



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 682 OF 2016**

**BUTICH MILDRED.....APPELLANT**

**VERSUS**

**RONALD AGESA OMBIMA**

**(Suing as administrator of the estate of**

**JUDITH AGISA OMBIMA-Deceased).....RESPONDENT**

***(Being an appeal against the judgment and decree of Honourable R. Ngetich (Mrs.)***

***(Chief Magistrate) delivered on 27<sup>th</sup> October, 2016 in CMCC NO. 3054 OF 2014)***

**JUDGEMENT**

1. The respondent, being the administrator of the estate of Judith Agisa Ombima (*“the deceased”*) instituted a suit against the appellant vide Nairobi CMCC No. 3054 OF 2014 by way of the plaint dated 28<sup>th</sup> May, 2014 seeking for general damages under the Law Reform Act and Fatal Accidents Act, special damages in the sum of Kshs.257,770/= and costs of the suit together with interest on damages.

2. In a summary, the respondent pleaded that on or about the 8<sup>th</sup> day of October, 2013 while the deceased was lawfully walking along Mombasa Road, the appellant by herself or through her servant/agent, negligently and/or recklessly drove the motor vehicle registration number KAT 588T (*“the subject vehicle”*) causing the same to hit and fatally injure the deceased. The particulars of negligence were laid out in the plaint.

3. The respondent further pleaded that at the time of her death,

the deceased was a 32-year old woman in good health and self-employed as a kiosk operator, earning a monthly salary of between Kshs.35,000/= and Kshs.40,000/=. It was also pleaded that the deceased left behind the following dependants:

<i>i. Levi Ombima Sande</i>	<i>Father</i>	<i>68 years</i>
<i>ii. Jane Kavulani Ombima</i>	<i>Mother</i>	<i>70 years</i>
<i>iii. Ronald Agesa Ombima</i>	<i>Brother</i>	<i>45 years</i>
<i>iv. Mercy Garet</i>	<i>Daughter</i>	<i>13 years</i>
<i>v. OS</i>	<i>Son</i>	<i>9 years</i>

4. The appellant entered appearance and filed her statement of

defence on 18<sup>th</sup> July, 2014 averring that while it is true that an accident occurred on the date indicated in the plaint, the particulars thereof are denied, more so negligence on her part. Instead, the appellant pleaded that the deceased’s negligence is what resulted in the accident.

5. At the hearing, the parties availed two (2) witnesses each to

provide evidence of the accounts in support of the plaintiff’s and defence cases. At the close thereof, the parties exchanged written

submissions.

6. The trial court subsequently entered judgment as follows:

<i>i. Liability-20%:80% in favour of the respondent</i>	
<i>ii. General damages</i>	
<i>iii. Pain and suffering</i>	<i>Kshs.300,000/=</i>
<i>iv. Loss of expectation of life</i>	<i>Kshs.100,000/=</i>
<i>v. Loss of dependency</i>	<i>Kshs.3,000,000/=</i>
<i>vi. Special damages</i>	<i>Kshs.80,970/=</i>
<i>TOTAL</i>	<i>Kshs.3,480,970/=</i>
<i>Less 20% (696,194)</i>	<i>Kshs.2,784,776/=</i>

7. Being dissatisfied with the judgment, the appellant has now appealed to this court. Her memorandum of appeal dated 7<sup>th</sup> November, 2016 is premised on nine (9) grounds.

8. Parties filed and exchanged written submissions on the appeal.

The appellant on the one part has challenged the learned trial magistrate's finding on liability on the basis that according to the evidence on record, the deceased was negligently crossing the road when the accident occurred while the appellant was driving at a reasonable speed since there was heavy traffic, which is to say that the trial magistrate ought to have found the respondent 100% liable.

9. On quantum, it is the appellant's submission that the learned trial magistrate awarded an excessive sum as general damages for pain and suffering; and loss of dependency.

10. The respondent on the other part contends that the finding on liability was magnanimous and urges this court to substitute the same with a finding of 100% liability on the part of the appellant.

11. In respect to the award of damages, the respondent has taken the position that the learned trial magistrate properly exercised her discretion in awarding the same and there is no basis on which to interfere with the award as is. Consequently, the respondent urges this court to dismiss the appeal with costs.

12. I have re-evaluated the evidence tendered before the trial court and also considered the rival written submissions.

13. It is clear from the grounds of appeal that the appellant is challenging both the trial court's finding on liability and the award on general damages.

14. The issue of liability has been challenged under *grounds 1), 2) and 3)* of the appeal. According to the evidence adduced at trial, *PW1* who is the respondent herein testified that he received a call on the material day informing him of the accident and the deceased's involvement in the same.

