



**REPUBLIC OF KENYA**

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

**(CORAM: CHERERE-J)**

**CIVIL APPEAL NO.35 OF 2021**

**BETWEEN**

**MATHEW NDUVA KARIMI.....1<sup>ST</sup> APPELLANT**

**HATARI SECURITY GUARDS LTD.....2<sup>ND</sup> APPELLANT**

**AND**

**MARGRET KARIMI.....1<sup>ST</sup> RESPONDENT**

**MUGWIKI STEPHEN MWONGO.....2<sup>ND</sup> RESPONDENT**

**(Suing as legal representative of the estate of Sarah Thirindi (Deceased))**

**(Being an Appeal from the Judgment and Decree in Tigania PMCC No. 14 of 2020 by Hon. Sogomo. G (PM) on 11<sup>th</sup> February, 2021)**

**JUDGMENT**

1. On 18.10.2019, **Sarah Thirindi (Deceased)** was lawfully walking along Meru-Maua Road when she was knocked down by motor vehicle **KCL 060F (accident motor vehicle)** owned by **Hatari Security Guards Ltd (2<sup>nd</sup> Appellant)** which was being driven by **Mathew Nduva Karimi (1<sup>st</sup> Appellant)** and she suffered fatal injuries.

2. **Margret Karimi** and **Mugwika Stephen Mwongo (1<sup>st</sup> and 2<sup>nd</sup> Respondents respectively)** in their capacity as daughter and father to the deceased filed suit against Appellants seeking damages.

3. The Defendants/Appellants in his statement of Defence denied the claim and attributed it to the negligence of the deceased.

4. At the conclusion of the trial, the learned trial magistrate apportioned liability at 80% against Appellant's jointly and severally and 20% against the Respondents. The court then proceeded to award damages as follows:

1) Pain and suffered	Kshs. 40,000/-
2) Loss of expectation of life	Kshs. 100,000/-
3) Loss of dependency	Kshs. 3,200,000/-
4) Special damages	Kshs. 153,510/-

**The Appeal**

5. The Appellant dissatisfied with the lower court's decision preferred this appeal on 03.03.2021 mainly disputing liability and contending that the award for pain and suffering and for loss of dependency are inordinately high.

**Analysis and Determination**

6. In carrying out its mandate, the first appellate court must reconsider the evidence before it, evaluate it and draw its own conclusions. This Court will only interfere where the finding is based on no evidence, a misapprehension of the evidence or if the trial court acted on wrong principles in reaching its finding. (See **Ephantus Mwangi & Another vs. Wambugu (1983) 2 KCA 100.**)

7. I have considered the entire record of appeal and the submissions of counsel for both parties and I will address the issues of liability and quantum as hereunder.

### **Liability**

8. The evidence on record as narrated by the 1<sup>st</sup> Appellant's is that deceased in this case was crossing the road when she saw an oncoming motor vehicle and turned back onto the lawful lane of the **accident motor vehicle** thereby causing the accident. This evidence was corroborated by PW2 Francis Aburuki who was at the scene of accident and the investigating officer who visited the scene and confirmed that the accident occurred in the middle of the road.

9. In **John Onyango & another vs. Samson Luwayi [1986] eKLR** the Court of Appeal expressed itself as follows: -

**“This court will not interfere with the findings of fact of the two lower courts unless it is clear that the magistrate and the judge have so misapprehended the evidence that their conclusions are based on incorrect bases: Abdul v Rubia 1917/1918 7 EALR 73.”**

10. Section 5 of the Kenyan Highway Code provides the following instructions on how to cross the road: **Look right, look left, look right again, then listen before crossing the road. Do not run. If traffic is coming, let it pass. Look around again and listen. Do not cross until there is safe distance in the traffic and you are certain that there is plenty of time. Remember, even if traffic is a long way off, it may be approaching very quickly.**

11. I have considered the evidence on record and the holding in **Joyce Gathoni Wathena & another (Suing as Personal Representatives of Estate of Simon Kiarie Mburu v Mbugua David & another [2020] eKLR.** The evidence on record clearly indicates that the trial court was not faced with instances of conflicting evidence as to how the accident happened. The evidence clearly disclosed that the deceased did not observe the Highway Code and tried to cross the road when it was unsafe, thereby causing the accident.

12. The investigating officer who inspected the scene determined that the point of contact was at the lawful lane of the **accident motor vehicle**. From the point of impact, the 1<sup>st</sup> Appellant was not to blame for the accident and had the deceased observed the correct traffic rules, she would have avoided the accident.

13. The case of **Teresia Sebastian Massawe (Suing as the Legal Administratrix of the estate of the late Silvia Sebastian Massawe v Solidarity Islamic (Kenya Office & another [2018] eKLR,** is distinguishable from this case for the reason that the deceased in that case was crossing the road when he was knocked down by a vehicle that was overtaking another.

14. In the circumstances of this case, I find that the trial court's decision faulting the 1<sup>st</sup> Appellant for not applying brakes was based on misapprehension of the evidence which led to a wrong conclusion.

15. Had the appeal not succeeded, I would have had no reason to interfere with the award of Kshs. 40,000/- for pain and suffering and Kshs. 100,000/- for loss of expectation of life which in my considered view are reasonable.

16. The award on loss of dependency is however worthy consideration for the reason that there was no prove of earnings by the deceased who was said to have been a farmer.

17. The Regulation of Wages (Agricultural Industry) (Amendment) Order, 2018 which was in force in 2019 when the accident occurred provides for wages for an unskilled employee at Kshs. 6736.30 which ought to have been applied as the multiplicand together with a multiplier of 10 years as is evident from the body of the trial court's judgment as opposed to Kshs. 20,000/- and a multiplier of 20 years indicated on the final tally of the trial court's judgment.

18. In the final analysis, I find that this appeal has merit and it is allowed in its entirety with costs to the Appellants.

**DATED AT MERU THIS 27TH DAY OF MAY 2021.**

**T. W. CHERERE**

**JUDGE**

**Court Assistant - Morris Kinoti**

**For Appellant - Mr. Kimaita for Wambugu & Muriuki Advocates**

**For Respondents - Mr. Kaberia for Nkunja Kaberia & Co. Advocates**