



**REPUBLIC OF KENYA**

**High Court at Eldoret**

**Civil Appeal 128 of 2001**

**ELISHA BUSIENEI.....APPELLANT**

**VERSUS**

**PAUL YATOR (Suing as Personal representative of**

**YATOR ARAP MAYO).....RESPONDENT**

*(Being an appeal from the judgement of the Honourable Senior Principle Magistrate Hedwig Ongundi (Mrs), in Eldoret SPMCC No. 251 of 2000 dated and delivered on 13<sup>th</sup> day September 2001)*

**JUDGMENT**

The Respondent sued the Appellant as the owner of motor vehicle KXF 826 for the negligence of his driver for causing an accident where one Yator Arap Mayo was hit and died after some days while undergoing medication. The accident took place on 2<sup>nd</sup> February 1995 at about 4.00 pm. The Respondent claimed general damages under the Law Reform Act and loss of dependency under the Fatal Accidents Act as well as special damages of Kshs. 45,150/=. General damages were also claimed for loss of consortium for the deceased widow. The Appellant was served and filed a defence denying liability and alleging contributory negligence of the deceased. In a judgment delivered on 13<sup>th</sup> September 2001 the trial magistrate entered judgment for the Respondent in the sum of Kshs. 380,000/= general damages and Kshs. 32,900/= as special damages making a total sum of Kshs. 412,900/=. The Appellant was aggrieved with the judgment and lodged a Memorandum of Appeal on 5<sup>th</sup> October 2001 which was amended on 18<sup>th</sup> January 2007 on the grounds that:

1. The learned resident magistrate erred in law and in fact in finding or holding the Appellant liable for the accident giving rise to the Eldoret SPMCC No. 251 of 2001
2. The learned resident magistrate erred in law and fact in awarding general damages of Kshs. 100,000/= on the heading of loss of expectation of life to the Respondent herein who was at the time of his death 88 years of age. It is the defendant's contention that the award was undeserving.
3. The learned trial magistrate erred in law and fact in awarding Kshs. 180,000/= as general damages on loss of dependency to the Respondent who was 88 years old. It is the Appellant's contention that the Respondent herein was in fact a dependent and his estate could not have lost any penny from the deceased after his death.
4. The trial magistrate erred in law and fact in failing to hold that the Respondent substantially contributed to the cause of the accident despite overwhelming evidence to this effect.

5. The trial magistrate erred in law and fact in awarding special damages of Kshs. 32,900/= which were not specifically pleaded and proved.
6. The trial magistrate erred in law and fact in not taking into account or considering the submissions of the Appellant and the evidence adduced.
7. The trial magistrate erred in law and in fact in awarding manifestly excessive and undeserved general damages of Kshs. 100,000/= for pain and suffering.
8. The trial magistrate erred in law and in fact in failing to discount the award under the Law Reform Act from the ultimate award thereby making a double award to the Respondent who was both a personal representative to the estate of the deceased and a dependent of the deceased.

Counsel for the Appellant argued grounds 1, 4 and 6 as touching on liability. He submitted that the finding that he Appellant was 100% liable is not tenable. The deceased did not exercise caution while crossing the road. He urged the court to review the evidence and to apportion liability on 50:50 basis. He submitted that remaining grounds touch on quantum. He submitted that it was wrong for the trial magistrate to have awarded Kshs. 100,000/= for loss of expectation of life. Counsel submitted that taking into account the age of the deceased (88 years) he had no more life to expect for which an amount of Kshs. 100,000/= could be awarded. He cited the case of **Tongenei Buigut Joseph v Johnstone Rotich Kimagut & anor. HCCC R. 5 of 2000 (Eldoret)** where a 26 year old deceased was awarded Kshs. 100,000/= for loss of expectation of life and contended that it was wrong for an 88 year old to be awarded the same sum. On loss of dependency he submitted that there was no evidence of earnings produced before court. That the deceased was himself a dependent. That the persons named as dependents were all over 30 years and it is not possible that they were dependants. Family had 50 acres of land and the so-called dependents had source of livelihood. He also submitted that award of pain and suffering of Kshs 100,000 was on the high side. Deceased died after 10 days. He argued that the award under the Fatal Accidents Act ought to have been discounted in award under the Law Reform Act. Failure to do so amounted to double award. The Respondent was a personal representative and dependant at the same time. He submitted that it was wrong for the trial magistrate to distribute the award to the dependants. He cited the case of **John Jembe Mumba v. Seif Mbaruka t/a Takrim Bus HCCC 523 of 2001 (Mombasa)** where Justice Khaminwa made deductions to take care of double award where the personal representatives were also the only dependants. Counsel contended that the trial magistrate ought to have deducted Kshs. 100,000 on account of loss of expectation of life. It amounted to double award. On special damages counsel submitted that only Kshs. 12,900 was specifically proved. He referred to Ex 5 and pages 15, 16 and 18 of the record of appeal. He urged that the judgment be set aside and adjustments be made in respective awards and special damages be scaled down.

