



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO 39 OF 2018**

**SIMON MUSYOKA KIVINDYO**

**RIDIA MBINYA MUSYOKA (suing as the **Personal****

**representatives of the Estate of ONESMUS MUKUU**

**MUSYOKA (DECEASED).....APPEL LANT**

**VERSUS**

**JILLO ABRAHAM.....RESPONDENT**

**(Being an appeal from the judgment of Honourable L.W. Kabaria (Ms) Senior Resident Magistrate delivered in Milimani CMCC No 3758 of 2006 on the 16<sup>th</sup> January 2018)**

**JUDGMENT**

**INTRODUCTION**

1. In a decision delivered on 16<sup>th</sup> January 2018, the Learned Trial Magistrate, Hon L.W. Kabaria (Ms), Senior Resident Magistrate dismissed the Appellants' case with costs to the Respondent herein on the ground that they did not prove that the Respondent was the owner of Motor Vehicle Registration Number KBC 624G (hereinafter referred to as "the subject Motor Vehicle") at the material time of the accident.

2. She further assessed the quantum that would have been payable to the Appellants in the event she was found to have erred in her aforesaid determination. The assessment was as follows:-

**Loss of dependency           Kshs 1,183,107.60**

**Loss of expectation of life   Kshs 100,000/=**

**Pain & suffering             Kshs 30,000/=**

3. Notably, she did not address herself to how she would have apportioned liability, if at all and/or indicate if the Respondent would have been entitled to costs and interest and if interest was payable, the rate and from which date the same would be payable.

4. Being dissatisfied with the said decision, on 1<sup>st</sup> February 2019, the Appellants filed a Memorandum of Appeal of even date. They relied on seven (7) grounds of appeal.

5. Their Written Submissions were dated 21<sup>st</sup> February 2020 and filed on 24<sup>th</sup> February 2020 while those of the Respondent were filed on 23<sup>rd</sup> July 2020.

6. The Judgment herein is based on the said Written Submissions which were relied upon by both parties in their entirety.

**LEGAL ANALYSIS**

7. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand.

8. This was aptly stated in the cases of Selle vs Associated Motor Boat Company Ltd[1968] EA 123 and [1985] EA 424 where in the latter case, the court therein rendered itself as follows:-

**“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”**

9. It appeared to this court that the only issue that had been placed before it for determination was whether or not the Learned Trial Magistrate erred in having dismissed the Appellants’ suit. It therefore dealt with all grounds of appeal together as they were all related under one head shown hereinbelow and the issue of quantum under a separate and distinct head.

## **I. LIABILITY**

10. The Appellants submitted that Section 8 of the Traffic Act Cap 403 (Laws of Kenya) provides that the person in whose name a vehicle was registered was unless the contrary was proved, be deemed to have been the owner of the motor vehicle. They pointed out that they placed before the Trial Court a certificate of search signed by the Registrar of Motor Vehicles showing that the said motor vehicle was registered in the Respondent’s name.

11. They argued that since the Respondent did not adduce any evidence to prove that he was not the owner of the subject motor vehicle, their evidence that he was the registered owner of the said vehicle remained unchallenged and introverted (**sic**). They placed reliance on several cases to support their case. However, they did not attach any of the authorities to assist the court in analysing the same.

12. Perusal of the proceedings showed that No 58516 Police Constable Fairfax Masinde (hereinafter referred to as “PW 1”) testified that on 12<sup>th</sup> December 2015, he was summoned over an accident that occurred on 13<sup>th</sup> December 2015 along Mungai Kenyatta Road, the terminus area, in Dandora Nairobi where one Onesmus Mukuu (hereinafter referred to as “the deceased”) was ran over by the subject Motor Vehicle as he alighted. He was a passenger at the material time. The said subject Motor Vehicle was owned by Ecosa Sacco.

13. He testified that Martin Oluoch, who was the driver of the subject motor vehicle at the material time, was charged with the offence of causing death by dangerous driving. He adduced in evidence the Police Abstract Report. The same did not show the outcome of the Traffic case against the said Martin Oluoch.

14. On being cross-examined, he admitted that he never visited the scene of the accident. He told the Trial Court that the Traffic case had not yet been concluded as some witnesses had not yet testified. He was emphatic that the motor vehicle that caused the material accident was KBG 624G and that indication of 521G in the Police Abstract Report was a mistake and that he rectified the same.

