REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 87 OF 2016

ELITE EARTHMOVERS LTD.....APPELLANT

-VERSUS-

KIILU MASENGE & ANTONY MUINDI KIILU (Suing

as the legal representatives of the estate of

PATRICK KYALO KIILU-Deceased).....RESPONDENTS

(Being an appeal from the judgment and decree of Honourable M. Chesang (Mrs.) (Senior Resident Magistrate) delivered on 1st February, 2016 in CMCC No. 5540 of 2011)

JUDGEMENT

1. The respondents who were the plaintiffs in CMCC No. 5540 of 2011 instituted the suit against the appellant in their capacity as the legal representatives of the estate of Patrick Kyalo Kiilu ("*the deceased*") through the plaint dated 16th November, 2011 seeking for both general and special damages as well as costs of the suit and interest.

2. The respondents pleaded that sometime on or about 23rd February, 2010 at about 1.00p.m. while the deceased was travelling as a lawful passenger aboard the appellant's motor vehicle registration number KBA 794H ("*the subject motor vehicle*") along Peponi Road. The subject motor vehicle is alleged to have been negligently driven by its driver, Sailesh Pravin Patel, collided with the motor vehicle registration number KAR 256N resulting in fatal injuries to both the driver of the subject motor vehicle and the deceased. The particulars of negligence were laid out under paragraph 4 of the plaint.

3. The respondents also pleaded that the deceased left behind the following dependants:

a) JSM	*Daughter*	*12 years*
b) Kiilu Masenge	*Father*	*60 years*
c) Petronill Nduku Kiilu	*Mother*	*60 years*
d) Antony Muindi Kiilu	*Brother*	*34 years*

4. The appellant entered appearance and put in its statement of defence dated 9th January, 2012 denying ownership of the subject motor vehicle. The appellant also denied that Sailesh Pravin Patel was the driver of the said vehicle. The appellant also denied that the deceased was a lawful passenger in the subject motor vehicle and the version of events leading up to the accident as set out in the plaint.

5. Furthermore, the appellant denied the particulars of negligence laid out in the plaint, averring that in the alternative, the deceased was solely or substantially to blame for his death as a result of the accident, the particulars of

which featured in the defence.

6. The appellant also blamed the driver of motor vehicle registration number KAR 256N for either solely or substantially causing the accident.

7. At trial, the respondents summoned three (3) witnesses to give evidence in support of the plaintiffs' case whereas the appellant did not call any evidence. Thereafter, the parties filed written submissions and the trial court entered judgment in favour of the respondents in the following manner:

a) Liability	*80%:20% in favour of the respondents*
b) General damages	
i. Pain and suffering	*Kshs.20,000/*
ii. Loss of expectation of life	*Kshs.100,000/*
iii. Loss of dependency	*Kshs.856,800,/*
c) Special damages	*Kshs.37,455/*
Total	***Kshs.1,024,255/***

8. Being aggrieved by the abovementioned judgment, the appellant has now approached this court by way of preferred this appeal. Its memorandum of appeal dated 29th February, 2016 and amended on 13th November, 2018 contains eight (8) grounds of appeal challenging the findings on both liability and quantum.

9. On their part, the respondents filed a cross appeal largely challenging the finding arrived at on liability; the award on general damages and the calculation on interest on both the general and special damages.

10. The appeal was canvassed by way of written submissions, with the appellant submitting that the trial court did not consider the fact that neither of the witnesses who testified in support of the respondent's case were eye witnesses to the accident nor did the police abstract produced as evidence before the trial court blamed the appellant for the accident.

11. According to the appellant, the witness' accounts were essentially hearsay evidence and the trial court ought to have appreciated this.

12. The appellant is of the view that the trial court ought to have found that the respondents had not proved their case on a balance of probabilities, urging this court; in the alternative; to find the deceased to be substantially liable hence apportioning a higher degree of liability on the respondents.

13. On damages, the appellant argued that the trial court did not take into account the authorities quoted by itself in assessing damages. Further to this, the appellant contended that no evidence was adduced as proof of the deceased's earnings, hence the trial court ought to have applied the minimum wage regulations and therefore applied the sum of Kshs.3,043/ as a multiplicand.

14. It is also the appellant's submission that there was no proof of dependency adduced before the trial court on the part of the deceased's parents, hence this court was urged to substitute the trial court's ratio of ½ with a dependency ratio of 1/3, citing the case of **Benedeta Wanjiku Kimani v Changwon Cheboi & another [2013] eKLR** where the court stated that there is no rule in place requiring a court of law to apply a ratio of 2/3 since the extent of dependency is a factual matter. This court was also urged to set aside the multiplier of 15 years used by the trial court and instead apply a multiplier of 10 years, thus making the award as follows:

1/3 x 3,043 x 12 x 10 = Kshs.231,267/.

