Kariuki v Igoki & another (Civil Appeal E073 of 2023)
[2025] KEHC 4002 (KLR) (28 March 2025) (Judgment)

Neutral citation: [2025] KEHC 4002 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E073 OF 2023

MA ODERO, J

MARCH 28, 2025

(FROM THE ORIGINAL CMCC NO. 267/2015)

BETWEEN

BONIFACE MWANGI KARIUKI ..... APPELLANT

AND

HELLEN IGOKI ..... 1ST RESPONDENT

JOEL RAGUONGO NTHIGA ..... 2ND RESPONDENT

JUDGMENT

1. Before this Court is the Memorandum of Appeal dated 15th November 2023 by which the Appellant Boniface Mwangi Kariuki (suing as the legal representative and the administrator of the estate of James Ngunjiri Mwangi) seeks the following orders:-

> "(1) That the appeal herein be allowed and the judgment of the lower court be set aside and replaced by a judgment of this court.
>
> (2) That the costs of the Appeal and costs and interest of the lower court be granted to the Appellant."

2. The 1st Respondent Hellen Igoki and the 2nd Respondent Joel Raguongo Nthiga, both opposed the appeal.

3. The matter was canvassed by way of written submissions. The appellant filed the written submissions dated 11th December 2024, whilst the Respondents did not file any submissions.

Background

4. This appeal arises from a Road Traffic accident which occurred on 7th January 2014 along the Naromoru-Nanyuki road. It was alleged that motor vehicle Registration No. KBX 228C owned by the 1st Defendant was being driven by the 2nd Defendant. That on the same date at about 8.00pm the Deceased James Ngunjiri Mwangi was lawfully riding his motorcycle Registration No. KMCF 8990 along the same road.

5. The plaintiff alleges that the 2nd defendant drove his vehicle in a reckless and negligent manner and knocked down the Deceased's motorcycle causing the Deceased to sustain fatal injuries.

6. The Plaintiff who is the father of the Deceased victim then filed in the Magistrates Court a Plaint dated 28th July 2015 praying for judgment against the Defendants for the following:-

> "(a) General damages under the *Law Reform Act* Cap 26 and the *Fatal Accidents Act* Cap 32.
>
> (b) Special damages – Kshs. 25,400/-
>
> (c) Costs of this suit.
>
> (d) Interest on (a), (b) and (c) above at court rates.
>
> (e) Any other or better relief that this Honourable Court may deem fit to grant."

7. The Defendants filed a statement of Defence dated 25th November 2022 in which they conceded that an accident did occur on 7th January 2014 along the Naro Moru-Nanyuki Road involving their vehicle and the motorcycle being driven by the Deceased.

8. However the Defendants categorically denied having caused the accident through the negligent and/or reckless driving of the 2nd Defendant. On the contrary the Respondents averred that the Deceased solely caused and/or substantially contributed to the accident through the negligent manner of driving the Motorcycle Registration No. KMCF 8990.

9. The suit was heard in the lower court and on 19th October 2023, Hon. M. Okuche Senior Principal Magistrate delivered judgment in which the plaintiff's suit was dismissed in its entirety with costs to the Defendant.

10. Being aggrieved by the decision of the lower court. The Appellant/Plaintiff filed the instant Memorandum of Appeal which appeal is premised upon the following grounds;-

> "1. That the learned trial Magistrate erred in law and in fact in condemning the Appellant herein 100% on liability without any evidence having been tendered before the court by an independent witness on the Appellant's negligence.
>
> 2. That the learned Magistrate erred both in law and in fact when he dismissed the Appellant's suit with costs and failed to assess the damages which might have been payable to the Appellant.
>
> 3. That the learned Magistrate erred in law and in fact in failing to consider or even adequately adopt and appreciate the Appellant's evidence the written submissions of the Appellant on record, the authorities annexed and cited

therein and the evidence of the police officer in support of the Appellant's case hence arriving at a wrong decision.

