**Entertainer Trucks Company Limited v Nduati (Suing as the administrator of the Estate of the Late Hellen Wangui Macharia) (Civil Appeal E019 of 2021) [2024] KEHC 9533 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9533 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAKURU**

**CIVIL APPEAL E019 OF 2021**

**HI ONG'UDI, J**

**JULY 25, 2024**

**BETWEEN**

**ENTERTAINER TRUCKS COMPANY LIMITED ..... APPELLANT**

**AND**

**PAUL MACHARIA NDUATI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE HELLEN WANGUI MACHARIA) ..... RESPONDENT**

***(Being an appeal from the Judgment by Hon. L. Arika Chief Magistrate in Nakuru CMCC No. 416 of 2014 delivered on 23rd December, 2020)***

## JUDGMENT

1. The respondent who was the plaintiff in the lower court sued the appellant seeking general damages under the *Fatal Accidents Act* and *Law Reform Act*, plus special damages, costs and interest arising out of a fatal road accident which claimed the life of Hellen Wangui Macharia. He sued on behalf of the estate of the deceased. The appellant in its defence denied the claim and the matter proceeded to full hearing. Thereafter the trial court delivered Judgment in favour of the respondent at 100% liability, loss of dependency Ksh 6,000,000/=, special damages 16,000/=, pain and suffering Ksh 50,000/= loss of expectation of life Ksh 150,000/= plus costs and interest.

2. Being aggrieved by the Judgment the appellant filed this appeal citing the following grounds:

    i. That the honourable magistrate misdirected herself both in fact and in law in awarding the respondent a sum of Kshs 6,000,000/= for Loss of dependency taking into account the totality of the evidence tendered during trial.

    ii. That the trial court applied the wrong principles in regard to the award, particularly on loss of dependency, by applying the wrong multiplier and the wrong dependency ratio.

iii. That on the dependency ratio, the trial court applied the wrong principles in failing to appreciate that the deceased was neither the head nor sole bread winner of the family, and that her income, if any, was supplemented by that of the respondent

iv. That the trial court applied the wrong principles in awarding the quantum and thereby made an award of damages that was so inordinately high as to represent an entirely erroneous estimate.

v. That the honourable magistrate erred in both fact and in law by failing to correctly evaluate the evidence and thereby arrived at a wrong conclusion by finding the appellants 100% liable for the accident.

vi. That the honourable magistrate erred in both fact and in law by taking into account evidence that was not tendered during trial and thereby prejudicing the appellant who was in effect not given a chance to be heard in respect of that evidence.

vii. That the learned judge erred in law and fact by considering irrelevant facts and at the same time ignoring relevant facts and thereby arrived at a completely erroneous conclusion.

viii. That the court failed to properly analyze the evidence on record, the submissions and thereby arrived at a completely erroneous conclusion.

ix. In all circumstances of the case, the findings of the learned judge are insupportable in Law.

3. The Appeal was canvassed by way of written submissions.

**Appellant's submissions**

4. These were filed by Tororei & Company Advocates and are dated 28th February, 2024. Counsel submitted on both liability and quantum.

5. On liability counsel submitted that the court's analysis on the circumstances that led to the fatal accident was not supported by evidence led during trial. Further, that the conclusion by the trial court that the appellant was 100% liable for the accident was erroneous. He added that the respondent should be held 50% liable in contributory negligence.

6. On quantum, that is whether the lower court correctly applied well settled principles for loss of dependency, counsel submitted that dependency was a matter of fact and the same must be proved by evidence. Further that it was not disputed that the deceased was a 20% shareholder and director of the company as known as Palmac, but no evidence was adduced to confirm whether or not she was drawing any salary or income from the said company. He placed reliance on the case of Abdalla Rubeya Hemed v Kayuma Mvurya & Another [2017] eKLR where the court held as follows:-

> " Dependency is always a matter of fact to be proved by evidence. It is not that the deceased earned a sum and therefore must have devoted a portion or part of it to his dependence. Rather the claimant must give some evidence to show that he was dependent upon the deceased and to what extent."

7. Counsel submitted further that the trial court did not exercise its discretion correctly in making the award of kshs. 6,000,000/= which when all factors are considered was inordinately high taking into account the totality of evidence during trial. Furthermore, that the award of kshs. 40,000/= as the multiplicand constituted an unjust award as kshs. 10,000/= was the applicable multiplicand.