Counsel for Respondent opposed the appeal. On liability he submitted that the deceased was not crossing but was hit on the pavement. There was a finding that the 1<sup>st</sup> defendant was an employee of the Appellant. 1<sup>st</sup> defendant was convicted in traffic case and the Appellant cannot seek to appeal on his behalf by asking the court to revisit the circumstances of the accident. He submitted that there was no evidence supporting the plea of contributory negligence. The Appellant did not call any evidence at the trial court. They did not plead that the deceased was crossing the road. He cited the case of **Johnson Omay v Josphat Munyau HCCC R.16 of 1998 (Eldoret)** in support of the contention that conviction in criminal case raises an irrebutable presumption that the driver was negligent. Counsel supported his finding of 100% liability against the Respondent. On quantum he submitted that the deceased was earning some income and that even without proof of income the trial court could still award loss of dependency based on global estimate. Counsel cited the case of **Rahab Wanjiku Gitonga v. Almas Njoroge Mungai & anor. HCCC 59 of 1997** where Justice D.M. Rimita awarded loss of dependency to the family of a man who was aged 64 years at the time of his death and had no proof of earnings. On pain and suffering he urged that the court should consider length of suffering. Where a deceased dies immediately he is normally awarded Kshs. 20,000/=. He cited the case of **Tongenei Buigut Joseph v. Joseph Rotich Kimagut & Another** as a comparable award. The deceased had died ten days after accident and did suffer pain prior to death, Kshs. 60,000 was awarded for pain and suffering. He submitted that special damages were proper and that age was not an issue. He urged that the appeal be dismissed.

I have considered the rival submissions of counsel. The first issue is whether liability should have been apportioned at 50:50 or any the ratio but not 100% against the Appellant. The Appellant has invited the court to look into the evidence of how the accident took place. I have reviewed the evidence and I find that an eye witness called Joshua Nzuki Muli gave evidence as PW2. The following passage of his testimony is relevant:

***“As I talked with Owino I saw a lorry along Uganda road from Nairobi direction. It was KXF 826 Mitsubishi. An old man had just passed us and was to cross the road. The mzee saw the lorry coming and he saw that it was safe to cross the road. He started crossing the road. He passed the first lane to Kitale. In the middle is a pavement. He stopped on the pavement. The lorry had reached him. Mzee was facing Iten. The lorry hit him on his right side and he fell on the pavement on his back. The lorry stopped there and there. We ran here. I advised he driver to take mzee to the hospital. They did so... The motor vehicle was moving very fast. I saw it. The mzee was on the pavement. It's the front drivers side which hit him.”***

On cross examination Muili maintained that the impact was on the pavement. That it was prudent for mzee to stop at the pavement because had he continued to cross he would have been hit by motor vehicles from Kitale. The deceased was careful. The driver saw the deceased from far and he started applying brakes. In Traffic case no. 2435 of 1995, Muli also gave evidence. The driver was convicted for causing death by dangerous driving. There was no appeal preferred. The Appellant is the owner of the motor vehicle. By contending that the driver was not 100% liable the Appellant is inviting this court to reopen the traffic case and consider whether the circumstances could be considered as dangerous. In light of the provisions of section 47 of the Evidence Act shall cause of action is not available to this court. The conviction is conclusive as between the parties and can be relied upon to establish negligence. The trial magistrate had the opportunity to watch the demeanour of PW2 and was better placed to assess the weight to place on his testimony. She did not make any remark that would suggest that she disbelieved how the accident occurred. The traffic proceedings had been produced n evidence and no questions were put to PW2 about the consistency or inaccuracy of his evidence. The present challenge on consistency is a red-herring. I find that the grounds of appeal on liability no. 1, 4 and 6 lack merit and they fail.

The second issue was quantum of damages. It was submitted that the sum of Kshs. 100,000 for loss of expectation of life was high taking into account the age of the deceased. In awarding damages for loss of expectation of life the general trend is to give a sum that is sensible to the trial magistrate. All that is needed is proof that the deceased was happy and has been deprived of his life. Age in this circumstance would not be a conclusive factor. The deceased had lived up to 88 years and there was no indication that he was going to die the next year or when he was going to die. The fact that this court could have awarded a different sum is not in itself a sufficient ground for interfering with the award.

The award of pain and suffering of Kshs. 100,000/= was only found to be high by the Appellant. As submitted by counsel for Respondent it is not out of the ordinary to award Kshs. 100,000/= for pain and suffering especially where it is clear that the deceased did not die immediately after the accident. In this case the deceased died after ten days. I have looked at the exhibits produced and I concur with counsel for the Appellant that special damages were proved to the tune of Kshs. 12,900/=. The sum of Kshs. 20,000 was pleaded as funeral expenses but no receipt was produced. It would not be out of the ordinary to suppose that some money was expended towards funeral expense. The best proof of expenditure is documentary but this is not the only means of proof. I would not disturb the award of special damages of Kshs. 32,900/=.

It was contended that it was wrong for the trial magistrate to have distributed the loss of dependency money. I find nothing wrong. No statutory provision was cited. All the dependents are *sui juris*. By distributing the trial magistrate avoided a lot of controversy that would have surrounded the distribution. The trial magistrate awarded the plaintiff Kshs. 150,000 and the money was stated to include money to be paid to the advocates as fees and costs and all expenses. The plaintiff was not the only dependent and the case law of ***John Jembe Mumba*** is therefore distinguishable. I find that the remaining grounds of appeal lack merit and they all fail.

The upshot is that this appeal lacks merit and is hereby dismissed with costs.

DATED AND SIGNED AT NAIROBI ON THIS 13TH DAY OF AUGUST 2012

**M. K. IBRAHIM**  
**JUDGE**

DATED AND DELIVERED AT ELDORET ON THIS 17<sup>TH</sup> DAY OF OCTOBER 2012

**F. AZANGALALA**  
**JUDGE**

In the presence of: Mr. Yego h/b for Mr. Sungok for Applicant

Mr. Kwambi for the Respondent