4. That the learned Magistrate erred in law and in fact by dismissing the Appellant's suit and failing to follow riles of precedents in awarding general damages.

5. That the learned magistrate misdirected himself into misapplying and misapprehending the law on evidence and in arriving at a wrong decision on the liability.

6. That the learned trial Magistrate misdirected himself into arriving at a decision that was obviously against the weight of evidence tendered at the trial."

Analysis and Determination

11. I have carefully considered this memorandum of appeal as well as the record of Appeal filed on 25th September 2024.

12. This is a first appeal. It is settled law that the duty of the first

appellate court is to re-evaluate the evidence which was adduced in the subordinate court both on points of law and fact and come up with its own findings and conclusions [see Peters -vs- Sunday Post Limited [1958] E.A 424]

13. In Selle and another -vs- Associated Motor Boat Company LTD & Others [1968] 1 E.A 123 it was stated as follows:-

> " .....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind [the fact] 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 that he has clearly failed on some point to take into account particular circumstances or probabilities materially to estimate the evidence."

14. Likewise in Gitobu Imanyara & 2 others -vs- Attorney General [2016] eKLR, the court of Appeal stated thus;-

> " An appeal to this court is by way of a 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 allowance in this respect."

15. Therefore the appropriate standard of review in cases of appeal can be summarized in the following principles:-

(1) On first appeal the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions.

(2) In reconsidering and re-evaluating the evidence the first appeal court must bear in mind and give due allowance for the fact that the trial court had the advantage of seeing and hearing the witnesses.

(3) It is not open to the first appellate court to review the findings of a trial court simply on the basis that it would have reached a different conclusion had it been hearing the matter for the first time.

16. It is not in any dispute and indeed is conceded by all the parties that an accident did occur on 7th January 2014 at about 8.00pm along the Naromoru-Nanyuki road. That said accident involved a motor vehicle Registration No. KBX 228C being driven by the 2nd Respondent and a motorcycle Registration No. KMCF 8990 being ridden by the Deceased.

17. The plaintiff filed the suit on behalf of the estate of his late son. A copy of the Death Certificate Serial No. 339350 appears at Page 13 of the record. The Appellant also produced a copy of a limited Grant of letters of Administration Ad Litem issued to him on 17th February 2015. (see Page 17). I am therefore satisfied that the Appellant had legal authority to represent the estate of the Deceased and to file the suit on behalf of said estate.

18. The main issue for determination is which party (if any) is to be held liable for the accident and to what proportion. It is trite law that he who alleges must prove.

> " Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:
>
> > "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

19. This was reiterated in Anne Wambui Ndiritu -vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, where the Court of Appeal held that:

> " As a general proposition under Section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in sections 109 and 112 of the Act."

20. The plaintiff's case was that the driver of the motor vehicle was to blame for the accident as he veered off his lane onto the lane where the Deceased was riding his motor cycle.

21. However the 2nd Respondent stated that the Deceased was speeding and lost control of his motorcycle which veered from its lane to the right thereby hitting the motor vehicle.

22. In his judgment the learned trial magistrate found that no liability for the accident attached to the 2nd Respondent. In coming to this finding the trial court stated that neither of the two (2) witnesses called by the plaintiff (Respondent) actually witnessed the accident. That the only eye witnesses to the accident who was the 2nd Respondent gave a totally different account of how the accident occurred.

23. Pw2 PC Henry Maingi was a police officer attached to Naro Moru Police Station. He told the court that he attended the scene of the accident. He produced the police abstract which was produced in court as an exhibit.

24. Pw2 confirmed that according to the police abstract the matter was pending investigations. He also confirmed that no party was blamed and/or charged as a result of the accident. The trial magistrate relied on these two factors as a reason to absolve the Respondent from any liability in respect of the accident.

25. I am mindful of the fact that under cross-examination the 2nd Respondent admitted that his vehicle was being driven at a speed of 100 kph in an 80kph zone. Therefore he was over speeding.

