



REPUBLIC OF KENYA



Cebit Cargo Ltd & another v Wanjiru & another (Suing as the Personal Representative of the Late Ndolo Makumi - Deceased) (Civil Appeal E006 of 2022) [2024] KEHC 6805 (KLR) (23 April 2024) (Judgment)

Neutral citation: [2024] KEHC 6805 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E006 OF 2022
GMA DULU, J
APRIL 23, 2024**

BETWEEN

CEBIT CARGO LTD 1ST APPELLANT

JOSHUA MBITHI NGUTU 2ND APPELLANT

AND

NAOMI NJERI WANJIRU 1ST RESPONDENT

SYLVESTER MAKALI MAKUMI 2ND RESPONDENT

**SUING AS THE PERSONAL REPRESENTATIVE OF THE LATE NDOLO
MAKUMI - DECEASED**

*(From the Judgment in Civil Case No. 243 of 2019 delivered on 17th
February 2022 by Hon. A. M. Obura (Mrs.) (CM) at Voi Law Courts)*

JUDGMENT

1. In a judgment delivered on 17th February 2022, the learned trial Magistrate in Voi CMCC No. 243 of 2019 apportioned liability 10%:90% and concluded as follows:-

- “80. In the end, the total sum awarded to the plaintiffs is Kshs. 16,228,000/= less 10% contribution of Kshs. 1,622,800/=. The balance is Kshs. 14,605,200/=
81. I hereby enter judgment for the plaintiff as against the defendants jointly and severally for the sum of Kshs. 14,605,200/= (Fourteen million six hundred and five thousand two hundred only). The plaintiff is also awarded costs of the suit and interest thereon at court rates.”



2. Aggrieved by the decision of the trial court, the two appellants, who were the defendants in the trial court, have come to this court on appeal through counsel Lenjo Saru & Associates Advocates, on the following grounds:-
 1. That the Magistrate erred in law and fact in finding that the 2nd appellant was liable in causing the accident to the extent of 90% in respect of the road traffic accident which occurred on 19th March 2017 at Manyani area along Nairobi-Mombasa road involving the 1st appellant's motor vehicle registration No. KAW 432E/ZC 5556 Mercedes Axor that was being driven by the 2nd appellant and motor vehicle registration No. KCT 189T Toyota Harrier that was being driven by one Martin Mbuta Mutua, now deceased when this was not obviously the case given the circumstances leading to the accident.
 2. That the learned Magistrate erred in law and fact by failing to analyse facts and circumstances leading to the road traffic accident which occurred on 19th March 2017 which greatly pointed to huge contributory negligence on the part of the driver of motor vehicle Reg. No. KCT 189T Toyota Harrier and failed to apportion liability in the ratio of 50:50 as between the driver of motor vehicle Reg. No. KCT 189T Toyota Harrier and the 2nd appellant. The particulars of negligence against the driver of motor vehicle Reg. No. KCT 189T Toyota Harrier were:
 - i. Failing to slow, swerve, properly control motor vehicle Reg. No. KCT 189T Toyota Harrier or take any evasive measures to avoid the accident and or mitigate the injuries on a section of the road that was straight, flat and with no corners.
 - ii. Driving motor vehicle Reg. No. KCT 189T Toyota Harrier at high speed to the extent that he was unable to slow down and stop to avoid colliding head on with motor vehicle Reg. No. KAW 432E/ZC/5556 that was being driven by the 2nd appellant.
 - iii. Failing to heed the warning signs of the driver for motor vehicle Reg. No. KAW 432E/ZC/5556 which included hooting, flashing lights to alert him of the impending danger.
 - iv. Driving motor vehicle Reg. No. KCT 189T Toyota Harrier at high speed to the extent that after carelessly colliding with motor vehicle Reg. No. KAW 432E/ZC/5556 that was not in motion following a sudden engine failure, the said motor vehicle Reg. No. KCT 189T Toyota Harrier was pushed backwards by about 25 meters after the impact, a clear indication that it was being driven at high speed.
 - v. Driving motor vehicle Reg. No. KCT 189T Toyota Harrier while tired, fatigued and physically exhausted given the undisputed fact that the occupants of the said motor vehicle, including its driver had travelled on the night of 17th March 2017 from Mombasa to Kitui and arrived in Kitui on 18th March 2017 to attend a wedding ceremony. This is a clear indication that they travelled at night from Mombasa to Kitui, attended the wedding ceremony during the day on 18th March 2017 and travelled back from Kitui to Mombasa in the night of 18th March 2017 until the early morning hours of 19th March 2017 when the accident occurred.
 - vi. Wilfully carrying excess passengers beyond the capacity of 5 passengers in motor vehicle Reg. No. KCT 189T Toyota Harrier.
 3. That the learned Magistrate erred in law and fact by failing to hold that physical exhaustion, failing to heed the warning signs by the 2nd appellant on the impending danger, failing to stop, swerve or control his motor vehicle to avoid the accident, driving at high speed and careless



driving on the part of the driver of motor vehicle Reg. No. KCT 189T Toyota Harrier were the major factors which made the late Martin Mbuta Mutua unable to carefully drive and control motor vehicle Reg. No. KCT 189T Toyota Harrier thus he was liable for the road traffic accident which occurred on 19th March 2017 to the extent of 50% in contributory negligence and liability.

