



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MALILNDI**  
**CIVIL APPEAL NO. 39 OF 2013**

**ABSON MOTORS .....1<sup>ST</sup> APPELLANT**

**WAAMU BUILDERS & HARDWARE LIMITED .....2<sup>ND</sup>  
APPELLANT**

**WAAMU BUILDERS & HARDWARE .....3<sup>RD</sup> APPELLANT**

**VERSUS**

**SINEMA KITSAO .....1<sup>ST</sup> RESPONDENT**

**CHRISPUS KITSAO KAJEFWA (Administrators of the**

**estate of the late KITSAO KAJEFWA KITUNGA [deceased].....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

The late Kitsao Kajefa Kitunga was involved in a road traffic accident on 22<sup>nd</sup> November, 2010 along Kilifi-Malilndi road involving motor vehicle registration number KBC 535V. The deceased died on the spot. The respondents herein obtained letters of administration for the deceased's estate and instituted the civil suit before the Kilifi Senior Resident Magistrate's Court whose decision is the subject of this appeal. There are three grounds of appeal namely that the trial court erred in law and fact by holding the appellants 100% liable, that the award of Kshs.10,000/= as monthly income for the deceased is not supported by any evidence and that the trial court erred in law and fact by awarding damages totaling Kshs.541,250/=.

M/s Mogaka Omwenga & Co. Advocates, counsels for the appellant submit that the respondent did not prove that the appellants were 100% to blame. There can be no liability without fault. Counsels are of the view that liability ought to have been apportioned at 50% against the deceased and 50% against the appellants.

It is further submitted that the respondents did not prove the deceased's earnings and therefore the loss of dependency ought to have failed. Counsels for the appellant rely on the cases of **JACOB MUTAHI GITHAGA V SAID K. MSELLEM [2005] eKLR** and that of **LAKHANI & 2 OTHERS V ISMAIL KAMAU [2004] eKLR**. In both cases the court held that loss of dependency has to be proved. Counsels also contend that the trial court was not properly guided in awarding the respondents Kshs.541,350/=. According to the appellants, the claim for special damages was also not proved. The trial court also did not take into account damages awarded under the Fatal Accident Act when computing

damages under the Law Reform Act. The appellants' proposed award is Kshs.50,000/= for loss of expectation of life, Kshs.10,000/= for pain and suffering and Kshs.80,000/= for loss of dependency assessed at a monthly income of Kshs.4,000/= and a multiplier of five years. The appellants are offering special damages at Kshs.11,300/=.

Miss Osino, counsel for the respondents, opposed the appeal. Counsel contend that the defence did not call any evidence to controvert the evidence in support of the respondents' case. The deceased was not negligent. The driver of the accident motor vehicle did not stop after the accident. It is also submitted that the bonnet of the accident vehicle was damaged and this implies that the impact was great. The road was straight and the driver ought to have seen the deceased and slow down so that he could have finished crossing safely.

On the issue of quantum, counsel for the respondents contend that the award is fair. The sum of Kshs.10,000/= reflects the minimum wage in the year 2009. The deceased was 85 years old. He used to work as a herbalist.

The record of the trial court shows that three witnesses testified before the trial court. PW1 SINEMA KITSAO is the deceased's widow. She learnt of her husband's death on 23<sup>rd</sup> November, 2009 while at home. She testified that she had five children with the deceased. The deceased was 85 years. He was a herbalist who used to earn Kshs.15,000/= monthly. He used to take care of the family expenses. She participated in the burial of her husband and incurred expenses.

PW2 P.C. PETER MUNGAI was based at the Kilifi police station, traffic department. The accident occurred on 23<sup>rd</sup> November, 2009 involving motor vehicle registration number KBC 535V Pick up. The vehicle was from Kilifi direction heading towards Watamu at around 9.15 am. The deceased was hit while crossing the road and died on the spot. The road at the scene is straight and there is no vegetation. No sketch plan was drawn. The front bonnet was dented.

PW3 HUSSEIN BARUA KWANGUMA is an uncle to the deceased. On the 23<sup>rd</sup> November, 2009 he was with the deceased. The deceased was walking a few metres ahead of him. They were coming from the beach side crossing the road. The deceased had almost crossed the road when he was knocked by a yellow Pick-up. The deceased was thrown off the road. The driver did not stop. The driver braked suddenly and knocked the deceased. Boda boda riders chased the driver and arrested him. Police went to the scene and took the body. It is his evidence that the deceased was a herbalist. The appellant closed their case without calling any evidence.

The first issue being raised in the appeal is that of liability. It is evident that the deceased was hit by the accident vehicle while crossing the road. According to PW2, the road at the scene is tarmacked and quite straight. The driver of the accident vehicle recorded his statement with the police. He indicated that he saw the deceased at close range. The accident occurred during the day and visibility was clear. The deceased crossed from the right hand side of the road heading towards the left. The vehicle was being driven on the left side of the road. The trial magistrate held that the appellants were 100% liable. The trial court relied on the evidence of PW3. It appears that PW3 was the only eye witness. No sketch plan was drawn or produced. According to PW3, the deceased had almost crossed the road and was hit as he was about to finish crossing.

It is evident that the accident occurred during the day. The accident driver did not testify and it is not clear whether he could not have swerved to the right and avoid causing the accident. On the other hand, it was also incumbent upon the deceased to have checked and timed himself as to whether he could have safely crossed the road. The roads are not made for the exclusive use of motorists. However, a pedestrian who opts to cross the road must ensure that it is safe for him/her to do so. It is clear to me that the deceased, being aged, mistimed his decision to cross the road. Being an old man, it is possible that he was walking slowly although he was physically healthy. The area was straight and he ought to have seen the vehicle before deciding to cross.

Given the circumstances of the case, I do find that the deceased was to a lesser extent also to

blame. The trial court erred by holding the defendant 100% liable. The driver was driving on his correct lane. I do assess the deceased's liability at 20%. The deceased should have ensured that he crossed the road without a vehicle finding him on the road. The appellant was largely to blame as the driver ought to have seen the deceased from a distance and either slow down or swerve to the side and avoid the collision. The mere fact that the accident driver was on his correct lane does not entitle him to knock anything on his way.

With regard to quantum, I do note that there is no issue on the amount of Kshs.10,000/= awarded by the trial court for pain and suffering. There is also no issue relating to the multiplier of five years adopted by the trial court. In their written submissions before the trial court, the appellants submitted for an award of Kshs.10,000/= for pain and suffering and a multiplier of five (5) years.

The only dispute relates to the award of Kshs100,000/= for loss of expectation of life, the amount of special damages as well as the adoption of Kshs.10,000/= as the deceased's monthly salary. It is clear that the deceased was still working as a herbalist. There is sufficient evidence that was not controverted that PW1 was married to the deceased and they had children. PW1 was born in 1973 and they got married in 1991. The accident occurred in 2009. The logical conclusion is that from 1991 when the deceased married PW1, the eldest child could at most be 18 years. There is no evidence that PW1 gave birth before she got married to the deceased. In any case she was about 18 or 19 years when she got married to the deceased.

The deceased was a herbalist. Having worked as a herbalist for quite a long time, it is clear that he was earning his living from that work. Counsel for the respondent submitted that the sum of Kshs.10,000/= adopted by the trial court is the minimum wage.

In the case of **ELIZABETH MARY ADEMBESA V SHADRACK MWOKI HARUA, Mombasa HCCC No. 435 of 1992**, Mbogholi J awarded a sum of Kshs.70,000/= for loss of expectation of life for the deceased who was 68 years old. In the case of **KENYA PORTS AUTHORITY V BERYL BERTHA MALOWA WERE** (Administrator of **JOHN PAUL LUBALO WERE, Mombasa Court of Appeal, Civil Appeal Number 244 of 2011**), the court adopted a sum of Kshs.10,000/= as the monthly income for a deceased whose salary was not known.

With regard to the award of Kshs.100,000/= for loss of expectation of life, I do find that the trial court made a fair award that does not need to be disturbed. I will not disturb that award. On the issue of the sum of Kshs.10,000/= as the deceased's monthly income, I do find that there is a basis for that award. The deceased used to cater for his family. He was an old herbalist who relied on his work to maintain his family. It can be presumed that at his age, he must have mastered his work and was known to his customers. He was not a young herbalist who was learning the work. He was experienced. There is the decision of the Court of Appeal in **THE KENYA PORTS AUTHORITY CASE VS BERYL BERTHA Malowa (supra)** where the court adopted a sum of Kshs.10,000/= as minimum wage. I do find that the award made by the trial court for loss of dependency is quite reasonable and should not be disturbed.

The deceased's body was taken to Kilifi hospital mortuary. It was later transported for burial. It is common knowledge that burials call for expenses. The respondents produced a receipt for Kshs.10,000/= being the cost of obtaining the grant which enabled them file the suit. The other amount of Kshs.20,000/= was for funeral expenses. I do find that a sum of Kshs.20,000/= for funeral expenses is not exorbitant. PW1 testified that they had to transport the body from Kilifi to Ganze. They had to buy a coffin. I hold that the award on special damages is fair.

In the end, the appeal on liability succeeds. The deceased is hereby held 20% liable and the appellant 80% liable. The award made by the trial court amounting to Kshs.541,350/= shall be reduced by 20% contribution. This leaves a final net award of Kshs.433,080/=. The respondent is awarded damages in the sum of Kshs.433,080/=. The respondent shall have costs awarded by the trial court. Each party shall meet their own costs of the appeal.

**Dated and delivered in Malindi this 15<sup>th</sup> day of August, 2016.**

**S.J. CHITEMBWE**

**JUDGE**