



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 162 OF 2018**

**MUNYAU WINFRED ALIAS**

**WINFRED NDUKU MUNYAO.....APPELLANT**

**VERSUS**

**PHILIP KIOKO MUTIE**

**(Suing as the legal representative**

**of the Estate of REGINA MWIKALI**

**NZIOKA (DECEASED).....RESPONDENT**

*(Being an Appeal from the Ruling and order delivered*

*on 16<sup>th</sup> November, 2018 by Hon. A.N. Makau, Principal*

*Magistrate in the Chief Magistrate's court Civil Case No. 1797 of 2014)*

**JUDGMENT**

The late REGINA MWIKALI NZIOKA was involved in a road traffic accident on the 4<sup>th</sup> of March 2012. The deceased was hit by motor vehicle registration number KBN 868Y along Mombasa road near Panari Hotel. The vehicle was owned and driven on that day by the appellant. The respondent who is the deceased's husband filed Civil Suit number 4369 of 2013 before the Chief Magistrate's Court, Nairobi, and was awarded a total of Kshs.809,000. The appellant was held 100% liable.

The appellant preferred this appeal on the following grounds:-

- 1. The Learned Magistrate erred in law and in fact in holding that it was evident the Defendant was fully liable for the accident and thus erred in failing to apportion liability.**
- 2. The learned Magistrate erred in law and in fact in failing to hold that the accident was caused by the deceased attempting to cross a busy highway at an undesignated pedestrian crossing.**
- 3. The learned Magistrate erred in law and in fact in awarding damages of Kshs.100,000/- as pain and suffering.**
- 4. The learned Magistrate erred in law and in fact in awarding damages of Kshs. 100,000/= of Loss of Expectation of Life.**
- 5. The learned Magistrate erred in law and in fact in awarding damages for Kshs.549,000/= under the fatal accident Act in the absence of any evidence in support thereof.**
- 6. The learned Magistrate erred in law and in fact in awarding Kshs. 60,000/= as special damages.**

Counsel for the appellant submit that there was no eye witness to the accident other than the appellant. The trial court erred by failing to analyze the evidence on liability. No tangent reasons were given by the trial court for finding the appellant fully liable or for failing to apportion liability. The burden of proof was on the respondent to prove the alleged negligence on the part of the appellant. The respondent's evidence was accepted to be the truth. The accident was wholly caused by the deceased who attempted to cross a busy road at an

undesigned pedestrian crossing. Counsel maintain that should this court feel obliged to apportion liability, the deceased should be held 90% liable.

On the issue of quantum, counsel for the appellant proposes an award of Kshs.20,000 for pain and suffering. The deceased was 59 years old. There was no basis assigned for the award of Kshs.549,000 under the Fatal Accidents Act. The deceased's earnings were not proved. It is further submitted that the trial court erred by making an award of Kshs.100,000 for loss of expectation of life.

On his part, counsel for the respondent contend that the accident was solely caused by the appellant. The appellant had two other people in her vehicle but opted not to call them as witnesses. It is submitted that PW2 testified that the appellant did not even see the deceased on the road. Counsel argue that more caution was required on the part of the appellant as there was a public bus stage at the scene.

On the issue of quantum, it is submitted that the deceased died while undergoing treatment. She must have undergone excruciating pain before she finally succumbed to her injuries. Counsel referred to the case of **ALI EMOY ABDI NOOR (Suing as the legal representative of the deceased) –V- SIGMA FEEDS, Machakos HCCC No. 47 of 2003** where the deceased died a few hours after an accident and Kshs.150,000 was awarded for pain and suffering. Reference is also made to the case of **NELSON N. KIOKO & OTHERS – V- MOMBASA LINERS & ANOTHER, Machakos HCCC No. 211 of 2000** where the deceased died on the same day of accident and was awarded Kshs.100,000.

Regarding the damages awarded for the loss of expectation of life, counsel for the respondent referred to the case of **KITAMPLAN LOLKORIA –V- KADENGA KENGA & ATTORNEY GENERAL; Mombasa HCCC No. 39 of 1999** where the deceased who was aged 45 years old was awarded Kshs.150,000 for loss of expectation of life and the case of **WANGUI MURIITHI –V- SAMUEL OGIRO NGORE, Nairobi HCCC No. 2630 of 1995** where a 54 years old deceased was awarded Kshs.120,000 for loss of expectation of life.

