



**West Kenya Sugar Co. Limited v Shifuna & another (Civil Appeal
2 of 2022) [2023] KEHC 22977 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22977 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL 2 OF 2022
SC CHIRCHIR, J
SEPTEMBER 29, 2023**

BETWEEN

WEST KENYA SUGAR CO. LIMITED APPELLANT

AND

JOSEPHINE AYIEKO SHIFUNA 1ST RESPONDENT

ERICK KHAVALA MAKOKHA 2ND RESPONDENT

(Being an appeal from the Judgment and decree of the Hon. C.N. Njalale, Senior Resident Magistrate, in Butali SRMCC NO. 102 of 2020 delivered on 20th December, 2021))

JUDGMENT

1. The respondent herein sued the Appellant at the Chief Magistrate's court in Butali seeking for damages and related loss sustained by the Estate and dependants of the late Benson Maloba (Deceased) arising from a road Accident which occurred on 20th January 2020 along Mwanza – Likume road.
2. The trial court delivered judgment in favour of the respondent in which the Appellant was found fully liable for the accident and the respondent awarded damages for an all-inclusive sum of kshs. 2,823,186/=.
3. The Appellant was aggrieved by the judgment and proffered this Appeal and set out the following grounds:

Grounds of Appeal

1. The Learned Trial Magistrate grossly misdirected herself in treating the evidence and submissions on liability before him superficially and consequently coming to a wrong conclusion on the same.



2. The learned Trial Magistrate did not in the alternative consider or sufficiently consider the demand for contributory negligence based on the evidence adduced and the submissions filed by the Appellant.
3. The learned trial magistrate grossly misdirected herself in treating the evidence and submissions on quantum before him superficially and consequently coming to a wrong conclusion on the same.
4. The Learned Trial Magistrate misdirected herself in ignoring the principles applicable and the relevant authorities cited in the written submissions presented and filed by the Appellant.
5. The learned trial Magistrate erred in not sufficiently taking into account all the evidence presented before him in totality and in particular the evidence presented on behalf of the Appellant.
6. The Learned trial Magistrate erred in failing to hold that the Respondents have failed to prove negligence on the part of the Appellant while the onus of proof lay with the Respondents.
7. The learned trial Magistrate proceeded on wrong principles (if any) when assessing the damages to be awarded to the Respondents and failed to apply precedents and tents of law applicable.
8. The learned Trial Magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstance that it represented an entirely erroneous estimate vis-a-vis the respondent's claim
9. The learned trial magistrate failed to apply judicially and to adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision unsustainable in law.

Appellant's submissions

4. It is the Appellant's submissions that there was no evidence led to demonstrate negligence; that the police abstract produced did not disclose the results of investigations and any findings. That no sketch plans either were produced so as to show a clear picture of the circumstances surrounding the accident.
5. It is submitted that the deceased was negligent in failing to wear a helmet or any protective gear and that he therefore voluntarily assumed risk.
6. It is further submitted that if the trial court was unable to determine who was to blame based on the evidence presented, then the court should have held both parties equally liable. The Appellant has relied on the case of *Lakamish v.s Ag* (971) EA 118 in this regard.
7. On damages, the appellant is not contesting the trial court award of kshs. 10,000 on pain and suffering. The award of kshs. 100,000 for loss of expectation of life is equally not under contest.
8. Under the *Fatal accidents Act*, the Appellant proposes a multiplier of two-thirds and a monthly income of kshs.28,835 bringing the total award for loss of dependency to kshs.1,845,440. The Appellant further submits that the dependants will benefit on the award under the *law reform Act* and award of the aggregate of kshs.110,000 under the *law Reform Act* should therefore be deducted from the one under the Fatal Accident's Act. The appellant has no issue with the special damages.



Respondent's Submissions

9. The Appeal is opposed. It is the respondent's submissions that the Appellant's driver did not witness the accident; that the primary cause of the accident was the overloading of the Appellant's tractor with cane; that the manner in which the accident occurred as presented by the respondent is therefore not rebutted.
10. On assessment of damages, the respondent points out that this is at the discretion of the trial court and this court should not interfere with it, unless it is established that the trial court erred in principle. That the trial court applied proper principle in assessing the damages in any event.

Determination

11. This is a first appeal and the role of this court is as set out in the case of *inter alia* [Gitobu Imanyara & 2 others vs A.G](#) (2016) e KLR where it was held: "An appeal to this court by the high court is by way of retrial and the principles upon which this court acts are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion, though it should always bear in mind that it has never seen nor heard the witnesses and should make due allowance in this respect"
12. There are two issues for determination namely:
 - a). If liability on the part of the Appellant was proved
 - b). Whether the award on damages was excessive

Whether liability on the part of the Appellant was proved.

13. The testimony of PW2 and DW1 are relevant in this regard. PW2 adopted his written statement as his evidence-in-chief. He told the court that on that material day, he was pillion passenger in a motorbike which was behind the one carrying the deceased. That a head of the motorbike was trailer registration number KYCB 303X/Trailer ZE 9182 which was carrying sugarcane; that as the motorcycle overtook the trailer a heap of the cane fell off the truck and hit the motorbike in which the deceased was riding on. On impact the Deceased fell off the motorbike, and was thrown underneath the trailer. He was ran over by the rear wheels of the trailer as a result.
14. On cross examination, PW2 told the court that the deceased was a passenger in a motorbike which was ahead of him; that both the motorbike and the truck were headed the same direction. He denied the suggestion that the Rider of the subject motorbike was riding very close to the trailer. He told the court that the trailer was moving at a high speed causing the sugarcane to fall off. That the motorcyclist was also at a high speed too. In the re-examination, he stated that the cane had not been placed properly on the trailer and that is why a portion of it fell off.
15. DW1 driver of the trailer also adopted his written statement as evidence in chief. In the said statement, he stated that he was not the cause of the accident. That according to him, the accident occurred when two motor cycles, registration numbers. KMEA 939D and KMEL 965p collided. He further told the court it is the impact of the collision of the two motorbikes that threw the deceased under the trailer's right rear tyre.
16. On cross examination, he told the court that the tractor had no side mirrors and that the trailer was broader than the trailer. He admitted that when driving he is unable to view the rear.



17. In re-examination, he told the court that he did not see the accident. He was just told that he had knocked down the deceased.
18. PW1 produced the police abstract (PEX8). The abstract shows that the accident involved motorcycles registration numbers KMEA 939D and KMEL 965E and motor vehicle registration No. KCB 302/ZE 9182.
19. The report was produced without any objection on the part of the Appellant, and as at the date of the abstract was issued the accident was still pending investigation. The Appellant has argued that the respondent failed to discharge the burden of proving negligence. However, the evidence of PW2 gives an account on how the accident occurred. His testimony remained unshaken at cross examination. Indeed his, is the only account on how the accident occurred. DW1 on the other hand admitted that he did not witness the accident. He admitted that he was stopped after he had driven on and was only informed that he had ran over a person. His initial statement referring to a collision between the two motorcycles was a report he got from the police. This was hearsay evidence which could not have been admitted. The same police did not come to court to back up what DW1 was alleging on the part of the respondent.
20. As per section 124 of the Evidence Act, the respondent was not required to call fluidy of witnesses but such number as may be required to prove a fact.
21. Even though PW2 admitted that the motor bike was also at a high speed, it is evident that the primary cause of the accident was the falling off of the cane from the trailer. I am satisfied that the evidence of PW2 was sufficient to prove negligence on part of Appellant.
22. Further, and in any event, the deceased was a pillion passenger in the motorcycle. He played no role in the causation of the accident.
23. The Appellant also shifted blame to the Rider of the motorcycle (paragraph 14 of the defence,) but failed to take out 3rd party proceedings against the said Rider. Order 1 Rule 15 of the Civil procedure Rules provide as follows:
 - a. That he is entitled to contribution or indemnity; or
 - b. That he is entitled to any relief or remedy relating to or connected with the original subject matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or
 - c. Any question or issue relating to or connected with the said subject matter is substantially the same question or issue arising between the plaintiff and defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and the defendant and third party or between any or either of them, he shall apply to the court within 14 days after the close of pleadings for leave of the court to issue a Notice (hereinafter called the Third party Notice) to that effect, and such leave shall be for by summons in chambers ex parte supported by affidavit.”
24. In the light of PW2’s testimony, as well as failure to comply with the aforesaid provisions of the Civil procedure Rules so as to bring the Rider into the proceedings the trial court cannot be faulted



