



Otieno & another v Mukanda & another (Suing as Legal Representatives of the Estate of Francis Ikeepu - Deceased) (Civil Appeal E013 & E016 of 2022 (Consolidated)) [2024] KEHC 5138 (KLR) (16 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5138 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL APPEAL E013 & E016 OF 2022 (CONSOLIDATED)**

WM MUSYOKA, J

MAY 16, 2024

BETWEEN

HASTINGS OWINO OTIENO 1ST APPELLANT

BEN OMOLO T/A BREENLINE SERVICES 2ND APPELLANT

AND

DEOGRACIOUS EGESA MUKANDA 1ST RESPONDENT

NOCENCIA AKUKU MUKANDA 2ND RESPONDENT

**SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF FRANCIS IKEEPU
- DECEASED**

(Appeal from judgment and decree of Hon. PY Kulecho, Senior Resident Magistrate, SRM, in Busia RMCCC No. 107 of 2020, delivered on 6th April 2022)

JUDGMENT

1. The appellants had been sued by the respondents, at the primary court, for compensation arising out of the death of the deceased, following a road traffic accident on 25th June 2017, along Busia-Kisumu road. The deceased was riding a motorcycle, and was knocked down by motor vehicle registration mark and number KCE 645L, said to have belonged to or operated by the appellants, and liability was attributed on the appellants on account of negligence. The appellants filed a defence, denying the accident, and everything else pleaded in the plaint. In the alternative, the appellants pleaded that, if any accident occurred, it must have been due to negligence on the part of the deceased, or he contributed to it, or it was beyond their control.
2. A trial was conducted. 3 witnesses testified for the respondents, and 2 for the appellants. The trial court pronounced itself, in a judgement that it delivered on 6th April 2022. Liability was apportioned



- at 50:50. On quantum, the court awarded a total of Kshs. 2,548, 466.00; broken down into Kshs. 148,000.00 special damages, Kshs. 100,000.00 loss of expectation of life, Kshs. 20,000.00 pain and suffering and Kshs. 2,280,096.00 for loss of dependency. With 50% contribution, the figure reduced to Kshs. 1,274,233.00.
3. Both sides were aggrieved by that judgement and brought the 2 appeals herein, which have been consolidated. The first appeal in time was Busia HCCA No. E013 of 2022, which was filed by the defendants in the primary suit, while the second, Busia HCCA No. E016 of 2022, was by the plaintiffs in the case at the primary court. The 2 appeals were consolidated, by an order made in Busia HCCA No. E013 of 2022, which made Busia HCCA No. E013 of 2022 the lead file. The issues raised in both appeals revolve around liability, failure to dismiss the primary suit in view of the evidence adduced, failing to consider the submissions by the appellants, using the wrong principles in assessing damages, erringly adopting a multiplier of 42, and erringly adopting a multiplicand of 13,572.00.
 4. On 26th February 2023, directions were given, for canvassing of the appeal by way of written submissions. Both parties filed written submissions.
 5. On liability, the appellants submitted that the burden of proof was on the respondents, by virtue of section 107 of the *Evidence Act*, Cap 80, Laws of Kenya, to establish negligence. It is submitted that the evidence tendered by the eyewitness called by the respondents pointed to the motor vehicle hitting the motorcycle from the rear, while that by the defence witnesses presented a contrary view, the motor cycle hitting the motor vehicle from the rear. It is argued that the defence availed documented evidence, and that the trial court, therefore, erred in holding that both sides were equally negligent. On the multiplier, it is argued that 42 was too high. The retirement age in Kenya is 60 years, and a multiplier of 20 should have been adopted, based on *Ireru Moses vs. Peter Murugi Mutugi Muthike* (suing as the legal administrator of estate of the late Mary Njeri Muthike (Deceased) [2019] eKLR (Janet Mulwa, J)). On the multiplicand, it is submitted that the trial court should have adopted 7,240.95, instead of 13,572.00, based on Regulation of Wages (General) (Amendment) Order, 2015, and considering that the deceased was working within Busia County.
 6. On their part, on liability, the respondents submit that their eyewitness provided primary evidence, while the witnesses by the appellants provided secondary evidence. *Bwire vs. Wayo & Sailoki* [2022] KEHC 7 (KLR)(Mativo, J) is cited. It is submitted that the driver of the accident motor vehicle himself testified that he did not know how the accident happened. It is submitted that the testimony of the eyewitness contradicted the contents of the inspection report that the trial court relied on, and being opinion evidence the same could not override eyewitness evidence. *Bernard Philip Mutiso vs. Tabitha Mutiso* [2022] eKLR (Odunga, J) is cited. On the multiplier, it is submitted that the deceased was aged 23, and the figure adopted aligned with his age. In *Re Estate of John Paul Lubalo Were* (Deceased) [2010] eKLR (Ojwang, J) and *Crown Bus Ltd & 2 others vs. Jamila Nyongesa and Amida Nyongesa* (Legal Representatives of Alvin Nanjala (Deceased) [2020] eKLR (Muriithi, J) are cited. On the multiplicand, it is submitted that where the income of the deceased cannot be ascertained, the court should adopt the applicable minimum wage promulgated by the government. Section 3 of the Insurance (Motor Vehicle Third Party Risks) Act, Cp 405, Laws of Kenya and *Joseph Gatone Karanja vs. John Okumu Soita & Esther Chepkorir* (Suing as admin of the estate of Benard Soita Nyongesa (DCD) [2022] eKLR (Ogola, J) are cited. It is submitted that the deceased herein died in October 2017, and the prevailing wage regulations then was Legal Notice No. 112 of 2017. It is argued that the courts have treated boda boda riders as equivalent to mechanics, laundry operators and light tractor drivers, and *Petronila Muli vs. Richard Muindi Savi & Catherine Mwendu Mwindu* [2021] eKLR (Limo, J) and *Joseph Gatone Karanja vs. John Okumu Soita & Esther Chepkorir* (Suing as admin of the estate of Benard Soita Nyongesa (DCD) [2022] eKLR (Ogola, J) are cited in support. It is argued that under