15. Violet Anyona Otsialo (*PW2*) stated that she was in the company of the deceased on the material day when the accident occurred. She narrated that they were heading to work and had crossed the road at Steel Makers area along Mombasa Road and were on the foot path when the subject motor vehicle, while being driven at a high speed by the appellant, overtook another vehicle and knocked the deceased.

16. In her testimony the appellant (*DW1*), the appellant gave evidence that she was driving along Mombasa Road at Steel Makers when she saw the deceased suddenly emerge onto the road and that she tried to apply brakes but could not prevent the accident. She went ahead to state that at the time, there was slight traffic on the road and she was driving at 50km/hr and that she was in the company of two (2) persons whom she was carrying as passengers.

17. The appellant denied that she was overtaking another motor vehicle when the accident occurred and clarified that there was in fact no place for her to overtake since there was a ditch on the side of the road.

18. The appellant explained that following the accident, she took the deceased to hospital and paid the sum of Kshs.200,000/= as part of the bill. During cross examination, the appellant stated that the deceased ran across the road just before the accident took place and that there had been trailers on her right hence she was unable to see the deceased until she emerged on the road from the direction of the said trailers.

19. Hellen Achieng (*DW2*) stated that she was travelling as a passenger in the appellant's vehicle on the material day and was in the back seat, hence she did not see the deceased prior to the accident. The witness further stated that there were a number of other vehicles on the

road at the time and reiterated the appellant's version of events that she was not overtaking.

20. She explained that the deceased was indeed crossing the road and was not hit while standing on the pavement, which explains the injuries to her left leg. On being cross examined, DW2 testified that the other passenger who was at the front seat of the subject motor vehicle was the appellant's nephew, a young boy and that she only saw the deceased after she had been knocked.

21. The above accounts were restated in the parties' respective submissions. In her judgment, the learned trial magistrate reasoned that if at all there was traffic as was indicated by the appellant in her oral evidence, then she would have been able to control the subject motor vehicle and prevent the collision or reduce its impact.

22. The learned trial magistrate appreciated that given the nature and extent of injuries sustained by the deceased, it is likely that the appellant was driving at a high speed and that she was possibly knocked down while on the pedestrian pavement or at the edge of the tarmac. Further to this, the said magistrate acknowledged that the deceased was responsible for ensuring that the distance was sufficient to enable her cross safely, hence a finding of 20%:80% was entered in favour of the respondent.

23. According to the learned trial magistrate, the circumstances of the case called for an apportionment of blame. I note that the respondent has urged this court to substitute the finding on liability with a finding of 100% liability on the part of the appellant. It is apparent that no cross-appeal was filed in this respect and I therefore have no basis on which to consider the respondent's proposal.

24. It is apparent from the various witness accounts that the deceased was knocked down along Mombasa Road while attempting to cross the road. On the one part, PW2 testified that the deceased was hit after they had crossed the second lane of the highway and that the appellant was overtaking another vehicle immediately prior to the accident.

25. On the other part, the appellant testified that the deceased suddenly emerged from in between two trailers and ran across the road, and that she was unable to halt in time to prevent the collision despite having hooted to the deceased. DW2 on her part admitted to having not seen the deceased crossing the road and only came to be aware of the accident on impact.

26. The post-mortem report adduced as evidence, shows that the deceased sustained serious injuries including an injury to the head, which eventually led to her demise. In the circumstances, I concur with the learned trial magistrate's finding that if the appellant was driving at a reasonable speed and amidst motor vehicle traffic, she would have been able to come to a stop or reduce the impact. It is therefore more plausible than not that the appellant was driving at a high speed.

27. I have re-evaluated the evidence and agree with the learned trial magistrate's analysis that the deceased owed herself and other road users a duty of care and should have ensured it was safe enough to cross the road. In the premises, I am satisfied by the learned trial magistrate's apportionment on liability since the evidence points to the fact that the appellant substantially contributed to the accident.

28. *Grounds (4) to (9)* of the appeal touch on the award in respect to general damages. In determining whether to disturb an award of damages, this court is expected to consider the principles as articulated in ***Kemfro Africa Ltd t/a Meru Express Services 1976 & Another [1976] v Lubia & Another (No. 2) [1985] eKLR*** as follows:

a) ***Whether an irrelevant factor was taken into account.***

b) ***Whether a relevant factor was disregarded.***

c) ***Whether the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.***

29. The appellant is of the submission that the awards made are inordinately high. In his submissions, the respondent proposed an award of Kshs.500,000/= under the head of pain and suffering on the basis that the deceased spent two (2) months in hospital prior to her demise. The appellant urged the trial court to instead award Kshs.50,000/=. In the end, the trial court awarded Kshs.300,000/=.

30. The appellant has now urged this court to disturb the award and in place award Kshs.50,000/= as earlier proposed before the trial court.