15. The 1<sup>st</sup> Plaintiff adduced in evidence a Copy of Records that showed that the Respondent was the registered owner of the subject Motor Vehicle at the material time. He stated that he went to the Police Station and asked them to rectify the registration number of the said subject Motor Vehicle. On being cross-examined, he stated that he was not present when the accident occurred. He added that the person who witnessed the accident testified in the Traffic case.

16. In Paragraph 3 of their Complaint, the Appellants averred that the deceased was a lawful passenger in Motor Vehicle Registration Number KBC 521G. This information was repeated in the 1<sup>st</sup> Plaintiff’s Witness Statement. The Police Abstract Report showed that it was the same vehicle that was involved in the accident. The Statutory Notice pursuant to Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act and the demand letter both dated 17<sup>th</sup> March 2016 also bore the said registration number.

17. The Complaint dated 2<sup>nd</sup> June 2016 was subsequently amended on 19<sup>th</sup> September 2016 showing that the motor vehicle that was involved in the accident was Motor Vehicle Registration Number KBC 624G. The Appellants attached a fresh demand letter and Statutory Notice pursuant to Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act dated 14<sup>th</sup> September 2016 and 16<sup>th</sup> September 2016 respectively.

18. The Respondent did not call any evidence. However, in their Amended Statement of Defence dated 24<sup>th</sup> February 2017 and filed on 27<sup>th</sup> February 2017, he denied ever having been the registered owner of the subject Motor Vehicle. However, it was evident from the Copy of Records that as at 14<sup>th</sup> September 2016, he had been registered as the owner of the subject Motor Vehicle.

19. While this court did not agree with the Learned Trial Magistrate’s reasoning that the suit was not sustainable against the Respondent as the Police Abstract Report had showed that the owner as Martin Oluoch and the Occurrence Book report had indicated the owner as Ecosa Sacco for the reason that Section 8 of the Traffic Act Cap 403 (Laws of Kenya) provides that the person in whose name a vehicle was registered was unless the contrary was proved, be deemed to have been the owner of the motor vehicle, it nonetheless found and held that the suit against the Respondent could not be sustained against him.

20. This is because the 1<sup>st</sup> Appellant did not lay the basis to demonstrate how the registration number of the motor vehicle that caused the material accident ended up being Motor Vehicle Registration Number KBC 624G from the original Motor Vehicle Registration Number KBC 521G that appeared in all the documents at the time of filing suit, a fact that was well argued by the Respondent to argue that the Appellants failed to prove a balance of probabilities that the Respondent was the owner of the subject Motor Vehicle.

21. This court also agreed with the Respondent that the Appellants did not prove on a balance of probabilities that the deceased was a passenger of the subject Motor Vehicle at the material time.

22. Although the 1<sup>st</sup> Appellant told the Trial Court that the person who witnessed the accident testified in the Traffic case, that person was not called to give evidence in his case in the lower court. He was a crucial witness who could have assisted this court in ascertaining and/or determining which motor vehicle was actually involved in the material accident herein. Indeed, both PW 1 and the 1<sup>st</sup> Appellant were not present at the time of the material accident.

23. This was the Appellants' case and it was incumbent upon them to have presented a tight and cogent case. The burden was not on the Respondent to prove that he was not the owner of the subject Motor Vehicle. The burden was on them to prove their assertion that it was the subject Motor vehicle that caused the material accident and caused the death of the deceased as is provided in Section 107 (1) of the Evidence Act that provides as follows:-

**“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”**

24. This court was therefore not persuaded that it should interfere with the decision of the Learned Trial Magistrate that the case could not be sustained against the Respondent herein. Suffice it to state that it found and held that the Appellants had not proved their case on a balance of probability and thus came to a similar determination but on different reasons as aforesaid.

## **II. QUANTUM**

25. Having said so, this court addressed its mind to the question of damages on quantum in the event it was found to have been wrong on the question of liability. The same was dealt with under the heads shown hereunder.

### **A. FATAL ACCIDENTS ACT**

26. The Appellants had urged the Trial Court to adopt an income of Kshs 10,954/= being the minimum wage of a general labourer based on the Regulation of Wages (General) (Amendment) Order 2015 Legal Notice No 117 which took effect from 1<sup>st</sup> May 2015, a multiplier of 27 years and a dependency ratio of 2/3 giving a total figure of Kshs 3,067,316/=.

27. On his part, the Respondent submitted that the Trial Court erred in having adopted a multiplier of 27 years, a dependency ratio of 2/3 as the deceased was unmarried and an income of Kshs 10,954.70 when the Appellants had not adduced in evidence any evidence to show that he had been a businessman at the material time of the accident.

