



Munyamai & another v Representatives Of Joseph Okoth Aloo (Deceased) (Civil Appeal E528 of 2021) [2024] KEHC 2638 (KLR) (Civ) (12 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2638 (KLR)

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

CIVIL

CIVIL APPEAL E528 OF 2021

DAS MAJANJA, J

MARCH 12, 2024

BETWEEN

EVAN MAINGI MUNYAMAI 1ST APPELLANT

KAMILU PACKERS LIMITED 2ND APPELLANT

AND

REPRESENTATIVES OF JOSEPH OKOTH ALOO (DECEASED). RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. L. Gicheha, CM dated 30th July 2021 at the Nairobi Magistrates Court, Milimani in CMCC No. 2526 of 2019)

JUDGMENT

1. The Appellants appeal against the judgment of the Subordinate Court dated 30.07.2021 finding them fully liable for the accident that took place on 25.08.2018. According to the Respondents the Deceased was riding his motorcycle when he was hit by the 2nd Appellant's motor vehicle Isuzu lorry registration number KCJ 468X being driven by the 1st appellant.
2. The trial court awarded the Respondents Kshs. 1,123,904.00 as damages for loss of dependency under the *Fatal Accidents Act* (Chapter 32 of the Laws of Kenya), Kshs. 100,000.00 loss of expectation of life and Kshs. 20,000.00 as damages for pain and suffering together with special damages amounting to Kshs. 1660.00 making the total award Kshs. 1,145,504.00.
3. In the memorandum of appeal dated 25.08.2021, the Appellants are dissatisfied with the finding of the trial court that the 1st Appellant was negligent and liable for causing the accident. That in finding the Appellants liable, the court proceeded on wrong principles and took into account irrelevant factors and failed to take into account relevant factors. They complain that the court relied on an extract of an Occurrence Book (OB) which was not properly produced. The Appellants also challenged the award



- of damages on the ground that the trial court proceeded on wrong principles and failed to take into account relevant factors in assessing and awarding damages.
4. Determination of liability is a matter of fact. In resolving this appeal therefore, the court is guided by the principle that it is the duty of the first appellate court to re-evaluate the evidence independently and reach its own conclusion as to whether to uphold the judgment. In doing so, the court must make an allowance for the fact that it neither heard nor saw the witnesses testify (see *Selle v Associated Motor Boat Co. Ltd* [1968] EA 123).
 5. At the hearing of the suit, Beatrice Ochola (PW 1) adopted her witness statement where she told the court that the Deceased was riding his motor vehicle when he was hit by the 1st Appellant driving the 2nd Appellant's lorry. She produced the police abstract and an extract of the occurrence book in evidence.
 6. The 1st Appellant (DW 1) also adopted his witness statement. He stated that he was driving the lorry from Kampala Road towards Lusaka Road at a speed of about 30kph keeping on the nearside. On reaching the roundabout, there was another Pickup vehicle on its right side when suddenly a motorcycle proceeded between both motor vehicles. He explained that the motorcycle came into contact with the Pickup whereupon the motor cyclist lost his grip and fell onto the tarmac stretching his head onto the side of the lorry which overran his head by the near offside wheel.
 7. The trial magistrate relied on the OB report to hold that the 1st Appellant was fully liable for the accident. The Appellants contest this finding. I agree with the Appellants that the Occurrence Book and the contents therein were inadmissible hearsay evidence to prove the truth of the contents (see *Cheserem v HZ and Company Limited* [1982] KLR 24 and *Techarad Steam and Power Limited v Mutio Muli & Mutua Ngao* [2019] eKLR). The OB is only evidence that the accident involving the vehicles and the persons named took place. Any statements of culpability by the author of the report amount to opinion evidence and are inadmissible to prove the truth of the facts therein.
 8. The only evidence of how the accident took place is the testimony of PW 1 and DW 1. It is apparent from the record that PW 1 was not present when the accident took place. Apart from her statement of the incident being threadbare, it does not explain how the accident took place and how the 1st Appellant was to blame. On the other hand, DW 1's testimony of how the accident took place shows that the Deceased drove in between the two vehicles and was hit by the Pick Up whereupon he fell on his side on the path of the 1st Appellant. Based on the evidence, I hold that the Respondent did not prove that the Appellants were negligent in the circumstances. I therefore allow the appeal to that extent.
 9. Turning to damages under the *Fatal Accidents Act*, it was not disputed that at the time of his death the Deceased was 52 years old. He was working as a mechanic but there was no evidence of his earnings. The court accepted a multiplicand of Kshs. 17,561.00 based on the *Regulation of Wages (General) Amendment Order, 2018* as proposed by the Appellants. It also accepted the multiplier of 8 years proposed by the Appellants. The point of departure is the 2/3 dependency ratio which the trial court applied on the ground that the Deceased supported his wife and children.
 10. The Deceased was survived by his widow and three sons. One son was aged 18 years while the other two were aged 14 and 7 years old respectively. The Appellants' position was that the multiplier ought to take into account that the Respondents would receive a lump sum which would be invested and that the one of the children would soon become an adult and the two adult children would be duty bound to take care of their mother.
 11. The determination of the dependency ratio is a question of fact. In this case, the Deceased left a widow and two children wholly dependent on him. I do not find any error in the determination of



the dependency ratio bearing in mind that this court should not intervene in award of damages by the Subordinate Court merely because it would have come to a different conclusion. I therefore uphold the award under the *Fatal Accidents Act*. I do not find any dispute as to the other amounts awarded under the *Law Reform Act* and the special damages.

12. I allow the appeal and order as follows:

- a. The judgment and decree of the Subordinate Court is set aside and substituted with judgment dismissing the suit with costs to the Appellants.
- b. The Appellants are awarded costs of this appeal assessed at Kshs. 30,000.00.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MARCH 2024.

D. S. MAJANJA

JUDGE

Mr Kamau instructed by A. B. Shah Advocate for the Appellants.

Mr Otinga instructed by S. N. Otinga and Company Advocates for the Respondent.

