



Transport & Lifting Services Limited v Mbaja & another (Suing as the legal representatives of the Estate of Barack Mbaja Dawa). (Civil Appeal E104 of 2023) [2024] KEHC 7554 (KLR) (19 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7554 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E104 OF 2023
RE ABURILI, J
JUNE 19, 2024**

BETWEEN

TRANSPORT & LIFTING SERVICES LIMITED APPELLANT

AND

SCOVIA ATIENO MBAJA & DISMAS DAWA DAWA (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF BARACK MBAJA DAWA). RESPONDENT

(An appeal arising out of the Judgment & Decree of the Honourable E.A. Obina in the Chief Magistrate's Court at Kisumu delivered on the 8th June 2023 in Kisumu CMCC No. E074 of 2021)

JUDGMENT

Introduction

1. The respondents Scovia Atieno mbaja and Dismas Dawa Dawa sued the appellant Company Transport & Lifting Services Limited vide a plaint dated 3.3.2020 for general and special damages under the [Fatal Accidents Act](#) and the [Law Reform Act](#) following a road traffic accident that occurred on or about the 21st February 2021 when the deceased Barack Mbaja Dawa who was a lawful rider of motor cycle registration number KMDZ 055Q along Kisumu – Busia road at Otonglo area was knocked by the appellant's driver then driving vehicle registration number KCX 902K causing the same to violently collide with the deceased thereby occasioning him fatal injuries.
2. The appellant filed an amended defence on the 12th April 2022 denying the averments made by the respondents and instead imputing negligence on the part of the deceased as contained in paragraph 7 (a) to (n) of the amended defence.



3. The respondents on the 12.4.2022 sought and were granted leave of court to amend the plaint to introduce more special damages and further on the 19th May 2022, the respondents sought a further amendment on the registration number of the motor vehicle to read KCB 019Y instead of KCX 902K.
4. The trial magistrate in his judgement found liability in favour of the appellant against the respondents in the ratio of 40:60 on the grounds that the deceased was largely to blame for the occurrence of the accident had also that he acted in a manner that was wanting. The trial magistrate proceeded to award the appellants damages as follows:

Pain & Suffering.....Kshs. 20,000

Loss of expectation of LifeKshs. 100,000

Loss of dependencyKshs.3,474,432

Less pain and loss of expectation of life...Kshs.120,000

Total.....Kshs. 3,354,432

Special Damages.....Kshs. 30,940

Total.....Kshs. 3,385,372

Less 40% contribution.....Kshs. 1,354,148.40
5. The trial court also awarded the respondents costs of the suit and interest from the date of judgment until payment in full.
6. Aggrieved by the said judgment and decree, the appellant filed a memorandum of appeal dated 6th July, 2023 raising the following grounds of appeal:
 1. The learned trial magistrate grossly misdirected himself in treating the evidence and submissions on liability before him superficially and consequently coming to a wrong conclusion on the same.
 2. The learned trial magistrate did not in the alternative consider or sufficiently consider the demand for contributory negligence based on the evidence adduced and the submissions filed by the appellant.
 3. The learned trial magistrate grossly misdirected himself in treating the evidence and submissions on quantum before him superficially and consequently coming to a wrong conclusion on the same.
 4. The learned trial magistrate misdirected himself in ignoring the principles applicable and the relevant authorities cited in the written submissions presented and filed by the appellant.
 5. The learned trial magistrate erred in not sufficiently taking into account all the evidence presented before him in totality and in particular the evidence presented on behalf of the appellant.
 6. The learned trial magistrate erred in failing to hold that the respondents have failed to prove negligence on the part of the appellant while the onus of proof lay with the respondents.
 7. The learned trial magistrate proceeded on wrong principles (if any) when assessing damages to be awarded to the respondents and failed to apply precedents and tenets of law applicable.