26. However the fact of over speeding cannot in itself be presumed to have been the cause of the accident. This is not entirely clear how or why the vehicle and the motorbike ended up colliding. No sketch map was produced as an exhibit to enable the court visualize the scene and the point of impact.

27. I do agree with the trial magistrate that there was a paucity of evidence in this case. Neither Pw1 nor Pw2 witnessed the accident. The only eye witness was the 2nd Respondent who told the court that the motor cycle which swerved into his lane. This evidence was not controverted by the plaintiffs at all. In short the plaintiffs failed to prove their case on a balance of probability. The mere fact that an accident occurred cannot be taken as proof of liability on the part of the 2nd Respondent. The plaintiff must demonstrate why and how the Respondent should be held liable for said accident.

28. If the 2nd Respondent was guilty of over speeding then he ought to have been charged with that particular offence. But as Pw2 told the court no person was charged with any offence as a result of this accident.

29. Based on the foregoing I agree with the decision of the learned trial magistrate. The onus lay on the plaintiff to prove that the 2nd Defendant caused the accident due to his negligent manner of driving. This onus was not discharged as from the evidence availed it was not possible to tell exactly how the accident occurred. As stated earlier proof that an accident occurred does not amount to proof of liability. As such liability was not established as against the 2nd Respondent and the plaintiff's claim was rightfully dismissed.

30. Notwithstanding the dismissal of the claim the trial court was still obliged to assess damages.

31. In the case of Frida Agwamba & Ezekiel Onduru Okech vs Titus Kagichu Mbugua [2015] eKLR court held that:

> Indeed even when the learned magistrate dismissed the claim, in such a case, he should have assessed damages, notwithstanding the dismissal. That now will be done by this court, for convenience, instead of returning the file to the lower court for assessment.

32. Similarly in Lei Masaku vs Kaplana Builders Ltd [2014] eKLR it was observed that:-

> It has been held time and again by the Court of Appeal that the court of first instance shall assess damages even if it finds that liability has not been established. To have casually dismissed the suit and failed to address that issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the appellate court need to know the view by the court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behooves this court to assess quantum.

33. In the circumstances notwithstanding the dismissal by this court of the appeal on the question of liability I will proceed to assess damages which would have been due on a finding of 50:50 liability. The measure of quantum is left to the discretion of the judicial offer, taking to account relevant precedents.

34. In cases where the income earned by the Deceased is known then the multiplier approach can be used.

35. There are two schools of thought on this issue, with one school advocating for an award under the heading calculating loss of dependency in terms of the number of years and anticipated income for the deceased, whereas the other school advocates for a global award.

36. In the case of Beatrice Wangui Thaini v Hon. Ezekiel Bargetuny and Another NRB HCC 1638 OF 1998 (UR) Ringera J (as he then was) stated:

> " The principles applicable to an assessment of damages under the *Fatal Accidents Act* are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependents and the chances of life of the deceased and dependents. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature."

37. In Mwanzia vs Ngalali Mutua Kenya Bus Ltd cited in Albert Odawa vs Gichumu Githenji Nku Hcca No. 15 of 2003 [2007] eKLR, the court made the following observation;

> " The multiplier approach is just a method of assessing damages. It is not a principle of law or a 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 amount of annual or monthly dependency and the expected length of the dependency are known 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." [Own emphasis]

38. In Frankline Kimathi Maariu & another v Philip Akungu Mitu Mborothi (suing as administrator and personal representative of Antony Mwiti Gakungu deceased [2020] eKLR the court was dealing with a similar issue, stated as follows:-

> " In the present case, there was no satisfactory proof of the monthly income. Where there is no salary proved or employment, the Court should be wary into subscribing to a figure so as to come up with a probable sum to be used as a multiplicand. In such circumstances, it is advisable to apply the global sum approach or the minimum wage as the appropriate mode of assessing the loss of dependency [24]. The global sum would be an estimate informed by the special circumstances of each case. It will differ from case to case but should not be arbitrary. It should be seen to be a suitable replacement that correctly fits the gap." [Own emphasis]

39. The Appellant herein has not proven that the Deceased had an annual income to which a multiplicand would have applied. He stated that the Deceased was an estate agent who was self-employed but did not provide evidence of the income earned by the Deceased.