15. The appellant also challenged the trial court's award for pain and suffering, arguing that the trial court did not

appreciate that the deceased died instantly. In that case, the appellant urged that the award under this head be substituted with a reasonable award of Kshs.10,000/, relying on the case of **David Ngunje Mwangi v Chairman of the Board of Governors of Njiri High School [2001] eKLR.**

16. The appellant also challenged the award made on loss of expectation of life, arguing that the trial court did not take into account that the beneficiaries under the Law Reform Act and the Fatal Accidents Act were one and the same, hence this award ought to have been deducted from the total award. In the alternative, the appellant urged that the award of Kshs.100,000/ made by the trial court be set aside and substituted with an award of Kshs.40,000/.

17. The respondents contend that the trial court erred in failing to hold the appellant 100% liable despite the existence of evidence to support their case on liability, which evidence was uncontroverted. On a similar note, the respondents submit that according to the law, the owner of a motor vehicle is deemed vicariously liable for the acts/omissions of his or her driver.

18. It is also the respondents' submission that they had proved their case against the appellant to the required standard, urging this court to consider the applicability of the *res ipsa loquitur* doctrine.

19. Closely related to the above, the respondents argue that the appellant did not call any evidence to prove liability on the part of a third party, hence the reason as to why liability ought to fall solely on the appellant.

20. In respect to quantum, it is the respondents' submission that evidence was tendered before the trial court to show the deceased's earnings, which evidence was not rebutted by the appellant at trial and that in any event, the minimum wage regulations, 2013 stipulate that the minimum wage for general labourers including cleaners is Kshs.9,780.95/.

21. On the dependency ratio and multiplier, the respondents drew this court's attention to **Benedeta Wanjiku Kimani v Changwon Cheboi & another [2013] eKLR** in stating that whereas the trial court had indicated its intention to apply a dependency ratio of 2/3, it applied a ratio of ½ in assessing the damages for loss of dependency. The respondents also advanced the argument that this court should set aside the multiplier of 15 years and substitute it with that of 24 years, thus causing the award to read as follows:

9,520 x 24 x 12 x 2/3 = Kshs.1,827,840/

22. On their part, the respondents supported the trial court's award of damages for pain and suffering, citing the case of **Paul Kioko v Samuel G. Karinga & 2 others [2012] eKLR** where the sum of Kshs.50,000/ was awarded to the estate of a deceased person who was pronounced dead on arrival at the hospital.

23. Lastly, the respondents noted an error in the computation of interest in the decree as regards general and special damages, as well as costs of the suit, and urged this court to find as such.

24. I have considered the rival submissions and various authorities cited on appeal. As is required of the first appellate court, I have re-evaluated the evidence presented before the trial court.

25. As earlier mentioned, both the appeal and cross appeal touch on the findings on liability and general damages, hence I will address them under the two (2) limbs, choosing to begin with liability.

26. Going by the typed proceedings constituting the record of appeal, the 2nd respondent who was PW1 began by stating that the deceased was his brother. He went on to aver that on the material day at about 8.00pm, he received a call from a woman he was not familiar with, informing him that the deceased had been involved in an accident and had lost his life.

27. The 2nd respondent testified that the following day, while accompanied by a few relatives and a friend, they visited the deceased's place of work and confirmed the deceased's death. That they then proceeded to Chiromo Mortuary to identify the body and thereafter, made funeral arrangements. According to the 2nd respondent, they also requested a pathologist to perform an autopsy on the deceased and this was done.

28. He further stated that prior to his death, the deceased worked for the appellant as a cleaner cum-loader and was being driven in the appellant's subject motor vehicle at the time of the accident.

29. During cross examination, the 2nd respondent averred that he has no knowledge on who caused the accident.

30. The 1st respondent gave evidence as PW1 confirming that the deceased was his son and that he was informed of the accident by the 2nd respondent after it had occurred.

31. The 1st respondent admitted that he did not know how the accident took place upon being cross examined and indicated that the police would be in a better position to shed light on the subject. However, he blamed the appellant for the accident and the deceased's consequent death since he was on duty at the time. He however confirmed that he did not witness the accident.

32. Police Constable Justus Chimero, (PW3) in his evidence as clarified that his office was issued with the police abstract relating to the accident and confirmed that the accident involved two (2) motor vehicles. He thereafter produced the police abstract.

33. On being cross examined, the witness stated that he was not the one who investigated the accident and that while an investigation file was opened, he did not have the same in his possession. The witness stated that he visited the scene of the accident and that a sketch map was drawn and placed in the investigation file. The witness further stated that according to the police abstract, the case is pending under investigation though he is not aware of such investigations or whether the driver of the other motor vehicle recorded a statement.