the 2017 regulations, the applicable amount was 15,646, and the court made an error in adopting the figure used in the judgement.

7. The appeal essentially turns on liability, and on the multiplier and multiplicand adopted.
8. On liability, I note that 2 individuals, who should have been eyewitnesses, testified. PW2, David Wabwire Oduor, claimed to have been on the same road with the deceased and the accident motor vehicle. He was pushing his bicycle along that road, when he saw the motor vehicle hit the motor cycle and its rider, some 100 metres away. He stated that it was early morning, at 5.00 AM, and it was still dark. The deceased was said to be off the road, when he was hit from behind. He died on the spot. The driver of the alleged killer vehicle, testified as DW2, the 1st appellant herein, he was not even aware that his vehicle had been involved in an accident. His manager called to inform him of the same. When he went to the police station at Busia, he was told that the deceased rammed into the bus from behind.
9. In addition to the testimonies of those 2 primary witnesses were the 2 police officers called by both sides. PW3, No. 84165 PC Moses Ewoi, of the Busia police traffic section, was the author of the police abstract placed on record. He did not investigate the accident, and could not tell the circumstances under which it occurred. DW1, No. 48360 PC Zedekiah Mboni, was also from the Busia police station traffic section. He did not investigate the accident, but he presented an investigation file prepared by the officer who investigated the incident, on directions from the office of the Director of Public Prosecutions. According to those investigations, the deceased was riding behind the motor vehicle, and he hit its rear side. The bus rear bumper and lamp got scratched on impact. The investigating officer recommended an inquest, one was conducted, the finding was that the deceased had hit the motor vehicle from behind, no charges were proposed against the driver, and the inquest file was closed. DW1 produced what was described as a covering report, which was unsigned, and which bore no name of the author. He said that police sources quoted a person, whose statement was not taken, who alleged that it was the deceased who hit the motor vehicle. He stated that there was no independent witness testimony as to why the police blamed the deceased. The inquest proceedings were not produced at the trial, and it was said that the sketch drawing of the scene was in the inquest file.
10. So, who was to blame? The trial court took the view that the circumstances of the accident were uncertain, from the testimonies of the witnesses presented by both sides. It was noted that PW2, who was allegedly at the scene, claimed that the motor vehicle had hit the deceased from behind, yet an inspection of the accident vehicle, on the same day indicated marks at the rear of the vehicle from where the collision happened. PW2 had also testified that the deceased was hit while off the road, yet he did not state that the motor vehicle had swerved off the road or veered from its path. When the accident happened it was still dark, and PW2 said he was 100 metres away. A report was presented by the police, which suggested that the motor vehicle was hit from the rear, but the same was found to be inauthentic, as it was not signed. The court, though, appeared to find the inspection report credible.
11. What do I make of it? I would agree with the trial court, the evidence placed before the court was not clear on how the collision happened. There was no doubt, though, that a collision happened between the 2 vehicles. The uncertainty was on how it happened. The deceased died, so he was not available to speak for himself. The driver of the other vehicle said he was not even aware of the accident, even though his vehicle suffered some damage, if the inspection report were to be believed. A report on the damage wrought on the motor cycle would have helped, and so would have the inquest file. But none of them were availed, and the trial court had to deal with the “ambiguous” material before it. Given that scenario, the trial court was right in holding that liability be assessed at 50:50, based on the principle that where there is evidence of a clash or collision, but it is unclear on who was to blame, both sides have to take equal blame. See *Lakhamshi vs. Attorney General* [1971] EA 118 (Spry VP, Lutta & Mustafa, JJA), *Hussein Omar Farah vs. Lento Agencies* [2006] eKLR (Omolo, Tunoi & Githinji, JJA), *Domitila*



