



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CIVIL APPEAL NO 21 OF 2016

CHANIA SHUTTLE BUSAPPELLANT

VERSUS

REBECCA MBOGHO (Suing as the legal representative of the estate of

JOSEPH MWANYIKIA MBOGHO.....RESPONDENT

(Being an appeal from the Judgment of the Honorable Nderitu, Senior Principal magistrate delivered on the 20th day of June, 2026)

JUDGMENT

1. On 17th July, 2010, Joseph Mwanyika Mbogho was a pedestrian walking along Nairobi-Mombasa road when a Bus Reg No KBB 854 C belonging to Chania Shuttle bus was so carelessly and or negligently driven thus veered off the road and hit the said Joseph who succumbed to fatal injuries sustained thereof. The deceased admittedly had no parents, wife nor children. His close relatives as per the pleadings were Rebecca Mbogho the respondent herein an elder sister and Mary Mbogho his younger sister.

2. Having obtained a grant of letters of administration in respect of the deceased's estate, Rebecca Mbogho suing as the legal representative of the estate moved to Voi law courts through a plaint dated 5th July, 2013 and filed on 8th July, 2013 suing Chania Shuttle Bus seeking;

(a) General damages under the fatal accidents Act and the law reform Act

(b) special damages

(c) costs

(d) interest on a,b and c above

3. In the said plaint, Rebecca (Plaintiff) stated that the deceased died at the age of 31 years while in good health and that he left as dependants Rebecca Mbogho (herself) and Mary Mbogho (sister).

4. Through their statement of defence dated 22nd January, 2014, the defendants denied the claim generally and instead shifted liability to the deceased.

5. During the hearing, the plaintiff vide her submissions filed on 30th May, 2016 submitted both on liability and damages thus blaming the defendant /respondent for the occurrence of the accident at 100%. On damages, the plaintiff (appellant) submitted for Kshs 50,000 for pain and suffering after taking into account that the deceased died instantly. On loss of expectation of life, she prayed for Kshs150,000. On the aspect of loss of dependency, the appellant pleaded for Kshs1,140,000 based on monthly income of kshs15,000, a dependency ratio of 1/3 and a multiplier of 29 years. As to special damages, she prayed for Kshs 60,000 plus kshs15,000 being the cost of obtaining a grant of letters of administration.

6. On their part, the defendants filed submissions before the lower court on 30th May, 2016 denying liability thus shifting the blame to the deceased 100%. On quantum regarding loss of dependency, it was contended that there was no proof of dependency. On loss of expectation of life, they submitted that a sum of Kshs70,000 was sufficient and for pain and suffering Kshs10,000.

7. Having considered the pleadings, evidence by witnesses and submissions by both counsel, the trial court delivered its judgment on 20th June, 2016 thus apportioning contributory negligence in the ratio of 50:50%. The court also awarded kshs100,000 for loss of expectation of life, kshs 40,000 for pain and suffering and, special damages at Kshs 31,650. Under the Fatal Accidents Act, the court awarded kshs 584,420 based on a monthly salary of kshs 5000 as confirmed by the plaintiff who was his employer at a multiplier of 25 years and 1/3 as dependency

ratio. Accordingly, the defendants (appellant) were ordered to bear the ratio of 50% calculated at kshs393,860 being half of the total assessed damages.

8. Aggrieved by the said judgment, the defendant now the appellant filed a memorandum of appeal dated 14th December, 2016 and filed on 15th December,2016 citing 3 grounds of appeal as follows;

(1) The learned magistrate erred in fact and in law in finding that the plaintiff/respondent was entitled to general damages of kshs 393,860 that was erroneously awarded despite the fact that the plaintiff/ respondent was a sister to the deceased and as such she did not qualify to be a dependant as per Section 4 (1) of the Fatal Accident Act Cap 32 of the Laws of Kenya.

