



Wafula (Suing as a Legal Representative and Administrator of the Estate of Anthony Wafula Mwoko) & another v Vallary Linnet Ogolla t/a Quick Shuttle (Civil Appeal E061 of 2023) [2024] KEHC 7172 (KLR) (29 May 2024) (Judgment)

Neutral citation: [2024] KEHC 7172 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E061 OF 2023**

REA OUGO, J

MAY 29, 2024

BETWEEN

GENTRIX NAFULA WAFULA (SUING AS A LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF ANTHONY WAFULA MWOKO) 1ST APPELLANT

EVANS WANYONYI WAFULA (SUING AS A LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF ANTHONY WAFULA MWOKO) 2ND APPELLANT

AND

VALLARY LINNET OGOLLA T/A QUICK SHUTTLE RESPONDENT

(An appeal from the judgment and decision of Hon. G.A Adhiambo Senior Principal Magistrate in Kimilili PMCC 86 of 2020 delivered on 31/5/2023)

JUDGMENT

1. The suit before the trial court was brought under the [Law Reform Act](#) and the Fatal Accident Act following the death of Anthony Wafula Mwoko in a road traffic accident. The appellants alleged that on 25/11/2018 the deceased was riding motorcycle registration number KMCC 901H along Webuye-Kitale road in the Wabukhonyoi area when the defendant's motor vehicle, KBB 921L which was driven without any due care, lost control and knocked the deceased causing him fatal injuries. It was alleged that the deceased had a wife and 5 adult children. At the time of death, he was 56 years old, earning a sum of Kshs 68,530 per month basic pay with a net salary of Kshs 51,506.10/-. The appellants sought for general and special damages, costs and interest.
2. The respondent put in her statement of defence. She denied the occurrence of the accident and that she was responsible for the same. She denied being the registered and/or beneficial owner of the vehicle



registration number KBB 921L Toyota Townace. In the alternative, she averred that if an accident occurred the same was caused by the reckless and negligent acts of the appellant.

3. The trial magistrate upon considering the evidence adduced entered the following judgment:

“I find that without the records from the registrar of motor vehicle the court cannot be certain as to who was the registered owner and beneficial owner of the said vehicle as such the court is not certain as to who should be held vicariously liable for the acts and omissions of the driver who was driving the aforesaid vehicle.

If the plaintiff were to prove the owner of the vehicle whether beneficial or registered this court would have found him/her liable for the acts and omissions of the driver thereof by 100% and would have apportioned him 100% liability.

.....

I would have awarded general damages of Kshs [51,506 x4/12 x1/3] 824,096....

...I would have awarded special damages of Kshs 79,000/-...”

4. The appellant is dissatisfied with the finding of the subordinate court and filed a Memorandum of Appeal dated 13/6/2023 raising the following grounds:

1. That the learned trial magistrate erred in law and fact in holding that the appellants had not proved their case against the respondent on a balance of probability.
 2. That the learned trial magistrate after holding the respondent’s agent and/or servant 100% liable for the accident erred in law and fact in holding that the respondent is vicariously liable.
 3. That the learned trial magistrate erred in law and fact in holding that the appellants had not proved on a balance of probability that the motor vehicle registration number KBB 921 Toyota Hiace belong to the respondent.
 4. That the learned trial magistrate erred in law and fact in holding that the only means to prove ownership is the production of the motor vehicle search.
 5. That the learned trial magistrate erred in law and fact in dismissing the production of a police abstract as a proof of ownership of motor vehicle.
 6. That the learned trial magistrate erred in law and fact and failed to consider the evidence placed before her on ownership of the motor vehicle registration number KBB 921L Toyota Hiace.
 7. That the learned trial magistrate in awarding alternative quantum erred in law and in fact in applying multiplier ratio of 1/3 to the deceased who was survived with a widow and children.
 8. That the learned trial magistrate after considering the fact and evidence before her arrived at a wrong decision hence a miscarriage of justice.



5. The appellant prays that the appeal be allowed and the decision of the trial magistrate be set aside. They urge this court to re-assess the damages payable to the appellants under the [Law Reform Act](#) and Fatal Accident Act.

6. The appeal was canvassed by way of written submissions. The appellants in their submissions dated 1/2/2024 argue that they produced police abstract exhibit 10 which showed that the respondent was the owner trading as Quick Shuttle. The police abstract shows that motor vehicle KBB 921L owned by the respondent, was involved in the accident. They referred to the decision in [Samuel Mukunya Kamunge v John Mwangi Kamuru](#) [2005] eKLR:

“It is true that a certificate of search from the Registrar of motor-vehicle would have shown who was the registered owner of the motor-vehicle according to the records held by the Registrar of motor vehicle. That however is not conclusive proof of actual ownership of the motor vehicle as section 8 of the [Traffic Act](#) provides that the contrary can be proved. This is in recognition of the fact that often times vehicles change hands but the records are not amended.