34. It is apparent from the evidence on record that the deceased was aboard the subject motor vehicle when the accident occurred. It is also apparent from the evidence gathered that accident involved two (2) motor vehicles, that is, the subject motor vehicle and motor vehicle registration number KAR 256N though neither the driver nor the owner of the aforesaid motor vehicle was enjoined as a party. It is thus clear that the deceased was involved in an accident which cost him his life.

35. This being a negligence claim, the burden of proof rested on the respondents to prove the particulars of negligence. None of the witnesses who testified in the suit actually witnessed the accident, neither did they call any person who actually witnessed the accident. The respondents admitted that they were only later on informed of the accident and did not at any one point visit the accident scene.

36. One would expect that the evidence of PW3 who visited the scene could have shed some light on the accident but the said witness did not offer any useful information as to what may have caused the accident or who was to blame for the same especially since there were two (2) motor vehicles involved. The witness (PW3) admitted that he was not the officer who investigated the accident. Having revisited his evidence, it is noted that PW3 did not produce the sketch maps or at least elaborate the findings thereof.

37. The police abstract tendered in evidence did not indicate who was to blame for the accident and only stated that the matter was pending under investigations. As it stands therefore, what caused or contributed to the accident remains a mystery. The Court of Appeal in the case of **Abbay Abubakar Haji Patuma Ali Abdulla v Freight Agencies Ltd [1984] eKLR** held inter alia:

> ***"Although it is usually possible, but nevertheless often extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence, yet where it is not possible it is proper to divide the blame equally between them. Where, however, there is a lack of evidence, the position is different. It is difficult to see how a party can be found guilty of negligence if there is no evidence that he was in fact negligent and if negligence on his part cannot properly be inferred from the circumstances of the accident."***

38. Though the appellant did not call any evidence to rebut the respondents' case, the burden of proof at all material times lay with the respondents; I am not convinced that they discharged that burden by establishing that the appellant through its driver was to blame for the accident. I find that the learned trial magistrate had no basis at all to apportion liability as she so did.

39. I am convinced that the learned trial magistrate misdirected herself in holding that since the respondents' evidence was uncontroverted, it followed that the appellant was somewhat vicariously liable for the accident in the absence of concrete evidence. It is also apparent that the learned trial magistrate did not consider the authorities cited by the appellant to the effect that the respondents had the burden of proving liability; had she done so, she would have probably arrived at a different finding. In my view; therefore; the respondents had failed to prove liability on the part of the appellant.

40. Despite having determined the above, I am obligated to re-evaluate the assessment of general damages as this was equally challenged by both parties on appeal.

41. The law sets out that an award of the trial court can only be interfered with in the following scenarios as articulated in the case of ***Kemfro Africa Ltd t/a Meru Express Services 1976 & Another [1976] v Lubia & Another (No. 2) [1985] eKLR*** inter alia as follows:

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

b) *Where a relevant factor was disregarded.*

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

42. In respect of the award on pain and suffering, A the 2nd respondent stated that upon visiting the deceased's supervisor at his former place of employment, he was informed that the deceased's body had been transferred to Chiromo Mortuary. In their submissions, the respondents proposed an award of Kshs.80,000/.

43. The appellant it would appear did not discuss an award under this head.

44. In the end, the learned trial magistrate held that the deceased having died on the spot, an award of Kshs.20,000/ would suffice.

45. From the foregoing, I take the view that the evidence does little to elucidate how soon the deceased passed on following the accident. However, there is nothing to indicate that the deceased was taken to hospital. In the circumstances, I find the award of Kshs.20,000/ to be on the higher side. In **David Ngunje Mwangi v Chairman of the Board of Governors of Njiri High School [2001] eKLR** the appellant was awarded a sum of Kshs.10,000/ whose time of death was unclear. A similar award was made in the case of **Easy Coach Bus Services & another v Henry Charles Tsuma & another (suing as the administrators and personal representatives of the estate of Josephine Weyanga Tsuma– Deceased) [2019] eKLR** for a deceased person whose death was deemed immediate. I would therefore have substituted the award made with a reasonable award of Kshs.10,000/.

46. On damages for loss of expectation of life, the respondents proposed the sum of Kshs.200,000/ while the appellant did not discuss an award of such nature. The learned trial magistrate eventually awarded the sum of Kshs.100,000/. To my mind, this is a conventional award hence I would not have been prompted to disturb it.

