



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 108 OF 2010**

DHOKIA TRANSPORTERS LIMITED.....1<sup>ST</sup> APPELLANT

YASH FREIGHTERS LIMITED.....2<sup>ND</sup> APPELLANT

PAUL NG'ANG'A KARIUKI (*suing on behalf of the Estate of the  
late KENNETH OWINO (deceased)*).....3<sup>RD</sup> APPELLANT

**VERSUS**

RICHARD ODINGA .....RESPONDENT

**JUDGMENT**

The Appellants have in a Memorandum of Appeal dated 6.05.2010, and filed on 15.10.2012 set out six grounds of appeal why the judgment of the lower court should be set aside, and the appeal allowed with costs. The grounds are -

1. *that the learned trial magistrate erred in law and in fact by failing to give a concise statement of the case, the points of determination and reasons for her decision in her judgment,*
  2. *that the learned trial magistrate erred and misdirected herself in law and in fact by totally ignoring the Appellants' submissions,*
  3. *that the learned trial Magistrate erred and misdirected herself in law in her assessment of damages awardable to the Plaintiff/Respondent by awarding damages which were excessive in the circumstances,*
  4. *that the learned trial magistrate erred and misdirected herself in law and in fact by totally ignoring the Appellant's exhibit on the deceased's earnings and instead used a multiplicand that had not been proved,*
  5. *that the learned trial magistrate erred and misdirected herself in law and in fact in awarding loss of expectation of life in addition to loss of dependency by failing to discount the same against the established principles of law and decided authorities,*
  6. *that the learned trial magistrate failed to appreciate and/or misapplied the principles applicable in the assessment of damages under the various heads of damages herein.*
2. In addition to the grounds of appeal, the Appellants as well as the Respondent's Advocates filed

written submissions with authorities in support of their respective positions.

3. Although there were six grounds of appeal, in effect, three grounds were argued by counsel for the Appellants. Firstly, that the judgment did not comply with the requirements of Order XX, rule 4 (*now Order XXI, rule 4*) of the Civil Procedure Rules – that judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision and the reasons for such a decision (**WAMUTU VS. KIARIE [1982] KLR 486**).

4. The second primary ground relates to the salary the deceased was earning, was not proved by the Respondents. The third ground was that damages could not be awarded on both the Law Reform Act, (*Cap. 26, Laws of Kenya*), and the Fatal Accidents Act (*Cap. 32, Laws of Kenya*).

5. On the first ground, whether the judgment complied with the requirements of Order XX rule 4, of the Civil Procedure Rules, although the judgment is not expressed on all fours with the requirements of that Order, the four elements of that order are scattered in the learned trial magistrate's judgment, whether there was an accident, how it was caused, who was liable therefore, and the consequences thereof.

6. I have perused both the Plaintiff and Defence in this matter, as well as the evidence adduced on behalf of the Respondent. The Appellants chose to adduce no evidence, except one piece of evidence, the payslip (*DW Exhibit 1*), showing the salary earned by Kenneth Owino (*the deceased*) son of the Respondent, which the subject of grounds 2, 3, 4 and 6 of the Appeal.

7. The Court found the Respondents 100% liable for the accident on the doctrine of *res ipsa loquitur* (*the thing speaks for itself*). According to the only eye witness of the accident, the Appellant's vehicles, trailer ZC 2643, being pulled by motor vehicle No. KAU 145H, in which the deceased was lawfully travelling as a turnboy, was so negligently and or recklessly driven that it collided with the motor vehicle registration number KAS 107A, owned by the third Appellant. The deceased died instantly as a consequence of that accident.

8. None of the Respondents or their representatives offered any evidence to controvert the evidence of the only witness, PW3 who saw the trailer whiz past him as he rode his bike only to hear a loud bang and smashing of vehicles 20-30 seconds later. His evidence was that the trailer was being driven at very high speed, or it had defective brakes. The learned trial magistrate was correct in her finding the Respondents as having been 100% vicariously liable for the accident.

9. The Respondents however contended that the trial court erred in applying a multiplicand of Ksh 10,000/= while the evidence showed that the deceased earned Ksh 6,000/= p.m. prior to his death. The Appellants, with consent of counsel for the Respondents tendered a payslip in support of the salary of Ksh 6,000/= p.m. In the absence of any evidence in support of the claim for a monthly salary of Ksh 10,000/= the trial court erred in applying a multiplicand of Ksh 10,000/= instead of Ksh 6,000/= which was admitted into evidence with consent of respective counsel.

10. I therefore agree with the Appellants that the multiplicand applicable for the monthly salary is Ksh 6,000/=. Though there was no controversy on the 15 years of loss of earnings, no evidence was adduced particularly by the Appellants that the deceased was suffering from any known ailment and would only work for, and remain a turnboy for 15 years, and had no prospect for graduating into a trailer driver.

11. The deceased was 25 years at the time of his death, and in the absence of any known handicap or disability, (*which would affect his advancement to a qualified driver*), and considering that the retirement age was at least 60 years in the year 2010, the loss of earnings for the period of 15 years only was in my opinion inordinately low, and the learned trial magistrate erred in that respect. I would therefore set aside the period of 15 years and enhance them to 20 years.

12. Consequently the sum due for the period of lost earnings would be Kshs 1,640,000/= comprising the monthly salary multiplied by the number of lost years, multiplied by the 12 months in

each year, and the two third ( $\frac{2}{3}$ ) rule the deceased in his life time used to apply for the upkeep of his family i.e.  $6,000 \times 20 \times 12 \times \frac{2}{3} = \text{Shs } 960,000/=$ .

13. I accept the sum of Ksh 100,000/= as the current conventional sum for loss of expectation of life. This sum is however deductible on the grounds that under the Law Reform Act, it is the deceased's own cause which survives for the benefit of the estate, so that the estate should recover the damages the deceased would have recovered but for his death, and that whatever that sum is, it is deductible from the sum awarded under the Fatal Accidents Act because it is the same persons who are entitled to the benefit of the deceased's estate,. I would therefore deduct the sum from the award under the Fatal Accidents Act, so that the estate does not benefit both under the Law Reform and the Fatal Accidents Act.

14. Counsel for the Appellant did not raise or address the court on the question of special damages which stood at Shs 40,000/=. That award therefore stands.

15. In the premises, the Appellants appeal is dismissed with costs, and I assess the damages as follows -

1. Pain and Suffering	Shs	10,000/=
2. Loss of Expectation of Life	Shs	100,000/=
3. Loss of Earnings	Shs	<u>960,000/=</u>
Sub-total	Shs	1,070,000/=
(4) Less award under Law Reform Act	Shs	<u>100,000/=</u>
(5) Sub-total		970,000/=
(6) Add Special Damages	Shs	<u>40,000/=</u>
		<u>1,010,000/=</u>

16. There shall be orders accordingly.

**Dated, signed and delivered at Nakuru this 28<sup>th</sup> day of March, 2014**

**M. J. ANYARA EMUKULE**

**JUDGE**