



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 112 of 2009**

**BUSTRACK LIMITED.....APPELLANT**

**VERSUS**

**WILFRIDA ACHOLA OMONDI.....1<sup>ST</sup> RESPONDENT**

**DANIEL AKENDO MUNDA.....2<sup>ND</sup> RESPONDENT**

***(Suing as joint administrators of the estate of the late Ibrahim Osigiro Munda)***

**J U D G M E N T**

1. Bustrack Limited (hereinafter referred to as the appellant), was the defendant in the suit which was filed in the Chief Magistrate's Court at Milimani. Wilfred Achola Omondi and Daniel Akendo Munda (hereinafter referred to as the respondents), brought the suit against the appellant in their capacity as the joint administrators of the estate of the late Ibrahim Osigiro Munda, (hereinafter referred to as the deceased).
2. The suit was for general and special damages under the Fatal Accidents Act (Chapter 32 of the Laws of Kenya), and the Law Reform Act (Chapter 26 of the Laws of Kenya), arising from the death of the deceased. The respondents maintained that the deceased died as a result of fatal injuries suffered by him in an accident involving the appellant's motor vehicle Reg. No.KAH 768U. It was contended that the accident was caused by the negligence of the appellant's duly authorized agent, or servant one Timothy Anyandi Amwanda. The suit was brought on behalf of the deceased's widow who is the 1<sup>st</sup> respondent, the deceased's 4 daughters and son aged between 1 year and 12 years.
3. The appellant filed a defence to the respondents' suit in which the appellant denied ownership of the subject vehicle or that an accident occurred or that its driver, agent or servant was negligent. In the alternative, the appellant maintained that the accident if it occurred, was caused wholly or substantially by the negligence of the deceased. The appellant further relied on the maxim *volenti non fit injuria*, maintaining that the deceased was the author of his own misfortune in attempting to board a bus while it was moving.
4. Following negotiations between the parties, judgment on liability was agreed by consent in the ratio of 40-60% in favour of the respondent, the respondent bearing 40% contribution.
5. During the trial, Daniel Akendo Munda, the 2<sup>nd</sup> respondent who is the deceased's younger brother, was the only witness. He testified that the deceased died as a result of a road traffic accident. He produced a police abstract report of the accident. He testified that the 1<sup>st</sup> respondent was the deceased's widow with whom they had 5 children of the marriage. He produced a letter from the deceased's area Chief confirming the deceased's marital status. The witness further testified that the deceased who was 38 years old was working at the Nairobi City Council clearing department where he was earning a basic salary of Kshs.9,485/=. The witness produced the deceased's pay slip for November, 2004. The witness further testified that as a result of the deceased's death they spent a total sum of Kshs.85,000/= as funeral expenses.
6. At the close of the respondent's case, both counsel for the respondent and the appellant filed written submissions. Counsel for the respondent urged the court to adopt a multiplier of 20 and a dependency ratio of  $\frac{2}{3}$  and that using the deceased's net salary of 9,485/= a total sum of Kshs.1,517,600/= should be awarded for loss of dependency, Kshs.30,000/= for pain and suffering, Kshs.250,000/= for loss of expectation of life and Kshs.31,475/= as special damages less the agreed contribution of 40%.
7. For the appellant it was submitted that no damages should be awarded for pain and suffering as there was no evidence that the deceased suffered any pain after the accident as the deceased died instantaneously. With regard to loss of expectation of life,

counsel urged the court to award a sum of Kshs.80,000/= while the court was urged to award no special damages as none was pleaded nor strictly proved. As regards loss of dependency, it was submitted that under Section 4 of the Fatal Accidents Act Cap 32 a claim for loss of dependency can only be for the benefit of the spouse, parent or child of the deceased. It was submitted that the 2<sup>nd</sup> respondent, being a brother of the deceased, could not claim any benefit under that head of damages.

