



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT BUSIA**

**CIVIL APPEAL NO.31 OF 2019**

**PHILIP KIPROTICH KIMETO.....1<sup>ST</sup> APPELLANT**

**KIBOKO TRANSPORTERS LIMITED.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**TOMAS RAISI MATAYO & KENNEDY BAHATI MATAYO (Both suing as Legal**

**Representatives of the Estate of FRED MORARA NYARUDI – Deceased)...RESPONDENT**

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

[1] This appeal arises from the decision and judgment of the Resident Magistrate in **BUSIA CM CC No.499 OF 2015**, in which the appellants, **PHILIP KIPROTICH KIMETO** and **KISOKO TRANSPORTERS LTD**, were sued by the respondents, **TOMAS RAISI MATAYO** and **KENNEDY BAHATI MATAYO**, for general and special damages arising from a road traffic accident which occurred along the Busia – Kisumu road at Tanaka area involving the appellant’s motor vehicle Reg No.KCC 824K – ZE9873 and a pedal cyclist, David Juma Raizi (**DECEASED**), who was related to the respondents.

[2] It was pleaded by the respondents that on the material date, the deceased was riding a motor cycle along the Busia – Kisumu road when he was hit and knocked down by the appellant’s motor vehicle. As a result, the deceased suffered fatal injuries.

The respondents contended that the appellant’s motor vehicle was at the time being driven in a manner which was so negligent and careless such that it lost control and knocked down the deceased.

The respondents therefore prayed for damages against the appellant both under the Law Reform Act and the Fatal Accident Act.

[3] The appellants denied the claim in their statement of defence and contended that the accident was solely and/or substantially contributed to by the negligence of the deceased in the careless manner of riding his bicycle.

At the hearing of the case, evidence was led on behalf of the respondents (**PLAINTIFFS**) by the first respondent Tomas Raisi Matayo (**PW1**) but before he completed his testimony, the parties entered a consent on the following terms;- **“Liability is entered at the ratio of 85:15 in favour of the plaintiff against the defendant”**.

Therefore, the quantum of damages was the only issue left for determination by the trial court. In that regard, no evidence was led by the appellants.

[4] After considering the evidence placed before it, the trial court rendered its judgment on the 4<sup>th</sup> September 2019, awarding the respondent's damages, in the total sum of **ksh.1,767,990/=** less 15% contribution i.e **ksh.1,502,791/05**.

Being aggrieved by the award, the appellants filed the present appeal on the basis of the grounds set out in the memorandum of appeal filed herein on 9<sup>th</sup> December 2019. The hearing of the appeal proceeded by way of written submissions. In that regard, the appellants filed their submissions dated 26<sup>th</sup> March 2021, through **L.G. MENEZES & CO. ADVOCATES**, while those of the respondents dated 9<sup>th</sup> April 2021, were filed by **C.M. MWEBI & CO. ADVOCATES**.

[5] At this stage, the duty of this court is to reconsider the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses (see, **SELLE VS ASSOCIATED MOTOR BOAT CO. [1968] E.A 123**).

Accordingly, this court having reconsidered the evidence availed at the trial by the respondents and also having considered the grounds of appeal and the rival submissions for and against the appeal, draws its attention to the holding of the Court of Appeal in the case of **KEMFRO AFRICA LTD t/a MERU EXPRESS SERVICES & ANOTHER VS A.M LUBIA & ANOTHER (1982-88)1 KAR 727**, to wit:-

**“The principles to be observed by an appellate court is deciding whether it is justified in dismissing the quantum of damages awarded by a trial judge were held by the former Court of Appeal for Eastern Africa to be that:-**

**It must be satisfied that either the judge, in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage”**

[6] Having agreed to take the most blame for the accident which led to the death of the deceased, the appellants were invariably obliged to compensate the estate of the deceased and his dependants by way of both special and general damages an amount of money commensurate with their degree of blame.

