



Ariba & another v Kavoo (Suing as the personal representative of the Estate of Jackyson K Mutitu (Deceased) (Civil Appeal 449 of 2018) [2023] KEHC 19058 (KLR) (Civ) (24 March 2023) (Judgment)

Neutral citation: [2023] KEHC 19058 (KLR)

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

CIVIL

CIVIL APPEAL 449 OF 2018

DO CHEPKWONY, J

MARCH 24, 2023

BETWEEN

EDWARD OKETCH ARIBA 1ST APPELLANT

JOHNSTONE SUMMIT OKETCH 2ND APPELLANT

AND

MARY N KAVOO (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF JACKYSON K MUTITU (DECEASED)) RESPONDENT

(Being an Appeal from the Judgment and Decree of the Honourable D.O. Mbeja (SRM) dated 28th August, 2018 in Milimani CMCC No.2337 of 2011)

JUDGMENT

Background

1. By a Plaint dated July 1, 2011 filed on even date, the Respondent in his capacity as Widow and Legal Representative of the estate of Jackyson Kiio Mutitu (the deceased) sought for general damages, special damages, costs and interest.
2. In the Plaint, the Respondent pleaded that on or about November 7, 2009 at about 6.45pm along Jogoo road near Uchumi, the deceased Jackyson K. Mutitu was lawfully and prudently standing along the correct side of the road pavement when the 1st or the 2nd Defendant's (hereinafter referred to as "the Appellant"), agent, servant or employee so carelessly, recklessly and or negligently drove Motor Vehicle Registration Number KBJ 252Z that the same was caused to lose control, veer off the road and knock or crush the deceased thereby occasioning fatal injuries.



3. The Respondent pleaded particulars of negligence on the part of the Appellants as set out at paragraph 4 of the Plaint and blamed them for the deceased's demise.
4. It was the Respondents averment that by reasons of the foregoing, she and the estate of the deceased have suffered damages and loss due to loss of life of the deceased who died at the age of 30 years and therefore she brought the suit on her own behalf and on behalf of the other beneficiaries of the deceased to claim for damages. Pursuant to the provisions of the Fatal Accidents Act and Law Reform Act respectively.
5. It is further pleaded that at the time of the deceased's death, he was married to the Respondent and was employed by Unilever Kenya Ltd as a Messenger/Clerk earning a gross monthly salary of Kshs 8,079.48 out of which he used to support his wife, mother and children, which support is now lost.
6. The Appellants entered appearance on July 15, 2011 and subsequently filed a statement of defence on 5th August, 2011. In their statement of defence, the Appellants denied occurrence of the alleged accident and negligence attributed to them. They went on to state that the occurrence of the accident was solely caused by the negligence of the deceased, particulars thereof are set out at Paragraph 6 of the defence..
7. After close of pleadings, the matter was set down for hearing. The Respondent called a total of three (3) witnesses who testified in support of her case.
8. Mary Ndinda Kavoo testified as PW1 and adopted her witness statement dated June 27, 2011 as her evidence in chief. She stated that her husband was involved in an accident on November 7, 2009 and he died aged 30 years old. She produced a Death Certificate as PEX-1. She stated that he used to work at Unilever (K) Ltd where he was earning a sum of Kshs 8,000/= and produced a copy of his payslip marked as PEX-2. She told the court that her husband died in hospital. PW1 also told the court that the deceased had dependents namely a child and his grandmother and produced a Birth Certificate marked as PEX-3. She further testified that her husband was not alcoholic and blamed the driver for the accident. She stated that she was issued a police abstract and confirmed that the case was still under investigations at the time she was testifying. She produced the police abstract as PEX-5.
9. On cross examination, she stated that she was not at the scene of accident, hence did not witness the accident. She said that her husband's gross salary was Kshs 8,000/= and net pay was Kshs 7400/=. She also told court that they were married though they did not have a Marriage Certificate but had a child and were living together. Lastly, PW1 said she did not know if the police blamed the pedestrian for the accident.
10. PW2 - Daniel Musila Muendo in his testimony testified that he recorded his statement on 1st July, 2011 which he adopted as his evidence in chief. He stated that on November 7, 2009 while at Jogoo road in the evening, he saw two vehicles in a convoy and there was a matatu at the stage. He then saw one vehicle Registration Number KBJ 252Z leave the road and hit a pedestrian. He told court that he was never called to testify in any traffic case nor to record a statement with the police. According to PW2, the vehicle was driven at high speed and he blamed Motor Vehicle Registration Number KBJ 252Z for the accident. He stated that the driver ought to have slowed.
11. When cross-examined, PW2 said that he was standing at the Uchumi stage near Makadara Law Courts. He confirmed that there is a flyover but not many people use it. He told court that the deceased was in the middle of the road. He confirmed that he has never been called by the police to record any statement but he saw the accident as it was not very dark and there were street lights. PW2 said that he did not see the number plates of the other vehicle. He also said that he went to Kenyatta National Hospital the following morning. On re-examination, PW2 stated that the accident occurred near a bus stage where



there is a flyover. He said that he saw the deceased on the pavement but did not see the deceased cross the road. Finally, PW2 said he did not know why the police did not call him to testify.

