



**Mukhanisi v Barasa & another (Suing as the Legal Representatives
of the Estate of Samwel Owinya Barasa Deceased) (Civil Appeal
E104 of 2022) [2024] KEHC 2581 (KLR) (12 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2581 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E104 OF 2022
PJO OTIENO, J
MARCH 12, 2024**

BETWEEN

KELIFAS ITENYO MUKHANISI APPELLANT

AND

JOHNSTONE OSENDO BARASA 1ST RESPONDENT

HELLEN KHAUMA BARASA 2ND RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF SAMWEL
OWINYA BARASA DECEASED**

*(Being an appeal from the Judgment of Hon. M. A. Onyango (SRM)
in Mumias SPMCC. No. 56 of 2019 delivered on 31st October, 2022)*

JUDGMENT

1. In this appeal, the trial Court is faulted on only two grounds; finding the Appellant to blame and in its approach on assessment of damages on liability. On the first limb of challenges the Court is faulted for holding the Appellant was 100% to blame for the tort of negligence; and for failing to dismiss the suit by failure to properly consider the submissions and evidence by the only eye witness being the Appellant's driver.
2. On the second limb on assessment of damages, the Court is faulted for application of wrong principles in assessment of damages in its choice of multiplicand of Kshs. 13,572/=.
3. The suit giving rise to the Judgment appealed against was instituted by the Respondent. In the Complaint dated 16.5.2019 but filed in Court on the 23.5.2019, the Plaintiff (now Respondent) sought both general and special damages against the Defendant (now Appellant), together with costs of the suit and interest, on the allegation that the Appellant was liable in negligence leading to the injuries suffered



- by the Respondent on 18/12/2018 when there occurred a collision between the Appellant's motor vehicle KBF 360N with a motor cycle the deceased was riding. The Respondent blamed the Appellant for negligence on the basis that the motor vehicle was controlled in a careless manner in that it was permitted to hit the deceased thereby occasioning him fatal injuries.
4. The Plaintiff then gave particulars of negligence, injuries, special damages as well as those of the Dependents pursuant to the statute. Together with the Plaintiff, the Respondent filed witness statements and list of authorities.
 5. The suit was resisted by the Appellant by the statement dated 10.12.2019 whose gist was to deny all and every allegation by the Respondent including, the ownership of the motor vehicle, occurrence of the accident as well as the alleged of damage suffered by the Respondent. The particulars of negligence and the particulars of dependents to the deceased were all denied and strict proof invited.
 6. In the alternative, it was pleaded that if any accident ever occurred as pleaded then the same was out of the reckless, negligent and careless acts by the deceased in the manner he rode the motor cycle. The particulars of such negligence were then set out. Even receipt of the notice of intention to sue was denied and strict proof invited of the Respondent. That pleading was accompanied by witness statement and copies of documents to be used in evidence. At the trial that followed closure of pleadings, the Respondent called evidence from the Respondent and a police officer from Mumias Police Station who produce the OB extract and the police abstract.
 7. The Respondent on her part led evidence by adopting her witness statement as evidence in chief, produced the documents filed, save for the police abstract, by consent and was cross-examined. On being cross-examined, she told the Court that the deceased was a welder and that she did not witness the accident but was informed of the same. She said the motor cycle belonged to the husband who had been riding it for four months prior to the accident but she had not seen his driving licence. She added that the deceased was taken to St. Mary's hospital where he died after one week. She however did not know how much the deceased earned.
 8. For PW2, the police officer, after producing the police abstract, he was put to cross-examination when he told the Court that he was not the Investigating Officer, and could not trace the OB nor confirm if a police file was ever opened. He concluded the cross-examination by stating that he was unable to assign any blame for such was not in the police abstract.
 9. On his part the Appellant called two witnesses; an officer from Mumias Police Station, DW1 and the driver of the motor vehicle on the material day, DW2.
 10. DW1 told the Court that there was indeed an accident on the date and place pleaded for which reason a police file was opened. He relied on the statement by the driver in the file to assert that the accident was occasioned when the motor cyclist who was riding in front of the suit motor vehicle suddenly and without indicating turned to the right to enter a feeder road and was hit by the motor vehicle which was overtaking while loaded with goods. The motor vehicle was later inspected and no dent was noted.
 11. The witness further referred to another statement in the file which said that after the accident, both the motorcycle and the motor vehicle rested on the right hand side of the road but the Investigating Officer blamed the rider and that the driver was not to blame because he was never charged, and that the only eye witness was the driver.
 12. On being cross-examined, the witness told the Court that the statement of the Investigating Officer's statement did not indicate if the driver himself indicated the intention to overtake the cyclist. To him a driver is expected to keep safe distance and must have kept distance that is why he was overtaking. He also told the Court that the parties negotiated and the rider was paid 500/= by the driver to go for