8. While placing reliance on the case of Petronila Muli v Richrd Muindi Savi & Catherine Mwende Mwindu [2021] eKLR, counsel submitted that where there was no evidence of income the court was free to resort to the minimum wage and it did not matter that the work was informal or menial. He urged the court to adopt the multiplier of 15 years given the uncertainties of life in order to arrive at an award of kshs. 900,000/= (1/2 x 15 x 12 x kshs. 10,000/=).

9. On pain and suffering and loss of expectation of life, counsel submitted that the lower court's award of kshs. 150,000/= respectively was inordinately high and the same ought to be reduced. Further that the conventional award for loss of expectation of life was kshs. 100,000/= while for pain and suffering ranged from kshs. 10,000/= to kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death. He urged the court to make an award of general damages for pain and suffering at kshs. 10,000/=, loss of expectation of life kshs. 100,000/= and loss of dependency kshs. 1,200,000/=.

**Respondent's submissions**

10. These were filed by Kanyi Ngure & Company Advocates and are dated 25th April, 2024. Counsel identified five issues for determination.

11. The first issue is whether the trial magistrate erred in holding the appellant 100% liable for the accident. He made reference to the testimonies of PW1, PW2 and DW1 and submitted that where there were two 2 different versions of the accident it was incumbent upon the trial court to make a determination as to which version of the story appeared to be more credible. Further, that the court should interrogate the witness statements, the testimony and the supporting documents produced in court and thereafter ascertain which version of the story was plausible as per circumstances presented in the particular case.

12. The court's attention was drawn to the provisions of section 112,119 of the *Evidence Act*, the judicial decisions in Simon Hungu & Another v Vincent Barasa Wafula & Another [2014] eKLR, Ugenya Bus Services v Gachoka [1986] KLR 567 pages 568-570, Odds Jobs v Mubia [1970]1 EA 796 (CAN), Kimotho v Kenya Commercial Bank [2003] 1EA 108 (CCK) at page 109 and Municipality Council of Nakuru & Another v Gathiaya [1993] KLR.

13. The second issue is whether the trial magistrate applied the wrong multiplier and the wrong dependency ratio in calculating the loss of dependency. Counsel submitted that the appellant had failed to prove that the assessment by the trial court for the multiplier of 15 years and dependency ratio of 2/3 was erroneous and/or that the magistrate misdirected herself in law. He cited the case of Issack Kimani Kanyingi & Catherine Njeri Mugo (Suing as the legal representative of the Estate of Loice Gathoni Mugo (Deceased) v Hellena Wanjiru Rukanga [2020] eKLR pages 8-9 and T.M & 2 Others v Moses Kinyua Muriuki [2016] eKLR, in support.

14. The third issue is whether the award of kshs. 6,000,000/= for loss of dependency was inordinately high so as to represent an erroneous estimate given the totality of the evidence. Counsel submitted that the said figure was derived from assessment of a monthly income of Kshs.50,000/= multiplied by the 2/3 dependency ratio and the 15 years period. Further, that the respondent had proposed a net monthly income of Kshs. 80,000/= which would have resulted in a dependency award of Kshs.9,600,000/= while using the ratio of 2/3 and a multiplier of 15 Years. He added that the appellant on the other hand, had proposed a global award of Kshs.400,000/= without making any tangible proposal on the net monthly income awardable of the deceased.

15. Counsel went on to submit that the respondent adduced evidence before the trial court to support the income of Palmac Agriculture Services Limited where the deceased was a shareholder/director.

Further, that the appellant has not demonstrated that the trial magistrate arrived at erroneous estimates while assessing the income or multiplicand for loss of dependency.

16. He placed reliance on decisions in Jacob Ayiga Maruja & Another v Simeon Obayo [2005] eKLR at page 3, Tessie Margaret Kariuki & Another v Shakhalaga Kwa Jirongo & Another [2014] eKLR at pages 3 & 4, Richard Macharia Nderitu (Legal Representatives of the Estate of Salome Muthoni Maina) v Phillemon Rotich Langas & 3 Others at page 4, Ali v Muhozozo [1983] eKLR page 1, Okeyo Adrain Omolo v Henry Okoth [2020] eKLR at page 4 and Nairobi Bus Union v Imanne [1993] KLR.

