



**Gitahi & 2 others v Kiungu (Suing as the Legal Representative of the
Estate of George Waitara Wangui – Deceased) (Civil Appeal 1 of 2019)
[2019] KEELRC 2617 (KLR) (20 November 2019) (Judgment)**

Neutral citation: [2019] KEELRC 2617 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CIVIL APPEAL 1 OF 2019
NZIOKI WA MAKAU, J
NOVEMBER 20, 2019**

BETWEEN

**MILTON MUIGAI GITAHU 1ST APPELLANT
CHRISTINE WAMBUI MUIGAI 2ND APPELLANT
GITAHU MUGO T/A GATEWAY SERVICE STATION LIMITED 3RD
APPELLANT**

AND

**BEATRICE WANGUI KIUNGU RESPONDENT
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF GEORGE
WAITARA WANGUI – DECEASED**

JUDGMENT

1. The Appeal was transferred to this court by order of the High Court as the High Court was of the considered view that the matter subject of the appeal falls within the jurisdiction of the Employment & Labour Relations Court, the appeal therefore was to heard and disposed of by this Court and I accordingly reserved judgment for delivery today.
2. The appeal is from a Judgment of the learned trial court delivered on 6th June 2013 by the Nyeri Chief Magistrate in Civil Case No. 396 of 2006 between the 2nd and 3rd Appellants as Defendants and the Respondent as Plaintiff. There were 5 grounds of appeal, the gravamen of which was that the learned trial Magistrate erred in fact and law in finding that the Appellants were liable in a case where the Respondent did not prove that the Appellants were liable, that the learned trial Magistrate erred in law and in fact that liability in the circumstances could not all attach to the Appellants, that the learned trial Magistrate erred in law and in fact in finding that the Appellants owed a duty of care to the Plaintiff in his capacity as a pump attendant viz-à-viz the circumstances of how the deceased met his death and



that the learned trial Magistrate erred in law and in fact in reaching an award of general damages in the amount reached which amount was inordinately high.

3. When the Appeal came up for directions on 26th June 2019 after the High Court order of transfer on 27th March 2019, the advocates for the Appellants and the Respondent consented to have the appeal determined on the basis of the material before court. The parties were to file submissions and the Appellants submitted that in a first appeal such as this one, the court hearing the appeal was duty bound to consider the evidence, assess it and come to its own conclusion or agree with the trial court's conclusion. The Appellants submitted that parties are bound by their pleadings and cited the case of Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others [2014] eKLR. They argued that a party is to keep to their pleadings and any party that wishes to depart from its pleadings must amend the same. The Appellant submitted that it was important to ascertain who the Plaintiff's employer was. It was asserted that the Plaintiff sued the Defendants trading as Gateway Service Station and in the amended plaint added the word limited. The Appellants submitted that there is a great difference between an individual and a corporation. The Appellant submitted that the Plaintiff saw no difference between the company and the people she said were her son's employers. The Appellants submitted that it was clear the deceased was employed by a company and that the suit was filed against the wrong people. The Appellants submitted that the lower court's judgment should be set aside and the appeal allowed as prayed.
4. The Respondent submitted that the Appellants did not dispute that the deceased was working as a pump attendant and as employee of Gateway Service Station Othaya where he was shot dead by gangsters. The Respondent submitted that the point of departure was that the Appellants contend that the deceased was an employee of Gateway Service Station Limited a company in which they were all directors and which company owned the fueling station. The Appellants thus contend that they are not liable to compensate the Respondent herein.
5. As the first court on appeal, I am bound to consider the evidence and pleadings of parties while warning myself that I never saw nor heard the witnesses and evaluate the evidence accordingly and if in agreement with the finding of the Learned trial Magistrate uphold the decision and where there is basis for departure even set aside the decision. The 1st Appellant testified before the learned Magistrate and stated that he knew the Respondent as the mother of a young man who worked for him at Gateway Service Station Othaya. He stated that it was the company that employed him and not himself as a person. He however did not produce any letter of employment for the deceased. He stated that the company existed but was not doing any business. The learned Magistrate had therefore no hesitation finding for the Plaintiff in the suit before her. She gave a judgment against the Defendant as follows:- pain and suffering – Kshs. 10,000/-, loss of expectation of life – Kshs. 100,000/-, loss of dependency – Kshs. 630,840/- and special damages assessed as Kshs. 29,575/- plus costs of the suit and interest on the sum awarded at court rates from the date of judgment. Whereas there is an assertion that the Respondent sued the wrong party, there was no material to prove that this was so. It was not shown how the said company which the Appellants assert was the liable party had a nexus with the deceased. The learned trial Magistrate therefore in my view did not err as the case was proved on a balance of probabilities and in accordance with the evidence before the court. In addition, the sum awarded as shown above was not excessive and in actual fact was very conservative for the death of the 22 year old former employee of the Appellants. I would not interfere with the decision and would mulct the Appellants with costs for the failed attempt in appeal. Appeal dismissed. Costs of the appeal to the Respondent.

It is so ordered.

DATED AND DELIVERED AT NYERI THIS 20TH DAY OF NOVEMBER 2019



NZIOKI WA MAKAU
JUDGE

