



Nabutola & another v Kinyanjui & another (Sued as the administratrix and administrator of the Estate of the Late John Kahuha Mwangi respectively) (Civil Appeal E213 of 2022) [2024] KEHC 9307 (KLR) (Civ) (27 June 2024) (Judgment)

Neutral citation: [2024] KEHC 9307 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E213 OF 2022

AB MWAMUYE, J

JUNE 27, 2024

**SUED AS THE ADMINISTRATRIX AND ADMINISTRATOR OF THE
ESTATE OF THE LATE JOHN KAHUHA MWANGI, RESPECTIVELY**

BETWEEN

LUASI M NABUTOLA 1ST APPELLANT

REBECCA MWIKALI NABUTOLA 2ND APPELLANT

AND

MARY WAMBUI KINYANJUI 1ST RESPONDENT

REBECCA MWIKALI NABUTOLA 2ND RESPONDENT

**SUED AS THE ADMINISTRATRIX AND ADMINISTRATOR OF THE ESTATE
OF THE LATE JOHN KAHUHA MWANGI RESPECTIVELY**

*(Being an Appeal against the Judgment and Decree of the Hon. S.A. Opande
(PM) delivered on 8th March, 2022 in Milimani CMCC No. 7316 of 2006)*

JUDGMENT

1. Every year, thousands of lives are lost in Kenya as a result of road traffic accidents. These road deaths are a matter beyond being mere statistics announced annually by grim-faced public officers. Each of those deaths represents an individual's future cut short by the cold and cruel hand of death, leaving behind a family and a community of friends from whom a dearly beloved person has been unexpectedly snatched from their lives.



1. It is natural for us to want to hold someone accountable whenever a life is lost in a sudden and unexpected way. It is perhaps for that reason that the Trial Court's Judgment dated 8th March, 2022 contains the following passage on its second page:

“On liability, there is no evidence spelling out who is to blame. However, a life was lost and the 1st Defendant as a driver had an obligation to have exercised duty of care while driving, which would have minimized the impact on collision. As to whether the 1st Defendant was intoxicated, no evidence has been laid out to prove the same. The evidence brought to court by the Plaintiff is not sufficient to entirely lay blame on the Defendant[s]. It is on this premise that I shall apportion liability 80:20 in favour of the Plaintiff.”

2. It is the duty of this Court, sitting on appeal, to ascertain whether the Trial Court's reasons met the required legal and factual thresholds required to sustain its findings. In doing so, this Court, as the first appellate court, is called upon to re-evaluate the evidence in the Trial Court both on points of law and facts, and to thereafter reach its own findings and conclusions. The Court of Appeal for East Africa in *Peters V Sunday Post Limited*, [1958] at page 424 stated that:

“An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.”

3. The Appellants' Written Submissions dated 26th January, 2024 build upon the grounds set out in the Memorandum of Appeal dated 6th April, 2022. The Appellants fault the Learned Magistrate for arriving at a finding of 80:20 liability in favour of the Respondents despite the Respondents having failed to prove their case. In addition to faulting the Trial Court on liability, the Appellants are equally aggrieved with the lower court's findings on quantum; which they describe as excessive for, inter alia, being based on a sum three times the prescribed minimum wage.

4. At Paragraph 25 of the Appellants' Written Submissions, the Appellants have submitted that this Court should apportion liability equally and recalculate the quantum of damages as follows:
General Damages for Loss of Dependency (KShs.5,271 x 12 x 22 x 2/3) = KShs.927,696.00
General Damages for Pain and Suffering = KShs.20,000.00
Special Damages = KShs.92,885.00
TOTAL = KShs.1,040,581.00
Less 50% Liability (KShs.520,290.50) = KShs.520,290.50

5. The Trial Court had apportioned an 80:20 liability in favour of the Respondents, and also awarded them costs. The specific breakdown in the Trial Court's Judgment dated 8th March, 2022 was as follows:
General Damages for Loss of Dependency (KShs.15,000 x 12 x 22 x 2/3) = KShs.2,640,000.00
General Damages for Pain and Suffering = KShs.20,000.00
Special Damages = KShs.92,885.00

TOTAL = KShs.2,752,885.00

Less 20% Liability (KShs.550,577.00) = KShs.2,202,308.00.

6. On 5th June, 2024 the Respondents were granted up until the end of 17th June, 2024 to file and serve their written submissions. The directions of the Court were clear that at the lapse of that period this matter would be reserved for judgment and judgment would be written based on



the filings as at the end of 17th June, 2024. When the period lapsed, the Respondent had failed to file written submissions. Consequently, this judgment was written without the benefit of the Respondents' rejoinder to the Appellants' Written Submissions.