I find that the trial magistrate was wrong in holding that only a certificate of search from the Registrar of motor vehicle could prove ownership of the motor-vehicle. I find a police abstract report having been produced showing the Respondent as the owner of motor vehicle KAH 264A, and evidence having been adduced that letters of demand sent to the Respondent elicited no response from him denying ownership of the motor vehicle, and the Respondent having offered no evidence to contradict the information on the police abstract report, the appellant had established on a balance of probability that motor vehicle KAH 264A was owned by the Respondent.”

7. The appellant submits that the police abstract is not a creation of the police. It contains information provided by the owner of the motor vehicle or his agent after the accident.

8. On multiplier, the appellant provided evidence that the deceased left behind 5 children most of them adults. PW1 stated that she was in college and depended on the deceased. They urged the court to find that the applicable ratio was 2/3.

9. The respondent opposed the appeal. She filed her submissions dated 4/3/2024. They submit that since the appellants failed to produce a search certificate, they failed to prove ownership of the motor vehicle. They relied on the Court of Appeal decision in [Thuranira Kaururi v Agnes Mubeche](#) (1997) eKLR where the court held that:

“The plaintiff did not prove that the vehicle which was involved in the accident was owned by the defendant. As the defendant denied ownership, it was incumbent on the plaintiff to place before the Judge a certificate of search signed by the Registrar of Motor-vehicles showing the registered owner of the lorry. Mr. Kimathi, for the plaintiff, submitted that the information in the police abstract that the lorry belonged to the defendant was sufficient proof of ownership. That cannot be a serious submission and we must reject it.”

10. The respondent submitted that the trial magistrate did not err in dismissing the appellants’ suit as the appellant failed to create a nexus between the suit motor vehicle and herself.

11. In the unlikely event that the appeal succeeds, she submits that on the head pain and suffering, the appellant should be awarded Kshs 10,000/- as the deceased died on the spot (see [Wachira Joseph & 2 others v Hannah Wangui Makumi & another](#) [2021] eKLR). They also submit that considering the



passage of time and inflation, an award of Kshs 70,000/- would be reasonable for loss of expectation of life.

12. On the claim under the Fatal Accident Act, they advance that Kshs 56,506/- which was the deceased's net pay should be adopted as the multiplicand. The deceased was 56 years old and considering the vagaries of life a multiplier of 2 years is appropriate. They submit that the deceased's children were all adults and it cannot be said that they depended on him. The appellants did not provide admission letters or receipts to show that the deceased would pay school fees for the children. They proposed that the court should calculate the award as follows: $951,506 \times 2 \times 12 \times \frac{1}{3} = \text{Kshs } 412,048/-$. They did not challenge the award on special damages.

Analysis And Determination

13. The issues raised by the appeal are twofold: whether there was sufficient evidence to prove that the respondent was the owner of the vehicle and, if so, whether the trial magistrate applied incorrect principles in awarding damages. First, I shall re-evaluate the evidence and arguments presented during the trial, as is expected of a first appellate court. (see the case of *Selle & Another v. Associated Motor Boat Co. Ltd & Others* [1968] EA 123).
14. The evidence at the subordinate court can be summarized as follows:
15. Gentrix Nafula Wafula (PW1) testified that the deceased was her husband and he died following a road traffic accident. She adopted her statement dated 4/8/2021 as her evidence in chief. She produced the post-mortem report, death certificate, burial permit, grant of letters of administration, the chief's letter and the deceased's payslip. PW1 testified that the deceased was 56 years old and he was the sole breadwinner. He used to provide clothes, food and school fees for the children.
16. No 96248 PC Nobert Wamukota (PW2) testified that he works at Kimilili police station. The investigating officer in the traffic case was Corporal Samuel Simotwo. According to the recommendations in the cover report, it was indicated that the driver of motor vehicle registration number KBB 921L was primarily responsible for the accident and the driver was charged in Traffic Case No 88 of 2019. He produced the police abstract as Pex1.
17. David Wangila (PW3) testified that he was at the scene when he saw the vehicle knock the deceased. The deceased was wearing a helmet and a reflective jacket. They were both moving in the same direction. The deceased did not overtake. The deceased indicated by an indicator and by hand that he was crossing the road to the other side. The deceased was about to turn at the feeder road and there was no need to overtake. He slowed down but the vehicle which was behind him would not slow down and it knocked the deceased from behind at a high speed.
18. The first issue before the court is whether the appellants proved to the required standard that the respondent was the owner of the motor vehicle KBB 921L. It is not in dispute that the appellants did not produce a Certificate of Search signed by the registrar of motor vehicles. The only evidence before the court was the police abstract where the name of the respondent together with her address was captured. The respondent, in the police abstract, was described as the owner of the motor vehicle.
19. It is trite law that he who alleges must prove. Sections 107, 108 and 109 of the *Evidence Act* provide as follows:

107. Burden of proof



(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.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

20. In this case, the respondent relied on the Court of Appeal decision in the *Thuranira Kaururi v Agnes Mucheche* case (supra) where it was held that the plaintiff was to place before the court a certificate of search signed by the Registrar of Motor-vehicles showing the registered owner.

21. However, in this case, I note that the respondent did not raise any objection during the production of the police abstract as Pexh1 by PW2. The Court of Appeal in the case of *Wellington Nganga Muthiora v Akamba Public Road Services Ltd & Another*, (2010) eKLR held as follows:

“Where a police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even cross-examination challenged it, the police abstract being prima facie evidence not rebutted could be relied on as proof of ownership in the absence of anything else as proof in civil cases was within the standards of probability and not beyond reasonable doubt as is in criminal cases. However, where it was challenged by evidence or in cross-examination, the plaintiff would need to produce a certificate from the Registrar or any other proof such as an agreement for sale of the motor vehicle which would only be conclusive evidence in the absence of proof to the contrary”

22. The police abstract produced by PW2 captured the respondent as the owner of the vehicle, other particulars of the vehicle were also accurately captured. The respondent did not adduce any evidence to rebut the appellants’ case. Therefore, I find that it was sufficiently proved that the respondent is the owner of the motor vehicle KBB 921L. In her judgment, the trial magistrate held that the driver of the vehicle was 100% liable for causing the accident. The question of liability has not been challenged.

23. I shall now turn to consider the damages awarded. The appeal only challenged the multiplier used by the trial magistrate. In an appeal against the assessment of damages, an appellate court must be careful not to interfere with the trial court’s discretion unless certain conditions are met. These conditions were outlined in the case of *Kemfro Africa Limited t/a “Meru Express Services (1976)” & Another v Lubia & Another* (No 2) Civil Appeal No 21 of 1984 [1985] eKLR thus:

“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 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.”

24. In this case, it is not in dispute that the deceased at the time of his death had adult children. His youngest child was 23 years old. PW2 testified that some of the children are in college. On cross-examination, PW2 admitted that she did not produce any evidence that the children were in college or receipts of school fees to show that the children were in college. The appellants did not provide any information on the deceased’s children who were in college and which college they were attending. The information concerning the deceased’s adult children attending college was scanty. The only evidence by PW1 is that she depended on the deceased who would send her money to take care of the home. The appellant submits that a multiplier ratio of 2/3 would be appropriate.

25. In *Allan Owiti Awuor & another v Tabitha Micere Mathu (Suing As Personal Representative of The Estate Of Peter Math Ng’ang’a)* [2021] eKLR, the deceased died at the age of 57 years and was survived by his widow and children aged 24 and 39. On the multiplier ratio, the court held as follows:

“ 45. That brings us to the issue of dependency ratio, the multiplier and earnings. On dependency ratio, the applicants argued that the 2/3 ratio was on the higher side. They argued that a ratio of 1/3 would be appropriate. I agree. It must be clear that dependency is a question of fact to be proved unless the court could take judicial notice depending on the circumstances of each case. There were only two dependants and therefore there was no way the deceased would have spent two thirds of earnings on them.”

26. I agree that the deceased couldn't spend 2/3 of his earnings on PW1. In the circumstances, the trial magistrate cannot be faulted for finding that a multiplier of 1/3 was adequate.

27. In the end, I find that the trial magistrate was correct in her computation of damages. The respondent is 100% liable for the accident and damages are awarded as follows:

- a. General damages for pain and suffering Kshs 30,000/-
- b. Loss of expectation of life Kshs 200,000/-
- c. Loss of dependency [51,506 x 4 x 12 x 1/3] Kshs 824, 096/-
- d. Special damages Kshs 79,000/-

Total Kshs 1,133,096/-

28. The appellant shall have the cost of this appeal

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 29TH DAY OF MAY 2024

R.E. OUGO

JUDGE

In the presence of:

Mr. Onkangi -For the Appellant

Mr. Amihanda -For the Respondent

Wilkister/ Diana -C/A