4. That the learned Magistrate erred in law and fact by awarding excessive arbitrary and unjustifiable amount of quantum of loss of dependency amounting to Kenya Shillings Sixteen Million (16,000,000/=) only when the same was not proved at all as it is required by law.
5. That the learned Magistrate erred in law and fact by awarding the sum of Kshs. 16,000,000/= as quantum on loss of dependency based on the deceased's transactions in his bank account, mpesa statements and that the deceased had employees yet none of the witnesses who testified in court referred to any page of the bank and mpesa statements to guide the trial court on the status of deceased's daily, average or even monthly income to justify the award on loss of dependency. Further no evidence was tendered before the trial court to prove that the deceased had employees and if so, how much the deceased used to pay his employees per day or per month.
6. That the learned Magistrate erred in law and fact by awarding the sum of Kshs. 16,000,000/= to the respondents as quantum on loss of dependency after holding that the deceased earned a monthly income of Kshs. 100,000/= when such monthly income was not proved at all by the respondents during trial.
7. That the learned Magistrate erred in law and fact by awarding the sum of Kshs. 16,000,000/= as quantum on loss of dependency yet she had rightly held at paragraph 72 of her judgment that the bank statements produced by the respondents did not reflect a consistent income and that it was not clear what some transactions in the mpesa statement relate to.
8. That by awarding the sum of Kshs. 100,000/= as monthly income of the deceased, the learned Magistrate arbitrary and unreasonably exercised her judicial discretion as no factual or documentary evidence had been presented before the trial court by the respondents to arrive at such an award of monthly income to the deceased.
9. That the learned Magistrate erred in law and fact by failing to appreciate and apply the principles set in law of what constitutes an income of an individual or a company known as under the *Income Tax Act* whereby no tax returns were produced in court by the respondents to prove the deceased's net income or the net income of Lakehill Logistics Ltd wherein it was testified in court that the deceased used to own and or worked for before holding that the deceased earned a monthly income of Kshs. 100,000/=
10. That the learned Magistrate erred in law and fact by assuming that the income of the deceased and that of a company known as Lakehill Logistics Ltd if at all it existed were one and the same legal entity and the income of such a company was the income of the deceased.
11. That the learned Magistrate erred in law and fact by awarding special damages that was not specifically pleaded and proved as it is required by law.
12. That the learned Magistrate erred in law and fact by disregarding the submissions and authorities cited by the appellants in support of their defence case and proceeded to award judgment in favour of the respondents.



13. That the quantum of damages is excessive, inordinately high and erroneous estimate of the damages awarded to the respondents with due regard to the weight and circumstances of the case.
14. The appellants shall cave leave of court to amend, add, alter and/or omit any ground on or before hearing hereof.
3. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Musungu Pekke & Company Advocates for the appellants, as well as the submissions filed by Gitonga Muriuki & Company Advocates for the respondents.
4. This being a first appeal, I have a duty to reconsider all the evidence on record, re-evaluate the said evidence and come to my own findings bearing in mind though that I did not have the opportunity to hear and see witnesses testify to determine their demeanour and give due allowance for that – see *Selle =Versus= Associate Motor Boat Company Ltd (1968) EA 132*.
5. These appeals being in a series, I am informed that this appeal No. E006 of 2022 is the lead file. I note that in the other five appeals in the series also, the submissions were on both quantum of damages awarded, and on liability.
6. In deciding this appeal, I have to bear in mind that the legal burden was on the plaintiffs (now respondents) to prove their allegations of negligence against the defendants, now appellants. They also had the burden to prove the quantum of damages to be awarded. This burden is codified under Section 107, 108 and 109 of the *Evidence Act* (Cap.80).
7. This being a civil case, the standard of proof is on the balance of probabilities, see the English case of *Miller =Versus= Minister of Pensions (1942) 2 ALL ER 372*.
8. In proving their case at the trial in Voi CMCC No. 243 of 2019 the plaintiffs (now respondents) called three witnesses PW1 Naomi Njeri Wanjiru, PW2 Sylvester Makali Mukami and PW3 PC Bernard Mwangi.
9. PW1 Naomi Njeri Wanjiru testified that she was wife of Ndolo Makumi deceased. She testified that he was owner of motor vehicle KCE 189T, and a passenger therein when the vehicle was involved in a road traffic accident herein. She adopted her witness statement and other documents filed. She stated that she had a young child with the deceased, and that the driver of the other vehicle drove on the wrong side of the road when the accident occurred. She testified that she was a business woman selling hand bags.
10. In cross-examination, she stated that her husband operated clearing and forwarding business through Lakehill Logistics Ltd. She did not produce a birth certificate for the child. She stated that the mpesa transactions of the deceased showed that his average expenditure was 150,000/= per month. She said that she opened her own driving business soon after her husband died.
11. PW2 was Sylvester Makali Makumi a brother of the deceased whose evidence was that deceased engaged him on part time basis at Lake Hills Logistics Ltd owned by Lawrence Asam Mohamed. According to him, the deceased paid him Kshs. 50,000/= per month in cash. He did not produce any documents to support his oral evidence.
12. In cross-examination, he agreed that he did not have documents to support his oral evidence, but maintained that the deceased earned Kshs. 150,000/= - 200,000/= per month from clearing and forwarding transactions.



