



**Musembi & another (Suing as Administrators of the Estate of the Late Saimon Musembi Musau (Deceased)) v Ngomeni Cargo Services Ltd & another (Civil Appeal E87 of 2023) [2024] KEHC 7678 (KLR) (28 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7678 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL E87 OF 2023  
H NAMISI, J  
JUNE 28, 2024**

**BETWEEN**

**CHRISTOPHER MUSYOKA MUSEMBI ..... 1<sup>ST</sup> APPELLANT  
ALICE KANINI SIMON MUSEMBI ..... 2<sup>ND</sup> APPELLANT  
SUIING AS ADMINISTRATORS OF THE ESTATE OF THE LATE SAIMON  
MUSEMBI MUSAU (DECEASED)**

**AND**

**NGOMENI CARGO SERVICES LTD ..... 1<sup>ST</sup> RESPONDENT  
CHARLES MUSILI KIMOLO ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from judgement by Hon. O. Wanyanga  
delivered on 16th March 2022 in Thika CMCC No. 335 of 2018)*

**JUDGMENT**

**Introduction**

1. The Appellants, being dissatisfied by the judgement of Hon. O. Wanyanga dated 16th March 2022 filed a Memorandum of Appeal dated 6th April 2022 on the following grounds:
  - i. That the learned Magistrate erred in law and in fact by apportioning liability in the ratio of 50:50;
  - ii. That the learned Magistrate erred in law and in fact in using wrong principles in assessing general damages this arriving at an entirely erroneous estimation;
  - iii. That the learned Magistrate erred in law and in fact in assessing zero damages on loss of dependency;



- iv. That the learned Magistrate erred in law and fact in relying on insufficient evidence to award low award on pain and suffering;
  - v. That the learned magistrate erred in law and fact by apportioning our costs of the suit;
  - vi. That the learned Magistrate erred in law and fact by reaching at a conclusion that was contrary to the evidence before him and the submissions.
2. Parties canvassed the appeal by way of written submissions. The Appellant filed written submissions dated 14th December 2023. The Respondent's written submissions are dated 26th February 2024

### **Brief Facts**

3. The Appellants, on behalf of the estate of Saimon Musembi Musau (Deceased), instituted proceedings in the lower court against the Respondents, seeking general and special damages arising out of a motor vehicle accident that caused the death of Simon Musembi Musau. The Respondents entered appearance and filed a Statement of Defence denying liability for the accident.
4. The matter came up for hearing on 19th January 2022. Christopher Musyoka Musembi was the only witness for the Appellants. The Respondents did not call any witness.

### **The Evidence**

5. It is not in dispute that an accident occurred 5th May 2015 along the Thika-Garissa Road at Ngoliba area. It is also not in dispute that Saimon Musembi Musau met his death on the same day along the same Highway. A certificate of Death was produced in Court. Christopher Musyoka Musembi testified that he received a phone call on the morning of 5th May 2015 informing him that his father had been involved in a road accident and had passed away. It was his testimony that the deceased was a 63 year old casual laborer, earning Kshs 17,000 per month.
6. The Appellants produced a Police Abstract dated 3rd June 2016 indicating the motor vehicle registration number KAZ 33C as having been involved in the accident and there was one fatality, Saimon Musembi Musau, a pedestrian. They also produced a copy of letter from the Assistant Chief, Mavoloni Sub-Location dated 7th June 2016, which listed 8 beneficiaries of the estate of the deceased. These included his 64 year old widow and 7 children aged between 22 and 38 years.
7. On their part, the Respondents filed a Statement of Defence denying the claim. Although the Respondents presented a list of witnesses, they did not call any to testify, neither did they adduce any evidence to rebut the Appellant's claims.
8. The trial court in its judgement noted that there was no eye witness to the accident. Additionally, the Police did not blame anyone at the time that the Appellants were issued with a Police Abstract. In view of the fact that the Respondents did not call any evidence to challenge the claim that they were responsible for the accident, the trial court apportioned liability at 50:50 between the Appellants and Respondents.
9. Further, since it is not clear after how long the deceased died, the trial court awarded Kshs 30,000/- for pain and suffering. The trial court gave an award of Kshs 100,000/- for loss of expectation, and did not award any damages under loss of dependence.