The respondents were thus entitled to damages for loss of expectation of life as well as pain and suffering occasioned to the deceased. Such damages were available under the **LAW REFORM ACT** for the benefit of the estate.

[7] The respondents were also entitled to damages under the **FATAL ACCIDENTS ACT** for the benefit of the dependants of the deceased.

Basically, the appellant's grounds of appeal are based on alleged insufficiency of the evidence relied upon by the trial court to award the disputed damages such that the award was inordinately high in the circumstances and/or was based on wrong principles as to represent an erroneous estimate of the damages.

[8] With regard to the evidence, this court is satisfied that it was sufficient enough to be acted upon by the trial court in arriving at its conclusion. In any event, the evidence was largely that of the respondents and was properly received without any dispute from the appellants. It did establish that the deceased died from a severe head injury at the age of thirty (30) years (see, **PEX 2 DEATH CERTIFICATE**) on 28<sup>th</sup> May 2015. The charge sheet (**P.EX 8**) showed that the first appellant was charged with a traffic offence of causing death of the deceased by dangerous driving on 28<sup>th</sup> May 2015, and not on 18<sup>th</sup> June 2015, as reflected in the amended plaint at paragraph 5.

[9] Clearly, the deceased did not die instantly but a few hours or minutes after being hit by the appellant's motor vehicle. Evidence suggested that he died while undergoing treatment in hospital. He therefore endured a painful death.

The trial court's award of ksh.100,000/= for loss of expectation of life was thus conventional and proper. The award of ksh.40,000/= for pain and suffering was also proper in the circumstances.

[10] With regard to the damages under the Fatal Accident Act, the trial court awarded a sum of ksh.1,448/190 for loss of dependency based on a multiplier of twenty five (25) years, a multiplicand of ksh.7,240/45 and a dependency ratio of 2/3.

There was undisputed evidence that the deceased was married but separated from his wife for two (2) years prior to his demise. The two were however blessed with two children who lived with the first respondent, the father of the deceased.

[11] There was also undisputed evidence that the deceased earned an income from farming and his boda boda (**BICYCLE TAXI**) business and that he committed 3,000/= towards the welfare of his father who took care of his children. However, there was no documentary evidence to confirm the alleged earnings and since a business persons daily and/or monthly income does not remain constant but fluctuates on any given day, the application by the trial court of a multiplicand of ksh.7,240/95 on the basis of the minimum wage of an unskilled employee was improper and resulted in an award which was inordinately high in the circumstances.

[12] Given that the first respondents undisputed evidence that he normally received ksh.3000/= per month from the deceased, the figure would in the present circumstance be reasonable and adequate for adoption as the multiplicand for loss of dependency upon a dependency ratio of 2/3 and a multiplier of 25 years.

The award made by the trial court for loss of dependency is therefore set aside and substituted for an award for loss of dependency as follows:-

$$\text{Kshs.3000/=} \times 12 \times 15 \times 2/3 = \text{Kshs.600,000/=}$$

[13] Indeed, this was the most contested award in this appeal as was deciphered from the appellants submissions in support of the appeal. Otherwise, there being no or substantial contest on the remaining awards, this appeal succeeds partly with regard to the award on loss of dependency under the Fatal Accident Act.

Ultimately, there shall be judgment in favour of the respondents against the appellants in the following terms:-

- (1) Loss of expedition of life - ksh.100,000/=
- (2) Pain & suffering - ksh. 40,000/=
- (3) Loss of dependency - kshs.600,000/=
- (4) Special damages - ksh.179,800/=

The total amount comes to ksh.919,800/=

Less 15%contributing negligence Grand Total = Kshs.766,970/= together with costs and interest

[14] Each party shall bear own cost of appeal.

Ordered accordingly.

**J.R. KARANJAH**

**J U D G E**

[Dated and Delivered this 20<sup>TH</sup> day of MAY 2021]