Counsel for the respondent urged the court not to interfere with the award for loss of dependency. The trial court awarded Kshs.549,000 for loss of dependency. Counsel referred to the case of **SIYARAM ENTERPRISES –V- SAMUEL NYACHANI (2015) eKLR** where the court held:-

**“With regard to the issue of proof of income, a majority of Kenyans are not in formal employment. To have expected the Respondent to produce receipts or pay slips to prove income would have been unreasonable.”**

Reliance is also placed on the case of **JACOB AYINGA MARUJA & ANOTHER V SIMEON OBATO (2005) eKLR** where the Court of Appeal held:-

**"We do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving earning is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things."**

It is further submitted that the sum of Kshs.60,400 awarded as special damages was pleaded. The award is proper as it caters for funeral expenses.

This is a first appeal. The court is required to evaluate the record of the trial court before drawing its own conclusion. This court has to take into consideration the fact that it did not take the oral testimony of the witnesses so as to verify the truthfulness of each one of them. However, this limitation does not stop the court from making its own inferences from the trial court's record.

The respondent is the deceased's husband. They had four children together, three sons and one daughter. All were adults by the time the case was filed on 19<sup>th</sup> July, 2013. On 4<sup>th</sup> March 2012 he was informed about the accident and went to Mater Hospital where the deceased had been taken. He was a watchman in Karen, Nairobi. The deceased was a business woman earning Kshs.16,000 monthly. She had initially worked as a maid in Nairobi but was doing business at home in Machakos.

**PW2 P.C. JIM ZAMORA** was based at the Industrial Area Police Station, Nairobi on traffic duties. He testified that the appellant was driving the accident vehicle and had her daughter and sister on board. The deceased was crossing the road towards Panari having alighted at Subaru Kenya stage. He went to the scene and rushed the deceased to hospital. He is the one who called PW1. He did not get an eye witness to the accident.

It is PW2's evidence that the appellant was driving at between 80-90kph and there was minimal traffic being a Sunday. The appellant stopped about 50 metres away after hitting the deceased. The accident occurred on the second lane. The appellant told him that she heard a bang from the left side of the vehicle. There is a matatu stage near Subaru, Kenya. He recommended an inquest but it was not done. The appellant's vehicle was damaged on the front and the left side mirror was ripped off. There was no pedestrian crossing at the scene.

**DW1 WINFRED NDUKU MUNYAO** is the appellant. She was driving the accident vehicle. She was driving at a speed of between 50 and 60kph. The deceased ran into the road and hit her car on the left side. The car was slightly damaged on the front side. There was a motor vehicle ahead of her on the left side. The deceased crossed the road soon after the other vehicle had passed. The vehicle's side mirror was ripped off. She tried to swerve on her side. The windscreen was also damaged. The vehicle zig zaged on the road as she was trying to brake and control it.

The appeal raises two issues, liability and quantum. On the issue of liability, the trial court made the following observation.

**“.....it is clear from the evidence that the Defendant in this case is liable for the accident. The defendant did not tender any evidence to show that there was no negligence or that they were not to blame for the accident. The Defendant’s evidence that she tried to swerve to avoid hitting the deceased is not persuasive.”**

The evidence on record shows that the accident occurred on the 2<sup>nd</sup> lane of the road as per the evidence of PC Jim Zamora. It is true that the deceased was crossing the road and that there was no pedestrian crossing at the scene. However, that in itself does not make motorist not to be careful wherever driving along that portion of the road. It is impractical to expect pedestrians to use the foot bridges along the busy Mombasa Road. Some pedestrians are physically challenged and may not be able to use those foot bridges. In some places the bridges are quite far apart and it is imprudent for a pedestrian to walk for some few kilometres to use the foot bridge. The bottom line is that motorists should always be on the look out for pedestrians.

The appellant testified that she was driving at about 50-60kph. According to PW2, she was doing between 80-90kph and the vehicle stopped about 50 metres from where the deceased was hit. I do find that the appellant did not manage the vehicle properly and hit the deceased. If she was driving at a speed of around 60kph, she could have stopped the vehicle abruptly near the scene. It is her own evidence that she tried to swerve and the vehicle moved in a zig zag manner. At a speed of 50kph, it would have been easy for the appellant to swerve without the vehicle moving in a zig zag manner. I do find that had the appellant been on the lookout while driving she would have seen the deceased and either stop the vehicle for her to cross or hoot so that the deceased could have stopped and let her pass. PW2 went to the scene and it is the appellant who informed him soon after the accident that she was driving at 80kph.

On her part, the deceased cannot be held to be free from blame. She had the duty of waiting until it was safe for her to cross the road. She was 59 years old and was an adult who should have known how to safely cross the road. At times pedestrians underestimate the speed of vehicles and opt to cross when it is not safe to do so.

