



**REPUBLIC OF KENYA**

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

**HCCA NO. 23 OF 2019**

**TERESIA WANJIRU GITHINJI.....APPELLANT**

**VERSUS**

**LUCY KANANA M'RUKARIA &**

**LINUS MAINGI NABEA (Suing as legal representative of**

**ERNEST GUTUURA NABEA (DECEASED).....RESPONDENTS**

**J U D G M E N T**

**BACKGROUND**

1. The suit CMCC 156 of 2017 arose following a road traffic accident on 23/11/2016 in which the deceased, who was on foot, was hit by a motor vehicle and fatally wounded. The plaintiffs sued for general damages, special damages and costs of the suit.

The deceased, aged 26 years, had been a student at Chuka University and a part time worker at Godka Hotel. At the time of the accident, the deceased had escorted his mother, who blamed the driver of the motor vehicle for driving at a high speed and knocking the deceased who was off the road. A police officer testified that indeed the vehicle was being driven at a high speed as per their investigations. The driver of the motor vehicle testified that the person he knocked down staggered into the road and hit his vehicle. However, the driver was noted as having fled the scene thus hampering any further scene of accident investigations.

**TRIAL COURT JUDGMENT**

2. The court opined that the driver, who claimed to have been driving at 70kph, would have managed to avoid the accident if that indeed had been his speed. The court also felt that the fact that the driver fled to Embu, while Chuka police station was 100 metres from the scene of the accident, brought into question issues on the defendant's demeanour and whether or not the deceased really walked onto the path of his vehicle. The driver was found to be 100% liable for the accident and the defendant was held vicariously liable for the accident.

The court awarded a total sum of Kshs. 1,585,000/= with Kshs. 15,000/= for pain and suffering as he died the same day, Kshs. 100,000/= for loss of expectation of life which the court cited as the conventional sum, Kshs. 1,500,000/= global sum for loss of dependency as deceased was studying bachelor of commerce, Kshs. 20,000/= special damages in obtaining a limited grant and Kshs. 50,000/= for funeral expenses as an average figure since there was no proven expenditure.

**MEMORANDUM OF APPEAL**

3. The appellant was aggrieved by the Judgment and filed Memorandum of Appeal dated 22/5/2019 and filed on 24/5/2019. The Appellant appeals against the entire judgment. They rely on the grounds that;

***1. That the trial magistrate erred in fact and in law by misapprehending the principles governing liability by apportioning the Defendant/Appellant 100% liability.***

***2. That the trial magistrate erred in law and in fact and completely misapprehended the principles governing an award of General damages and thus arrived at a figure that was inordinately high***

***3. That the learned trial magistrate erred in law and in fact by failing to take into account the Defendant's submissions and the binding authorities cited in regard to principles and law governing both liability and quantum and thus arrived at an erroneous conclusion.***

**4. That the learned trial magistrate erred in law and in fact in failing to consider the weight of evidence adduced by the Defendant.**

She prays that the Appeal be allowed, the judgment be varied or set aside as well as costs of the Appeal.

**APPELLANT'S WRITTEN SUBMISSIONS**

4. The Appellant's written submissions were filed on 25/6/2020.

The Appellant submits that the factual evidence was insufficient and was not aptly considered as the police officer who testified was not the investigating officer and did not provide maps or sketches of the scene of the accident. They opine that evidence tendered was hearsay and opinion, save for the Police Abstract that was produced as exhibit. They faulted the evidence of the deceased's mother who claimed to have been 50metres away from the accident scene which occurred at 1am. They also submit that she was not listed as an eye witness on the Police Abstract form though she claimed to be an eye witness and they are therefore of the view that her testimony was exaggerated and should be taken with a pinch of salt. They emphasized that the defendant swerved to avoid the collision after the deceased walked onto the road but the vehicle still hit him on the right side. They stated that the police officer who testified could not have been taken to corroborate the evidence of the deceased's mother as he was not the investigating officer and he did not adduce evidence as to the scene of the crime. They further submit that negligence was not proven.

They opine that there being two different versions of events, at most liability should accrue 50:50 on this submission they rely on **Nelson Njuguna Kimani -v- David Marua & Another (2017) eKLR** They also submit that the defendant had not stopped because he was afraid the area was insecure and that he reported the incident later on.

They further submit that they take issue with the awards for loss of dependency and funeral expenses but they are agreeable with the other awards. They submit that indeed there was a letter of offer to the deceased from Chuka University but that is not sufficient proof that he was a student at the school and no evidence of the same was proven. They also state that there was no evidence that the deceased worked at Godka Hotel as claimed and the same ought not to have been considered. They urge that the court awards a global sum of Kshs 700,000/=. They rely on **Stanley Muiro Njuguna & Another -v- SR 2019 eKLR and Florence Mumbua Ndeo & Another -v- Ezra Korir Kipng'eno & Another (2017) eKLR** on the issue of the award for funeral expenses, they state that in testimony, PW2 said the funeral expenses were Kshs 20,000/= and that amount should be substituted instead of Kshs. 50,000/=.

**RESPONDENT'S WRITTEN SUBMISSIONS**

5. The Respondent filed their submissions on 28/8/2020.

They state that the issue is whether negligence was proven and how much the respondent is entitled under loss of dependency. They concede that the funeral expenses can be capped at Kshs 20,000/=. They state that DW1 should have seen the deceased crossing the road as the area of the accident was in front of Godka Hotel where there are 3 lanes. They also fault the action of the Appellant in failing to report the accident at Chuka police station, Runyenjes police station or Embu police station until the next day. They clarify that the Appellant was not held liable because of the issues he raises such as failure to stop or because of being charged with a traffic offence.

