



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 86 OF 2018**

**SALIM MOHAMMED ..... APPELLANT**

**VERSUS**

**FATUMA HAMISI BILALI** (*Suing as the Legal Representative*

*of the Estate of the Deceased ASINA THWALIB, deceased*)..... **RESPONDENT**

**[Being an appeal against the findings, decision and Judgment of Hon. E.M. Onzere SRM on**

**7<sup>th</sup> December, 2017 in Tamu SRMCCC No. 12 of 2014]**

**JUDGMENT**

The Appellant, **SALIM MOHAMMED**, was found 100% vicariously liable for the accident in which his driver was involved.

1. The learned trial magistrate awarded to the Plaintiff an award of

Kshs 1,372,320/= as compensation following the demise of **ASINA TWALIB**, who died in the accident in which the Appellant was held liable.

2. In his submissions the Appellant said that the trial court erred in the apportionment of liability and in the award of damages.

3. According to the Appellant;

***“From the evidence adduced in the lower court, by both parties, it is not in contention that the accident occurred at the date and time highlighted in the pleading. The issues in contention are the apportionment of liability and the quantum of damages awarded.”***

4. When canvassing the appeal, the Appellant blamed the police for being responsible for the accident because they are said to have placed a road-block at a bend, at night, when the visibility was described as ‘poor’.

5. Furthermore, the police are said to have stopped another vehicle, Registration Number KBU 682D on the other side of the road, thus blocking the whole road.

6. Thirdly, the Appellant blames the driver of the vehicle registration No. KAZ 932G for failing to heed the warning given by the driver of the vehicle registration No. KYC 280. Apparently, the warning about imminent danger was given by hooting and also by the lights from the said vehicle.

7. The Appellant expressed the view that if the driver of that vehicle (KZA 932), had taken evasive action, by swerving, braking, slowing down, stopping or controlling it, the accident could have been avoided.

8. In the opinion of the Appellant, it is the drivers of the other vehicles as well as the police who were to blame for the accident.

9. On the issue of Quantum of Damages, the Appellant said that because the deceased died instantly, he did not endure any pain or suffering.

10. And in respect to the Loss of Expectation of Life, this court was invited to find that an award of Kshs 60,000/= was sufficient compensation.

11. If the court made an award for Loss of Life under the **Law Reform Act** and the **Fatal Accidents Act**, the Appellant submitted that the sum so awarded ought to be deducted from the grand total, as the beneficiaries are the same.
12. On the question of the multiplier, the Appellant submitted that 20 years was appropriate.
13. And as regards the multiplicand, the Appellant pointed out there was no evidence to prove the earnings of the deceased. Therefore, the Appellant submitted that the court should apply the Minimum Wage of a General Labourer, which is Kshs 5,218/=.
14. Ultimately, the Appellant asked this court to award a sum of Kshs 333,452/=, in total.
15. In answer to the appeal, the Respondents urged this court to uphold the findings made by the learned trial magistrate.
16. Being the first appellate court, I have an obligation to re-evaluate all the evidence on record and to draw my own conclusions. When carrying out the task of re-evaluation, the court will bear in mind the fact that, unlike the learned trial magistrate, I did not have the opportunity of observing the witnesses when they testified.
17. The Plaintiff called 3 witnesses at the trial, whilst the Appellant called one witness.