treatment but hastened to add that such is not an adequate compensation to a deceased person. He also said that there was no sketch plan in the file he produced.

13. DW2, the driver gave evidence whose gist was that he had driven for fifteen (15) years and that on the material day there occurred an accident due to the sudden turn by the cyclist from right to left on his way. He said after collision, the cyclist fell down then rose and demanded that he be paid Kshs. 500/= because he had not been injured and the witness obliged. The cyclist then removed the motorcycle from the scene allegedly to avoid the police taking away his motor cycle. The police came to the scene and after three days he was asked to take the motor vehicle for inspection. He blamed the deceased for the accident and confirmed that the deceased died nine days later.
14. On being cross-examined, the witness told the Court that he was riding the matatu with passenger but without a conductor. On being cross-examined further, he confirmed that him and the deceased were on the same lane and he was trying to overtake when the large luggage the rider had touched his side mirror and the cyclist fell down. He said he kept a safe distance and commence to overtake when the road was clear but the rider turned right and the accident occurred. He lastly said in re-examination that there was no point for him to slow down or take any evasive action and that he could do nothing to avoid the accident.
15. After appraisal of the evidence, the trial Court delivered a Judgment by which it held the Appellant wholly liable and assessed damages at Kshs. 100,000/= for pains and suffering, Kshs. 150,000/= for loss of expectation of life, Kshs. 1,954,497.60 for lost dependency and special damages of Kshs. 20,000/= . He equally awarded to the Respondent costs of the suit and interest on damages from the date of Judgment till payment in full.
16. It is that Judgment which has provoked the instant appeal on the grounds summarized at the onset of this Judgment.
17. Both sides have filed written Submissions and the Court has enjoyed the benefit of reading same and expresses gratitude to Counsel.

Issues, Analysis and Determination

18. Upon analysis and re-appraisal of the literature presented before the trial Court and here, two issues arise for determination by the Court. The first is whether the finding on liability was grounded on due and accurate evaluation and analysis of the evidence recorded and; the second is whether there is a justification to interfere with the discretionary jurisdiction in assessment of damages.
19. On liability, it is not in debate that the Appellant's driver, DW2 was the only eye witness ever called to testify. In his evidence he told the Court that he was driving behind the cyclist who was carrying a large load, he ascertained the road clear before he embarked on the journey to overtake and that it was in his course of overtaking that his side mirror, pushed the cyclist's luggage making him lose control and fall off the road. In his statement recorded with the police on the material day, however, he maintained that he hit the luggage on the motorcycle as the cyclist attempted to turn to the right onto a feeder road. After the collision, the rider fell on the tarmac.
20. Upon analysis of the evidence, the court finds that if it was indeed true that the cyclist was turning from left to right across the path of the motorist, then it was impossible to be hit by the side mirror. To that extent, and when the two version are not reconcilable on how the accident occurred, the Court finds the evidence of the driver not credible.
21. Another matter of note is that while in the witness statement filed at trial, page 21 of the record of appeal, the witness says that he hooted before beginning to overtake yet he did not mention such in



the statement to the police and on being cross-examined, he told the Court that the only action he took was to report matter to the police. He took no evasive action to avoid hitting the cyclist. On re-examination he was even more explicit. He said: -

“The point of impact on my motor vehicle was on the left side. There was no reason for me to slow down and could not do anything to avoid the accident.”