17. The fourth issue is whether the trial magistrate erred in law by making awards that were inordinately high for damages on pain and suffering and on loss of expectation of life. Counsel submitted that the trial magistrate awarded Kshs.50,000/= as damages for pain and suffering whereas Kshs.150,000/= was awarded for loss of expectation of life. Further, that the learned trial magistrate was alive to previous decisions over the same subject matter and still took into account the effects of inflation. Clearly, that the trial magistrate could not be faulted for her assessment of the damages. He placed reliance on the case of Catholic Diocese of Kisumu v Tete [2004] 2 KLR at page 55.

18. The fifth issue is whether there is a competent appeal in light of the uncertified copy of decree exhibited in the record of appeal. Counsel submitted in the negative and cited the provisions of section 65 of *Civil Procedure Act*, Order 42 rule 2 of the Civil Procedure Rules and decisions in Premier Dairy Limited v Amarjit Singh Sagoo & Another [2009] KLR at page 359, Elvis Anyimbo v Orange Democratic Movement & 4 Others [2018] eKLR and Silrack Industries Limited v Kioko [2020] 1EA 214. He urged the court to dismiss the appeal with costs.

**Analysis and determination**

19. This being a first appeal this court has a duty to re-consider and re-evaluate the evidence and arrive at its own independent conclusion. It has to bear in mind that it did not see nor hear the witnesses and give and allowance for that. This has been stated in several decisions among them is Gitobu Imanyara & 2 others V Attorney General [2016] eKLR where the Court of Appeal stated:

> " An Appeal to this court from a trial court by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect".

20. Having considered the grounds of appeal, record of appeal, submissions and authorities by both parties and the law I find the issues falling for determination to be as follows:

    i. Whether the trial magistrate's finding on liability was an error.

    ii. Whether the award on general damages was too high

21. In addressing the issue as to whether the trial magistrate's finding on liability was an error, I will refer to the Court of Appeal decision in Michael Hubert Kloss & Another V David Seroney & 5 Others [2009] eKLR where it stated

> " The determination of liability in a road traffic accident is not a scientific affair, Lord Reid put it more graphically in Stapley V Gypsum Mines Ltd (2) (1953) A.C 663 at pg 681 as follows

> "To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide .....
>
> "The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally".

22. Further, in Farah V Lento Agencies [2006] 1 KLR 124, 125, the Court of Appeal held that:

> " Where there is no concrete evidence to determine who is to blame between the two drivers, both should be held equally to blame. As no side could establish the fault of the opposite party, liability for the accident could be equally on both the drivers. Therefore, each driver was to blame".

23. Guided by the above cited authorities it is my view that in determining liability this court must consider the facts of the case and establish what mainly contributed to the cause of the accident. The court will always consider the manner of driving, conduct of the pedestrian and identify the person who was at fault and place the blame on him/her. Where the facts and circumstances are such that it is not clear who was at fault and who was to blame, the court will apportion liability.

24. From the evidence on record there is no dispute that the deceased's motor vehicle was on 19/10/2013 at 7.30pm hit by the appellant's vehicle registration No. KBC 495Y leading to her demise. During trial, the respondent testified as PW1 and produced limited grant of letters of administration (EXB 2). PW1 did not tell the court much on how the accident occurred but only blamed the driver of the said vehicle for causing the accident. He informed the court that the appellant's driver had been charged in Molo Traffic case number 1701 of 2013 and, he produced the charge sheet for the said case (EXB 4a).

25. PW2 equally blamed the appellant's driver for the accident and informed the court that he was a passenger in the deceased motor vehicle. He testified that they were driving from Molo when the appellant's motor vehicle hit them from behind as they wanted to enter the right side of the highway towards a murram road.

26. The appellant's driver testified as DW1, he informed the court that he was driving motor vehicle registration number KBC 495Y from Eldoret to Nairobi. That the deceased's vehicle was ahead of him and as he almost finished overtaking it, it turned to go to the right and hit the cabin side. He added that he blamed the deceased for the accident because if she had checked the side mirror she would seen that he was already overtaking

27. In cross examination, he confirmed that facing Nairobi, the accident occurred on the right-hand side of the road and that he had tried to swerve to avoid the accident but they landed in a ditch. He denied hitting the deceased's motor vehicle and dragging it into a ditch. He further confirmed that after the accident the pick up was under the lorry.