## Issues for Determination

10. I have considered the Memorandum of Appeal, Record of Appeal as well as submissions by both parties. The issues for determination in this appeal can be summarised as follows:
  - i. Whether the Appellants proved their case on a balance of probability;
  - ii. Whether the damages awarded were appropriate in the circumstances

## Analysis

11. The Respondents filed a defence denying the Appellants' allegations. At the hearing, the Respondents did not call any witnesses nor adduce any evidence to prove their pleadings. It, therefore, follows that the Respondents' defence remained mere allegation. There are many decided cases addressing this. In *Edward Muriga through Stanley Muriga v Nathaniel D. Schulter*, Civil Appeal No. 23 of 1997, the court held that:

“Where a defendant does not adduce evidence, the plaintiff's evidence is to be believed, as allegations by the defence is not evidence.”

12. The Appellants, however, have the onus of proving their case against the Respondents whether or not the Respondents adduced evidence. Lord Nichol of the House of Lords in the case of *Re: H & Others (Minors) (Sexual Abuse: Standard of Proof) (1969)* stated the civil standard of proof to be:

“The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probability, the court will have in mind as factors, to whatever extent is appropriate in the particular case, that the more serious allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.”

13. From the Record, it is apparent that the only evidence on record relating to the accident is the Police Abstract. There was no eye witness to give an account of how the accident happened. It is not clear whether the Deceased was walking by the roadside or attempting to cross. Similarly, there was no evidence of the negligence, if at all, of the Respondents who are indicated as the owners of the motor vehicle. The trial court was only left with the testimony of the Appellant who was informed of the accident and when it considered it analytically, it apportioned blame equally between the deceased and the Respondents.
14. On the basis of the above, it was rational to apportion liability in the ratio of 50:50 between the deceased and the Respondents. I, therefore, uphold the finding of the trial court on liability and apportionment thereof.
15. On the issue of quantum, what is clear is that the deceased died on the same day. It is not clear whether he died instantly or after several hours. The trial court's award for pain and suffering of Kshs 30,000/- is reasonable and I find no reason to interfere with the award.
16. In the case of *Sukari Industries v Clyde Machimbo Jume* HCCA no 68 of 2015 [2016] eKLR, the court held as follows:

“On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is



nevertheless pain for which the deceased's estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs 10,000 to Kshs 100,000 over the last 20 years hence I cannot say that the sum of Kshs 50,000 awarded under this head is unreasonable.”

17. The deceased died at the age of 63 years. On the issue of loss of expectation of life, it was reasonable for the trial court to award Kshs 100,000/- and I find no reason to depart from the same.

18. On the issue of loss of dependency, the evidence produced before the trial court indicated that all dependents listed are adults, the youngest being 22 years. The Respondents relied on the case of *Hudson Dumisi Mungafu v Kenya Builders and Concrete Ltd & Another* [2019] eKLR, in which the court stated thus:

“I refuse to accept as true that all the 7 children of the deceased aged between 40 years and 24 years were dependents on their father who was aged 63 years old. It is ridiculous to think that these children still depended on their father and not in line with the traditional customs. If anything, it would be expected that the deceased was the one dependent on his children and not vice versa.”

19. Once again, I see no reason to interfere with the finding of the trial court on the issue of loss of dependency.

### **Disposition**

20. In view of the foregoing, the appeal fails. Each party shall bear its own costs.

**DATED AND DELIVERED AT THIKA THIS 28<sup>TH</sup> DAY OF JUNE 2024.**

**HELENE R. NAMISI**

**JUDGE**

In the presence of:-

Ms. Adhiambo for the Appellants

Ms. omwenga for the 1st & 2nd Respondents