Given the circumstances of the case and the evidence of PW2, I do find that the appellant ought to shoulder a bigger proportion of liability. She was the one who was in control of the vehicle which caused the accident. Other vehicles were using the same road and did not hit the deceased. I do apportion liability at 80% for the appellant and 20% for the deceased. There was minimal traffic as per PW2 and the appellant ought to have properly controlled her vehicle. According to PW2, the appellant told her she just heard a bang meaning she did not even see the deceased on the road. The appellant conveniently did not call her passengers to testify in her favour.

The deceased was taken to Mater Hospital where she died. According to PW2, the deceased had serious head injuries, a fracture and other injuries on the rib. The deceased died while undergoing treatment. Counsel for the appellant urged the trial court to award Kshs.20,000 for pain and suffering. It is evident that the deceased was physically okay and was walking across the road. Her life was cut short and she did undergo serious pain before succumbing to the injuries. The authorities in the case of **ALI EMOY ABDI NOOR (supra)** and **KITAMPLAN LOLKORIA (supra)** referred to by counsel for the respondent are useful on the issue of damages for pain and suffering and loss of expectation of life. I do find that the award of Kshs.100,000 by the trial court for pain and suffering is quite reasonable.

There is the ground of appeal relating to the award of Kshs.100,000 for loss of expectation of life. It is submitted that the trial court erred in law by making the award. Once again counsel for the appellant urged the trial court to award Kshs.20,000 for loss of expectation of life. Counsel for the respondent referred to the case of **WANGUI MURIITHI (supra)** where Kshs.120,000 was awarded to a 54 year old for loss of expectation of life. I am satisfied that the award of Kshs.100,000 for loss of expectation of life is equally fair and the same shall not be disturbed.

The plaintiff sought for damages both under the Fatal Accidents Act and the Law Reform Act. The list of dependents is indicated at Paragraph 5 of the plaint. The respondent, one daughter and three sons are indicated as dependants. The trial court awarded Kshs.549,000 under the Fatal Accidents Act. There is no indication as to how that amount was computed. It is not unusual for the court to make a global award for damages for loss of dependency in situations where the deceased’s income is not known or where the deceased was quite elderly or a child. The trial court did not also indicate the level of dependency.

The respondent testified that at one time the deceased worked as a maid in Nairobi. He also informed the court that the deceased was a business woman in Machakos. It is established that the deceased was not just idle at home. She was 59 years old and was engaged in some form of economic activities. I do find that the deceased could have generated an income of Kshs.8500 monthly out of her economic activities. I do further find that at 59 years old, she could have continued to carry on her business for a further eight years and do adopt a multiplicand of 8 years.

The deceased’s children were adults. The trial court found that the respondent had proved loss of dependency for himself. I do agree with that finding. I will adopt a 2/3 dependency ratio. The respondent was working as a watchman. The award of Kshs.549,000 made by the trial court is hereby set aside and replaced with the following award:-

Kshs.8500X12X8X2/3 – 544,000.

I do note that the trial court awarded the respondent damages under both the Law Reform Act and the Fatal Accidents Act. I see no reason why the award of Kshs.100,000 under the Law Reform Act should be deducted from the award made under the Fatal Accidents Act. In my view this does not amount to double compensation. A life was lost and no amount of money can be held to be sufficient compensation for life. In the case of **HELLEN WARUGURU WAWERU (Suing as the legal representative of PETER WAWERU MWENJA (deceased) –V- KIARIE SHOE STORES LIMITED (2015) eKLR**, the Court of Appeal stated as follows:-

**“This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the Law Reform Act and dependants under the Fatal Accidents Act are the same, and consequently the claim for lost**

**years and dependency will go to the same persons. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the Law Reform Act, hence the issue of duplication does not arise.”**

All what the court is supposed to do is to take into account the award made under the Law Reform Act when making an award under the Fatal Accidents Act. The court can as well deduct the award under the Law Reform Act from the award under the Fatal Accidents Act if it is established that the later award is higher than the former. Given the fact that the amount involved is quite lower due to the deceased's age and income, I find no reason as to why I should deduct the award under the Law Reform Act.

In the end, the appeal partly succeeds. Judgment is entered for the respondent as follows:-

- a) Pain and suffering - Kshs.100,000**
- b) Loss of expectation of life - Kshs.100,000**
- c) Loss of dependency - Kshs. 544,000**
- less 20% contribution - Kshs. 148,000**
- d) Special damages - Kshs. 60,000**
- Total - Kshs. 656,000**

The respondent is awarded cost and interest as per the judgment of the trial court. Parties should meet their own costs of the appeal.

**DATED AND SIGNED AT NAIROBI THIS 28<sup>TH</sup> DAY OF SEPTEMBER, 2021.**

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**S. CHITEMBWE**

**JUDGE**