



**Jotis EA Limited v Mukunya & another (Civil Appeal 14 of 2018)
[2024] KEHC 3785 (KLR) (4 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3785 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CIVIL APPEAL 14 OF 2018**

**J WAKIAGA, J
APRIL 4, 2024**

BETWEEN

JOTIS EA LIMITED APPELLANT

AND

JAMES NJUGUNA MUKUNYA & ANOTHER RESPONDENT

*(An Appeal from the Judgement of Hon. W.M. Kinyanjui SRM KANDARA
delivered on 22nd March 2018 in Kandara CMCC No 191 of 2015)*

JUDGMENT

1. By a plaint dated 10th September 2015, the Respondent sued the Appellant for special and general damages arising out of a road traffic accident on 11th January 2015 involving the deceased and motor vehicle registration number KQB 323 T owned by the Appellant along Kandara road at Kahaini. It was contended that the said accident and subsequent loss was caused by the negligence on the part of the Appellant's Driver.
2. The Appellant by a statement of defence thereon dated 23rd December 2015 denied the occurrence of the accident and damages arising therefrom and, in the alternative, attributed the said accident to the negligent on the part of the Respondent.
3. By a Judgement thereon dated 22nd March 2018, the trial Court found the Appellant liable at 100% and entered Judgment on quantum, for loss of dependency at $15,000 \times 12 \times 14 \times 2/3 = 1,680,000$, loss of expectation of life, Kshs.100,000 and pain and suffering Kshs.50,000.
4. Being dissatisfied by the said Judgement, the Appellant filed this Appeal and raised the following grounds of Appeal:
 - a. The Court erred in finding the Appellant liable at 100% in disregard of the evidence tendered.



- b. The Court erred in failing to consider the evidence, witnesses' testimony and the submissions by the Appellant.
- c. The Court failed to apply the well settled principle that whenever the Court is in doubt liability ought to be apportioned at 50:50 between the parties.
- d. The award in general damages was manifestly excessive.

Submissions

5. Directions were given on the disposal of the Appeal by way of written submissions. On behalf of the Appellant, it was submitted that the burden of proof of negligence was on the Respondent as was stated in the case of *Jamal Ramadhan Yusuf & Another v Ruth Achieng Onditi & Another* [2010] eKLR. It was contended that the Respondent did not produce any eye witness and that the police officer testified that he could not tell who caused the accident. It was submitted that the evidence on record pointed to the negligence on the part of the deceased. It was submitted that the Appellant's witnesses gave consistent evidence on how the accident occurred.
6. It was submitted that the award on pain and suffering was excessive considering that the deceased died on the same day as was stated in the case of *Wangari v Nkaru* [2004] eKLR and *Antony Kamau Kungu v Leah Wanjiku Macharia* [2020] eKLR where an award of Kshs.10,000 was given.
7. On the award under the Fatal Accident Act, it was submitted that no evidence was tendered in support of the income from the deceased alleged business and further loss of dependency was not proved and therefore the Court should have adopted a global award principle as was stated in *Michael Rimiri Mingetha v Zipporah Mukomua Mituri* [2020] eKLR and that an award of Kshs.400,000, taking into account the age of the deceased, would be appropriate in support of which *Mrarama Mnthieri v Luke Kiumbe Murithi* was tendered where an award of Kshs.500,000 was given for a 30 year old deceased.
8. On loss of expectation of life, Kshs.60,000 was proposed and on the multiplicand, it was submitted that there was no justification for the adoption of Kshs.15,000.
9. On behalf of the Respondent, it was submitted that the honourable Court was justified in her approach based on the cases of *Albert Odawa v Gichumu Githenji* [2007] eKLR and *Beatrice Wangui Tuhiru v Hon Ezekiel Bargatuny & Another*. On multiplicand it was submitted that the deceased was a business man and that the Court adopted a correct multiplicand as was held in the case of *Mosonik & Another v Cheruiyot* [2022] KEHC 11823 where Kshs.12,000 was adopted where there was no proof of earning and that the age of the deceased was not contested and so the multiplier used by the trial Court of 14 years was sufficient, in support of which the cases of: *Midland Media Limited & Another v Pauline Naukot Aule* [2020] eKLR where the Court said that it was not un common for business people to work up to the age of 80 depending on the business venture and *Crown Bus Services Ltd & Another v Jamila Nyongesa* [2020] eKLR where a multiplier of 35 year was adopted.
10. On the dependency ratio it was submitted that the deceased left a minor and a teenager who were fully dependent upon him and that should the Court find in favour of the global figure award, then a sum of Kshs. 2,000,000 would be appropriate on the authority of *Ainu Shamsi Haulers Limited v Moses Sakwa & Another* [2020] eKLR.
11. On pain and suffering, it was submitted that the award by the Court was sufficient and that the Court used correct principles supported by the case of *Joseph Kavitu wambua v SMM & Another* [20321] eKLR where Kshs.120,000 was upheld on Appeal.



12. On loss of expectation of life, it was contended that the award by the trial Court was fair and in support thereof the case of *West Kenya Sugar & Co Ltd v Philip Sumba Julaya & Another* Kakamega High Court Civil Appeal No 7 of 2017 where the Court confirmed an award of Kshs. 100,000.

Analysis and Determination

13. This being a first Appeal, the Court is under a duty to re-evaluate the proceedings before the lower Court and to come to its own conclusion thereon. PW1 Elizabeth Wanjiku testified that the deceased who was her mother was hit by a motor vehicle and died while undergoing treatment at the age of 51 years. She was a business woman with three children aged 31, 25 and 16 years respectively at the time of trial and that she was supporting two of them from her earnings. In cross examination she stated that she used to work in Mombasa.
14. PW2 SGT Stephen Masaku produced the police abstract and testified that he was not at the scene. It was his evidence that the case was pending under investigations they could not determine who was to blame for the accident. PW3 Simon Ndichu stated that he blamed the driver of the motor vehicle for the accident based on his witness statement, which is missing from the record of Appeal. In cross examination, he stated that the deceased had crossed the road and the motor vehicle hit her on the right side.
15. DW1 Joseph Thiongo Chege stated that he was driving from Kandara to Thika, when the deceased suddenly jumped onto the road and was hit, PW3 who was with her tried to escape from the scene. In cross examination, he stated that there was a slight bend on the road and that the deceased crossed from the left and that he was driving at a speed of 70 Km/h. DW2 Naftali Gichuki Kingori corroborated PW1, that the deceased crossed the road and was hit by the motor vehicle which threw her to the right. He stated that the accident occurred between 8-9 pm and that the point of impact was the front right bumper.
16. In finding the Appellant liable at 100% the Court had this to say, "I have no doubt from the evidence in finding that indeed the Plaintiff was crossing the road at the material time. DW2 said that the impact was on the right side of the front bumper and DW1 confirmed that the Plaintiff was thrown to the right. This shows that indeed she had not just entered the road but was actually at the centre of it. The Defendant clearly had not seen her in time and therefore knocked her. If indeed she had just jumped on the left side of the road she would have not been thrown to the right nor would the impact have been on the right front bumper. I am convinced the driver was speeding and being at night was not able to spot the deceased in time."
17. In determining the issue of liability, the question for this Court to decide is whether the trial Courts finding was based on the evidence tendered? There is no evidence that the deceased had crossed to the middle of the road. PW2 stated that the motor vehicle crossed onto their side, while the defence evidence was that she studently crossed onto the road, thereby no eliminating the possibility of her being knocked on the right side of the bumper.
18. It is clear that the trial Court's finding on liability was not supported by the evidence on record and that the same went on speculation which made her finding erroneous and subject to being upset by this Court on Appeal. Being at night, the deceased was expected to exercise some care and caution and must therefore have contributed to the accident herein. Having re-evaluated the evidence tendered I would allow the Appeal on liability and substitute the trial Court find thereon with a finding of 30:70% in favour of the Respondent.



19. On quantum, the principles upon which the Court will interfere with a finding of the trial Court thereon are well settled as stated in the case of Bashir Ahamed Butt v Uwais Ahamed Khan (1982-88) KAR and applying the said principles, it is clear that the trial Court applied the correct principles in arriving at the award herein and therefore will not interfere with the same on the ground that had this Court being the trial Court it might have arrived at a different award.
20. There is evidence that the deceased was in same form of business with which she supported her children and the trial Court cannot be faulted in finding for the Respondent.
21. I will therefore allow the Appeal on liability but dismiss the Appeal on quantum, which I hereby affirm.
22. In the final analysis I make the following finding:
- a. Liability 30% : 70%
 - b. Loss of dependency Kshs.1,680,000
 - c. Loss of expectation of life..... Kshs.100,000
 - d. Pain and suffering.....Kshs.50,000
 - e. Special damages.....Kshs.34,000
- Total Kshs.1,864,000
Less 30% Kshs.559,200
Grand total..... .Kshs.1,304,800
23. Having partially succeeded the Appellant shall be entitled to half cost of the Appeal.

DATED, SIGNED AND DELIVERED AT MURANGA THIS 4TH DAY OF APRIL 2024

J. WAKIAGA

JUDGE

In the presence of:

Ms Rigathe for the Appellant

Ms. Ooko for Shem Kabongo for the Respondent

Jackline – Court Assistant