(2) The learned magistrate erred in fact and in law in failing to consider Section 4 (1) of the Fatal Accidents Act Cap 32 of the Laws of Kenya that provides inter alia that “Every action brought by virtue of provisions of this Act shall be for the benefit of wife, husband, parents and children of persons whose death was caused (and shall ...be brought by and in the name of executor and administrator of the person deceased).

(3) The learned magistrate erred in both fact and in law in failing to consider the various precedent cases of similar nature of cases as the one herein.

9. On the other hand, the respondent (plaintiff) filed a memorandum of cross appeal dated 26th February, 2018 and filed on 9th March,2018 citing one ground of appeal to the effect that; the learned trial magistrate erred in law and in fact in failing to make an award for lost years in favour of the deceased’s estate and that upon allowing the cross appeal, an award for lost years be made.

10. When the application came up for directions, the court directed parties to file submissions in deposition of the same.

Appellant’s submissions

11. The appellant filed two sets of submissions. The first set dated 9th June, 2017 was filed on 15th June, 2017 and the second set in respect of the cross appeal on 16th March, 2020. In the original submissions, the appellant submitted that they were not challenging court’s finding on liability. They were however dissatisfied with the amount of quantum awarded on the aspect of loss of dependency.

12. The appellant submitted that they were satisfied with the assessment and award made under the Law Reform Act in respect of quantum on loss of expectation of life at kshs100,0000 and pain and suffering at kshs 40,0000 terming the same as fairly assessed.

13. It was submitted that the only contestation is in respect of the award of loss of dependency under the Fatal Accidents Act. The basis of this contestation is on two fronts namely; that the deceased did not leave any dependant nor are the sisters listed as dependants recognized as such under that Act.

14. Counsel took the court through the respondent’s evidence (Pw1) before the trial court in which she claimed that she was the one who had employed the deceased her younger brother as a herdsman at a monthly salary of kshs 5,000. According to learned counsel, it was the deceased who was dependant upon the respondent and not the other way round. Regarding Rosemary, the younger sister, counsel opined that there was no proof that she depended upon the deceased at any one time.

15. It was counsel’s submission that loss of dependency must be proved as a matter of fact that the people listed as dependants indeed depended upon the deceased. In support of this proposition, counsel relied on the decision in the case of **Chania Shuttle Vs Mary Mumbi Nairobi HCC NO. 6 of 2014.**

16. Concerning dependency under the Fatal Accidents Act, counsel referred the court to Section 4 (1) of the Fatal Accidents Act which recognizes a wife, husband, child and parent as dependants but not sisters as in this case; To fortify this argument, counsel relied on the holding in **Aphia Plus Western Kenya and another Vs Mary Anyango Kadenge and another (2015) e KLR** where the court held that brothers and sisters to the deceased were not entitled to claim as dependants. The court was further referred to the holding in the case of **Tombe Tea Factory Limited Vs Samuel O. Araka (2010) e KLR** where Makhandia J held that a sisters and a brothers were not dependants to the deceased.

17. As regards special damages of kshs31,650, counsel submitted that there was no specific proof by way of receipts that such expenditure was incurred as held in the case of **Delta Haulage Services Limited vs Complast Limited and Another (2015) e KLR.**

18. According to the submissions in response to the cross appeal, counsel submitted that the claim for lost years was an afterthought and that it was not pleaded nor submitted before the trial court hence a new matter on appeal.

Respondent’s submissions

19. The respondent filed submissions on 9th February, 2021 claiming that the learned trial magistrate failed to award damages for lost years in favour of the deceased’s estate. Under the Law Reform Act, it was submitted that the award of kshs 100,000 for loss of expectation of life and kshs 40,000 for pain and suffering was fair and uncontested. Counsel submitted on the award for lost years to be calculated at kshs 5,855.20 at the dependency ratio of 1/3 and a multiplier of 25 thus making a total of kshs 584,420. In support of this calculation, counsel relied on the holding in the case of **Daniel Kuria Nga’nga’a V Nairobi City Council HCC No 362 of 2001 Nairobi.**

20. As to special damages, counsel submitted that, even without including specific expenditure receipts, the court can award reasonable

expenditure incurred in burial expenses. In this regard, reliance was placed in the holding in the case of **Jacob Ayiga Maruja & another Vs Simeon Obayo Kisumu Civil Appeal No 167/2020.**

Determination.

