



Hirani Quarries Ltd v Kithinji & another (Suing as the legal representatives of the Estate of Layford Mwirigi Mwititi - Deceased) (Civil Appeal 116 of 2023) [2024] KEHC 13025 (KLR) (25 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13025 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 116 OF 2023
AC BETT, J
OCTOBER 25, 2024**

BETWEEN

HIRANI QUARRIES LTD APPELLANT

AND

RODAH KAGWIRA KITHINJI & ERIC KIOGORA MWITITI (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF LAYFORD MWIRIGI MWITITI - DECEASED) RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. H.M. Ng'ang'a (PM) in Gatundu SPMC Civil Case No. E202 of 2021 delivered on 2nd September, 2022)

JUDGMENT

Background of the Appeal

1. By way of a plaint dated 5th July, 2021, the Respondents sued the Appellant for general damages, special damages of Kshs. 1,650/, costs of the suit and interest.
2. The Respondents' case was that on or about 27th August 2020 the deceased was a lawful pedestrian along Thika Nairobi super highway at Witethe area when motor vehicle registration No. KCG 752J, a Leyland truck owned by the Appellant was negligently driven thus knocking down the deceased who sustained fatal injuries.
3. In a defence dated 5th August 2021, the Appellant denied ownership of the motor vehicle and the occurrence of the accident and further stated if at all the accident occurred, then it was solely as a result of the negligence of the deceased.
4. The trial court in a Judgment delivered on 2nd September 2022 found the Appellant 80% liable for the accident and awarded the respondent damages in the sum of Kshs. 3,496,539.20 made up as follows:-



- a. General damages for pain and suffering Kshs. 20,000/=
- b) General damages for lost years Kshs. 4,250,124/=
- c) Loss of expectation of life Kshs. 100,000/=
- d) Special damages Kshs. 550/=

Total Kshs. 4,370,74/=

Less 20% contribution Kshs. 874,134.80

Net total Kshs.3,496, 539.20

5. Aggrieved by the decision of the trial court, the Appellant lodged a Memorandum of Appeal dated 19th September, 2022 seeking orders that the appeal be allowed, the Judgment of the trial court on quantum be set aside and same be assessed afresh, it be awarded costs of this appeal and that of the trial court. The appeal is premised on the following grounds:-
- a. The learned Magistrate erred in law and in fact in giving a narrow interpretation of the facts, leading to an erroneous assessment of the issue of liability.
 - b. The learned Magistrate erred in law and in fact as he failed to take into account the issue of liability which was not proved by the Respondents against the Appellant.
 - c. The learned Magistrate erred in failing to consider the law on negligence and thereby erroneously finding the Appellant to blame at 80% liability.
 - d. The learned Magistrate erred in law and in fact in awarding general and special damages when there is no legal basis for the award.
 - e. The learned Magistrate erred in law and in fact in awarding general damages that were so excessive as to amount to an abuse of discretion.
 - f. The learned Magistrate erred in law and in fact in applying wrong principles in awarding general damages and special damages.
 - g. The learned Magistrate erred in law and in fact in totally ignoring the law and the submissions put in by the Appellant thereby arriving at a wrong decision on quantum of damages.
 - h. The learned Magistrate misdirected himself on the applicable measure of award of general damages and special damages in favour of the Respondents.
 - i. The learned Magistrate erred in law and in fact in awarding general damages that were so excessive as to represent an erroneous estimate of the loss suffered.
 - j. That the judgment of the learned Magistrate is against the law and weight of the evidence on record.
6. Directions were given by this court that the appeal be canvassed by way of written submissions, and I can only see the Respondents' submissions on record.

Respondents' Submissions

7. The Respondents identify two issues for determination by this court that is, on liability and on quantum.



8. On the issue of liability, the Respondents submit that contrary to the assertion by the Appellant that the deceased was hanging on the suit motor vehicle at the time of the accident, both the Appellant's witnesses did not witness the accident as it occurred but after, since it was their testimony that they stopped when they felt a jolt and that is when they looked outside the vehicle and saw an individual lying on the tarmac. They claim that only PW2 witnessed the accident and that he testified that he was standing at the Witeithie stage when he saw the Appellant's motor vehicle which was being driven at a high speed losing control thus hitting the deceased who was at the underpass and that the deceased was trapped beneath the vehicle.
9. On the general damages for loss of dependency, the Respondents contend that the use of the multiplier method is at the discretion of the court and there is no requirement for a court to give a global award under the head though it is mostly applied to fatal injuries of minors who are still in school. They argue that the deceased herein was thirty one (31) years old and a driver and the court was correct in applying the minimum wage of a driver prevailing at the time of the accident that is Kshs. 18,315/=. They further relied on the case of *Coast Bus (Msa)Ltd v Fatimabhai Osman (2020) eKLR* where the court applied a multiplicand of $\frac{2}{3}$ for an unmarried man where the parents were the dependants.