22. The Court’s analysis and appreciation of the accident is that the cyclist was hit from the rear on the luggage he was carrying. Before hitting the cyclist, the motorist took no avoiding action. He never slowed down, braked nor swerved to avoid the collision. He was driving at a speed of about 70 KPH. From his own evidence, the accident occurred at river-crossing or at Kholera Centre. If he was crossing the bridge he was not expected to overtake and if it was at Kholera Centre he was not expected to do more than 50 KPH. More important, if he had seen the cyclist ahead of him and carrying a luggage that clearly blurred his rear view vision, he was expected to keep a keener and more heightened outlook. That he failed to do. He was to blame for such failure.
23. In a civil matter like this, if the evidence proves that the Defendant was more to blame, a prima facie case is established. When prima facie case is established, the Claimant is entitled to a Judgment. That was the determination of the trial Court which I affirm and see no reason to interfere with. The appeal against finding on liability lacks merit and is therefore dismissed.
24. On assessment of damages, which is a discretionary mandate of the trial Court, the Appellant faults the trial Court for adopting wrong principles and singles out the choice of a multiplicand of Kshs. 13,572. That challenge, arising from the Submissions filed, only attack the general damages for loss of dependency. There is no challenge to the sums awarded for pains and suffering as well as loss of expectation of life. Those remain intact.
25. As a factor for calculation of damages for lost dependency, the Court goes for what was proved as the monthly earnings. However, where there is no evidence on actual earning but there is a proof of engagement in gainful activities, it is permissible to adopt the minimum wage guidelines¹.
26. In adopting the figure now challenged, the Court did apply the minimum wage for a laborer. While the right thing was to adopt the minimum wage, the guidelines divide the County into three; Nairobi, Mombasa and Kisumu; all former Municipalities and town Councils of Mavoko, Ruiru and Lamu; then all other areas.
27. The accident occurred within the territory of Kakamega County but outside the former municipalities. By the reigning regulations, the minimum wage for a general laborer was thus Kshs. 7,240.95. That is the sum applicable and therefore, when the Court applied a sum set for Nairobi, the Court erred.
28. For that error, the award on loss of dependency is set aside to enable the proper multiplicand be applied. The sum thus works out as follows: -
$$7,240.95 \times 18 \times 12 \times \frac{2}{3} = 1,042,696.80$$
29. To that extent only is the appeal allowed. The sum was due under the Judgment is thus;
Pains and suffering 100,000.00
Loss of expectation of life 150,000.00
Loss of dependency 1,042,696.80

¹ Isaac Kimani Kanyingi v Hellena Wanjiru Rukanga [2020] eKLR



Special damages 20,000.00

T O T A L 1,312,696.80

The Appellant shall pay that sum with interests and costs of the Appeal.

30. For special damages, the Respondent gets interest at Court rates calculated from the date of the Plaint while for general damages the interest shall accrue from the date of the Judgment.
31. The costs of the appeal shall go to the Appellant while the costs at trial shall remain to the Respondent. The costs of this appeal are assessed at Kshs. 70,000.00.
32. And the trial Court needs to be commended for its due application of section 4 of the *Fatal Accidents Act* by sharing out the damages among the dependants. Every trial Court has no option but to so comply. Now that the apportionment by the trial Court has been disturbed, the Court now proceeding by way of rehearing apportions the damages as follows: -

Of the sum of 1,312,696.80

Costs to Counsel over and above

party and party costs at trial Kshs. 150,000.00

Costs of the Appeal Kshs. 70,000.00

Hellen Khauma Barasa Kshs. 292,696.80

Alex Juma Owinya Kshs. 200,000.00

Sharon Barasa Owinya Kshs. 200,000.00

Kevin Aringo Barasa Kshs. 200,000.00

Linnet Onyango Owinya Kshs. 200,000.00

Joseph Juma Owinya Kshs. 200,000.00

33. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA, THIS 12TH DAY OF MARCH, 2024.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Ms. Werunga for the Appellant

No appearance for the Respondent

Court Assistant: Polycap Mukabwa