21. I have considered grounds of appeal herein, counsel's submissions and lower court proceedings together with the impugned judgment thereof. Issues for determination are;

(1) Whether loss of dependency was proved to the required degree.

(2) Whether this court can award a claim on lost years.

22. This is a first appeal to this court. It is trite that as the first appellate court, I must independently re-evaluate, re-examine and make an independent determination or conclusion but bearing in mind that I did not have the opportunity to hear nor see nor assess the demeanor of witnesses. Further, the court can only interfere with matters of findings on factual issues on exercise of discretion if proved that wrong principles were applied. See **Mariga Vs Musila (1984) e KLR and Mbogo and another Vs Shah (1968) E.A 93** where the court stated that;

“an appellate court will interfere if the exercise of discretion is clearly wrong because the judge misdirected himself or acted in matters which he should not have acted upon or failed to take into consideration and in doing so arrived at a wrong conclusion ...”

23. Before me is an appeal and cross appeal which do not challenge apportionment of liability in the ratio of 50:50. Also, there is no contestation on the awards in respect of loss of expectation of life and pain and suffering.

24. The appellant is challenging an award on loss of dependency on grounds that the deceased did not have nor leave any dependant. Under the Fatal Accidents Act, the respondent was duty bound to prove dependency. According to the testimony of Pw1 the respondent herein, she had employed the deceased her brother as a herdsman. She also stated that she used to pay the deceased kshs5,000 per month. On cross examination by Mr Lewa she stated that;

“he used to assist me. I am older than him. He was 31 years old. He used to herd my livestock ...he used to earn approximately 5,000...”

25. From this testimony, it is clear that it was the respondent who was supporting the deceased and not the other way round. The only meagre income the deceased used to earn or receive from the respondent was kshs5,000 which was not sufficient to sustain him. The reverse should be the case to the extent that the respondent was able and capable of supporting the deceased hence she could not have paid him kshs 5,000 and then turn round to depend on him. The argument and claim by the respondent does not hold water. The respondent did not prove how and to what extent she depended on the deceased to earn a living other than losing a cheap labourer in the name of a brother.

26. As regards dependency by Mary, she did not testify. The only statement available is the testimony of pw1 who claimed that Mary was affected by the death of the deceased. There is no explanation rendered on how she was affected or dependant upon the deceased. The trial court merely found that the respondent had lost somebody who was herding her livestock. This is not a ground to arrive at dependency contemplated under the Fatal Accident Act. In **Chania Shuttle V Mary Mumbi Nair HCC NO 6 of 04 (Supra)** the court held that

“indeed, it is trite law that dependency is a matter of fact and must be proved. It must be demonstrated that persons for whose benefit the proceedings are brought under the Fatal Accidents Act were dependent on a deceased person.”

27. For one to plead dependency, he has the onus to prove that during the deceased's lifetime he or she actually depended on the deceased either to earn a living or some form of support be it economic or social support and that in the absence of the deceased, he or she will stand to suffer. Further, losing an employee does not translate to losing somebody providing for one's needs or requirements in the context of Section 4 of the Fatal Accident Act.

28. Were the respondent and her sister qualified to be treated as dependants? A dependant under the Fatal Accidents Act is clearly spelt out as follows;

“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 cost not recovered from the defendant shall be divided amongst those persons in such shares as the court, by its judgment shall find and direct”.