- Wangui Karugu & another vs. Dagu Hidris Haide [2020] eKLR (Majanja, J), Amani Kazungu Karema vs. Jackmash Auto Ltd & another [2021] eKLR (Nyakundi, J) and Ndatho vs. Chebet [2022] KEHC 346 (KLR)(Gitari, J).
12. On the multiplier, the contention is that it was too high for a 23-year-old. It is about the length of time that the deceased would have continued working had he not died at the accident. What usually comes to consideration would be the actual age of the deceased, considered against the average mortality age in the country and the age of retirement for the sort of engagement the deceased was in. The so-called vagaries and vicissitudes of life are brought to bear on these. The retirement age in Kenya is 60 years. The average mortality age varies from time to time. The court works out the multiplier from a consideration of those factors.
 13. In *Ngotho Gachanja & another vs. Mary Wangui Wanyoike* (suing as the legal representative of the estate of Gerald Ithagu) [2020] eKLR (Ng'etich, J), the court applied a multiplier of 28 for a 22-year-old deceased person. 30 was adopted as the multiplier, where the deceased died at 21 years, in *Muthike Muciimi Nyaga* (Suing as Administrator of the Estate of James Githinji Muthike (Deceased)) vs. *Dubai Superhardware* [2021] eKLR (Janet Mulwa, J). In *Petronila Muli vs. Richard Muindi Savi & Catherine Mwende Mwindu* [2021] eKLR (Limo, J), the court adopted 20 years for a 19-year-old. 27 years was adopted, in *Retco East Africa Limited vs. Josephine Kwamboka Nyachaki & another* [2021] eKLR (Maina, J), for a 23 year-old. In *Mosonik & another vs. Cheruiyot* (Suing as the Legal Administrator of the Estate of Stanley Kipchumba Kemboi, Deceased) [2022] KEHC 11823 (KLR) (Sewe, J), a multiplier of 37 was adopted for a deceased person aged 23, while *Mutinda (Deceased) vs. Maraga t/ a Mwamasaburi Hydrotech Services & another* [2023] KEHC (Janet Mulwa, J) adopted a multiplier of 30, for a 28 year-old.
 14. The decisions reviewed above reveal a very wide variation on multiplier adopted for persons who die in their 20s. They range from 20 for a 19-year-old to 37 for a 23-year-old. It would appear that the multiplier adopted by the trial court is closer to that used in *Mosonik & another vs. Cheruiyot* (Suing as the Legal Administrator of the Estate of Stanley Kipchumba Kemboi, Deceased) [2022] KEHC 11823 (KLR) (Sewe, J). With respect, it appears to be on the higher side. For a 23 year old, the multiplier ought not go beyond 30 years. I doubt, from the above review, whether there is a uniform way of arriving at a proper multiplier. I doubt that the multiplier approach does justice, in the end, given these very wide variations. It might, perhaps be wiser to adopt the global award or lumpsum approach, as suggested in *Mwanzia Ngalali Mutua vs. Kenya Bus Services (Msa) Ltd* (Ringera, J), cited in *Albert Odawa vs. Gichimu Gichenji* [2007] eKLR (Koome, J), where it becomes too cumbersome to work out the income of a deceased person.
 15. The multiplicand takes into account the income that the deceased was earning. It is usually easy to work it out where there is documented evidence of income. Where there are no records, courts adopt other methods of working out the figure. The common approach is to resort to the government regulations on the minimum wage. See *Petronila Muli vs. Richard Muindi Savi & Catherine Mwende Mwindu* [2021] eKLR (Limo, J). However, these regulations sometimes are not very helpful, where the deceased person does not fall in any of the categories listed. In this case, the deceased was said to be in the boda boda taxi business. The trial court adopted a minimum wage of Kshs. 13,572.00, for a multiplicand, but no basis was laid, as the relevant regulations relied upon were not cited. One side proposes reliance on the 2015 regulations, while the other seeks reliance on the 2017 regulations. I wish to reiterate the position taken in *Mwanzia Ngalali Mutua vs. Kenya Bus Services (Msa) Ltd* (Ringera, J, cited in *Albert Odawa vs. Gichimu Gichenji* [2007] eKLR (Koome, J), that where the income of a deceased person cannot be determined with certainty, it may be more useful to adopt the global award or lumpsum approach, rather than wallow in the sea of speculation and conjecture. See also *John Kipkemboi &*