12. PW3, Peter Mutitu testified that he is an uncle to the deceased. The deceased. He told court that the deceased had a wife who did not come back after the burial and had a small child. On cross examination, he stated that he raised and took the deceased to school. He also said that the deceased used to assist him. He took him to school and raised him.
13. The Respondent closed her case after the testimony of the three witnesses.
14. The Appellants did not call any witnesses to testify before the trial court but produced a police abstract dated November 27, 2009 and filed in court on January 14, 2010 by consent of both counsel for the parties on May 29, 2018.
15. Upon hearing the matter, the trial court delivered its Judgment on August 31, 2018, whereby Judgment was entered for the Respondent as against the Appellants as follows:-
 - Liability at 100%,
 - Pain and suffering - Kshs 50,000/=
 - Loss of expectation of life - Kshs 150,000/=
 - Loss of dependency - Kshs 1,615,800/=
 - Special damages - Kshs 1,075/=
 - Total award - Kshs 1,816,875/=
16. The Respondent was also awarded costs of the suit plus interest.

The Appeal

17. Being dissatisfied with the Judgment and Decree of the trial court delivered on August 31, 2018, the Appellants have preferred an appeal before this Honourable court vide a Memorandum of Appeal dated September 24, 2018 and filed in court of September 27, 2018 wherein the following Grounds of Appeal have been set out:-
 - a. That the learned Magistrate erred in law and in fact in apportioning liability at 100% against the Appellants in total disregard on the evidence adduced and the exhibits produced.
 - b. That the learned Magistrate erred in law and in fact in awarding loss of dependency at Kshs 1,615,800/= which award was excessive and unwarranted in light of the evidence adduced.
 - c. That the learned Magistrate erred in law and in fact by failing to deduct the award of loss of expectation of life of Kshs 150,000/= under the rule of thumb.
 - d. That the learned Magistrate erred in law and in fact in not finding that the special damages award of Kshs 1,075/ which award was not proved.
 - e. That the learned Magistrate erred in law and in fact in not finding that the pain and suffering of Kshs 50,000/= was excessive and unwarranted in light of the evidence and cited authorities.



- f. That the learned Magistrate erred in law in not taking into account entirely the written submissions of the Appellants.
 - g. That the learned Magistrate’s finding and decision were against the weight of the evidence adduced.
18. The Appellants asked this court to allow the appeal and set aside the award on apportionment of liability, loss of dependency, loss of expectation of life and special damages. The Appellants have also sought for the award of loss of expectation of life of Kshs 150,000/= to be deducted accordingly and they be granted costs of this appeal.
19. The appeal was admitted for hearing on February 18, 2022 with directions that the appeal be disposed by way of written submissions. The Appellants complied with the said directions and in support of their appeal, filed their written submissions dated March 17, 2022. There are no submissions on record by the Respondent.

Analysis and Determination

20. In considering this appeal, I have read through the original record of proceedings, the grounds of appeal, and the written submissions by counsel for the Appellants. I find that the issues arising for determination before this court are as follows:-
- a. Whether the trial court made an error in apportioning liability at 100% against the Appellants.
 - b. Whether the award was excessively high
 - c. Whether the trial Magistrate made an error in failing to deduct the award of loss of expectation of life.
21. This being a first appeal, this court has a duty to analyze and re-evaluate the evidence adduced before the trial court afresh before drawing its own inference. In the case of *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* (2013) eKLR, the court stated as follows-
- “This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”
22. It is a well settled principle that an appellate court will only interfere with the Judgment of the trial court if the decision is founded on wrong legal principles of the law. That was the position in the case of *Bashir Ahmed Butt v Uwais Ahmed Khan* (1982-88) KAR, where the Court of Appeal held that:
- “An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely 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...”
23. On the first issue regarding the apportionment of liability, it was submitted by the Appellants that the Respondent failed to prove liability against them jointly and severally. It is their contention that the



deceased was negligent while walking on the said road in purview of the Police Abstract No.01999 which blamed the pedestrian and Paragraph 7 thereof.

24. On liability, this court is guided by the decision in *Khambi & another v Mabithi and another* (1968) EA 70, where it was held that:

“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, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.”