28. He submitted that what was important was the expected period of dependency and not how long the deceased would have worked. He urged this court to make a conventional figure in the absence of proof of loss of earnings.

29. When he was cross-examined, the 1<sup>st</sup> Appellant told the Trial Court that the deceased was a businessman and that he used to sell charcoal in retail and would get a monthly income of Kshs 20,000/=. He stated that the deceased used to pay Kshs 1,000/= for the stall where he used to carry out his business.

30. The court perused the Record of Appeal and did not find any proof that the deceased was doing business as had been contended by the Appellant. As was stated hereinabove, it is trite law that he who asserts must prove. A court cannot make a determination based on an assumption that a deceased was working and thus award damages under the Fatal Accidents Act on the basis of a minimum wage. As the Respondent correctly submitted, it would be more prudent to award a global conventional figure. In this regard, this court would have awarded a global figure of Kshs 800,000/= as the deceased was a young man and would have been expected under African customs to look for some form of employment and assist his parents.

31. Going further, if the court would have been found to have erred on making a global award and would have been required to have computed the award under the Fatal Accidents Act as had been proposed by the Appellants, then it would have applied a multiplier of thirty (30) years due to the vagaries of life. In this regard, the court had due regard to the case of **Francis Wainaina Kirungu (suing as the representative of the Estate of John Karanja Wainaina (deceased) vs Elijah Oketch Adellah [2015] eKLR** where the court therein adopted a multiplier of thirty five (35) years.

32. It would not have interfered with the dependency ratio of 1/3 as had been applied by the Learned Trial Magistrate for the reason that the deceased was unmarried. According to the Plaintiff, the 1<sup>st</sup> and 2<sup>nd</sup> Appellants aged 66 and 64 years respectively were shown to have been the deceased's only dependents. The dependency ratio of 2/3 as they had been proposed was therefore not tenable. In this regard, this court also referred to the case of **Francis Wainaina Kirungu (suing as the representative of the Estate of John Karanja Wainaina (deceased) vs Elijah Oketch Adellah** (Supra) where the court adopted a dependency ratio of 1/3 for where the deceased was aged twenty eight (28) years at the time of his death.

33. On the issue of income, it would have adopted a sum of Kshs 5,000/= as there was no evidence that the deceased was ever employed on the assumption that a Kenyan youth would hustle and get some income to sustain himself in the city.

### **B. LAW REFORM ACT**

34. The Appellants urged this court to award them Kshs 100,000/= and Kshs 250,000/= for pain and suffering and loss of expectation of life

respectively. They placed reliance on the case of **Francis Wainaina Kirungu (suing as the representative of the Estate of John Karanja Wainaina (deceased) vs Elijah Oketch Adellah** (Supra) where in 2012, the court therein awarded Kshs 50,000/= and Kshs 150,000/= for pain and suffering and loss of expectation of life respectively.

35. They also referred this court to the case of **Cornelia Elaine Wambua (suing as the legal representative of Estate Phillipe Wamba (deceased) vs Shreeji Enterprises Ltd & Others [2012] eKLR** where in 2012, the court therein awarded Kshs 50,000/= and Kshs 150,000/= for pain and suffering and loss of expectation of life.

36. On his part, the Respondent did not contest the award of Kshs 100,000/= for loss of expectation of life. He, however, urged this court to award a sum of Kshs 10,000/= for pain and suffering. Notably, he referred this court to several cases but none of them were attached to his Written Submissions. It is for that reason that this court did not cite them herein.

37. Bearing in mind the inflationary trends, an award of Kshs 10,000/= was too low in the circumstances. This court would have awarded a sum of Kshs 50,000/= and Kshs 150,000/= for loss of expectation of life respectively.

38. Consequently, the assessment of the damages would have been as follows:-

**a. Global award** **Kshs 800,000/=**

**b. Under Fatal Accidents Act and Law Reform Act**

**Loss of dependency**

**1/3 x 5000 x 30 x 12** **Kshs 600,000/=**

**Loss of expectation of life** **Kshs 150,000/=**

**Pain and suffering** **Kshs 50,000/=**

**Kshs 800,000/=**

#### **DISPOSITION**

39. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal was not successful and the same be and is hereby dismissed with costs to the Respondent herein.

40. It is so ordered.

**DATED and DELIVERED at NAIROBI this 28<sup>th</sup> day of October 2020**

**J. KAMAU**

**JUDGE**