherefore the appellant prayed that the judgment of the trial court be set aside and the court reevaluate the evidence and make its own finding and judgment in regard to liability and quantum.

13. The court directed that the appeal be canvassed through written submissions.

14. The appellant submitted that the mere fact that the 1st Respondent admitted to have been in the middle of the road when the accident happened is proof that he was driving without due care and attention. Therefore, the trial court erred in dismissing the appellant's claim.

15. Notwithstanding the finding of the court on liability, there was a requirement that the court renders itself on quantum had liability been established. The appellant thus urged the court to adopt a global figure in assessing damages for loss of dependency for the appellant. Reliance was placed on several cases including **Anthony Konde Fondo & Another v RMC [2020] eKLR,** where Nyakundi J awarded a sum of Kshs. 900,000 in respect of a deceased minor aged 7 years old. The appellant urged that a sum of Kshs. 2,000,000 would be adequate for loss of dependency, Kshs. 100,000 for loss of expectation of life, Kshs. 100,000 for pain and suffering and special damages at Kshs. 365,550.

16. I have gone through all the material placed before me and I am of the view that the gravamen of the Appellant's case is whether the trial court properly directed itself in apportioning liability and whether the trial court erred in failing to make an assessment on quantum.

17. **Selle vs. Associated Motor Boat Company [1968] EA 123** is probably the most seminal authority on the review scope of the High Court as the first appellate forum for matters emanating from the sub-ordinate courts where the court stated that:

> ***"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."***

18. This court will therefore reevaluate the evidence on record, if necessary, to be able to arrive at an independent decision on liability.

19. I take note that in his testimony given under oath, the 1st Respondent expressed that he was the driver of motor vehicle registration number KCW 594B while carrying the appellant and other passengers. At the time of the accident, he had held his license for a period of one (1) month. The trial court in its judgment took note of the same deposition.

20. By his own admission, the 1st Respondent testified that he was not on his lane. Also, he was not in a position to see any oncoming vehicle as he had not anticipated that a vehicle would emerge from anywhere, therefore, he was unable to avoid the accident as whether he swerved to the

right or left, an accident would still have occurred as there was heavy traffic on the road.

21. While it is true that the traffic might have been heavy, the 1st Respondent has by his admission demonstrated that he contributed to the accident as he was not on his rightful lane. The mere fact that other motorists had overlapped and left their legitimate lane was not a sufficient excuse for the 1st Respondent to join them in flouting traffic rules. Moreover, the fact that the 1st Respondent had been a licensed driver for only a month placed on him the huge responsibility of utmost compliance with traffic rules. It is unfortunate that his quest to join other motorists resulted in an accident resulted in fatal injuries to the appellant and serious injuries to other passengers.

22. In **Simba v Langat (Civil Appeal 84 of 2021)** [**2024] KEHC 2110 (KLR)** the High Court at Nakuru observed that:

> ***"The basic principle underlying the defense of contributory negligence is that people should take reasonable care for their own safety as well as for that of others."***

23. I am persuaded that the 1st Respondent by his own actions contributed to the accident and therefore the trial court erred in absolving him of any liability.

24. The appellant's case is that the 1st Respondent contributed to the accident by failing to keep a proper look out thus was unable to control the vehicle in a proper manner to avoid the accident.

25. Whereas the trial court absolved the 1st Respondent of liability on the fact that the 2nd Respondent had been charged. There was no evidence on record to demonstrate that indeed a person had been charged with the offence of

careless driving. Without such proof, it is difficult to conclusively determine the truth of the allegation that a person, the 2nd Respondent, was indeed charged for the accident, a perusal of the police abstract shows that the matter was still marked as PUI, meaning, there was no conclusive determination on liability.

26. In any case, a police abstract in and of itself is not proof of liability, it simply demonstrates that an accident that allegedly occurred was reported to a police station. Therefore, liability has to be proved by both fact and circumstance of the accident. In the instant case, I find that the appellant's had proved their case on liability against the 1st Respondent on a balance of probability.

27. I realise that there was no representation by the 2nd Respondent, therefore, I have no benefit of his testimony regarding the manner in which the accident occurred. As a result, going by the testimony of the 1st Respondent and the appellant regarding the circumstance of the road at the time of the accident, it is evident that there was no clarity on how exactly the accident occurred.

28. In such instances, the preferred approach is as per the clear principle that where there is no conclusive proof of who caused or contributed more to the accident, the law often apportions blame between parties. This principle was established in the case of **Barclay–Steward Limited & Another Vs. Waiyaki [1982-88] 1 KAR 1118**, where the Court said:-

> **"The bare narrative of the accident gives rise to a number of possibilities. Either Waiyaki was driving on his correct side and the Datsun hit his vehicle on its correct side or Mr. Cottle was driving on his correct side where the Range Rover crushed it."**

The Court said further:-

The collision is a fact. It is, however, not reasonably possible to decide on the evidence of Waiyaki & Gitau who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame.

