



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**CIVIL APPEAL NO. 3 OF 2013**

**BETWEEN**

**SHAMJI HARJI & BROTHERS LIMITED .....APPELLANT**

**AND**

**ESTHER ANNECLEA OPIYO &**

**ELIJAH BONYO OWUOR suing as administrator of**

**estate of DAVID OMONDI OWUOR (DECEASED) ..... RESPONDENT**

***(Being an appeal from the Judgment and Decree of Hon.L. Gitari, CM at the Chief Magistrates Court at Kisumu in Civil Case No. 519 of 2010 dated 21<sup>st</sup> December 2010)***

**JUDGMENT**

1. According to the plaint filed in the subordinate court, on 23<sup>rd</sup> November 2009, the deceased, David Omondi Owuor, was riding motorcycle registration no. KMCB 605D along the Nandi Hills – Awasi Road, when at Chemelil Market, a tractor registration number KAH 592 E belonging to the respondent was negligently driven causing it to collide with the motorcycle resulting in the deceased sustaining fatal injuries. The deceased’s estate and dependants claimed damages under the ***Law Reform Act (Chapter 26 of the Laws of Kenya)*** and ***Fatal Accidents Act (Chapter 32 of the Laws of Kenya)***. After hearing the matter, the learned magistrate apportioned liability at 70:30 against the appellant and made the following award in favour of the respondent which has now precipitated this appeal;

Pain and Suffering	Kshs. 10,000/-
Loss of expectation of life	Kshs. 100,000/-
Loss of dependency	Kshs. 1,920,000/-
Total	Kshs. 2,030,000/-
Less 30%	Kshs. 609,000/-
<b>Total Due</b>	<b>Kshs. 1,421,000/-</b>

2. The gravamen of the appellant’s appeal is that the learned magistrate erred in apportioning liability when the deceased was wholly to blame for the accident. This being a first appeal this court's role as the

first appellate court is to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court saw and heard the parties and giving allowance for that reach an independent conclusion as to whether to uphold the judgment (see *Selle v Associated Motor Boat Co.* [1968] EA 123. In order to carry out this task it is necessary to outline the facts emerging at the trial on how the accident occurred.

3. Three witnesses testified to the circumstances of the accident. Omondi Johanes Donga (PW 3) recalled that on the material day he was riding his motorbike behind the deceased as they were approaching the Chemelil Sugar Factory. He stated that the tractor was coming from the roundabout going to the factory while the deceased was going towards Chemelil. In his view the tractor failed to give way as it came from the junction and that the tractor came onto the highway and knocked the deceased. When asked in cross-examination which part of the tractor hit the deceased, he stated that it was the rear side of the tractor.

4. Corporal Mwita (PW 4) produced the police abstract which confirmed the particulars of the accident. While he was not the investigating officer, he told the court he had the sketch map that was prepared and he gave a description of the area where the accident took place as follows;

*It was at the gate of Chemelil factory. It was a dual carriage. There were flower gardens between the lanes and there was a turn off for motorists to access the factory from Nandi Hills and Awasi. The driver was coming from the left and was to turn to join the feeder road to the factory. The driver had to cross the highway. The one who was to turn to the factory was to give way. After making a turn to the factory that is where the accident occurred. He hit the cyclist rear side near the tyre. The motor cyclist rammed.*

5. The appellant's driver, Hamaton Mwakazi Masumbuko (DW 1), recalled that he was driving on the material day and when he reached the factory, he stopped and looked at both sides and as he did not see anything. He crossed the highway and after he had crossed, he heard a bang on the right rear tyre. When he looked behind he saw a motorbike on the ground and a woman. He did not know where the motorbike came from. As he feared for his life, he drove the tractor into the factory. In cross-examination he insisted that the tractor was hit on the right rear side.

6. The issue of liability was fought on who had the right of way. Mr K'ouko, learned counsel for the appellant, submitted that the deceased was to blame for the accident. He contended that the person joining the highway should have the right of way and that it is only after DW 1 had joined the road that he heard a loud bang meaning that the accident took place after DW 1 had joined the highway. On the respondent's part, Mr Nyanga submitted that the apportionment of liability was proper as the trailer ought to have stopped for the deceased who was already on the highway.

7. The occurrence of the accident was an undisputed fact and the only issue was who was to blame for the accident. Neither side called an independent witness to confirm and fortify their respective versions of the circumstances leading to the accident. PW 4 was not the investigating officer and he could not tell from the information he had who was to blame. Although he gave an outline of the scene, he did not tell the court where the collision took place for the court to determine who was to blame. Each of the witnesses insisted that he was correct and in light of the conflicting evidence on both sides and without clear evidence of who was to blame, I would apportion liability equally. I find support for this position in the case of *Hussein Omar Farah v Lento Agencies* NRB CA Civil Appeal No. 34 of 2005[2006] eKLR, the Court of Appeal observed that:

*In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.*

8. I now turn to the issue of quantum and it is worth reciting the general principle upon which this Court, as an appellate court, will interfere with an award of damages as stated in *Bashir Ahmed Butt v Uwais*

**Ahmed Khan [1982-88] KAR 5** as follows;

*An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low ....*

9. Mr K'ouko challenged the quantum of damages on to the extent of attacking the multiplier used in assessing damages for loss of dependency under the **Fatal Accident Act**. He complained that there was no evidence of the deceased's age. Mr Nyanga contended that there was evidence of his age for example, the certificate of grant of letters of administration ad litem issued in favour of the respondents. In determining the multiplier, the learned magistrate held as follows;

*The deceased at paragraph 4 of the plaint pleads that the deceased was 30 years old at the time of his death. It is not true to say that there was no proof his age. He could have worked for 30 years based on the retirement for public servants.*

10. It is trite law that pleading set out facts and not evidence (see **Simon Muchemi Atako & Another v Gordon Osore NRB CA Civil Appeal No. 180 of 2005[2013]eKLR**). Thus the learned magistrate had to ascertain the age from the available evidence to come up with a proper multiplier. The ad litem grant did not have the date of birth or the deceased's age and none of the respondent's witnesses referred to his age. The only document that referenced the deceased's age was the post mortem report which gave his apparent age as 38.

11. The Court of Appeal in **Board of Governors of Kangubiri Girls High School & Another v Jane Wanjiku & Another NYR CA Civil Appeal No. 35 of 2014 [2014]eKLR** held that, "*The choice of a multiplier is a matter of the courts discretion which discretion has to be exercised judiciously with a reason.*" *It must take into account expected working age of the deceased, the period which the dependants would have expected support and the fact that the deceased would have died or suffered disability from any other causes other than the accident. Given that the deceased was aged 38 years, he would have been expected to work until he was say 60 years, factoring in the uncertainties of life, I think a multiplier of 18 years would be appropriate. The award for loss of dependency would be Kshs. 8000 X 12 X 18 X 2/3 = Kshs. 1,152,000/-.*

12. In the result appeal is allowed to and substituted with judgment for the respondents against the appellant as follows;

Pain and Suffering	Kshs. 10,000/-
Loss of expectation of life	Kshs. 100,000/-
Loss of dependency	Kshs. 1,152,000/-
Total	Kshs. 1,262,000/-
Less 50%	Kshs. 631,000/-
<b>Total Due</b>	<b>Kshs. 631,000/-</b>

13. The award shall attract interest from the date of judgment in the subordinate court. The respondent shall have the costs of the suit in the subordinate court while the appellant shall have the costs of the appeal.

14. When the court makes an award under the **Fatal Accidents Act**, it must, in accordance with **section 4(1)** apportion the amount awarded to each dependant and where children are involved approve a scheme of investment for the sums due to the children. I therefore direct that the respondents to file the necessary

application for consideration before the subordinate court in due course before the decretal sum is released to them.

**DATED and DELIVERED at KISUMU this 11<sup>th</sup> day of August 2016.**

**D.S. MAJANJA**

**JUDGE**

Mr Kouko instructed by Odhiambo Owiti and Company Advocates for the appellant.

Mr Nyanga instructed by Nyanga and Company Advocates for the respondents.