



REPUBLIC OF KENYA



KENYA LAW
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**Kihara v Njeru & another (Civil Appeal E016 of 2021)
[2024] KEHC 6057 (KLR) (29 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6057 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CIVIL APPEAL E016 OF 2021**

**J WAKIAGA, J
MAY 29, 2024**

BETWEEN

DAVID KAMAU KIHARA APPELLANT

AND

CLAIRE GACHUNKU NJERU 1ST RESPONDENT

ANDREW MUCHIRI GICHUBI 2ND RESPONDENT

*(Being an Appeal from the Judgement of Chief Magistrate's Court
in Kandara CMCC No 131 of 2019 delivered on 6th May 2021)*

JUDGMENT

1. This appeal arises from the judgement delivered by Hon. M. Kurumbu on 6th May 2021 in which the Court found the Appellant liable on liability at 85% : 15%, on the basis that as a driver he ought to have been more careful and that he hit the deceased who was walking ahead of him from behind. The Court proceeded to award a sum of Kshs.2,217,470 in general and special damages.
2. Being aggrieved by the said determination, the Appellant filed this appeal and raised the following grounds:
 - a. The learned magistrate erred by awarding inordinately high general damages.
 - b. The Court failed to consider the Appellant's submissions.
 - c. The award for income of Kshs.20,000 was never proved.
 - d. The judgement was not supported by the evidenced tendered.



Submissions

3. Directions were issued on the disposal of the appeal by way of written submissions. On behalf of the Appellant it was submitted that there was no evidence tendered to disapprove the Appellant's account on how the accident occurred and on the authority of *Ndeti v Mwangangi & another* [2022] KEHC 15732, the Court should have apportioned liability on the basis of 50% :50%.
4. On quantum it was submitted that the Appellant Court has powers to interfere with the award if it was inordinately high or lower. On the multiplicand it was contended that the Respondent pleaded that the deceased was a business man earning Kshs. 20,000 per month but at the hearing tendered no evidence in support thereof. It was submitted that the Court should therefore have used the minimum wage in determining the award under this heading as was stated in the case of *Tobias Odoyo Obura v Jane Kerubo Miruka & another* [2018] eKLR.
5. On the multiplier it was submitted that the deceased was aged 47 years at the time of his death and therefore a multiplier of nine years should have been applied as was held in the case of *Isaac Kimani & another v Hellena Wanjiru Rukanga* {2014} eKLR and that a dependency ratio of 2/3 should have been applied. For pain and suffering Kshs.10,000 was proposed as the deceased died on the same day in support of which the cases of *Hyder Nthenya Musili & another v China Wu Yi limited & another* [2017] eKLR was cited.
6. On behalf of the Respondent it was submitted that the deceased should have retired at the age of 60 years and therefore the multiplier of 13 years was appropriate as there was no retirement age for a business person. On the multiplicand it was submitted that the deceased's wife tendered oral evidence in support thereon.
7. This being a first appeal, the Court is required to re-evaluate the evidence tendered before the trial Court to make to its own determination thereon, while giving allowance to the fact that unless the trial Court, it did not have the advantage of seeing and hearing the witnesses.
8. PW1 CPL Ahmed Wako presented the police abstract in Court which indicated that KBW 560J was blamed for the accident and the driver thereof was charged in Court for causing death and the case was pending in Court as at the time he testified. PW2 Claire Gachunku Njeru stated that the deceased was a business man and relied on the list of documents. In cross examination she stated that she did not have any document to prove the deceased's earnings.
9. PW3 Joshua Maina Kanae stated that he was with the deceased when the motor vehicle registration number KBW 560J left it side and hit them on the pedestrian walk. In cross examination he stated that they did not see the said motor vehicle.
10. DW1 David Kamau Kihara relied on his statement and stated that there were people on the road whom he wanted to avoid hitting and that he veered off the road where the deceased was walking at. On cross examination he stated that it was dark and it had rained and therefore could not see them.