In Baker V Market Harborough Industrial Co-operative Society LTD [1953] 1 WLR 1472 at 1476, Denning L.J. (as he then was) observed inter alia as follows:

Every day, proof of collision is held to be sufficient to call on the defendant for an answer. Never do they both escape liability. One or the other is held to blame, and sometimes both. If each of the drivers were alive and neither chose to give evidence, the court would unhesitatingly hold that both were to blame. They would not escape liability simply because the court had nothing by which to draw any distinction between them……..

See also Welch V Standard Bank LTD [1970] EA 115 at 117 and Simon V Carlo [1970] EA 285. It cannot be doubted that both drivers are to blame. In the ultimate analysis of the evidence in the instant case, the circumstances are such that there is no concrete evidence of distinguishing between the two drivers. The drivers should therefore be held equally to blame……..”

29. In this case, the evidence does not conclusively establish exclusive fault on either side. Although the 2nd Respondent

did not defend its case, the 1st Respondent admitted to have failed to keep to his lane and was unable to clearly anticipate and see any oncoming traffic. This non-compliance with the Highway Code may have affected his control of the motor vehicle at a critical moment. The trial court's decision to place 100% liability on the 2nd Respondent fails to account for these complicating factors.

30. Nevertheless, the law also holds that in the absence of clear proof pinpointing who primarily caused or contributed to the accident, liability ought to be shared. This is because neither side provided conclusive evidence that the other was solely responsible. As a corollary, passengers, who merely boarded the motor vehicle, are to be viewed as innocent parties unless specific evidence shows they contributed to the cause of the accident. In the instant case, no evidence was led to suggest that the appellant was responsible for the accident in any way.

31. On the balance of probabilities and guided by the principle of fairness, I find that the trial court erred in apportioning 100% liability on the 2nd Respondent without any proof that he had indeed been charged with any criminal offence relating to the accident. Also, the trial court erred in absolving the 1st Respondent without conclusive evidence on the manner in which the accident occurred. The safer conclusion, consistent with the facts and the rule that doubtful or unproven causation should lead to shared liability, is to hold both parties equally responsible.

32. On the issue of quantum, I have noted that the trial court, contrary to well established principles of law, failed to make a determination on quantum.

33. On quantum, the deceased died on the spot. The general principle for award under the heading of pain and suffering is that where the period of suffering is short only a nominal damage is awarded, I would therefore award a sum of kshs

50, 000.00 which I find reasonable and with the acceptable range of awards See **Sukari Industries Limited v Clyde Machimbo Juma [2016] e KLR and Kenya Power and Lighting Co ltd v Lopeta [2022] KEHC 567 KLR .**

34. For loss of expectation of life, it is the finding of the court that an award of Kshs. 100,000 is reasonable.

35. On loss of dependency, I associate myself with the decision of Mulwa J in **Simon Kibet Langat & Anor. vs. Miriam Wairimu Ngugi (Suing as the Administrator of the estate of Daniel Mwiruti Ngugi [2016] eKLR** where she stated that:

> *"**For young minors, it is not clear how a child may turn out to be when they mature despite good grades in school and high expectations of parents. Further, minors cannot be said to strictly have dependents. All children from all walks of life, given equal opportunities could become anything in future. It is not predictable."***

36. In **TB v MOO & another (Suing as the legal representatives of the Estate of the Late LM - Deceased) (Civil Appeal 79 of 2021) [2025] KEHC 3520 (KLR) (6 March 2025) (Judgment)** the court remarked that:

> ***"...the use of multiplier is not good for a minor as they do not have an income. A global award will suffice. In the circumstances, a child of 2 years will attract a global award of Kshs. 800,000/=. I therefore set aside the award and replace it with Ksh. 800,000."***

37. Considering that the above case is recent, the court therefore adopts the global lump sum method and makes a global award in the sum of Kshs. 800,000 for loss of dependency.

38. The Appellant is entitled to an award for special damage as pleaded of Kshs. 365,550 as pleaded and proved which I hereby award.

39. ***The upshot is that the appeal is disposed as follows:***

    i. ***The judgment of the trial court apportioning 100% liability to the 2nd Respondent is hereby set aside. In place thereof, liability is apportioned on a 50:50 basis between the 1st Respondent and the 2nd Respondent.***

    ii. ***Pain and suffering Kshs. 50,000***

    iii. ***Loss of expectation of life Kshs. 100,000***

    iv. ***Loss of dependency Kshs. 800,000***

    v. ***Special damages Kshs. 365,550.***

    vi. ***Each party to bear their costs of the Appeal and aat the trial court.***

Dated, Signed and Delivered virtually this 9th day of April, 2026.

HON. T. W. OUYA
JUDGE

For Appellant – Mr. Muthomi Gitari
For Respondent – Ms. Olung'a for 1st Respondent
Court Assistant - Nyabuto