- another vs. Morris Kedolo [2019] eKLR (Musyoka, J), Ngila & another vs. Musili & another (Suing as Legal Representative of the Estate of the late Isika Musili) [2022] KEHC 12991 (KLR) (Limo, J) and Aleah Stores Limited & another vs Nthambi (sued as the legal representative/administrator of the estate of Benson Muchangi Njue-Dcd) [2022] KEHC 511 (KLR) Njuguna, J).
16. How have the courts handled a multiplicand for a boda boda operator? In Nicholas Nyagwenchi Miyogo Joseph vs. James Nyakundi Nyamari & 2 others [2019] eKLR (Ougo, J), although the minimum wage regulations were cited, the court chose to go with a proposed minimum income of Kshs. 10,000.00 per month, which was not based on the regulations. In Muriuki Ruth vs. Mueni Mbaluku & another [2020] eKLR (Ong'udi, J), in the absence of proof that the deceased was in the boda boda business, the court opted for the minimum wage regulations approach. In Joseph Gatone Karanja vs. John Okumu Soita & Esther Chepkorir (Suing as admin of the estate of Benard Soita Nyongesa (DCD) [2022] eKLR (Ogola, J), the court equated boda boda operators with mechanics and laundry operators, and settled on a multiplicand of 10,000.00. In other cases, the courts prefer the less cumbersome approach, the lumpsum or global figure measure of damages. In Aleah Stores Limited & another vs. Nthambi (sued as the legal representative/administrator of the estate of Benson Muchangi Njue-Dcd) [2022] KEHC 511 (KLR) (Njuguna, J), the court, following Ann Kanja Kithinji (suing as the legal representative of the estate of Patrick Koome (Deceased) & 2 others vs. Jacob Kirari & another [2018] eKLR, made a global award of Kshs. 1,000,000.00 in respect of a boda boda rider.
 17. I am persuaded that it would have been more realistic to adopt the global award approach in this case, given the uncertainties around the income that the deceased was making from his alleged activities. A global award of about Kshs. 1,000,000.00 should have been considered.
 18. Overall, I shall determine the appeal herein in the following terms:
 - a. That the appeal against liability is dismissed;
 - b. That the appeal against the adopted multiplier and multiplicand is allowed, the award of Kshs. 2,280,096.00, based on the adopted multiplier and multiplicand approach is hereby set aside, and I substitute it with a global figure or lumpsum of Kshs. 1,500,000.00;
 - c. That the other awards were not appealed against, and stand as made by the trial court; and
 - d. That the final total figure works out as Kshs. 1,768,370.00, less 50%, making Kshs. 884,185.00.
 19. The appeal is disposed of on those terms. Each party shall bear their own costs.

DELIVERED BY EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA THIS 16TH DAY OF MAY 2024

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Appearances

Ms. Wesonga, instructed by Kimondo Gachoka & Company, Advocates for the appellants

Mr. Omondi, instructed by Omondi & Company, Advocates for the respondents.

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