



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 40 OF 2020

JANET KATHAMBI.....APPELLANT

VERSUS

CHARITY KANJA NJIRU (Suing as the legal representative of The Estate of

MOSES GITONGA alias MUSA GITONGA (Deceased)).....RESPONDENT

JUDGMENT

1. The deceased succumbed to injuries sustained following a road traffic accident which occurred on or about 22nd April 2017 at Mujini-Maweni area along Meru Hospital road involving himself as a pillion passenger aboard Motor Cycle Registration Number KMDU 404P Top Rich which was being driven by the Appellant. Judgment on liability was entered in the ratio of 100:0 in favour of the Respondent. Following hearing, the Court awarded the Respondent special damages of Ksh 40,930/=, damages for pain and suffering of Ksh 10,000/=, damages for loss of expectation of life of Ksh 100,000/= and damages for loss of dependency of Ksh 2,520,000/=.

2. The Appellant was dissatisfied with the Judgment on both liability and quantum and she filed the instant Appeal. By her memorandum of appeal dated 8th June 2020, she raised the following grounds of appeal: -

i. The Honourable Magistrate erred in fact and law in holding that the deceased was a carpenter and applying the general minimum wage of Ksh 15,000/= applicable to such persons as the multiplicand where there was no evidence to prove the deceased's occupation and income, thus the award was excessive in the circumstances and therefore awarding inordinately high general damages.

ii. The Honourable Magistrate erred in law and in fact in adopting a multiplier of 21 years and he failed to take into account the vicissitudes of life thereby awarding inordinately high damages for loss of dependency and therefore awarding inordinately high general damages.

iii. That the learned Trial Magistrate erred in fact and in law by apportioning liability at 100% in favour of the Respondent as against the Appellant.

3. Ultimately, the Appellant seeks to have this Court set aside the award on general damages and reduce the same and to have the Court set aside the apportionment on liability and to have the same assessed afresh.

4. The Appeal was canvassed by way of written submissions.

Appellant's Submissions

5. The Appellant filed his submissions which are dated 3rd August 2020. He submits that despite the Respondent alleging that the deceased was a carpenter and a businessman earning at least Ksh 60,000/= per month, and despite alleging that she used to work together with the deceased and that she was in possession of the deceased's receipt book, she did not produce any material or documentary evidence to prove to same, contrary to the provisions of Section 109 of the Evidence Act and contrary to the holding in the case of *Joseph Njuguna Mwaure (Suing in his capacity as the personal representative of the Estate of Ann Nduta) v Builders Den Limited & Another (2014) eKLR*. He also relies on the case of *Authur Nyamwate Omutondi & Others v United Millers Limited & 2 Others (2009) eKLR*. He submits that since neither the deceased's occupation nor earnings were proved, he should be considered as a general labourer for purposes of determining his earnings. He relies on the case of *Tobias Odoyo Oburu v Jane Kerubo Miruka & Another (Suing as legal representatives of John Onywoki Sanganyi (Deceased) & Another (2018) eKLR*.

6. Relying on the case of *Mwita Nyamohanga & Another v Mary Robi Moherai (Suing on behalf of the estate of Joseph Tagare Mwita (Deceased)) & Another (2015) eKLR*, he submits that in determining a suitable multiplier, the Court is bound to take into account the uncertainties of life. He further submits that the Respondent did not produce any birth certificates to prove that the deceased had any children as alleged that he was survived by two children and that the multiplier of 21 years was excessive. He relied on the case of *Jane Wangui Kamau and 2 Others v Alice Atandi & Another (2004) eKLR* where the Court adopted a multiplier of 13 years in favour of dependents of a deceased aged 37 years and the case of *Asha Mohamed Swaleh v Kennedy Bindi Muriungi & Another (2012) eKLR* where the Court adopted a multiplier of 15 years for a deceased aged 35 years. He submits that the multiplier adopted by the trial Court was manifestly excessive and he urges that Court to set it aside and substitute it with 10 years.

7. On liability, he submits that while the Respondent stated that she witnessed the accident, in her witness statement, she is silent on the same. He submits that the allegation that the motorcycle was overspeeding was not included in her witness statement. He submits that the evidence of PW2 to the effect that the police abstract he produced blamed the rider for the accident was of less value as neither did he investigate the accident nor did he visit the scene and that he did not produce the police file in Court. Relying on the case of *Kennedy Nyangoya v BASH Hauliers (2016) eKLR* he submits that a police abstract is not conclusive proof of liability in the absence of evidence being called to support it. He submits that DW1 testified that the accident was as a result of the poor condition of the road in that due to an ongoing road construction, the soil had become loose and caved inwards, and that as a result the motor cycle slid and fell causing the deceased and DW1 to fall off the motorcycle. He submits that there were two conflicting accounts of how the accident occurred and that while the trial magistrate acknowledged that the poor state of the road could have contributed to the accident, he failed to apportion liability accordingly. He urges that liability awarded be set aside and re-apportion the same.