40. From the foregoing therefore I find that the in present case it is more appropriate to apply a global sum approach. Dependency is a matter of fact which must be proved by evidence. This is the position

that was taken in Abdalla Rubeya Hemed v Kayuma Mvurya & Another [2017] eKLR where it was held as follows:-

> " Dependency is always a matter of fact to be proved by evidence. It is not that the deceased earned a sum and therefore must have devoted a portion or part of it to his dependence. Rather the claimant must give some evidence to show that he was dependent upon the deceased and to what extent." [Own emphasis]

41. In Stanwel Holdings Limited & another v Racheal Haluku Emanuel & another [2020] eKLR the court reduced an award of Kshs. 2,000,000.00/= for loss of Dependency (a global sum) to Kshs. 1,000,000/ = for the Estate of a 23 year old deceased.

42. In Ainu Shamsi Hauliers Limited v Moses Sakwa & another (suing as the Administrators of the Estate of the Ben Siguda Okach (Deceased) [2021] eKLR, the court on appeal upheld an award of Kshs. 2,000,000/= for loss of dependency where the deceased was 40 years old and had left behind a wife and two young children.

43. In this case the Deceased was aged 23 years old was apparently unmarried and had no children. I am therefore inclined to follow the decision in Stanwel Holdings (supra) over that of Ainu Shamsi (supra) and award Kshs. 1,000,000/- in this case on the ratio of liability at 50:50.

44. The Appellant had prayed for Kshs. 20,000/- for pain and suffering. In Sukari Industries Limited v Clyde Machimbo Juma Homa Bay HCCA No. 38 of 2015 [2016] eKLR where the deceased had died immediately after the accident and the trial court had awarded Kshs. 50,000/- for pain and suffering, Majanja J. held that:

> " On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is entitled to compensation. The generally accepted principles is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs. 10,000/= to Kshs. 100,000/- over the last 20 years hence I cannot say that that the sum of Kshs. 50,000/- awarded under the head is unreasonable."

45. I therefore find that the prayer for Kes 20,000 under pain and suffering is within the range as the deceased died on the same day and on the spot.

46. On the loss of expectation of life in the case of Hyder Nthenya Musili & Another v China Wu Yi Limited & Another [2017] eKLR the Court stated as follows –

> " .....The conventional award for loss of expectation of life is Kshs. 100,000/= while for pain and suffering the awards range from Kshs. 10,000/= to Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death."

47. The Appellant had prayed for Kes. 100,000/- under Loss of Expectation of life and this court awards the conventional award of Kes. 100,000/-.

48. On the award of special damages, it is now firmly established that special damages must not only be specifically pleaded but also strictly proved, before they can be awarded by the court. The Court of Appeal in Hahn V. Singh, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717 and 721 held that:

> " 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."

49. Page 9 of the record of Appeal shows that a post-mortem receipt was made out to the Appellant for Kes. 5,000/- from Nanyuki District Hospital. Page 10 reveals that a receipt for Kes. 5,300 was made to the Appellant for mortuary fees, page 11 police abstract for Kes. 100/- page 18 advocates fees for Kes. 15,000/- for sourcing letters ad litem bringing the total costs to Kshs. 25,400/=.

50. Therefore based on the foregoing I would make the following awards:-

(a) Liability 50:50

(b) Loss of dependency (global sum) 1,000,000/-. Less 50% liability to the Appellant Kes. 500,000/- is payable.

(c) Pain and suffering Kes. 20,000/-

(d) Loss of Expectation of Life Kes. 100,000/-

(e) Special damages 25,400/=

Total - Kes. 645,400

51. Finally this appeal is dismissed in its entirety. Costs to be met by the Appellant.

DATED IN NYERI THIS 28TH DAY OF MARCH 2025

.....

MAUREEN A. ODERO

JUDGE