8. Relying on *HCCC. No1638 of 1988 Beatrice Wangari Thairu vs Hon. Ezekiel Bangituny and another*, it was submitted that the dependency is a matter of fact which therefore has to be proved. It was submitted that none of the alleged dependants gave evidence to demonstrate the state of their dependency. The court was therefore urged to find that the deceased's dependants had not demonstrated their dependency and therefore no damages should be awarded to them. It was submitted that even if the court was to award damages, a multiplicand of 10 years and a dependency ration of  $\frac{1}{4}$  would have been reasonable.
9. In her judgment the trial magistrate was satisfied that the deceased had dependants and adopted a multiplier of 17, a dependency ratio of  $\frac{2}{3}$  and a monthly income of Kshs.9,200/= and therefore assessed general damages for loss of dependency at Kshs.1,251,200/=. The trial magistrate further awarded a sum of Kshs.20,000/= for pain and suffering and Kshs.120,000/= for loss of expectation of life.
10. Being aggrieved by that judgment, the appellant has lodged this appeal raising 5 grounds as follows:
  - (i) That the learned magistrate erred in law and in fact in awarding damages for pain and suffering while no evidence was adduced to prove the deceased suffered any pain prior to his death.
  - (ii) That the learned magistrate erred in law and in fact in awarding the respondents Kshs.120,000/= for loss of expectation of life despite authorities to the contrary.
  - (iii) That the learned magistrate erred in law and fact in adopting a multiplier of 17 years without considering the vicissitudes of life and chances of life of the deceased and dependants.
  - (iv) That the learned magistrate erred in law and in fact in awarding damages for loss of dependency with a ratio of  $\frac{2}{3}$  (two thirds) whilst there was no such evidence as to the extent of that dependency and further erred in calculation of the multiplier of 17 years.
  - (v) That the learned magistrate erred in law in failing to discount the sum awarded for loss of dependency.
11. Mrs. Githae who argued the appeal on behalf of the appellant reiterated the submissions which were made before the trial magistrate urging this court to set aside the award in respect of pain and suffering, and to reduce the award in respect of loss of life expectancy. She further reiterated that the dependency was not established and that the dependency ratio of  $\frac{2}{3}$  had no basis.
12. For the respondent it was submitted that the court had no reason to interfere with the award of the trial magistrate as the awards had not been shown to be inordinately high or low as to justify interference by this court.
13. I have carefully reconsidered and evaluated the evidence which was adduced before the trial magistrate. As regards the issue of dependency, Daniel Akendo Munda, the deceased's brother who was one of the administrators of the estate testified that the deceased was married to the 1<sup>st</sup> respondent with whom they had 5 children whose ages ranged from 1 to 12 years. This was confirmed by a letter from the office of the District Commissioner, Siaya.
14. While it would have been desirable for the 1<sup>st</sup> respondent to testify, the evidence of the 2<sup>nd</sup> respondent was sufficient to establish the deceased's dependants. The deceased having had a family with such young children I have no doubt that his first responsibility was maintaining them. I find that the dependency ration of  $\frac{2}{3}$  adopted was fair and reasonable considering the large family that the deceased had. As regards the multiplier, the deceased was aged 38 years. A dependency ratio of 17 was fair and reasonable given the ages of the dependants and the retirement age which currently stands at 60. Further, the trial magistrate rounded off and adopted the deceased's net salary which according to his payslip was Kshs.9,208/=. Therefore, the amount of Kshs.1,251,200/= assessed for loss of dependency was fair and just.
15. With regard to damages for pain and suffering, although the 2<sup>nd</sup> respondent testified that he received information at the scene that the deceased had been taken to Kenyatta National Hospital, the deceased apparently died before arriving at the hospital and was therefore taken to the City Mortuary. I find therefore that there was no basis for the award of Kshs.20,000/.
16. As regards the amount awarded in respect of loss of life expectancy, the award of Kshs.120,000/= was neither excessive nor based on wrong principles as to justify intervention by this court.
17. For the above reasons, I would allow this appeal to the extent of setting aside of the award of the trial magistrate and substituting thereof a judgment in favour of the respondent subject to the agreed liability as follows:

Loss of dependency	-	Kshs.1,251,200/=
Loss of expectation of life	-	Kshs.120,000/=

Total - Kshs.1,371,200/=

The respondent shall further have costs of the appeal and costs in the lower court.

Dated and delivered this 24<sup>th</sup> day of March, 2010

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Mrs. Githae for the appellant

Jaoko for the respondent

Eric - Court clerk