



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kara Commodities Limited v Muyendi (Suing as the administrator of  
the Estate of Onesmus Ndilivu Muyendi) (Civil Appeal E001 of 2021)  
[2024] KEHC 1237 (KLR) (7 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1237 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITUI  
CIVIL APPEAL E001 OF 2021  
RK LIMO, J  
FEBRUARY 7, 2024**

**BETWEEN**

**KARA COMMODITIES LIMITED ..... APPELLANT**

**AND**

**MARTIN MUASYA MUYENDI (SUING AS THE ADMINISTRATOR OF THE  
ESTATE OF ONESMUS NDILIVU MUYENDI) ..... RESPONDENT**

**JUDGMENT**

1. This is an appeal arose from the judgment of Hon. M. K. Mwangi (Chief Magistrate) delivered on 21<sup>st</sup> December 2022 vide Mwingi CM’s court Civil Case No. E077 of 2021.
2. In that case the appellant had been sued by the Respondent for tort of negligence on account of a Road Traffic Accident (self-involving) involving motor vehicle registration No. KAV 121K belonging to the Appellant. The deceased (Onesmus Ndilivu Muyendi) was travelling aboard the said motor vehicle when it was involved in accident from and he suffered fatal injuries and later succumbed. The Respondent, as the Administrator of the estate filed the suit referred to above on his own behalf and the other named dependant.
3. The Respondent sought damages against the Appellant as follows;
  - i. Special damages of Kshs 250,550/-
  - ii. General damages under the *Fatal Accidents Act* and/or *Law Reform Act*
  - iii. Loss of earnings and costs of the suit
  - iv. Interest on (a), (b) and (c) above at court rates
  - v. Any other relief and remedy.



4. In a defence dated 7<sup>th</sup> July 2021, the Appellant denied allegations levelled against it and stated that the deceased caused and or contributed to the accident through his own negligence by failing to wear a seat belt and being an unauthorized passenger in the suit motor vehicle.
5. Briefly the evidence tendered at the trial court is entitled below.

PW1 (Peter Kimwele) who witnessed the accident adopted his witness statement dated 28<sup>th</sup> June 2021. PW1 testified that he was walking along the road when he saw the suit motor vehicle which he stated was speeding and moving in a zig-zag manner. He testified that the vehicle veered off the road and hit a tree. He also stated that there were three occupants in the vehicle including the deceased.
6. PW2 (Martin Muasya Mugendi) adopted his witness statement dated 28<sup>th</sup> June 2021. He testified that the deceased was his brother and that he used to financially support their mother before his demise.
7. PW3 (P.C Justin Murithi) from Mwingi Police Station testified that the accident was reported at the station on 24<sup>th</sup> January 2018. He indicated that crime officers visited the scene where they found the suit motor vehicle. That police then proceeded to Mwingi Level IV hospital where they found that one of the passengers, Onesmus Ndulivu Muyendi had died while undergoing treatment. He produced a police abstract which was marked as PEXH 3.
8. Doctor Curtis Alice (PW 4) testified and tendered the postmortem report in respect to the body of Onesmus Ndilivu Muyendi (deceased) as per exhibit 7.
9. The Appellant on his part tendered the following evidence.
10. Anish Karasha (DW1) testified that he worked for the Appellant as a director. He further stated that the deceased was unauthorized passenger when the accident occurred and added that their vehicles are only meant to ferry goods and they do carry passengers.
11. John Wahome Mununia (DW2) testified he was a driver employed the Appellant and that drivers have no permission to carry passengers because they only ferry cargo. He further stated that there is a notice at door of the vehicle he was driving cautioning people that unauthorized passengers are not allowed. He however clarified that he was not aware if the driver of fateful lorry allowed the deceased to board lorry but he was aware that the was a passenger when the accident occurred.
12. The trial court evaluated the evidence tendered and found that Appellant 100% liable. On quantum, the Respondent was awarded as follows:
  - a. Pain and suffering Kshs. - 100,000.00
  - b. Loss of expectation of life Kshs. - 1,440,000.00
  - c. Special damages – Kshs. - 280,500.00Total - Kshs. – 1,920,000.00
13. The Appellant being dissatisfied with the trial court’s judgment on liability and quantum filed this appeal raising the following grounds;
  - i. That the Learned Magistrate erred in law and fact in finding the Defendant 100% liable for the accident.
  - ii. That the Learned Magistrate erred in law and fact when he found that the Plaintiff was entitled to general and special damages amounting to Kshs 1,920,550/-



