



REPUBLIC OF KENYA



**Kensilver Express Limited & another v Gatuma (Suing as Legal Representative for Bedan Nyagaka Thuraku - Deceased) (Civil Appeal E020 of 2021) [2024] KEHC 4732 (KLR) (25 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4732 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E020 OF 2021  
TW CHERERE, J  
APRIL 25, 2024**

**BETWEEN**

**KENSILVER EXPRESS LIMITED ..... 1<sup>ST</sup> APPELLANT**

**DOUGLAS NTAMBURA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ESTHER MUKAMI GATUMA (SUING AS LEGAL REPRESENTATIVE FOR  
BEDAN NYAGAKA THURAKU - DECEASED) ..... RESPONDENT**

*(Being an Appeal from the Judgment and Decree in Maua CMCC  
182 OF 2013 by Hon. C.K. Obara (SPM) on 25th January, 2021)*

**JUDGMENT**

1. On 06<sup>th</sup> November, 2010, Respondent's 38-year-old Bedan Nyagaka Thuraku suffered fatal injuries while travelling as a fare paying passenger in 1<sup>st</sup> Appellant's motor vehicle KAW 097K which was being driven by 2<sup>nd</sup> Appellant.
2. After the hearing, the trial court by a judgment dated 25<sup>th</sup> January, 2021 found Appellants liable at 100% and awarded the Respondent damages in the sum of Kshs 1,910,000/-.

**The Appeal**

3. The Appellant being dissatisfied with the lower court's decision preferred this appeal and set out 19 grounds which were summarized into four as follows:
  1. Whether the appeal is competent
  2. Whether Respondent's suit had abated



3. Respondent was a passenger in the accident motor vehicle
4. Whether the defence was considered
5. Whether the general damages were excessive

### **Analysis and Determination**

4. This being the first appellate court, its duty is to reevaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. See *Peters v Sunday Post Limited* (1958) EA at Pg. 424).
5. I have considered the appeal in the light of the grounds of appeal and submission filed by both parties. In determining this appeal, I shall consider the grounds of appeal as follows;

#### **1. Whether the appeal is competent**

6. Both counsel are aware that this appeal was delayed on the ground that the Appellant wished to file a supplementary record of appeal to include the judgment and decree appealed from.
7. Notwithstanding the numerous adjournments, the supplementary record of appeal on what Mr. Chebii, counsel for the Appellant submitted to be the non-availability of the trial court file, the supplementary record was not filed.
8. Whereas the appeals in the cases of *Ndegwa Kamau T/A Sideview Garage v Isika Kalumbo* [2016] eKLR and *James Murage Nguyu v RNN (Minor suing through next of friend RNK) & another* [2021] eKLR were struck out for the reasons that the decrees that were being appealed from had not been annexed in the respective records of Appeal, this court takes a different position that it would be too draconian to strike out the Appeal herein.
9. This view is taken firstly on the ground that the judgment and decree are available in the lower court file and secondly on the ground that Respondent's counsel is before the court to defend a judgment and decree issued in his client's favour and which is within their knowledge and no prejudice has been shown to have been occasioned to Respondent and counsel.

#### **2. Whether there was a proper suit before the court**

10. The trial court found that the suit was filed within a period of three years although the letters of administration were obtained after the suit was filed. I however find that the non-compliance with the procedural technicality does not affect the substance of the appeal.

#### **3. Whether Respondent was a passenger in the accident motor vehicle**

11. An issue has arisen as to whether or not the Respondent discharged the burden to prove that her deceased husband was a passenger in the accident motor vehicle.



12. In *Hellen Wangari Wangechi v Carumera Muthini Gathua* [2005] eKLR, , Mativo J (as he then was) quoted with approval Lord Brandon in *Rbeir Shpping Co. SA. v Edmunds* [1955] IWL 948 at 955 where the court rendered itself as follows:

“No Judge likes to decide case on the burden of proof if he can legitimately avoid having to do so. There are cases, however in which owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just cause to take.”

13. It is trite law that "whoever alleges must prove. Section 107 of the *Evidence Act*, Chapter 80 Laws of Kenya states as follows:

1. 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.
2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person

14. The court of appeal in the case *Mbutia Macharia v Annab Mutua & another* [2017] eKLR discussed the burden of proof and stated thus:

(16) “The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced.

15. In this case, the learned trial magistrate found as a fact that the name of the deceased was missing from the list of names of passengers on the police occurrence book and no other evidence was tendered to demonstrated that deceased was a passenger in the accident motor vehicle.

16. The *Halsbury's Laws of England*, 4<sup>th</sup> Edition, Volume 17, at paras 13 and 14: describes the burden of proof thus:

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case.....”

17. In the absence of evidence of proof that deceased was a passenger in the accident motor vehicle, I find that the learned trial magistrate erred in shifting the burden of proof to the Appellants to disapprove a fact that had not been proved.

18. From the foregoing, I find that liability as against the Appellants was not proved.

#### **4. Whether the general damages were excessive**

19. Quantum is a matter of judicial discretion which can only be interfered with if the court is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. (See *Mbogo v Shab* (1968) EA 93 and *Kemfro Africa Limited t/a Meru Express Services (1976) & another v Lubia & another*, No 2 [1987] KLR 30).

20. The principles on which a court can interfere with an award for damages was stated by Madan JA in *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] E.A 898 and restated



by Kneller JA in *Kemfro Africa Limited t/a Meru Express Services (1976) & another v Lubia & another, No 2* [1987] KLR 30 that:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former court of appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, 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 the damage.”

21. Had appeal not succeeded, I would have upheld the award on damages there having been no evidence that in assessing the damages, the trial magistrate considered an irrelevant factor, 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 the damage.
22. From the foregoing, the appeal succeeds and it is allowed with costs of the trial and of the appeal to the Appellants.

**DATED AT MERU THIS 25<sup>TH</sup> DAY OF APRIL 2024**

**T. W. CHERERE**

**JUDGE**

Appearances

Court Assistant - Morris Kino

For Applicants - Mr. Chebii for M.K.Chebii & Co. Advocates

For Respondent - Mr. Njindo for Michael Ngunjiri & Kimathi & Co. Advocates

