



**Maweu (Suing as Legal Representative of the Estate of Felix Mutie Muthini - Deceased) v Misheck (Civil Appeal 54 of 2018) [2020] KEHC 10487 (KLR) (30 July 2020) (Judgment)**

Neutral citation: [2020] KEHC 10487 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL 54 OF 2018**

**DK KEMEL, J**

**JULY 30, 2020**

**BETWEEN**

**DANIEL MUTHINI MAWEU ..... APPELLANT  
SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF FELIX MUTIE  
MUTHINI - DECEASED**

**AND**

**GIDEON MISHECK ..... RESPONDENT**

*(An appeal from the Judgement of Hon. K. Kibelion (Senior Resident Magistrate) delivered on 3.5.2018 in Civil Case No. 301 of 2017 before the Chief Magistrate's Court at Machakos)*

**JUDGMENT**

1. According to the pleadings in the trial court, the deceased was 22 years old when he died as a result of a road accident and that an action was brought in the Chief Magistrates Court at Machakos through his father, as a legal representative against the respondent for damages under the *Fatal Accidents Act* and the *Law Reform Act* and special damages due to negligence.
2. It was pleaded that the deceased died from a road traffic accident that occurred on the 21.7.2016 where the deceased had been a pillion passenger on a motor cycle KMDC 040Y that was being ridden along Machakos- Kitui Road and that the motorcycle was hit by motor vehicle registration number KCC 464C that was registered in the names of the respondent. The appellant pleaded negligence and further that the deceased's estate suffered special damages of Kshs 114,850. It was pleaded that at the time of the death of the deceased, he was a 22 year old in good health and was pursuing a course at Valley Education Centre. The appellant also pleaded the doctrine of res ipsa loquitor.
3. The respondent denied negligence and its particulars, denied the accident and averred in the alternative that the accident was occasioned solely by the negligence of the rider of the motor cycle KMDC 040Y.



- The respondent pleaded that he would seek leave to join the owner of Motor Cycle KMDC 040Y and denied the applicability of *res ipsa loquitur*; he prayed that the suit be dismissed with costs.
4. The suit proceeded for hearing on 16.11.2017 where the appellant and a police officer testified. The respondent testified and closed his case.
  5. Parties filed submissions and the court delivered judgement on 3.5.2018 in which Hon. K. Kibelion dismissed the suit for want of proof of liability. He found that he would have awarded special damages of Kshs 111,000/- ; pain and suffering at Kshs 80,000/-; loss of expectation of life at Kshs. 100,000/- and damages under the *Fatal Accidents Act* of Kshs 2,400,000/- after using a dependency ratio of 1/3, a multiplicand of 20,000/- and a multiplier of 30.
  6. This appeal is against the finding of the trial court. The contents of the appellant's appeal are set out in the undated memorandum of appeal filed on 18.5.2018 that challenged the finding on liability. Counsel prayed that the judgement of the trial court be set aside and that this court makes a finding on liability and quantum. In the alternative, counsel prayed that the court align it with the finding of the trial court on quantum and that the appellant be awarded the costs of the appeal.
  7. The appeal was canvassed vide written submissions. Counsel for the appellant filed submissions on 6.1.2020 and the respondent on 20.1.2020. Learned counsel submitted that the trial court went into error in dismissing the suit. This was because according to the evidence on record, it is undisputed that an accident occurred and that the respondent was the driver; further that the undisputed evidence was that the appellant was hit and that he sustained injuries. Counsel submitted that the blame for the accident ought to be shouldered in the ratio of 50:50 and placed reliance on 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)*. It was counsel's submission that the trial court went into error in wholly relying on the evidence of the respondent. On quantum, counsel proposed Kshs 100,000/- as general damages for pain and suffering; Kshs 100,000/- for loss of expectation of life and Kshs 3,400,000/- for loss of dependency.
  8. In response, learned counsel for the respondent agreed with the findings of the trial court and urged this court to uphold the finding of the trial court.
  9. This being a first appeal this court's role as the first appellate court is to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court saw and heard the parties and giving allowance for that and to reach an independent conclusion as to whether to uphold the judgment. This was observed in the case of *Selle v Associated Motor Boat Co. [1968] EA 123*.
  10. The evidence in the trial court was as follows. Pw1, the appellant testified that the deceased was his son who died while travelling on a motor bike that was hit by a lorry. He tendered the post mortem report, death certificate, letters of administration and receipts in respect of expenses incurred totaling Kshs 111,0000/-. He also tendered a KCPE certificate of the deceased and the police abstract. On cross examination, he testified that he did not witness the accident.
  11. Pw2 was Pc Jamal Mohammed Bara attached to Machakos Police Station Traffic Base. He testified that there was a report of a fatal accident involving the deceased who was being carried alongside another pillion passenger. He testified that the rider was behind a motor vehicle saloon and when the said saloon turned towards Machakos Girls, the motor cycle rider swerved and hit motor vehicle KCC 464M on the rear right tire. He testified that from the file, the motor cyclist was to blame for the accident. That was the close of the appellant's case.
  12. The respondent testified as Dw1 and he relied on his witness statement and testified that the suit motor cycle approached him from the opposite direction and it hit his rear tyre. He testified that he blamed



- the motorcycle for causing the accident. On cross examination, he testified that when the accident occurred he was on the left side of the road and that the point of impact was not on his lane. The respondent closed his case.
13. From the evidence on record the accident that happened on the material day was confirmed vide the evidence of Dw1 and the cause may be inferred from the evidence of Dw1 as corroborated by the documentary evidence that was neither challenged nor controverted. The same was also corroborated by the evidence of the police officer (Pw2).
  14. Having considered the pleadings and the evidence on record, the following issues are to be determined.
    - a. Whether the accident was as a result of the negligence of the respondent.
    - b. Whether the respondent is liable for damage and loss that the deceased and his estate claims to have suffered and at what percentage.
    - c. Whether the court may interfere with the finding of quantum of the trial court.
  15. The answer to any of the above issue will depend on the amount of evidence adduced by a party having the legal burden to do so. See sections 107, 108 and 109 of the *Evidence Act*, Chapter 80 of the Laws of Kenya that place the burden of proof of a fact on the person who wishes the court to believe in the existence of such fact. The learned author WVH Rodgers, Winfield and Jolowicz on tort 17<sup>th</sup> Edition Sweet and Maxwell, 2006 at 132 as well as case law stated that the elements of negligence remains this:
    - (a) there is a duty of care owed by a defendant;
      - (i) the defendant would foresee the reasonable possibility of his conduct injuring another and causing him loss; See *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd or Wagon Mound (No. 1)* (1961) 1 All ER 404 and
      - (ii) the appellant would take reasonable steps to guard against such occurrence; and
    - (b) the appellant failed to take such steps.
 

In assessing whether the appellant took reasonable steps, the court will consider:

      - (a) The degree or extent of the risk created by the actor's conduct;
      - (b) The gravity of the possible consequences if the risk of harm materializes;
      - (c) The utility of the actor's conduct; and
      - (d) The burden of eliminating the risk of harm. See *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd (The "Wagon Mound" (No 2))* [1967] 1 AC 617.
  16. It is undisputed that the respondent and the rider of the suit motor vehicle owed a duty of care. All road users are expected to exercise a duty of care on the road. See *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.
  17. There is no evidence of the point of impact on the road and this court is not able to gauge who exactly was on the wrong. There are certain things that do not normally occur in the absence of negligence and upon proof of these a court will probably hold that there is a case to answer See *Hoe v Ministry of Health* (1954) AC Pages 66, 87- 88 Morris LJ.
  18. A carefully driven motor cycle does not just hit the tyre of another vehicle unless the rider was being reckless on the road.



19. On foreseeability of the injury, it is commonplace that if a miniature element runs into a leviathan, then the damage will be suffered by the weaker object. On the aspect of steps taken to eliminate harm, there is no evidence on steps that were taken by any of the parties to eliminate any harm that would result if an accident occurred. I find that the rider of the suit motorcycle was negligent and I am unable to agree that the respondent was negligent. I therefore find no error on the part of the trial court in dismissing the suit against the respondent. The evidence came out quite clearly that the rider of the motor cycle had swerved to the right and hit the rear tyre of another vehicle travelling in the opposite direction. The police officer who was called by the appellant confirmed that the motor cyclist was to blame. It is noted that the appellant opted not to enjoin the rider of the said motor cycle and this failure was fatal to his case. It was a bad gamble on the part of the appellant to wait and expect the respondent to join the motorcyclist as a co-defendant or third party. If that did not take place the burden of proof still lay with the appellant to discharge. I find that the appellant did not prove his case against the respondent on a balance of probabilities. His failure to enjoin the rider or owner of the motorcycle put paid his case against the respondent.
20. My finding notwithstanding, I will go ahead and make an assessment on quantum. In the instant case, the appellant's claim for damages for loss was set out in the plaint and he also particularized Kshs 114,850/- as the special damages.
21. In the prayer, the plaint asked for: "(10) (a) and (b) General damages as under the *Fatal Accidents Act* and the *Law Reform Act*."
22. In the present case it is necessary to consider what kind of life the deceased would have enjoyed had he not been killed. There is no evidence that the deceased would have had an unhappy life. According to his father, he was school-going. It is not known how far he would have reached in his education. The conclusion which can be reached here is that the deceased could have enjoyed average happiness, subject to the normal risks and uncertainties. It is not known how the figure of Kshs 3,400,000/- proposed by the appellant was arrived at for loss of dependency, the Kshs 100,000/- for pain and suffering and the Kshs 100,000/- for loss of expectation of life.
23. The law is now well settled that an appellate court will not interfere with an award of damages by a trial court unless the trial court has acted upon a wrong principle of law or that the amount is so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled.
24. The evidence of Pw1 is to the effect that he had high hopes in the deceased. In line with the multiplier approach, the damages would be by multiplicand and the result reduced by 1/3 because as at the deceased's death he was not married and the same multiplied by the expected number of years that the deceased would have lived had he not been a victim of wrongful death and multiplied by 12 months.
25. The deceased was aged 22 when he met his death. The life expectancy as per statistics given by the World Bank is 66.7 years. The multiplicand would be the expected monthly earnings of a skilled artisan and assuming that the deceased finished his studies when aged 24, the ability to secure employment in Kenya would be at about age 28 years. (See Formal employment (Kenya's demographic trends, millions - Source: World Bank & Kenya National Bureau of Statistics). I shall take the retirement age that would be 55 years meaning that the working life of the deceased would be 27 years on average. In the professional field, the average earnings of the deceased as per the minimum wage for an unskilled artisan in 2017 as per the time of death was Kshs 17,447.15/- in Nairobi (See The Regulation Of Wages (General) (Amendment) Order, 2017. The calculation for loss of dependency is thus;  $27 \times 1/3 \times 17,445.15 \times 12 =$  Kshs 1,884,060/-.



26. By way of comparison, the award of the trial court was not far off from my finding and hence had the appeal succeeded, I would have upheld the finding of the trial court. The rest of the amounts proposed by the trial court would remain undisturbed

27. In the result it is my finding that the appeal lacks merit and is accordingly dismissed with costs.

It is so ordered.

**DATED AND DELIVERED AT MACHAKOS THIS 30<sup>TH</sup> DAY OF JULY, 2020.**

**D. K. KEMEI**

**JUDGE**