- iii. That the Learned Magistrate erred in fact and in law in failing to evaluate correctly the evidence adduced by the Appellant and consequently arriving at a conclusion that has no legal or factual basis.
  - iv. That the Learned Magistrate erred in law and fact by failing to consider the written submissions of the appellant in arriving at his judgment.
  - v. That the Learned Magistrate erred in law and fact by failing to evaluate correctly the evidence adduced by the Appellant and consequently arriving at a conclusion that has no legal or factual basis.
  - vi. That the Learned Magistrate erred in law by misinterpreting and misdirecting himself on the law related to issuance of temporary mandatory injunctions.
14. The Appellant submits that it should not have been held vicariously liable for the actions of its driver because he carried unauthorized passengers in the Appellant's vehicle. It is submitted that there was no evidence tendered to demonstrate negligence on the part of the Appellant. The Appellant has placed reliance on the case of *Techard Steam & Power Limited vs Mutio Muli Ngao* (2019) eKLR.
  15. On the question of quantum, the Appellant submits that the trial court erred by adopting a dependency ratio of 3/4. Counsel proposes a dependency ratio of 1/3 and a multiplier of 8 years resulting to Kshs 483,840/-. He has placed reliance on the cases of *Dismas Muhami Wainarua vs Sapon Kasirimo Maranta* (suing as administrator and or personal representatives of the estate of Partinini Sapon (deceased) 2021 (eKLR) where the court adopted a dependency ratio of 1/3 in a case where the deceased was unmarried but supported his parents. He also cited the case of *Beatrice W. Murage vs Customer Transport Limited & Another* (2014) eKLR where the court expressed that ordinarily courts based the income or earnings on minimum wage where proof of earning is not provided.
  16. The Respondent on the hand has opposed this appeal solely on grounds that the Appellant compromised this appeal by paying the decretal sum through instalments settled by various first dated cheques. It is submitted that having settled the decretal sum in full, this appeal should first be marked as settled.
  17. The duty of this court as a first appeal is to re-evaluate the evidence tendered at the trial and come to own conclusions.
  18. The first issue raised in this appeal is whether payment of decretal sum by the Appellant is in itself a compromise of the appeal. I have gone through the record in this appeal and it is clear that though the decretal sum was paid by the appellant, it was done to avoid execution and perhaps the appellant embarrassments. The appellant's counsel in more than one occasion insisted that his client was desirous of pursuing its right of appeal.
  19. The right to appeal is enshrined under Article 50 of *the Constitution* provides for the right to be heard as follows;
 

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”
  20. In as far as parties did not file a consent marking the matter as settled, payment of the decree did not prevent the appellant from pursuing this appeal.



21. Payment of decree in itself does not extinguish the right to pursue an appeal unless a duly executed consent by parties is filed indicating that the appeal is settled.
22. The other issue for determination in this appeal is whether the trial court erred on the question of liability. The Appellant has faulted the trial court on the question of liability stating that its vehicles were not authorized to carry passengers. I have looked at the evidence tendered and find that though the Appellant called two (2) witnesses who testified that they were not authorized to carry unauthorized passengers, the allegations were not backed up sufficiently by facts or evidence. There was no evidence tendered showing the cautionary notices were pinned on the passenger's door of the ill-fated lorry indicative that there was such caution. The driver of the ill-fated lorry was not also called to testify to give account of the circumstances under which he carried the deceased person as a passenger.
23. The trial court's finding on liability is captured as follows;

“The deceased was a mere passenger. The driver of the vehicle KAV 121K was under an obligation to drive at reasonable speed and maintain the vehicle on the road. By speeding and veering off the road, he breached that duty and is to blame for the road traffic accident. Both DW1 and DW2 confirmed that the vehicle belonged to the Defendant but stated that the deceased was an unauthorized passenger on the vehicle. They concluded that there was a booklet stating that but none was produced. No photograph of the door with notices was also drawn. I am therefore persuaded on a balance of probabilities that indeed the deceased was a lawful the defendant is 100% liable.”
24. On vicarious liability the Court of Appeal in the case of *Tabitha Nduhi Kinyua v Francis Mutua Mbuvi & another* [2014] eKLR stated as follows:

“The principle of vicarious liability is an anomaly in our law because it imposes strict liability on an employer for the delict of its employee in circumstances in which the employer is not itself at fault. An employer will be held to be vicariously liable if its employee was acting within the course and scope of employment at the time the delict was committed.”
25. It is quite apparent from the observation made by the trial court that it considered all the relevant factors arrived at the correct decision. The driver of the ill-fated lorry was the authorized to drive the said lorry and the actions of the said driver binds the owner on account of vicarious liability.
26. It is quite clear from the evidence tendered by PW 1 that the accident vehicle was driven at high speed which on a balance of probability caused it to veer off the road and hit a tree. The deceased as a passenger had no or little control of how the lorry was driven. By virtue of the doctrine of vicarious liability, the Appellant is liable for torts committed by its employees. This court is satisfied that based on the evidence tendered, the trial court was correct to hold that the Appellant was 100% liable.
27. On quantum, it was stated that the deceased was a businessman involved in livestock trade but there was no evidence tendered to prove his actual earning. The Respondent however stated that he supported him and his old mother. The Respondent alleged that the deceased used to earn an average of Kshs. 50,000.00 but the trial court settled on Kshs. 20,000.00 as a reasonable sum.
28. This court finds that there was no basis for the trial court to settle on a “reasonable sum.” In cases where proof of income is difficult to establish, courts usually make an award based on minimum wage (where a person is stated to have been employed but had no pay slip) or a global sum.



29. In this instance, the deceased was aged fifty (50) years going by the birth certificate filed (though the Respondent’s counsel could have done better by pleading that the deceased was aged fifty (50) years old at the time). The question of age however is not contested here. What is contested is the amount used as multiplier in assessing damages.
30. In *Moses Mairua Muchiri v Cyrus Maina Macharia* (suing as the personal representative of the estate of Mercy Nzula Maina (deceased) [2016] eKLR, the Court stated as follows-
- “It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case.”
31. In *Rishi Hauliers Limited v Josiah Boundi Onyanacha* [2015] eKLR Majanja J held as follows;
- “In the instant case the learned magistrate used the multiplier approach to assess damages. No documentary evidence was produced to support the earnings to show for example that the deceased was earning a pension. The respondent did not provide any basis establishing how much the deceased earned from his income. The amount of Kshs. 50,000/- proposed by the respondent lacked any factual basis as was the sum of Kshs. 3,000/ proposed by the appellant. This is not to say that the deceased never earned any income.....This was a proper case for the court to have awarded a global sum in view of the age of the deceased and the scanty evidence provided by the respondent.”
32. As observed above, the deceased was said to be a livestock trader but there was no proof of income. In such cases given the circumstances it would have been safer to award a global figure for loss of dependency.
33. Comparative decisions on loss of dependency are as follows;
- i. In *Moses Maina Waweru v Esther Wanjiru Githae* (Suing as the personal representative of the Estate of the late David Githae Kiririo Taiti [2022] eKLR, the court set aside an award of Kshs 2,000,000/- awarded as a global figure by the trial court where the deceased was aged 68 years old with an award of Kshs 800,000/-
  - ii. In *Rishi Hauliers Limited v Josiah Boundi Onyanacha* [2015] eKLR the court substituted an award of Kshs 800,000/- awarded under loss of dependency with that of Kshs 500,000/- to a deceased aged 50 years old.
  - iii. *Moses Wetangula & Another v Eunice Titika Rengetiang* [2018] eKLR, where the court adopted a global sum of Kshs. 500, 000/= for a 42-year-old retired officer of the Kenya Defence Forces.
34. Going by the above comparative decided cases, an award of Kshs. 800,000.00 under loss of dependency would have been fair and find that the award made of Kshs. 1,440,000.00 was a bit on the higher side. The award under that head is set aside and an of Kshs. 800,000.00 is given, the other awards remain undisturbed as no issue has been raised in this appeal. In short, this appeal is partly allowed. The award given to the Respondent on loss of dependency is set aside and the award for clarity is now as follows:
- a. Pain and suffering Kshs. 100,000.00



b. Loss of expectation of life Kshs. 100,000.00

c. Loss of dependency Kshs. 800,000.00

d. Special damages Kshs. 280,550.00

Total Kshs. 1,280,000.00

35. I direct that the Respondent does refund the Appellant Kshs. 680,550.00. The Appellant will also have half cost of this appeal.

**DATED, SIGNED AND DELIVERED AT KITUI THIS 7<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**HON. JUSTICE R. LIMO - JUDGE**