Issues For Determination

10. This court has considered the grounds of appeal, the proceedings of the lower court and the submissions by the respondents and discerns the issues for determination to be:-
 - a. Who is liable for the accident and to what extent?
 - b. Whether the trial court applied the correct principles in assessing the damages payable.

Analysis

Who is liable for the accident and to what extent?

11. In *Stapley –v- Gypsum Mines Limited (2) (1953) A.C 663 at P. 681* Lord Reid reasoned as follows in determining liability:-

“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 it..... The question must be determined by applying common sense to the fact of each particular case. One may find that a matte of history, several people have been at fault and that if anyone 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 cause the accident. I doubt whether any test can apply generally.”

12. To determine how the accident occurred, the court has to re-evaluate the evidence adduced at the hearing. PW1 on cross examination stated that she was called by PW2 who informed her of the accident. PW2 stated that he witnessed the accident and that he saw the deceased walking off the road on a service lane and the Appellant's motor vehicle, which was speeding from Thika to Nairobi lost control, started moving in a zig zag direction and eventually knocked the deceased. PW3, a traffic police



officer testified to the effect that the deceased was at a stage with a pedestrian crossing when he was hit and overrun by the rear tyres of the Appellant's motor vehicle thus dying on the spot.

13. DW1's recollection of the accident is that he was driving the suit motor vehicle from Ndarugu to Nairobi and on reaching Witeithie underpass he stopped at a junction to turn to Nairobi. He saw someone standing off road and when he saw the road was clear, he joined the service lane and suddenly he heard the car roll over something and an explosion occurred and when he checked he saw someone lying down. DW2, the suit motor vehicle's turnboy stated that when they reached Witeithie underpass the driver stopped and when he checked on the left there was a man who was standing off road and when the driver began to move the car, they heard a blast and when he checked using his side mirror, he saw someone lying on the road having been knocked by the left rear tyre. He claimed that the deceased was hanging on the vehicle.
14. It is now well established that an appellate court ought not to interfere with a trial court's finding on liability unless there are exceptional circumstances to justify the interference. In the case of *Khambi & Another vs. Mahithi & [1968]EACA 8*, the Court of Appeal of East Africa held thus:-

“It is well settled that where a trial Judge has apportioned liability according to the fault of the parties, his apportionment should not be interfered with on appeal, save in exceptional cases as where there is some error in principle or the apportionment is manifestly erroneous...”

15. From the evidence, what can be deduced is that the driver of the motor vehicle was joining the service lane from the underpass and there was a passenger crossing. I do not agree with DW1 that the deceased was hanging on the vehicle at the time of the accident for if it were so, then the driver would have seen him through the side mirror when he was checking whether the road was clear. The driver claimed that the road was clear, and he saw someone standing off the road. It is not clear from the evidence whether the person seen standing off the road was the deceased. The more plausible explanation for the accident is that the deceased might have attempted to use the zebra crossing when he was hit after the driver of the accident motor vehicle lost control and started swaying in a zigzag manner as averred by PW3. I agree with the trial court that the Appellant's driver owed a higher duty of care to pedestrians. This is because there was a zebra crossing on the road and this called for extra caution from motorists. For that reason, I will not disturb the trial court's determination on liability.

Whether the trial court applied the correct principles in assessing the damages payable

16. As a general rule, assessment of damages lies in the discretion of the trial court and an appellate court will only interfere with the award of damages where it is inordinately high or low as to represent an erroneous estimate. This was the holding of the court in *Butt - vs - Khan (1977) I KAR* where it was held that: -

“An appellate court will not disturb an award for damages unless it is inordinately high or low as to entirely represent an erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low”

17. This position has been buttressed by the court of appeal in *Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenya) vs Kiarie Shore Stores Limited [2015] eKLR* where it was held as follows: -

“As a general principle, assessment of damages lies in the discretion of the trial court and an appellate court will not disturb an award of damages unless it is so inordinately high or



law as to represent an erroneous estimate. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure, which was either inordinately high or low. The Court 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 high that it must be a wholly erroneous estimate of the damages.”