47. The appellant had challenged the award on the premise that the beneficiaries would benefit twice. In the case of ***Hellen Waruguru Waweru v Kiarie Shoe Stores Limited (2015) eKLR*** the subject of double compensation was elaborated as follows:

> ***"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…"***

48. The Court of Appeal in **Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No 2) [1985] eKLR** stated as follows interalia:

> ***"In my view what section 2(5) of the Law Reform Act means is that a party entitled to sue under the Fatal Accidents Act still has the right to sue under the Law Reform Act in respect of the same death. To be taken into account and to be deducted are two different things. The words used in s. 4(2) of the Fatal Accidents Act are "taken into account". The section says what should not be taken into account and not necessarily deducted…There is no requirement in law or otherwise for him to engage in a mathematical deduction…"***

49. It is clear that the respondents were lawfully entitled to seek general damages under this head and there was no need for the learned trial magistrate to deduct the damages awarded from the total award. I would therefore have found no basis in subtracting the same as called for by the appellants.

50. On loss of dependency, the respondents submitted that the deceased died aged 36 years, thus offering a multiplier of 25 years. The appellant proposed a multiplier of 10 years. The learned trial magistrate settled for a multiplier of 15 years in considering the vagaries of life, the deceased's age and the current age of retirement.

51. The death certificate adduced as evidence before the trial court confirms that the deceased died at the age of 36 years with no indication that he was in poor health. It is noted that the authority cited by the appellant before the trial court did not offer a comparable multiplier as it related to a 43-year old deceased person. I have also considered the cases of **Jackson Kariuki Ndegwa (suing as the administrator of the Estate of Fabius Munga Kariuki v Peter Kungu Mwangi [2016] eKLR** and that of **Pleasant View School Limited v Rose Mutheu Kithoi & another [2017] eKLR** where the courts applied a multiplier of 18 years and 20 years respectively for deceased persons aged 36 years, similar to the deceased. I would therefore have substituted the multiplier applied with a reasonable one of 20 years.

52. On the dependency ratio, the respondents' evidence was that the deceased supported his wife and 12-year old daughter, as well as his parents prior to his death. The respondents therefore proposed a ratio of 2/3. The appellant urged a ratio of 1/3. The learned trial magistrate, while noting that no proof of dependency was tendered, acknowledged that in this day and age, adult children often support their elderly parents, thus opting to apply a ratio of 2/3. However, in her assessment, she applied a ratio of ½ which contradicted her earlier analysis.

53. It is apparent from the evidence on record that the deceased had a wife and a child, though no evidence was adduced in support thereof, whether by way of a marriage certificate or birth certificate for the child. The child's dependency was however not controverted by the appellant. Furthermore, the appellant did not insist on challenging the dependency of the 1st respondent or the mother to the deceased and the 1st respondent testified that the deceased would give him and his wife Kshs.3,000/ per month. In the premises, I am satisfied that 2/3 was a reasonable ratio to apply.

54. On the multiplicand, on their part, the respondents gave evidence that the deceased was at the time of his death earning a monthly salary of Kshs.9,520/. In their submissions, the respondents urged the trial court to apply the minimum wage of Kshs.9,780.95/ whereas the appellant maintained that since the deceased's income was not proved, the sum of Kshs.3,000/ ought to form the multiplicand. Eventually, the learned trial magistrate being guided by the pay slip produced before her, applied the sum of Kshs.9,520/.

55. I have had the opportunity of re-evaluating a copy of the pay slip issued to the deceased by the appellant and dated January, 2010. The same indicated the deceased's gross pay as being Kshs.9,920/ and his net salary as Kshs.9,520/ which is the sum applied by the learned trial magistrate.

56. It is noted that while the appellant challenged the authenticity of the pay slip in its submissions on the basis that it was not signed, it would appear no such objection was raised during its production at trial. In that case, I am persuaded that the learned trial magistrate's decision to apply the net salary of Kshs.9,520/ was justified. Consequently, the award under this head would have read as follows:

> Kshs.9,520/ x 2/3 x 20 x 12 = Kshs. 1,523,200/

57. In view of the above, had I found the appellant liable, I would have disturbed the awards made under the heads of damages for pain and suffering, and loss of dependency accordingly.

58. However, based on my above finding on liability, the cross appeal partially succeeds in that the awards on general and special damages should attract interest at court rates from the date of judgment until the date of full payment had the claim succeeded.

59. The upshot then is that the appeal is allowed and the cross appeal stands dismissed. Consequently, the judgment entered on 1st February, 2016 is hereby set aside and substituted with an order dismissing the respondents' suit with costs to the appellant. In the circumstances of this case a fair order on costs is that each party should meet its own costs of the appeal and the cost of appeal.

Dated, signed and delivered at Nairobi this 25th day of October, 2019.

.....

J.K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondents