



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**CIVIL APPEAL NO. 56 OF 2018**

**WECHULI NYONGESA PATRICK.....APPELLANT**

**VERSUS**

**ROSE AYUMA ABERI (Suing as Administrator of the Estate of**

**ROBERT ABERI KIBOMA [DCD].....RESPONDENT**

***(An appeal from the Judgment of Appeal and Decree of the Chief Magistrate's court Bungoma in Civil Suit No. 225 of 2018 delivered on the 18<sup>th</sup> day of June, 2019 by Hon. C.L ADISA Resident Magistrate.)***

**JUDGMENT**

The appellant Wechuli Nyongesa Patrick was sued by the Respondent Rose Ayuma Aberi (Suing as Administrator and personal representative of the estate of Robert Aberi Kiboma (deceased) seeking for general damages under the Law Reform Act and Fatal Accidents Act arising from an accident involving Motor Vehicle Reg. No. KBJ 749D owned and driven by the appellant on 14.3.2018 along Bungoma Mumias road whereby the deceased sustained injuries from which he died. The Respondent/Plaintiff gave particulars of negligence on the part of the appellant which were inter alia;

- a) *Driving motor vehicle registration No. KBJ 749D at a high speed in the circumstances.*
- b) *Driving without due care and attention of other road users particularly the deceased herein.*
- c) *Not being observant while driving.*
- d) *Failing to exercise any prudence or proper control of the suit motor vehicle.*
- e) *Failing to stop, brake in time or at all, slow down.*
- f) *Failing to heed to road traffic rules.*
- g) *Driving without taking into consideration the nature of the road.*
- h) *Causing the accident*

As a result of the accident, the estate of the deceased has suffered loss and claims damages under the Law Reform Act and the Fatal Accidents Act and further claims special damages.

The Appellant/Defendant filed statement of defence denying the claim or any negligence on his part. Without prejudice and in the alternative he averred that if an accident occurred (which is denied) the same was caused wholly by the carelessness and negligence of the deceased. The Appellant averred that the particulars of negligence on the part of the deceased were;

- (a) Suddenly jumping onto the road.
- (b) Walking on the highway rather than pedestrian pathway.
- (c) Walking without the presence of mind.

- (d) Operating a business on the road.
- (e) Crossing the road without proper look-out.
- (f) Failing to keep proper look out or have any sufficient regard for traffic reasonably expected on the road.
- (g) Failing to heed the presence of and/or approach of Motor Vehicle registration Number KBJ 749D.
- (h) Failing to take due regard and safety of other road users while walking along the road particularly Motor vehicle Registration Number KBJ 749D.
- (i) Occasioning the said accident.

Pw2 Elizabeth Naliaka who was the eye witness adopted her witness statement in which she stated;

- I was with the deceased herein as we used to do the same business at the same location.
- The deceased herein was attending to his customers when all of a sudden, I saw motor vehicle Reg. No. KBJ 749D which was being driven at a high speed coming from Mumias direction heading towards Bungoma town.
- The said Motor vehicle suddenly lost control and crossed the road then violently knocked the deceased herein who was off the road and attending to his customers, the deceased was thrown on the bonnet due to the impact, he then fell off the road and was for the second time knocked by the same motor vehicle thereafter he was pulled under the said vehicle for some distance.
- Before getting to the resting point it knocked a cart that was on the side of the road and stopped, the deceased was still under the vehicle.
- I rushed to the scene to check on the deceased and I noticed that his face had been severely damaged and he was bleeding from the nose and ears.
- The victim was rushed to Elgon View Hospital by good Samaritans, and I informed his wife about the incident.
- I later learnt that the deceased succumbed of the injuries while undergoing treatment at Elgon View Hospital.

The Appellant/Defendant on 4.6.2019 informed court that he wished to close the defence case without calling any witness. By Judgment delivered on 18.6.2019 the learned trial magistrate on liability stated;

*The evidence by the plaintiff's witnesses remains unchallenged as no other evidence was adduced in rebuttal. The copy of records shows the owner of the vehicle is **WECHULI NYONGESA PATRICK** who is the defendant herein.*

*There is no proof that the deceased contributed to the accident. In view of the above I find that the plaintiff established her case on a balance of probability against the defendant. I therefore award liability at 100% against the defendant.*

Aggrieved by the trial court find on liability, the appellant preferred this appeal on the followings grounds.

1. *The learned trial Magistrate erred by arriving at a finding on liability at 100% against the Appellant which was not supported by evidence adduced at the hearing.*
2. *The learned Magistrate erred in law and in fact in failing to appreciate or take into account the Appellant's submissions or at all.*
3. *The learned trial Magistrate erred both in law and fact in basing his finding on irrelevant matters.*
4. *The Respondent's case was not proved on balance of probability as is required by law.*
5. *The learned trial Magistrate erred on all points of fact and law in as far as both liability and quantum are concerned.*

Mr. Kibichy Counsel for the appellant filed written submission on support of the appeal. He submitted that it is not disputed that an accident occurred on 14.3.2018. He submitted that what was in dispute is who was liable for the accident. He submitted that the Respondent did not prove any acts of negligence on the part of the appellant. He submitted that the evidence of Pw2 was questionable as it was not clear whether the deceased was crossing the road or selling fruits on the road. He contended that the deceased contributed to his own misfortune as he ought to have taken reasonable care of himself and ought to have been found to have contributed to the occurrence of the accident. He referred the court to the decision in ***Techard Steam & Power Ltd -Vs- Mulio Muli & Another [2019] eKLR*** to fortify his submissions.

Mr. Mukisu for the Respondent also filed submissions on behalf of the Respondent. He submitted that what is being questioned in this appeal is the finding of fact by the trial court which this court cannot interfere with unless it is based on no evidence or on misapprehension

of evidence or he acted on wrong principles [see *Selle & Another -Vs- Associated Motor Boat Co. Ltd. & Another 1968 E.A. 123*] Counsel submitted that the Plaintiff witnesses particularly the eye - witness Pw2 saw the motor vehicle being driven lost control and knocked the deceased who was off the road. She therefore blamed the driver who was driving at high speed for the accident she submitted that this evidence was not challenged and the findings on liability was therefore grounded on evidence.

This is a first appeal. It is the duty of this court to review the evidence, evaluate it itself and draw its own conclusion but all the time bearing in mind that it did not see or hear the witnesses. This principle was emaciated in *Sella -Vs- Associated Motor Boat Co. Ltd. & Others 1968 E.A. 123* when the Court of Appeal stated;

*“This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from the High Court is by way of a 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. It itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial Judges’ finding of fact if it appears either that he has clearly failed at some point to take account of a particular circumstances on probabilities, materially to estimate the evidence or if the impression based on the demeanor of the witness is inconsistent with the evidence in the case generally.”*

In *Peters Vs. Sunday Post Ltd 1958 E.A. 424 Sir Kenneth O. Connor* in reiterating these principles stated’

*“It is a strong thing for an appellate court to differ from the finding on a question of fact of the Judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has indeed jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this a jurisdiction which should be exercised with caution. It is not enough, that the appellate court might itself have come to a different conclusion.”*

The first appellate court ...seized of an appeal must be aware (a) that it has a duty to reconsider the re-evaluate the evidence on record and draw its own conclusions (b) In doing (a) it must give allowance for the fact that it did not see or hear the witnesses, and (c) It is not open to review the findings simply because if it were hearing the matter it would have reached a different conclusion.

The evidence of Pw2 the eye witness to the accident is that the material day she was by the roadside together with the deceased when she saw a vehicle being driven at high speed from Mumias towards Bungoma town. The Motor vehicle lost control and knocked the deceased who was off the road.

Pw3 Cpl. Jane Ore attached to Bungoma Traffic base produced an abstract of the accident. From the record, the accident occurred when the driver was approaching Bungoma when the steering locked and he swerved and caused the accident. The appellant did not offer any evidence in their defence. No evidence was adduced to counter the assertion of the Respondents’ witness especially the eye witness, on how the accident occurred. The appellant though in their defence had alleged that the deceased was solely responsible or substantially contributed to the accident, no evidence of such negligence on the part of the deceased was tendered. Having not done so, the appellant cannot be heard to say that the trial court ought to have apportioned liability. I am satisfied from the evidence that the finding that appellant was 100% liable was based on evidence adduced on record.

On quantum of damages under the Fatal accident Act, the learned trial Magistrate stated;

**The deceased was a businessman. Even though there was no proof of earning it is obvious that he earned from his fruit business. There was no proof that he had any professional qualification.**

**Counsel for the plaintiff submitted Kshs.15,000/= as the multiplicand whereas the defence counsel submitted Kshs.8,500/=.**

**Counsel for the plaintiff relied on the case of *Jacob Ayega Maruja & Another Vs. Simeon Obayo C.A. No. 167/2000 (2005) eKLR* where the court of Appeal observed:**

*“We do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving his earnings is equality the production of documents. That kind of stand would do a lot of injustice to very many Kenyan who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things.”*

**From the above, cited authority and the submissions by the parties I find Kshs.8,500/= to be reasonable. Thus Kshs.8,500 x 12 x 2/3 = 680,000/=.**

The trial Magistrate rightly in my view considered the age of the deceased and the fact that he was self employed as a businessman. The court also appreciated that earning are an integral part of the assessment of damages under the Fatal Accidents Act as the Multiplicand. She however stated that having considered the submission and authority the sum of Kshs.8,500/= per month be reasonable.

Where the earnings of the deceased are known and have been tendered as evidence, the court should base assessment on the same. Where as in this case the earning is not known, the court cannot place any figure but should be a figure based on some criteria. This can be like comparable earnings by people employed by Government with similar qualifications for skilled workers or minimum wages as provided for under the Labour Institution Act (Act No. 2 of 2007). Such approach enhances certainty and consistency and avoids speculation in assessment of damages. The minimum wage should be the one in operation at death of the deceased.

On 14.3.2018 when the deceased died, the regulations then in force were as per the legal Notice No. 111 dated 10.7.2017 which were deemed to have come into operation on 1.5.2017. The minimum wage for general labourer including cleaner, sweeper, gardener, watchman or messenger where in the absence of any skills was to earn in all former municipalities Kshs.11,926.40. I am therefore satisfied that the trial magistrate in assessing the damages under the Fatal accidents Act failed to take into account the relevant factors which is the gazzetted minimum wages in respect of the earning of the deceased. I therefore set aside the Multiplacand of Kshs.500/= and substitute thereof a Multiplacand of Kshs.11,926.40. The Multiplier and dependency ratio are upheld.

In the analysis the damages under Judgment is entered for Respondent/Plaintiff against the Appellant/Defendant as hereunder;

1. Pain and Suffering	Kshs.50,000/=
2. Loss of expectation of life	Kshs.150,000/=
3. Loss of dependency	
$Kshs.11,926.40 \times 12 \times 10 \times \frac{2}{3}$	Kshs.954,080/=
4. Special damages	<u>Kshs.95,000/=</u>
<b>Total</b>	<b><u>Kshs.1,249,080</u></b>

In the final analysis except what has been amended in the quantum, the appeal lacks merit and is hereby dismissed with costs.

**Dated and Delivered at Bungoma this 27<sup>th</sup> day of January, 2021**

**S.N. RIECHI**

**JUDGE**