



**Mukare (Suing as the Personal Representative of the Estate of Joachim
Mwamburi Moto (Deceased)) v Kabiru & another (Civil Appeal
82 of 2022) [2025] KEHC 12159 (KLR) (30 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 12159 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 82 OF 2022**

F WANGARI, J

APRIL 30, 2025

BETWEEN

WINNIE MUKARE APPELLANT

**SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF
JOACHIM MWAMBURI MOTO (DECEASED)**

AND

PATRICK MIGWI KABIRU 1ST RESPONDENT

JACKSON ADEMBESA 2ND RESPONDENT

JUDGMENT

1. This is an Appeal from the Judgment and Decree of Hon. J.B. Kalo(CM) delivered on 26/05/2022 in Mombasa CMCC No. 280 of 2010. The Appeal is on the entire judgment of the lower court.
2. Through a Complaint dated 03/12/2010, the Appellants deceased husband (the deceased) who was the Plaintiff in the lower court matter claimed general and special damages as a result of injuries sustained in an accident that occurred on 02/04/2010. It was pleaded that the deceased was crossing the road along Mombasa- Nairobi road at Bahati, area Mombasa when m/v regn. No. KBK 063L which was being negligently driven by the 2nd Respondent knocked him down, resulting to serious injuries. The 1st Respondent was vicariously liable as the owner of the vehicle.
3. The Trial Court heard the parties and proceeded to render judgement on 26/05/2010 dismissing the Plaintiff's suit with costs. Aggrieved by the finding of the Trial Court, the Appellant lodged a Memorandum of Appeal hence this Appeal.
4. Upon filing this appeal, this court directed that the appeal be disposed of by way of written submissions. Only the Appellant filed submissions dated 05/07/2023. Even though I the proceedings



dated 20/02/2025, it was stated that both parties had filed their submissions, I have perused through the e-filing platform and confirmed that the Respondents did not file their written submissions.

5. The Appellant faulted the trial court's finding on liability. She submitted that the Respondents owed the deceased a duty of care, and which was breached. The suit being based on negligence on the part of the Defendants, the same was not controverted as the Respondents did not adduce evidence in the lower court. She cited authorities in support of the submissions.

Analysis

6. This being a first Appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a Trial Court, unlike the Appellate Court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. (see *Peters vs Sunday Post Limited* [1958] EA 424 and *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123)

Liability

7. The Appellant urges this court to find that the trial court erred in failing to find the Respondents liable for the accident. She prayed that the lower judgment on liability be set aside and in lieu, enter judgment on liability against the Respondents equally.
8. The role of this court is thus to reevaluate the evidence and arrive at my independent finding on liability. In *Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982* [1982-1988] 1KAR 278 the Court of Appeal held that:

“A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

9. I have perused the record of appeal filed in Court and the written submissions and authorities cited in support and opposition to the Appeal. In re-evaluating the evidence, the deceased was the only eye witness to the accident. He said that as he was crossing the road, the Respondents' vehicle which was being driven in a very high speed knocked him down.
10. The Appellant was the only witness to the accident. The Investigating Officer unfortunately did not file a sketch plan for the scene of the accident to corroborate the evidence of the Appellant. It was impossible to say who was to blame for the accident.
11. These are matters of evidence and the Appellant had the legal burden of proof. On this subject, 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.

12. In *Anne Wambui Ndiritu -vs- Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, 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 case 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.”.

13. It follows that the initial burden of proof lied on the Appellant, but the same may shift to the Respondents, depending on the circumstances of the case.
14. Therefore, as found by the trial court, it was indeed difficult to find the Respondents liable for the accident in the absence of the sketch plan, an independent witness or an expert witness who would reconstruct the scene of accident and what caused the accident.
15. On a balance of probability, I am unable to fault the trial court. The finding on liability was in tandem and reflected the evidence and testimonies presented by the witnesses before the court. I uphold the finding on liability.

Quantum

16. The Appellant submitted that an award of Kshs. 1,500,000 for general damages for pain and suffering which had been awarded by the trial court should be allowed on appeal.
17. The Court of Appeal, pronounced itself succinctly on the principles for disturbing award of damages in *Kemfro Africa Ltd Vs Meru Express Service Vs. A.M Lubia & Another* 1957 KLR 27 as follows: -

“The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.”

18. There is no dispute that the Respondent suffered the injuries as pleaded. In assessing injuries arising from a road traffic accident, consistency in the award of damages is necessary for judicial predictability and certainty. This is achieved through awarding similar injuries with similar or relatively similar damages. As stated in the case of *Odinga Jacktone Ouma V Maureen Achieng Odera* [2016] eKLR “comparable injuries should attract comparable awards”
19. The deceased having suffered the following injuries;
head injuries
fracture of the right clavicle
fracture of the 3rd to 6th rib
severe injuries to the chest including lung puncture
The award of Kshs. 1,500,000/= would have been commensurate to the injuries suffered. I therefore find no reason to disturb the award.
20. On the issue of costs, it is settled that the same follows the event. That is the import of section 27 of the *Civil Procedure Act*. The court reserves its discretion on whether to award costs to either party. This was well enunciated by the Supreme Court in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others* [2013] eKLR. The appeal being partially successful, this court exercises its discretion and order that each party bears its own costs.



Determination

i. In the upshot, I make the following orders: -

a. The Appeal has got no merits and is hereby dismissed.

b. Considering the nature of the suit, each party to bear its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON 30TH DAY OF APRIL, 2025.

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F. WANGARI

JUDGE

In the presence of;

Mr. Maundu Advocate for the Appellant

N/A by the Respondent

M/S Norah, Court Assistant