13. PW3 was PC Benard Mwangi of Voi Police Station whose evidence was that on 19th March 2017 at 3:30a.m, together with other police officers proceeded to a traffic accident scene near Manyani Prison on Mombasa – Nairobi road involving Toyota Harrier vehicle KCE 189T and trailer KAW 432E/ZE 5556. He noted that the trailer had pushed the Harrier vehicle 10 meters off the road. He found five dead bodies, and was informed that a lady had been taken to hospital but later died. He charged the trailer driver in court who was convicted of causing death by dangerous driving and driving defective motor vehicle and sentenced. He produced police abstracts on the deaths. In cross-examination, he confirmed that the capacity of the Harrier vehicle was 5 occupants, but was carrying 6 occupants at the time of accident.
14. Though I found no record of defence evidence tendered herein, except in Voi CMCC 238 of 2019, the trial Magistrate relied on the evidence of Joshua Mbithi Ngutu (DW1) for the defence who testified in that other case as the evidence of the defence herein. This must be for the reason that these 6 cases are in a series.
15. I start with the issue of liability. From the evidence on record where DW1 Joshua Mbithi Ngutu in CMCC 238 of 2019 the trailer driver himself admits that he swerved the trailer to the right suddenly at night with full lights, and failed to swerve back to his left side, and the fact that he was charged and convicted of all six counts of causing death by dangerous driving, as well as driving a defective motor vehicle, I find that the trial Magistrate was correct in finding liability at 10%:90%. The suggestion of the defence that liability be 50%:50% in my view is not sustainable or reasonable on the basis of the evidence on record. The mere fact of carrying one excess passenger in the back seat perse cannot be a basis for a finding of 50% liability or negligence against the plaintiff.
16. Since the said DW1 was employed by Cebit Cargo Ltd, the company was vicariously liable. I thus uphold the trial court’s finding on liability.
17. With regard to the quantum of damages awarded, I have to remind myself that assessment of damages is an exercise of discretionary power by a trial court and that an appellate court will be slow to interfere unless certain parameters are satisfied. In this regard, I am of the view that it will suffice if I cite only the case relied upon by the appellants counsel herein – *Kemfro Africa Ltd & Another =Versus= Lubia & Another (1985) eKLR* wherein it was stated as follows:-

“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 for Eastern Africa to be that it must be satisfied that either 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.”
18. I note that in the judgment delivered on 17th February 2022, the trial Magistrate considered separately each head of award for damages. In that regard, I find no error committed by the trial court in assessing the quantum of damages for pain and suffering and for loss of life expectancy. I uphold the same.
19. With regard to the award for loss of dependency, the trial Magistrate relied on oral evidence on the income of the deceased, that he was a clearing and forwarding operative. The Magistrate also relied on mpesa statement, and bank statements from Cooperative Bank Ltd and Family Bank Ltd as at a particular date. There is no documentary evidence however, of financial transactions for an extended continuous period of time.



20. In my view, though dependency could and was proved through the Chief's letter, the income of the deceased was not proved as found by the Magistrate, since even the alleged employee of the deceased PW2, did not testify to a single specific occurrence or mpesa transaction, which supports his alleged monthly pay of Kshs. 30,000/=.
21. Though I would not go by the minimum wage basis for a person who at least owned a Harrier vehicle which could bring reasonable income on hire, I am of the view that a finding of the income of Kshs. 100,000/= per month was inordinately high.
22. In my view, an income of Kshs. 30,000/= per month for an operator of a motor vehicle or driver is reasonable. The multiplier of 20 years in my view is reasonable, and the ratio and dependency used by the trial court is also reasonable.
23. Thus loss of dependency will be Kshs. 30,000/= x 20 years x 12 x 2/3 = Kshs. 4,800,000/= less 10%.
24. As for special damages, I find no fault of the trial court, as the Magistrate awarded what was pleaded and proved on the balance of probabilities.
25. I thus set aside the trial court's award of damages and order that the damages shall be as follows:-
- Pain and suffering Kshs. 20,000/=
- Loss of expectation of life Kshs. 100,000/=
- Loss of dependency
- Kshs. 30,000 x 20 years x 12 months x 2/3 Kshs 4,800,000/=
- Special damages Kshs. 108,000/=
- Sub total Kshs. 5,028,000/=
- Less 10% Kshs. 502,800/=
- Net total Kshs. 4,525,200/=
26. The damages will attract interest at court rates till payment in full. Parties will bear their respective costs of this appeal, as the appeal is only partially successful.

DATED, SIGNED AND DELIVERED THIS 23RD DAY OF APRIL 2024 IN OPEN COURT AT VOI.
GEORGE DULU

JUDGE

In the presence of:-

Alfred – Court Assistant

Mr. Musungu for the appellant

Mr. Muriuki for the respondent