8. The learned trial magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstance that it represented an entirely erroneous estimate vis-à-vis the respondents' claim.
9. The learned trial magistrate failed to apply judicially and to adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision unsustainable in law.
7. The parties filed written submissions to canvass the appeal.

The Appellant's Submissions

8. The appellant through its counsel submitted that it was not enough for the respondents to allege that the appellant be held liable for causing the accident but instead adduce evidence and prove their case on a balance of probabilities against the appellant.
9. It was submitted that the evidence of PW2 ought to be disregarded as he alleged that the accident occurred at 6.45p but in cross-examination, testified that he had no lights and could not see clearly thus it was clear that he did not see what transpired during the alleged accident and therefore was not sure who was to blame.
10. It was further submitted that the deceased did not have a driving license at the time of the accident nor was one produced by the respondents and further, that he did not wear a helmet as affirmed by PW2 in cross-examination.
11. The appellant submitted that the respondents failed to prove the nexus between the injuries sustained by the deceased and the alleged negligence on the part of the appellant's driver contrary to the provisions of section 107 and 108 of the *Evidence Act* and thus their case ought to be dismissed with costs to the appellant and further, that, no liability should attach to the appellant as was similarly held in the case of *Bonface Witaba Shivachi v Eldoret Steel Mills Limited Eldoret HCCA No. 199 OF 2011*.
12. On the damages for pain and suffering, it was submitted that the deceased died on the spot and thus a figure of Kshs. 10,000 ought to be awarded under this head as was held in the case of *Kakiki v Abdo & 2 Others KLR [1990]*, *Mercy Muriuki & Another v Samuel Mwangi Nduati & Anor (Suing as the Legal Administrators of the Estate of the Late Robert Mwangi) [2019] eKLR*.
13. On the award for loss of expectation of life, it was submitted that a conventional figure of Kshs. 80,000 would be sufficient. Reliance was placed on the case of *Kisumu HCCA No. 42 of 2010 Coast Bus (MSA) Limited v Susan Mboga Mandu (Deceased)*.
14. With regard to the award for loss of dependency, it was submitted that the respondents' having failed to prove the actual work and earnings of the deceased prior to his death, the court ought to have adopted the Regulation of Wages (General) (Amendment) Order 2018 which provides for the minimum wage of Kshs. 7,240.95 for unskilled employees in all other areas as a multiplicand.
15. On the multiplier, it was submitted that taking into account the statutory retirement age of 60 years old and the risks involved, the deceased would not have worked until 60 years and thus a multiplier of 20 years was appropriate.
16. On the award under loss of dependency, it was submitted that as the deceased had 2 children prior to his death, a ratio of 2/3 was applicable resulting in a calculation of loss of dependency as follows:

$$1,240.95 \times 12 \text{ (months)} \times \frac{2}{3} \times 20 \text{ (years)} = \text{Kshs. } 1,158,552$$



17. It was further submitted that since the deceased's dependents were the same under the *Law Reform Act* and *Fatal Accidents Act*, the award under the *Law Reform Act* should be subtracted from the award under the *Fatal Accidents Act*.

The Respondents' Submissions

18. It was submitted that the trial magistrate failed to apportion liability correctly by holding the deceased 60 % liable given the inconsistent testimony of the two defence witnesses and that instead liability should be apportioned at a ratio of 50:50.
19. It was submitted that the respondents proved their case on a balance of probability as required under sections 107 and 108 of the *Evidence Act* and as restated in the case of *William Kabogo Gitau v George Tewo & 2 Others* [2010] 1 KLR.
20. On quantum of damages, it was submitted that the court should be slow to interfere with the trial court's award unless it is manifestly proved that the trial court applied the wrong principles as was held in the case of *Kenya Power Lighting Company v James Muli & George Kirianki Laichen v Michael Mutwiri* Civil Appeal No. 162 of 2011.