25. It was not disputed that the deceased was involved in a traffic accident, in which he suffered fatal injuries. Two Police Abstracts, one dated 26th November, 2009 and 14th January, 2010 were produced by the parties to confirm and so did the Death Certificate.

26. From the proceedings before the trial court, PW2-Daniel Musila Muendo is the only witness who testified as having been at the scene and witnessed the accident. He told court that he saw the vehicle leave the road and hit a pedestrian. And on cross examination, PW2 stated that the deceased was standing at Uchumi stage and he said that the deceased was in the middle of the road when he was hit. He also admitted that there was a flyover at the scene but not many people used it.

27. There were two Police Abstracts produced. The Police Abstract dated November 26, 2009 indicated that the “case was pending investigations” while the one dated January 14, 2010 had remarks at Paragraph No.7 thereof that “case referred to Insurance blaming the pedestrian”.

28. Accordingly, from the evidence adduced before the trial court, even though the Appellants did not call any witness to support their claim and there being no evidence in rebuttal of the claim that the deceased was crossing the road instead of using the foot bridge at the scene, the Respondent has been shown to have been negligent and the Appellants ought not have been found 100% liable. The reason for determining liability at 100% are clear that the Appellants did not call any witness to support their claim or rebut the Respondent’s evidence. I proceed to apportion liability in terms of 30% for the Respondent and 70% for the Appellant.

29. On the second issue of whether the award was excessively high, this court is guided by the case of *West Kenya Co. Limited v Philip Sumba Julaya (Suing as the administrator and personal representative of the estate of James Julaya Sumba)* [2019]eKLR, where the court held that;

“The principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period of his death. In addition, a plaintiff whose expectation of life has been diminished by reason of injuries sustained in an accident is entitled to be compensated in damages for loss of expectation of life. The generally accepted principle is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident.”

30. It was the evidence of PW1 that the deceased died in hospital but a perusal of the Death Certificate indicates that the place of death was Jogoo road. This only goes on to suggest that the deceased died immediately after the accident. In the case of *Mercy Muriuki & another v Samuel Mwangi Nduati*



Ɖ Another (Suing as the Legal Administrator of the Estate of the late Robert Mwangi) [2019]eKLR, the court observed:-

“The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Ksh.100,000/- while for pain and suffering the awards range from Ksh.10,000/= to Ksh.100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.”

31. In the instant case, the Respondent had pleaded a sum of Kshs 50,000/= while Appellant proposed a sum of Kshs 10,000/= for pain and suffering. The Respondent relied on the case of Hyder Nthenya Musili Ɖ Another v China Wu Yi Limited Ɖ Another [2017]eKLR, where the court awarded the Plaintiff Kshs 50,000/= for pain and suffering. The trial court awarded Kshs 50,000/= for pain and suffering, which in my view is not excessive.
32. On the issue of loss of expectancy of life, the Respondent was awarded Kshs 150,000/= which is constitutional figure for one who has been deprived of good health and expectation of life. The deceased died at the ae of 30 years and it is not in dispute that he was his family’s sole bread earner. I find the same is not unreasonable and excessive.
33. On the question of loss of dependency, in her evidence, PW1 averred that the deceased left behind a child and a grandmother as dependents, a fact confirmed by PW3 who said the deceased was his nephew. Further, it was evidenced that the deceased used to work for Unilever Kenya Limited where he was earning a monthly salary of Kshs 8,079/=. The Appellants adduced evidence that the payslip produced as PEX.5 showed he was earning Kshs 7,479/=. I have perused the payslips produced and find the deceased’s gross salary was Kshs 8,079/= while the net was Kshs 7,479/=. That the trial court adopted a multiplier of Kshs 7,079/= which I find fair and hence no need to interfere with the same.
34. On special damages, the Respondent pleaded for Kshs 1,075/= which was for filing an Ad Litem Case No.1429 of 2010. A receipt was produced to confirm the same. I therefore find no need of interfering with this award.
35. In conclusion, I am persuaded that the Appellants’ appeal has succeeded partially in the following terms;-
 - a. Liability is substituted in terms of 70% for the Appellant and 30% for the Respondent.
 - b. Pain and suffering - Kshs 50,000/=
 - c. Loss of expectation of life - Kshs 150,000/=
 - d. Loss of dependency - Kshs 1,615,800/=
 - e. Special damages - Kshs 1,075/=Total award - Kshs 1,816,875/=
Less 30% - Kshs 545,062.50/=
Balance - Kshs 1,271,812.50/=
The Respondent is therefore awarded Kshs 1,271,872.50.
36. Each party to bear its own costs.



37 It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF MARCH, 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Opini counsel for the Respondent

No appearance for and by the Appellant

Court Assistant - Simon