28. The trial magistrate in her judgment faulted the appellant's driver for overtaking recklessly and causing the accident. She also referred to the judgment annexed in the plaintiff's submissions and stated that

she was curious on how the appellant's driver was silent on the issue of having overtaken other vehicles which had slowed down to allow the deceased turn off the road. She however stated that she would make no inference on the said judgment since the same had not been shown to DW1. Therefore, DW1 (the appellant's driver) was held 100% liable for the accident and the appellant vicariously liable for the acts of its driver.

29. After analysing all the evidence above, this court notes that the appellant's witness claimed to have been overtaking the deceased's vehicle rightfully when the accident occurred. He admitted that he had tried to swerve to avoid the accident but it was too late, so both vehicles collided and landed in a ditch. On the other hand the respondent's witness who was with the deceased at the time of the accident testified that the deceased had put on the indicator as she exited the highway to join the murram road leading to her home when the appellant's motor vehicle hit them from behind.

30. This court notes further that the only document that attests to the occurrence of the accident is the police abstract (EXB 4). There is no police investigations' report to show whether either the driver of the motor vehicle KBC 495Y Mitsubishi lorry or the driver of the motor vehicle KZF 196F Pick-up was wholly to blame. The police abstract does not give sufficient details. The respondent however produced a charge sheet showing the appellant's driver was charged. Was the case ever heard and was he convicted? There is nothing on record to confirm the position.

31. Having considered the circumstances leading to the occurrence of the accident, it is my view that none of the parties herein presented any evidence to show that they were not wholly liable. Both drivers ought to have been careful while driving on a public road.

32. Consequently, it is this court's finding that the appellant ought not to have been found 100% liable. I therefore set aside the said decision by the trial magistrate and substitute it with liability at 70:30 in favour of the respondent.

33. On the issue of whether the award on general damages was inordinately high. It is not disputed that the deceased was 43 years old at the time of her untimely death (EXB 3). The respondent in his testimony informed the court that the deceased and was a director at Palmac Agriculture Services Company Limited and held 20% of the shares. He produced as exhibit the Memorandum and Articles of Association (EXB 10).

34. In assessing loss of dependency, and while relying on several authorities the trial court held that where there was no proof of earning given, it was unjust to dismiss the claim under this head. The trial magistrate further observed that the deceased's exact earnings per day or per month were not strictly proved and she therefore resorted to the statement of account provided. She adopted the kshs. 50,000/= as monthly income, sixty years as the age of retirement, a multiplier of fifteen years given the vicissitudes of life and a 2/3 ratio considering that the deceased's contribution was not only monetary. She proceeded to make an award of Kshs. 6,000,000/= under this head.

35. In the case of Shah Vs Mbogo Kemfro Africa Ltd & Another (1985) eKLR, the Court of Appeal stated;

> " I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken consideration and in doing so arrived at a wrong conclusion."

36. The deceased in the instant case was in her early 40's, she was a wife and was doing well in her agricultural business as per the statement of accounts annexed in the supplementary record of appeal

from pages 46 -210. There is also nothing on record to show that the deceased may have suffered from an ailment as life expectancy is dependent on good health at the very least. Taking into consideration the vicissitudes and vagrancies of life, and the age of the deceased. I agree with the trial Magistrate on the use of the multiplier of 15 years.

37. In view of the above I find some merit in the appeal which I allow and set aside the Judgment by the trial court. The following orders are hereby issued:

    i. Liability apportioned at 70:30 in favour of the respondent

    ii. Loss of dependency 2/3 x 15 x 12 x 50,000/- = 6,000,000/= less 30% contribution

    iii. General damages for pain and suffering = 50,000/= less 30% contribution

    iv. Loss of expectation of life = 150,000/=

    v. Special damages = 16,000/=

    (6,000,000 + 50,000 = 6,050,500/= less 30% (Ksh 1,815,000) Balance = Ksh 4,235,000/= + 150,000/= + 16,000/=)

    TOTAL = 4,401,000/=

38. I enter Judgment for the respondent in the sum of Ksh 4,401,000/= (Four Million four hundred and one thousand shillings) plus costs and interest at court rates from date of Judgment.Each party to bear its own costs for the Appeal.

39. Orders accordingly.

**DELIVERED VIRTUALLY, DATED AND SIGNED THIS 25TH DAY OF JULY, 2024 IN OPEN COURT AT NAKURU.**

**H. I. ONG'UDI**

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**JUDGE**