31. It is apparent that the deceased died about two (2) months following the accident. This goes to show that prior to her demise, she likely experienced a great deal of prolonged pain and suffering. The appellant has referred this court to the case of ***E M K & another v E O O [2018] eKLR*** where the court held as follows:

***“The conventional award for...pain and suffering range from Kshs 10,000/= to Kshs 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death. In the present appeal PW2 testified that the deceased died after a period of hospitalization of about two months. I therefore award Kshs 150,000/= as damages for pain and suffering...”***

32. I am of the considered view that the award of Kshs.300,000/= made by the trial court was on the higher side in view of conventional awards given. However, the appellant's proposed award of Kshs.50,000/= is low considering the evidence showing that the deceased was hospitalized for two (2) months. I am persuaded by the case of ***E M K & another (supra)*** and instead award Kshs.150,000/= under this head.

33. The award of Kshs.100,000/= for loss of expectation was not challenged by the appellant save for the argument that the award be deducted from the award made under the Fatal Accidents Act since the beneficiaries are the same. I have perused the trial court's decision and have not come across anything to indicate that the beneficiaries received a double compensation under the Fatal Accidents Act and the

Law Reform Act. I therefore have no basis for interfering with the same.

34. On loss of dependency, the appellant challenged the multiplicand applied on the premise that no proof of the deceased's earnings was adduced. The appellant has therefore urged this court to apply a reasonable multiplicand of Kshs.6,000/= for an unskilled employee.

35. Before the trial court, the respondent and PW2 testified that the deceased was engaged in a hotel business earning a salary of between Kshs.35,000/= and Kshs.40,000/= per month and urged the trial court to apply a multiplicand of Kshs.40,000/=. The appellant proposed the sum of Kshs.6,000/=. The trial court noted that there was no evidence of the deceased's earnings and chose to apply a multiplicand of Kshs.25,000/=.

36. I have re-evaluated the evidence and it is apparent from the proceedings that no evidence was tendered to show how much the deceased was earning though it would appear she was engaged in business as opposed to being in formal employment. Be that as it may, the courts have acknowledged that the production of documents is not the only way to prove a party's earnings or income as this would amount to an injustice to many people.

37. The above could explain why the trial court opted to apply a reasonable minimum figure of Kshs.25,000/=, given that the deceased had dependants and it is only natural that she obtained profits or earnings from some form of economic activity. In the premises, I find the sum of Kshs.25,000/= given by the trial court to be reasonable and I am not persuaded to interfere with it.

38. On the multiplier, the appellant proposed 19 years before the trial court whereas the respondent proposed 21 years. The death certificate indicates that the deceased was aged 41 years at the time of her death. The trial court applied a multiplier of 15 years which I find reasonable in the circumstances, since in any case, the respondent did not challenge the same on appeal.

39. As concerns the dependency ratio, the appellant submitted that there was no evidence to show that the deceased's parents were dependent on her, neither was there evidence that her children depended entirely on her. Consequently, the appellant urged the trial court to apply a ratio of 1/3. On his part, the respondent proposed a ratio of 2/3 given that the deceased supported her parents and two (2) children prior to her demise. The trial court applied a ratio of 2/3.

40. The evidence on record indicates that the deceased was survived by both her parents and that she had two (2) children who were minors at the time, though only one (1) birth certificate was produced in court whereas a baptismal card was produced for the other child.

41. In my view, it is reasonable to state that the deceased's parents depended on her one way or the other even in the absence of evidence. Further to this, it is apparent from the evidence on record that she was a single parent. I am convinced that the learned trial magistrate's decision to apply a ratio of 2/3 under this head was reasonable in the circumstances. I therefore see no reason to interfere with the award under this head.

42. The appellant has further indicated in her submissions that she does not challenge the award made under the head of special damages.

43. The upshot is that the appeal partially succeeds. Consequently, the award made on general damages for pain and suffering and the total award are hereby set aside and substituted as follows:

**a) Liability-20%:80% in favour of the respondent**

**b) General damages**

**(i) Pain and suffering** Kshs. 150,000/=

**(ii) Loss of expectation of life** Kshs. 100,000/=

**(iii) Loss of dependency** Kshs.3,000,000/=

**c) Special damages** Kshs. 80,970/=

**TOTAL** Kshs.3,330,970/=

**Less 20%** Kshs. 666,194/=

**Net total** Kshs.2,664,776/=

**d) The respondent to have costs of the suit.**

**e) In the circumstances of this appeal, a fair order on costs is**

**to order that each party bears its own costs on appeal.**

**f) The awards made in (b) and (c) hereinabove to attract**

interest at court rates from the date of judgment of the

trial court until the date of full payment.

Dated, Signed and Delivered at Nairobi this 27<sup>th</sup> day of September, 2019.

.....

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent