Mwangi & 2 others v Waweru & another (Suing as Legal Representatives Estate of the Late Owen Karugu Githu) (Civil Appeal 96 of 2020) [2025] KEHC 7692 (KLR) (28 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7692 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL 96 OF 2020

JM NANG'EA, J

MAY 28, 2025

BETWEEN

JOHN MWANGI ..... 1ST APPELLANT

SIMON MBUTHIA ..... 2ND APPELLANT

ABRAHAM KAMAU GITU ..... 3RD APPELLANT

AND

REBECCA WANGARI WAWERU AND DAVID MUNGAI KARUGU (SUING AS LEGAL REPRESENTATIVES ESTATE OF THE LATE OWEN KARUGU GITHU) ..... RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. B. Mararo - SRM in Nakuru CMCC NO. 998 of 2018 delivered on 27th May, 2020)

JUDGMENT

1. The Respondents filed suit against the Appellants in the lower court seeking general damages under the *Law Reform Act* and the *Fatal Accidents Act*; special damages and the costs of the suit following a road traffic accident that occurred on 23rd February, 2018 causing fatal injuries to the named deceased person.

2. It is averred in the suit that the deceased was a cyclist when the 1st Appellant knocked him while driving motor vehicle registration number KAY 703 T belonging to the 2nd and 3rd Appellants in a careless or negligent manner.

3. The Appellants in their Statement of Defence dated 25th September 2018 denied occurrence of the accident and the alleged negligence attributed to them. Alternatively, they contend that if occurrence of the accident is proven, then it was wholly caused or contributed to by negligence of the deceased.

4. The Trial Court in the impugned judgement found in favour of the Respondent in the following terms;

   Liability at 100%

   General damages for pain and suffering - Kshs. 40,000/=

   Loss of expectation of life -Kshs 100,000/=

   Loss of dependency -Kshs. 800,000/=

   Special damages o- Kshs. 1,500/=

5. The Respondent was also granted the costs of the suit.

6. Dissatisfied, the Appellants preferred the instant Appeal vide Memorandum of Appeal dated 27th May, 2020 regarding the quantum of damages upon the following grounds:-

   i. The Trial Magistrate erred in law and in fact in awarding the Respondent as sum of Kshs. 800,000 for loss of dependency which award was inordinately high, unmerited, unjustified, excessive and unreasonable.

   ii. The Trial Magistrate erred in law and in fact in awarding 40,000 for pain and suffering.

   iii. The Learned Magistrate erred in law and in fact in failing to accord due regard to the Appellants' Submissions on quantum on applicable principles for assessment of damages.(sic)

   And

   iv. The Learned Magistrate erred in law and in fact in failing to consider authorities relied upon by the Appellants in their submissions.

7. The Appellants thus pray that the Appeal be allowed, judgement on quantum specifically on pain and suffering and loss of dependency (sic) be set aside and substituted with a proper award, and that the costs of the Appeal be borne by the Respondents.

8. Learned Counsel for the parties filed written submissions.

Appellants' Submissions

9. On loss of dependency the Appellants submitted that no evidence was provided that the deceased was a businessman. Reliance is placed on Beatice Murage v Consumer transport Ltd & Another [2014] eKLR where it as observed that use of the multiplier approach is inappropriate where there was no proof of earnings. It is also submitted that since the deceased was 70 years old at the time of death, he was not assured of a longer life and was past his employment age.

10. Counsel further state that the award did not consider the vagaries and vicissitudes of life that could have shortened the deceased's life.

11. The Appellants are of the opinion that the award under the *Law Reform Act* ought to be deducted from the sum granted for loss of dependency under the *Fatal Accidents Act* to avoid double compensation since the beneficiaries under the two statutes are the same (the case of Serem Korir & Another v SS (Suing as the legal representative of the estate of MS deceased) [2019] eKLR Counsel rely on in support of this submission).

Respondents' Submissions

12. The Respondents in opposing the appeal as regards the award for pain and suffering pitch tent on the case of Elijah Ole Kool v George Ikonya Thuo [2001] eKLR to submit that the trial court's award is reasonable considering the age of the deceased ; the pain and suffering he underwent and the incidence of inflation.

13. With respect to the claim for loss of expectation of life, it is proposed that the court ought to adopt the conventional figure of Kshs. 150,000 since courts are said have been awarding over Kshs. 100,000 since the year 2000 under this head.

14. Concerning loss of dependency, the Respondents tell the court that the trial court was right to apply the stated multiplicand , arguing that even without proof of earnings it would be unjust to dismiss the claim under this head as was held in Jacob Ayiga Maraja & Another v Simeon Obonyo [2005] eKLR and Kenya Pipeline Co. Ltd. v Lucy Njoki Njiru [2016] eKLR.

15. Regarding the costs of this litigation, it is opined that they should follow the event, reference being made to the case of *Cecilia Karuru Ngayu v Barclays Bank of Kena & Another Nyeri High Court Civil Case No. 17 of 2014*.

Analysis and determination

16. This being a first appeal I am required to reconsider the evidence adduced, evaluate it and then draw my own conclusions bearing in mind that I did not hear and see the witnesses who testified{ (see Selle & Another v Associated Motor Boat Company Ltd & Others [1968] EA 123 }. The Court of Appeal for East Africa in Peters v Sunday Post Limited [1958] EA 424 underscored the same principles delivering itself thus:-

> " i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
>
> ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
>
> iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time."

17. I have carefully gone through the Record of Appeal as well the original record of the trial court availed to this court . I have neither seen a certified copy of the lower court's judgement nor typed proceedings before that court. The decree emanating from the impugned judgement is not also included in the Record of Appeal.

18. From the record it is evident that the Appellant made a request for typed proceedings, certified copy of judgment and decree vide letters dated 8th September, 2021 and 22nd September, 2021. The Record of Appeal was, however, filed on 22nd May, 2022 without certified typed proceedings, judgment and decree.

19. My brother (Nyaga J) in his Ruling of 5th July, 2024 had declined to dismiss the Appeal for want of prosecution as the Record of Appeal had not been compiled, filed and served to pave the way for

admission and hearing of the Appeal. Despite being directed to comply immediately, the Appellants are yet to obtain the crucial documents and move the Appeal forward.

20. Contents of the Record of Appeal are provided for under Order 42 Rule 13 (4) of the Civil Procedure Rules 2010 thus:-

> " ....Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say-
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> a. the memorandum of appeal;
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> b. the pleadings;
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> c. the notes of the trial magistrate made at the hearing;
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> d. the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
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> e. all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
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> f. the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal."

21. Superior Courts have on numerous occasions addressed situations such as obtain herein where the Record of Appeal is incomplete.

22. The Supreme Court in Law Society of Kenya v Centre for Human Rights and Democracy & Others (Petition No. 14 of 2013) [2014] KESC 29 (KLR) held;

> " (38) ..."The Petition of Appeal on the other hand is a statement of grievance, an appeal cause against the judgment of a lower Court. The Record of Appeal is the complete bundle of documentation, including the pleadings, submissions, and judgment from the lower Court, without which the appellate Court would not be able to determine the appeal before it.
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> (39) If an intending appellant were to present the Court with a Notice and Petition of Appeal, but without the Record of Appeal, and expect the Court to determine 'the appeal' on the basis of these two, such an appeal would be incomplete and hence incompetent. Indeed, this is the gist of Rule 33 (1) of the Supreme Court Rules".

23. Pursuant to Order 42 Rule 13(4) of the Civil Procedure Rules 2010 a Court may dispense with some documents being part of the Record, but the lower court's judgment and the decree flowing therefrom are among essential contents of a Record of Appeal, without which the Appeal will not be decided.

24. I am further guided by the Supreme Court in Mwicigi and 14 others v Independent Electoral and Boundaries Commission and 5 Others [2016] KESC 2 (KLR) stated that:-

> " [65]. This court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so clearly intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a

procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.

[66]. Yet procedure, in general terms, is not an end in itself. In certain cases, insistence on a strict observance of a rule procedure, could undermine the cause of justice. Hence the pertinence of Article 159 (2) (d) of *the Constitution*, which proclaims that,

" ..... courts and tribunals shall be guided by the principle that] justice shall be administered without undue regard to procedural technicalities". This provision, however, is not a panacea for all situations befitting judicial intervention; and inevitably, a significant scope for discretion devolves to the Courts."

25. The omission is not just a procedural technicality excusable under Article 159 (2) (d) of *the constitution*. It is a matter of substance and it therefore follows that there is no competent appeal for consideration. I need not in the circumstances determine the merits of the Appeal. Instead, the Appeal is hereby struck out with costs to the Respondents.

J. M. NANG'EA

JUDGE

JUDGEMENT DATED, DELIVERED AND SIGNED AT NAKURU THIS 28TH DAY OF MAY, 2025 IN THE PRESENCE OF:

The Appellants' Advocate, Ms Kagira for Ms Nanjira.

The Respondents' Advocate, Mr Maina.

The Court Assistant, Jeniffer.

J. M. NANG'EA

JUDGE