29. The question therefore begging for an answer is whether sisters qualify to be dependants under the Fatal Accidents Act which award was made by the trial court. Section 4 (1) of the Fatal Accidents Act is clear that only a wife, husband, child or parent qualify to be a dependant. Brothers and sisters do not qualify. See **Kenya Power and Lighting Company Limited Vs Monica Otiang Oluoch suing as administrator of the estate of Ibrahim Obura Oluoch (deceased) (2016) e KLR** where the court stated that;

“the level of dependency is affected by the number of deceased’s dependants. The dependants contemplated under the Fatal Accidents Act are expressly defined under Section 4 (1) as follows ...it is trite that of the persons pleaded in paragraph 6 of the complaint, only the deceased’s mother is a dependant as the deceased brothers and sisters are not dependants for purposes of the fatal Accidents Act.”

30. Similar position was held in the case of John Mungai Kariuki & Another V Kaibei Kangai Ndethiu & 2 Others (2020) e KLR where the court held that;

“the brothers and sisters of the deceased are not dependants for purposes of the statute and language of the statute cannot be read, even by creative interpretation to expand the list of dependants to include siblings of the deceased.”

31. In view of the clear statutory provision and case law cited above, it is clear in my mind that the trial court misdirected itself by arriving at the award it did without satisfying itself as to whether the respondent and the sister qualified to be dependants. To that extent the award under the claim of loss of dependency is hereby set aside.

32. Concerning the prayer in the cross appeal for the award of lost years, this issue was not canvassed before the trial court. It is certainly an afterthought thus sneaking herein new issues through submissions during the appeal. The issue of lost years was not pleaded nor submitted before the trial court. How can this court arrive at a finding to fault the trial court on an issue that was not presented before it? I do agree with the appellant that parties are bound by their pleadings. see Jones V National Coal Board (1957) 2 QB 55 where it was held that;

“In the system of trial which we have evolved in this country, the Judge sits to hear and determine the issues raised by parties, not to conduct an investigation or examination on behalf of somebody at large, as happens, we believe, in some foreign countries...”

33. Similar position was held in the case Galaxy Paints Company Limited vs Falcon Guards Limited court of Appeal case Number 219/1998 where the court stated that;

“issues for determination in a suit generally flow from the pleadings and unless the pleadings are amended in accordance with Civil Procedure Rules, the trial court by dint of the aforesaid rules may only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court’s determination”

34. Indeed, it is not for the court to solicit for pleadings or create pleadings. As an appellate court, I am bound to consider only issues that arose before the trial court and make a finding on the same. Anything forgotten but now being introduced will be prejudicial to the other party. Accordingly, the cross appeal cannot stand and the same is dismissed.

35. Regarding the award of special damages, it is admitted that the same ought to be pleaded for and specifically proved. The trial court acknowledged that although receipts were not produced, death occurred and the body must have been buried hence awarded nominal special damages of kshs 31,650. It is a fact that somebody died and from the general practice by Kenyans, there must have been a burial ceremony which naturally attracts mortuary expenses, coffin, dressing, transport and other attendant costs. This court ought to make a finding whether the trial court applied a wrong principle by awarding nominal damages. In my view, a sum of kshs 31,000 must have been spent after taking into account the aforesaid possible expenses whether the deceased was a Christian or Muslim. The sum of kshs 31,000 was extremely reasonable assessment by the trial court which I will not interfere with.

36. Courts have time and again held that a court can award reasonable legitimate burial expenses even without production of specific expenditure. A judge can make an award on necessary burial expenditure without necessarily proving each single item. See court of appeal holding in Jacob Ayiga Maruja and Another Vs Simeon Obayo (supra).

37. Having held as above, it is my finding that the appeal herein is merited and same is allowed as prayed. Further, the cross appeal herein is dismissed as it is not merited.

38. Accordingly, the judgment delivered on 20th June, 2016 awarding the plaintiff (respondent) Ksh 393,860 is set aside and substituted thereof with a sum of loss expectation of life kshs 100,000, pain and suffering kshs40,000 and special damages ksh 31,650 making a total of kshs171,650 plus interest at court rates from the date of judgment till full payment. I do award costs of the appeal to the appellant.

Dated signed and delivered virtually at Mombasa this 28th day of May 2021

J. N. ONYIEGO

JUDGE