### **Liability**

18. Three witnesses testified on the issue of liability.
19. **PW2, CALEB ONYANGO OYAL**, was a fare-paying passenger in the Minibus KZA 932G. The minibus was travelling from Kisumu to Muhoroni.
20. At the Kipsitet junction the police had mounted a road-block. The minibus was stopped by the police at the road-block, and after it had been inspected, the police allowed the driver to proceed.
21. The road-block at Kipsitet had two metal spikes. One of the spikes was on the left-hand side of the road, as one is traveling from the direction of Kisumu. The second spike was on the right-hand side as one is traveling from Kisumu direction.
22. The spike on the left was “*ahead*” of the other one, if one is traveling from the direction of Kisumu.
23. It was the evidence of **PW2** that the minibus was just about to turn at the Kipsitet junction when a lorry hit it.
24. **PW2** said that the lorry was traveling at speed.
25. At the time the minibus was stopped by the police, on the left side of the road, **PW2** said that there was another vehicle which the police had stopped on the right-hand side.
26. **PW2** also said that the accident happened immediately after the police removed the spike to allow the minibus to move on.
27. Although the driver of the lorry was hooting and flashing the vehicle’s lights, **PW2** said that the lorry was moving so fast that there was no time to avoid the accident.
28. And although the lorry was approaching a road-block which the police had mounted, **PW2** said that the lorry never stopped.
29. It was the testimony of **PW2** that the lorry crossed over the yellow line on the road, and it hit the minibus on the left side of the road.
30. **PW3, SERGEANT DAVID ONYUKA**, produced the Police File relating to the accident in question.
31. He testified that the investigations conducted by the police revealed that the lorry (**KYC 280**) lost control after its brakes failed.
32. The lorry’s brakes failed when it was descending from Kipsitet towards the Muhoroni junction.
33. He testified that the lorry first rammed into the rear of a Toyota Surf (**KBU 682D**), which it pushed into a ditch.
34. The lorry thereafter collided with the minibus (**KAZ 932G**).
35. The record of the proceedings shows that **PW3** was never cross-examined about the evidence which he gave concerning how the accident occurred.
36. The cross-examination was focused on the ownership of the lorry.
37. In effect, the testimony of **PW3** was not contested by the Appellant.

38. **DW1, MARGARET OTIENO OKONGO**, testified on behalf of the 2<sup>nd</sup> Defendant, **LAMECK OMINDE**, who was the owner of the minibus.

39. She was a passenger in the minibus at the material time.

40. She testified that the lorry drove over the spikes on the road, and then hit the minibus.

41. She therefore put the blame squarely on the driver of the lorry.

42. On his part, the Appellant did not call any evidence.

43. Having re-evaluated the evidence on record, I have no doubt that the lorry was moving at a high speed, as it was descending from Kipsitet towards the Muhoroni junction.

44. At the material time, the police had mounted a road-block at the junction. Therefore, any driver approaching the road-block would have been expected to slow down and probably stop at the road-block.

45. However, the lorry neither slowed down nor stopped.

46. Instead, the lorry rammed the Toyota Surf from the rear, causing it to land in a ditch.

47. The impact from that first accident did not stop the lorry. Instead, it drove over the spikes on the road, crossed over the yellow line and hit the minibus which was on its correct side of the road.

48. The evidence demonstrates that the lorry was moving at a high speed in the circumstances.

49. I have found no reason at all, from the evidence, that would warrant assigning any blame for the accident to either the driver of the minibus or the police.

50. I accordingly find that the trial court did not err when it held that the Appellant was vicariously liable for 100% liability attributable to his driver.

### **Quantum**

51. The law is well settled, that an appellate court ought not to set aside the findings made by the trial court unless it can be shown that the said court had either applied the wrong principles or had taken into account irrelevant considerations.

52. The failure by the trial court to take into account relevant considerations may also be a factor that necessitates a re-assessment of the compensation awarded.

53. Finally, when the sums awarded were either too low or too high, in comparison with awards made in respect of injuries and losses that were comparable to those suffered in the case at hand, that would be a basis for concluding that the trial court had exercised its discretion inappropriately.

54. However, the appellate court ought not to vary the awards if the only reason for so doing was that appellate court would have given a different sum, if it had been the court which had been called upon to make the initial determination.

55. The assessment of compensation is not based on an exact scientific or mathematical formula.

56. The discretion of the court remains a central pillar in the exercise, provided that it is exercised in a manner that produces results which are within a range comparable to the awards given in similar cases.

57. In this case the Appellant has not even suggested that the learned trial magistrate had either taken into account irrelevant factors or had failed to take into account some relevant factors.

58. I have given careful consideration to the compensation awarded by the learned trial magistrate. Each of them is founded upon sound legal reasoning, backed with factual evidence.

59. In the result, I find no reason to set aside any of the sums awarded.

60. Accordingly, the appeal is dismissed, with costs to the Respondents.

**DATED, SIGNED and DELIVERED at KISUMU This 30<sup>th</sup> day of September 2019**

**FRED A. OCHIENG**

**JUDGE**