18. The Appellant contends that the trial court applied the wrong principles in awarding damages and that the damages were excessive.

19. I have looked at the plaint and established that the Respondents’ claim for damages was under the *Fatal Accidents Act* and the *Law Reform Act*. At paragraph 7 of the plaint the Respondent listed the deceased’s beneficiaries to include his mother and siblings. In awarding damages under the *Fatal Accidents Act*, the trial court at paragraph 34 of its Judgement considered all the beneficiaries listed in paragraph 7 of the plaint by noting as follows:-

“The deceased was not married, and his siblings were above 18 years old. PW2 stated that the deceased used to send her and his brother money for upkeep. I find dependency of $\frac{1}{3}$ ideal in the circumstance.”

20. Loss of dependency is a claim under the *Fatal Accidents Act*, Chapter 32, Laws of Kenya. Persons who can claim under the *Fatal Accidents Act* are listed under section 4(1) of the Act which provides as follows: -

“

“4. Action to be for benefit of family of deceased

(1) Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct:

Provided that not more than one action shall lie for and in respect of the same subject matter of complaint, and that every such action shall be commenced within three years after the death of the deceased person.”

21. I therefore find that the trial court erred in recognizing the deceased’s siblings in making an award under the loss of dependency.

22. On the damages for pain and suffering, I find that an award of Kshs. 20,000/= was reasonable since it was the evidence of PW3 that the deceased died on the spot.

23. On the damages for loss of dependency, I have noted that it was not disputed that the deceased was a 31-year-old driver. I have carefully considered the multiplicand, and the multiplier adopted by the



trial court. Taking into consideration the deceased's profession and the vicissitudes of life, I find that a multiplicand of 27 years is reasonable.

24. On the dependency ratio used, I have taken note that the trial court at paragraph 34 of its Judgement indicated that the ratio of $\frac{1}{3}$ was ideal but then at paragraph 35 the court adopted a ratio of $\frac{2}{3}$ in determining the damages for loss of dependency.
25. Upon thorough deliberation, I find that the dependency ratio of $\frac{1}{3}$ was ideal as there was no evidence adduced to prove that the deceased spent more on his parents. In arriving at this determination, I am guided by the case of *Dismas Muhami Wainarua v Sapon Kasirimo Maranta* (Suing as administrator and or personal representative of the estate of Partinini Sapon (Deceased)) (2021) eKLR where the court held that: -

“The deceased left behind parents. He must have supported them in some way. In that regard the ratio could not have been $\frac{2}{3}$. The Respondent's counsel agreed that the dependency ratio of $\frac{2}{3}$ was on the higher side and suggested a ratio of $\frac{1}{2}$. Although the deceased was not married, it would be difficult to assume without evidence that he gave $\frac{1}{2}$ of his income towards his parents' support. The ratio of $\frac{1}{3}$ would be appropriate.”

26. On the damages for loss of expectation of life, I believe the trial court made a typing error in noting that the deceased was sixty-five (65) years of age. Nonetheless, I find that the award of Kshs. 100,000/= under this head was reasonable. I also find that since the beneficiaries under the *Fatal Accidents Act* and under the *Law Reform Act* were different, the trial court was correct to award damages under both Acts.
27. The upshot is that I will only disturb the decision of the trial court as respects the dependency ratio. For avoidance of doubt, damages for loss of dependency shall be computed as follows:- 18,319.50 x 27 years x 12 x $\frac{1}{3}$ bringing a total of Kshs.1,978,506/=.
28. On the special damages, the Respondents produced a receipt for a motor vehicle search amounting to Kshs. 550/=.
29. Accordingly, for the reasons set out above, damages are hereby awarded in favour of the Respondents as follows:-
- a) General damages for pain and suffering Kshs. 20,000/=
 - b) General damages for lost years Kshs. 1,978,506/=
 - c) Loss of expectation of life Kshs. 100,000/=

Total Kshs. 2,098,506/=

Less 20% contribution Kshs. 419,701/=

Net total Kshs. 1,678,805/=

Add special damages Kshs. 550/=

Total Award Kshs.1,679,355/=

30. Since the appeal partially succeeds, I will not award costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 25TH DAY OF OCTOBER 2024.

A. C. BETT

JUDGE



In the presence of:

Ms. Opondo for Appellant

Ms. Kithuka for Respondent

Court Assistant: Polycap