Respondent's Submissions

8. The Respondents filed her submissions which are dated 6th August 2020. She submits that following filing of her pleadings, she produced evidence which included a police abstract dated 28th April 2017 in proof of the accident as well as a copy of search which confirmed that the motor cycle was owned by the Appellant. She submits that she produced a death certificate and a postmortem report which stipulated that the deceased died as a result of injuries sustained in the material accident. She submits further that she called a witness who testified on how the accident occurred and wholly blamed the rider of the subject motorcycle for the accident. She submits that both the Appellants and her witnesses agreed that there was nothing that the deceased could have done to prevent the accident as he was a mere pillion passenger. She submits that despite the Appellant claiming that the road whereon the accident occurred was under construction hence contributing to the occurrence of the said accident, he failed to enjoin the construction company M/S H Young Company EA Limited to the suit, as was noted by the trial Court. She submits that the Court also noted that the rider had a duty placed on the shoulder to be determining in his riding and under the circumstances to seek an alternative route or halt the journey if the road appeared difficult to maneuver. She submits that the rider of the motorcycle had a duty of care towards the deceased person and could not merely blame the bad condition of the road whereas he clearly admitted that he knew that the road was under construction more so, being a certified rider. She submits that the Appellant did not provide sufficient evidence to convince the Court to exonerate her while on the other hand, she proved that the deceased was a mere pillion passenger who could have done nothing to prevent the accident. She relies on the case of *Kanyungu Njogu v Daniel Kimani Maingi (2000) eKLR* which was cited in the other case of *Eastern Produce (K) Ltd – Chemoni Tea Estate v Bonfas Shoya (2018) eKLR*.

9. On proof of earning and income, she said that she had produced a death certificate which stipulated that the deceased was a carpenter and that the deceased was survived by two children, one of who was born shortly after the deceased's demise. She submits that the deceased used to support all of them and that he had to be earning some substantial amount of money in order to do so and that the mere fact that he was a rural man and used to do carpentry in the rural areas which does not require any documentations does not mean that he was not working at all. She relies in the case of *Jacob Ayiga Maraja & Another v Simeon Obayo CA 167/200 (2005) eKLR*. She submits that although she had asked the Court to adopt a multiplicand of Ksh 25,000/=, the trial Court adopted a multiplicand of Ksh 15,000/- reasoning that a carpenter is a semi-skilled trained person, an artisan whose skills are comparable to that of a tailor, welder and mason, and proceeded to award the equivalent of a person falling under that category. Relying on the case of *Beatrice W. Murage v Consumer Transport Limited & Another 2014*, she submits that the trial Court was right in relying on the Regulation of Wages (General) (Amendment) Order 2018.

10. On the multiplier, she submits that the deceased was 37 years at the time of his demise and that despite the Respondent having asked the Court to adopt a multiplier of 23 years going by the fact that business persons are not governed by the general retirement age of 60 years, the trial Court took into account the imponderables of life and adopted a multiplier of 21 years, despite the fact that no such imponderables had been proven. Relying on the case of *Benedita Wanjiku v Changwon Cheboi & Others (2013) eKLR*, she submits that such vicissitudes of life must be proven. She submits that the Appellant did not contest the dependency ration of 2/3, special damages, loss of expectation of life and damages for pain and suffering.

Issues for Determination

11. From the Memorandum of Appeal and submissions by parties, all the issues arising for determination point to quantum of damages as follows: -

- i. Whether the Court erred in adopting a multiplicand of Ksh 15,000/=.**
- ii. Whether the Court erred in adopting a multiplier of 21 years.**
- iii. Whether the Court erred in apportioning liability at 100:0.**

Whether the Court erred in adopting a multiplicand of Ksh 15,000/=

12. This Court has perused the Judgment of the trial Court and observes that the basis of adopting the multiplier of Ksh 15,000/= was as per the evidence of the Respondent to the effect that the deceased was a carpenter. The Court used the minimum wage applicable for such persons in arriving at the figure of Ksh 15,000/=.

13. The Applicant claims that the Respondent did not produce any materials or documents to prove this earning. This Court observes that the death certificate produced by the Respondent indicated that the Deceased was working as a carpenter at the time of his death. It would indeed have been more convincing had the Respondent produced some form of receipts or invoices to prove the earnings. However, this Court is very much alive to the situation in the country in that a large percentage of Kenyans in the *jua cali* informal industry earn their bread without there being proper records and documentations. Carpentry in itself is a business and as this Court appreciates, different persons have different ways of managing their businesses. This Court thus agrees with the submissions made by the Respondent that proof of earnings is not limited to production of documents and certificates. See the case of **Jacob Ayiga Vs Simon Obayo (Suing as personal representatives of the Estate of Thomas Ndaya Obayo) (2005) eKLR** and the case of **Civil Appeal No. 155 of 2019 Hussein Shariff Ali vs Grace Karee Mutia (Suing as the legal representative of The Estate of JOHN MUTUA (Deceased))**.