They submit that the evidence adduced in the plaintiff's case was not shaken by the defence case. They also state that the fact that a witness is not named on the abstract does not nullify their evidence. They submit that the evidence was sufficient to support the finding on liability. They submit that the evidence of the deceased being a student at Chuka University was not controverted nor was the evidence that he worked part time at Godka Hotel. They distinguish the case relied on by the Appellant because the deceased persons therein were engaged in casual employment and were not commerce students. They also point out that there is inflation to be factored in. They submit that the appeal should be dismissed.

**ANALYSIS AND DETERMINATION:**

The issues which arise for determination are:

- (i) Liability
- (ii) Whether the award of damages for loss of dependency should be upheld or not.

Firstly, this court's role as 1<sup>st</sup> appellate court was stated in the case of **CHINA ZHONGXING CONSTRUCTION COMPANY LTD V ANN AKURU SOPHIA [2020] EKLR** by Mwongo J;

***"3. This appeal is against both liability and damages. As a first appellate court, this court's role is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. This duty was well stated in Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123 in the following terms:***

***"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial 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 allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally*

7. It is well settled principle that an appellate court will not interfere with findings of fact by the trial court unless it is proved that there was an error in principle or the finding is outright wrong. The trial magistrate did not base the finding on liability on the fact that the appellant's driver was charged nor because the driver never stopped at the scene. The trial magistrate found as a fact that DW1- confirmed that he knocked down the deceased and that his defence that it is the deceased who staggered into the road and knocked his motor vehicle was disapproved by both PW1 &2 who were in agreement that the DW1 lost control and veered off the road. It is on the basis of this evidence that he found the driver of the motor vehicle to blame for causing the accident and held that liability on the driver was 100%. The trial magistrate properly addressed his mind to the law and facts in reaching that and I would have no reason to interfere with the apportionment of liability by the trial magistrate.

The evidence tabled indicated that the deceased was hit while off the road. The fact of negligence is based on evidence and liability must be proved. The respondent was lawfully walking off the road. No liability attaches to him.

### **Issue on loss of expectation**

The award of damages can be interfered with in some instances. In the classic case of **Ahmed Butt Versus Khan 1982-88 IKAR**, the court of appeal had this to say in a binding decision:

*"An appellant court will not dismiss an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimates. 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."*

Ndungú J in **ZACHARY ABUSA MAGOMA V JULIUS ASIAGO OGENTOTO & JANE KERUBO ASIAGO [2020] EKL**R reviewed downwards the award on loss of dependency where the deceased was awaiting admission to university. The court reasoned as below;

*"...They cited the decision of Maingi Celina v John Mithika M'itabari suing as the administrator of the estate of Erastus Kirimi Mithika (Deceased) [2018] eKLR where the court awarded Kshs 1,000,000/- where it was proved that the deceased at the time of death was an 18 year old who was about to be admitted to the University. The appellant on the other hand proposed an award of Kshs 256,740 before the lower court after applying the multiplier approach. The trial court in awarding Kshs 2,000,000 held as follows;*

*"In this present case the plaintiff has proposed a global sum of Kshs 3,000,000 relying on NRB HCC NO 814 OF 2007. PETER KIBOGORO WANJOHI (suing as the Administrator of LILIAN WANGUI WANJOHI (DECEASED) VS CHRISTINE WAKUTHI MURIUKI & ANO*

*I note that in the said authority the deceased was a university student studying Education course and a global sum was awarded. In the present case the deceased was a college student at Gusii Institute studying a course on food and beverage."*

*Having considered the cases cited before the trial court and taking into account that the deceased was about to sit for her final examination before graduating, I find the Kshs 2,000,000 awarded by the trial court was excessive and the same is substituted for an award of Kshs 1,500,000/- under the head loss of dependency."*

Okwany J in **SAMWEL KIMUTAI KORIRI (SUING AS PERSONAL AND LEGAL REPRESENTATIVE OF ESTATE) OF CHELANGAT SILEVIA V NYANCHWA ADVENTIST SECONDARY SCHOOL) & ANOTHER [2016] EKL**R awarded a sum of Kshs 1.8 million where the deceased was a student at a teachers training college.

In **STEVE TITO MWASYA & ANOTHER (BOTH SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF SHERINNA KOKI TOTI (DECEASED) V ROSEMARY MWASYA [2015] EKL**R, Sergon J awarded a staggering 14 million shillings where the deceased was a bachelor of Commerce student at Strathmore University.

These decisions are persuasive and I am in agreement with the awards as they show a near agreement on what amounts to a reasonable global award.

8. On the issue of quantum, I am of the view that the amount awarded for loss of dependency, which was a global award, is not inordinately high to warrant interference by this court. I am of view that the magistrate did not use any wrong principles or apply wrong considerations while awarding the same. There was no misapprehension by the trial magistrate and he properly applied the authorities cited to arrive at the award. The grounds must therefore fail.

On the award for funeral expenses the respondent conceded that it can be reduced downwards to Kshs.20,000/- as submitted by the appellants.

### **CONCLUSION**

9. I am of the view that the evidence tabled by the plaintiff at trial was not controverted and it was proved on a balance of probability that the deceased was killed due to the negligence of the plaintiff's driver. Having considered the entire evidence and the circumstances, it is more likely than not that the driver was speeding when he knocked down the deceased and there is no reason to interfere with apportionment of liability by the trial magistrate. In the end I find that this appeal is without merits save for the award of funeral expenses which I reduce to Kshs.20,000/-. I dismiss the appeal with costs.

**Dated, signed and delivered at Chuka this 25<sup>th</sup> day of February 2021.**

**L.W. GITARI**

**JUDGE**

**25/2/2021**

Ruling has been delivered in open court.

**L.W. GITARI**

**JUDGE**

**25/2/2021**