7. Nevertheless, it is clear to this Court that there are three issues of contention between the Parties, namely:
 - a. Whether the Trial Court erred in its findings on liability;
 - b. Whether the Trial Court erred in its findings on general damages; and
 - c. Who should bear the costs of the Appeal.
2. John Kahuha Mwangi was only 38 years old when he met his demise. He left behind a wife and three young children, on behalf of whom the Respondents moved the Trial Court for justice. However, as the Learned Magistrate stated in the passage of the lower court's judgment that I quoted at Paragraph 2 above, there was no evidence led before the Trial Court to apportion liability on the Appellants at 80:20. Indeed, there was no reason for a finding of 80:20 as opposed to 100% against the Appellants; nor was there a reason recorded for the finding of 20% contributory negligence on the part of the Deceased.
3. It is clear from the text of the impugned Judgment that the Trial Court was in error in both law and in fact due to it taking into account matters it ought not to and giving them undue consideration, and also for not taking into consideration matters it ought to have considered. The finding of 80:20 liability in favour of the Respondents was irregular.
4. As noted by the Trial Court, the Respondents did not prove that the Appellants were negligent in any way. In the case of *Henderson V Henry E Jenkins & Sons*, [1970] AC 232 at 301 it was held that:

“In an action for negligence the plaintiff must allege, and has the burden of proving, that the accident was caused by the negligence on the part of the defendant. That is the issue throughout the trial, and in giving judgment at the end of the trial, the Judge has to decide whether he is satisfied on a balance of probabilities that the accident was caused by the negligence on the part of the defendant, and if he is not satisfied the plaintiff's action fails. But if in the course of the trial there is proved a set of facts which raises a prima facie inference that the accident was caused by the negligence on the part of the defendants, the issue will be decided in the plaintiff's favour unless the defendants by their evidence provide some answer which is adequate to displace the prima facie inference. In this situation there is said to be an evidential burden of proof resting on the defendants.”
5. This position is also stated in statute. Sections 107,109, and 112 of the *Evidence Act*, on the burden of proof, were extensively dealt with in *Anne Wambui Ndiritu V Joseph Kiprono Ropkoi & Another*, [2005] 1 EA 334, in which the Court of Appeal held that:

“As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”



6. It is also not possible for the Respondents to rely on the doctrine of *res ipsa loquitur* in the present case. In *Embu Public Road Services Limited V Riimi*, [1968] EA 22 the East African Court of Appeal stated:

“The doctrine of *res ipsa loquitur* is one which a plaintiff, by proving that an accident occurred in circumstances in which an accident should not have occurred, thereby discharges, in the absence of any explanation by the defendant, the original burden of showing negligence on the part of the person who caused the accident. The plaintiff, in those circumstances does not have to show any specific negligence but merely shows that an accident of that nature should not have occurred in those circumstances, which leads to the inference, the only inference, that the only reason for the accident must therefore be the negligence of the defendant. The defendant can avoid liability if he can show either that there was no negligence on his part which contributed to the accident; or that there was a probable cause of the accident which does not connote negligence of his part; or that the accident was due to the circumstances not within his control. The mere showing that the accident occurred by reason of a skid is not sufficient since a skid is something which may occur by reason of negligence or without negligence, and in the absence of evidence showing that the skid did not arise through negligence the explanation that the accident was caused by a skid does not rebut the inference of negligence drawn from the circumstances of the accident... Where the circumstances of the accident give rise to the inference of negligence the defendant in order to escape liability has to show “that there was a probable cause of the accident which does not connote negligence” or “that the explanation for the accident was consistent only with an absence of negligence.”

7. For the doctrine of *res ipsa loquitur* to be successfully invoked, there must be evidence placed before the court from which negligence can be inferred. The mere occurrence of an accident does not necessarily mean that the driver and/or owner was negligent. No evidence of negligence on the part of either or both of the Appellants was produced by the Respondents during the trial.
8. The Appellants have prayed for the 80:20 finding on liability to be revised to 50:50. I note that this is in concert with the rule set by the Court of Appeal in *Hussein Omar Farar V Lento Agencies*, Nairobi COA Civil Appeal No. 34 of 2005 where the Court of Appeal held that where it is unclear as to which party was to blame for an accident then both sides should be found equally to blame for the accident.
9. On the issue of Quantum, the Appellants’ bone of contention is with the Trial Court using a base of KShs.15,000.00 for General Damages for Loss of Dependency. The Appellants have prayed that it be revised to KShs.5,271.00 but have not cited the Gazette Notice that sets out that figure as the minimum monthly wage for a driver in the year 2004 nor have they laid any basis for this appellate court to interfere with the KShs.15,000.00 base monthly figure. I also note that the figure of KShs.5,271.00 per month as the wage of a driver in 2004 was not advanced by the Appellants at the trial stage. In that regard, I decline to interfere with the Trial Court’s finding on that computation of quantum.
10. Given the circumstances, it is fair and just that each Party bears its own costs.
11. Consequently, the Appeal herein partially succeeds as follows:
- The Trial Court’s finding of 80:20 liability against the Appellants is set-aside and substituted with a finding of 50:50 liability between the Appellants and the Respondent;
 - The Trial Court’s finding on the quantum of KShs.2,752,885.00 is maintained, save for that it shall be subject to a liability of 50:50;
 - Each Party shall bear its own costs both for the Trial and for this Appeal.



DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 27TH DAY OF JUNE, 2024.

BAHATI MWAMUYE

JUDGE

In the presence of:

Mr. Ombati Counsel for the Appellants

Mr. Harrision Kinyanjui Counsel for the Respondent

Mr. Guyo, Court Assistant