14. The trial Court was also justified in using the minimum wage which figure has not been contested. This Court will not therefore disturb the Court's findings on the multiplicand of Ksh 15,000/=. See **Mariga V Musila [1984] KLR 257**.

Whether the Court erred in adopting a multiplier of 21 years

15. The deceased died at the age of 37 years. Being a carpenter in the private sector, who would have worked well up to the age of retirement, 65 years old, meaning he would have been able to work for a further 28 years. There was no evidence adduced to the effect that the deceased was of ill health or was impaired in any manner. However, taking into account the vicissitudes of life, the trial Court used its discretion and adopted a multiplier of 21 years. This Court finds that the multiplier of 21 years was justified.

Whether the Court erred in apportioning liability at 100:0.

16. The Court has perused the Judgment of the trial Court hereunder extracts the relevant parts that give the ratio for the issue of liability: -

'The deceased was a pillion passenger. The accident appears to have been self involving. The motor cycle lost control and turned down injuring the rider DW1 and the deceased herein.

DW1 states that the road was being repaired by M/S H. Young Company EA Limited and it was in a bad state. The said defendant has not enjoined the said construction company who he blames in the subject suit.

The said rider also had a duty placed on the shoulder to be determining in his riding under the circumstances seek an alternative route or halt the journey if the road appeared difficult to maneuver.'

17. It is not in dispute that the deceased was a *pillion passenger*. Authorities have held time and again that there is nothing a pillion passenger could do to prevent an accident from carrying since he does not have control over the motor cycle. This Court agrees as much. This Court pronounces itself on this issue in the case of **Civil Appeal No. 136 of 2019 Kubai Kithinji Kaiga (Suing as the legal representative of the estate of John Kaiga (Deceased) vs Kenya Wildlife Service**.

18. Other Courts have also held as much. See the High Court case of **David Kiprotich Bor v Kassim Maranga & another, Civil Appeal No. 94 of 2011 [2017] eKLR**.

19. In the circumstances, being a lawful fare paying pillion passenger, the deceased had entrusted the Appellant to rider him safely on the motorcycle and he had zero control of the same. As pointed out by the trial Court, the rider (the Appellant) had a duty of care towards the deceased and he ought to have been discerning and in the circumstances as the one claimed herein that the road was in a poor condition, she ought to have either used a different route or end the ride. Despite being aware of the risks involved, she assumed this risk and went ahead with the journey, thereby causing the decease. This is a classic case of negligence.

20. Furthermore, the Appellant seems to blame the construction company M/S H Young Company EA Limited for having the road in a bad condition. This is an attempt to shift blame to a third party who is not a party to these proceedings. This Court has previously pronounced itself on the duty of a Defendant who so attempts to shift blame to a third party to enjoin the said third party as per the provisions of Order 1 Rule 15 of the Civil Procedure Rules 2010. In the event of failure to do so, such liability as would have been supposedly due to the said third party may not be ascribed to the Plaintiff who in this case is the Respondent. See my decision in the case of **Civil Appeal No. 136 of 2019 Kubai Kithinji Kaiga (Suing as the legal representative of the estate of John Kaiga (Deceased) vs Kenya Wildlife Service**. See also the case of **James Gikonyo Mwangi vs D M (Suing through his Mother and Next Friend, IMO (2016) eKLR**.

21. This Court finds no reason to disturb the findings of the trial Court on liability.

Conclusion

22. This Court is not convinced that the trial Court exercised its jurisdiction erroneously and/or misapplied the principles with respect to quantum of damages. The multiplicand of KSh 15,000/= was reasonably arrived at by adopting the minimum wage. The multiplier of 21 years was arrived at based on a reasonable projection of the number of years the deceased would have worked up to. The liability of 100:0 was arrived at following an analysis of the roles and contributions, if any of each party and the deceased, being a pillion passenger had zero contribution. Although the Appellant, in her submissions raised the issue of proof of affiliation between the children and the deceased, this issue was not raised in her Memorandum of Appeal. This Court was therefore not bound to address the same as parties are indeed bound by their pleadings.

ORDERS

23. Accordingly, for the reasons set out above, this Court makes the following orders: -

i. The Appellant's Appeal is hereby dismissed.

ii. The Respondents shall have the costs of the Appeal.

Order accordingly.

DATED AND DELIVERED ON THIS 24TH DAY OF JUNE, 2021

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Kiruki & Kayika Advocates for the Appellant

M/S Ngunjiri Michael & Co. Advocates for the Respondent