Determination

11. From the proceedings and submissions herein, the following issues have been identified for determination:
 - a. Whether the trial Court arrived at a correct determination on liability.
 - b. Whether the award in general damages was inordinately high so as to be interfered with by this Court on appeal.



12. Liability is an issue of evidence, in finding against the Appellant, the trial Court had this to say: “ both the pedestrians and the driver of the motor vehicle had a duty of care to each other in this case I find both the deceased and the defendant contributed to the accident. The defendant will bear the bigger percentage of liability because as the driver he ought to have been more careful in the circumstances. First the deceased was walking ahead of the subject motor vehicle the motor vehicle approached him from behind and hit him. Secondly the defendant was at a loss when asked to explain about a matatu and a pick up which he blames for the accident..... the police blamed the subject motor vehicle for causing the accident. The deceased will also bear a percentage PW3 said that there was a pickup by the road side which blocked their footpath. This means that due to that pickup they might have walked too close to the tarmac. The deceased would not have been hit by the motor vehicle if he stood a side waited for the road to clear before trying to proceed to walk” (emphasis added).
13. The issue therefore for the Court to decide is whether the apportionment of liability herein was reason in view of the evidence as summed by the Court herein whereas the Appellant has proposed an apportionment on the basis of 50%:50%. From the evidence tendered, it is clear that the degree of contribution by the deceased was not on 50% basis but greater than 15% as assessed by the trial Court, having it is the deceased who walked too close to the tarmac did not wait for the road to clear.
13. In exercising the powers of this Court as first appellate Court, I am of the considered view and find that a contribution of 30% would have been appropriate based on the evidence tendered and would allow the appeal on liable by substituting the trial Court finding thereon with a finding of 30%: 70% in favour of the Respondent.
14. On quantum, the principles upon which the appellate Court, will interfere with the trial Court’s exercise of discretion on award are well settled in Kenya as was stated in *Kemfro Africa Ltd v A M Lubia & another* [1982-88] KAR 727 that is to say the Court acted on wrong principles or awarded so excessive low or high award so as to arrive at a wrong decision.
15. The Appellant challenge is on the award of loss of expectation of life and the use of Kshs.20,000 as the multiplicand without supporting documents.
16. In this case the Respondent did not support her claim with any documents and her testimony which the Court relied upon did not support the said assertion. The Court was in error in arriving at a finding that the sum was modest as it translated to Kshs.666 per day which was not supported by any evidence. Therefore, as submitted by the Appellant, one of the options available to the Court in the absence of the same was to use the global sum award or in the alternative the minimum wage option. Having opted for the multiplicand I would therefore agree with the submission by the Appellant that the Court ought to have used the minimum wage option.
17. I would therefore to that extent allow the appeal and substitute the trial Courts award thereon with a monthly earnings of Kshs.7,240.95 and having taken into account the age of the deceased as at the time of 47 years and having noted that he was a business man, the use of 13 years as a multiplier was reasonable and will not interfere with the same.
18. The award of loss of expectation of life at Kshs.100,000 and pain and suffering at Kshs.10,000 were supported by decided cases and will not interfere with the same.
19. In the final analysis I partially allow the appeal herein and substitute the trial Courts award as follows:
 - a. Liability 30% 70% in favour of the Respondent
 - b. General damages for lost dependency $Kshs. 7240.95 \times 12 \times 23 \times 2/3 = Kshs. 753,058.80$



- c. Loss of expectation of life Kshs. 100,000.00
 - d. Pain and suffering Kshs. 10,000.00
 - e. Special damages Kshs. 27,000.00
- Total Kshs. 890,058.80
Less 30% 267,017.64
Grand total Kshs. 623,041.16

20. The Appellant is entitled to the cost of the appeal while the Respondent is entitled to the cost of the lower Court together with interest thereon. And it is ordered.

DATED SIGNED AND DELIVERED AT MURANGA THIS 29th DAY OF MAY 2024

J. WAKIAGA

JUDGE

In the presence of :

Mr. Nganga for Mr. Mutunga for Respondent

Issa for the Appellant

Jackline – Court Assistant