for holding the Appellant fully liable for the accident. The Appellant's complain in this regard is unmerited. I uphold the findings of the trial court on the issue of liability.

Whether the award on damages was excessive

25. The principles upon which an appellate may interfere with the discretion of the trial court on assessment of damages has been the subject of many past decisions of the superior courts. The Appellate court will interfere only if the trial court acted on wrong principles or misapprehended facts or otherwise made a wholly erroneous estimate of the damages suffered. (See *John Kipkemboi & another vs. Morris Kedolo* (2019)e KLR cited by the respondent.
26. On head of damages under the *Law Reform Act*, I take note of the fact that the award under this head is not contested and hence I will not address myself to it.
27. On damages under the Fatal Accident Act, I in arriving at the award under this head, the trial court applied a multiplier of 8 years. There is common ground that the deceased was 30 years of age. While taking into consideration the fact that the deceased would have worked up to 60 years before retirement, the court took into consideration the imponderables of life, and adopted a multiplier of 8 years. Indeed this is the multiplier that the Appellant had proposed in their submissions. In arriving at an appropriate multiplier, retirement age as well as the vagaries of life are relevant considerations. The trial court took both of these factors into considerations. I do not find any error committed by the trial court on this issue.
28. On the income, the appellant has submitted that, the plaintiff pleaded that the deceased was earning a salary of kshs.30,335. I do not know where the Appellant has obtained this figure as the respondents clearly pleaded the deceased's earning as kshs.48,535 (paragraph 6 of the plaint).
29. In proof of the said earnings, respondent produced the deceased's payslip for March, 2019. The document shows a gross salary of kshs.48,535. what is deductible is PAYE of kshs.7,216.40. The trial court deducted another Kshs.606 towards WCPS contribution. This left a net of ksh. 40,711.50
30. From the Appellant's submissions, it has no issue with the deductions, which it has placed at a lesser figure of 1,500/- which would then give a net of kshs.28.835 from the alleged gross pay of 30,335. However as pointed out above the deceased's gross pay was not kshs.30,335 but kshs.48,535.
31. In a nutshell the lower court adoption of kshs.40,711.50 as multiplicand was valid.
32. On whether the damages under the *Law Reform Act* should be deducted from the award under Fatal Accident's Act, I can do no more than agree with the trial court. The court is only required to take into account the fact that both heads of damages are going to the same person(s). The decision cited by the court in this regard do not refer arithmetic deductions. It only requires the court to bear in mind the fact that the damages under both heads are going to the same beneficiaries. I have no reason to fault the trial court in this regard.
33. The trial court's finding in both liability and quantum is upheld.
34. In view of the foregoing, it is my findings that the entire Appeal was unwarranted, it has no merit.
35. These are the final orders:
 - (a) The Appeal is hereby dismissed with costs to the Respondent
 - (a) Interest on the award will attract interest at court rates from the date of the Judgment of the trial court



(b) For avoidance of doubt, costs of the suit in the trial court goes to the Respondent

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 29TH DAY OF SEPTEMBER, 2023.

S. CHIRCHIR

JUDGE

In the presence of :-

E. Zalo – Court Assistant

No appearance by the parties