Analysis and Determination

21. This being a first appeal, this Court is under a duty as stipulated in section 78 of the *Civil Procedure Act*, to re-evaluate and re-assess the evidence and reach its own independent conclusion. It must, however, bear in mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court stated as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

22. In that regard, an appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding by the Court of Appeal in *Mkubo v Nyamuro* [1983] LLR at 403, by Kneller JA & Hancox Ag JJA that:

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”

23. Having considered the Appellant's Grounds of Appeal and the parties' written submissions, this Court finds the issues before it for its determination to be:

Whether or not the apportionment of liability was fair and reasonable in the circumstances of this case.

Whether or not the award of quantum was unjustified in the circumstances of this case so as to warrant interference by this court.



Liability

24. On liability, In *Khambi and Another v Mahithi and Another* [1968] EA 70, it was held that:

“It is well settled that where a trial Judge has apportioned liability according to the fault of the parties, his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.”

25. That was the position in the cases of *Isabella Wanjiru Karangu v Washington Malele* Civil Appeal No. 50 of 1981 [1983] KLR 142 and *Mahendra M Malde v George M Angira* Civil Appeal No. 12 of 1981, where it was held that apportionment of blame represents an exercise of a discretion with which the appellate court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle.

26. The burden of proof lies with he who alleges. The term burden of proof is drawn from the Latin Phrase *Onus Probandi* and when we talk of burden, we sometimes talk of onus. Burden of Proof is used to mean an obligation to adduce evidence of a fact, to establish fact. According to Phipson on the Law of Evidence, the term ‘burden of proof’ has two distinct meanings:

1. Obligation on a party to convince the tribunal on a fact; here we are talking of the obligation of a party to persuade a tribunal to come into one’s way of thinking. The persuasion would be to get the tribunal to believe whatever proposition the party is making. That proposition of fact has to be a fact in issue. One that will be critical to the party with the obligation. The penalty that one suffers if they fail to proof their burden of proof is that they will fail, they will not get whatever judgment they require and if the plaintiff they will not sustain a conviction or claim and if defendant no relief. There will be a burden to persuade on each fact and maybe the matter that you failed to persuade on is not critical to the whole matter so you can still win.
2. The obligation to adduce sufficient evidence of a particular fact. The reason that one seeks to adduce sufficient evidence of a fact is to justify a finding of a particular matter. This is the evidential burden of proof. The person that will have the legal burden of proof will almost always have the burden of adducing evidence.

27. Section 107 of *Evidence Act* defines Burden of Proof as– of essence the burden of proof is proving the matter in court. subsection (2) Refers to the legal burden of proof.

28. Section 109 of the *Evidence Act* exemplifies the Rule in Section 107 on proof of a particular fact. It is to the effect that the burden of proof as to any particular fact lies on the person who wishes to rely on its existence. As earlier stated, whoever has the obligation to convince the court is the person said to bear the burden of proof. Thus, if one does not discharge the burden of proof then one will not succeed in as far as that fact is concerned.

29. The question therefore is whether the appellants herein discharged the burden of proof that the respondent was liable in negligence for the occurrence of the accident leading to the deceased’s passing.

30. On whether the respondents proved negligence on the part of the appellant, PW2 testified that he witnessed the accident and saw the respondent’s motor vehicle hit the deceased’s motorcycle and that further it was being driven at a high speed. He testified that the deceased was not clad with a helmet, that the deceased overtook him and remained in front of him and that the lorry came from the opposite direction passed him and after sometime, he heard a bang which turned out to be the accident. He



testified that he blamed the lorry driver who was in the middle of the road. He testified that the accident happened at 6.45pm when it was almost dark and that the deceased did not have his lights on.

31. In the police file produced as DEx2 by DW1, it was detailed that the accident was caused by the deceased who was dangerously overtaking. It was noted that the weather was dry. On the other hand, DW2, the driver of the appellant's motor vehicle contradicted this by stating that it was raining and the road was slippery. He testified that the deceased passed him from the opposite side and went onto the pavement then hit him with a high impact.
32. The parties herein have given contradicting testimonies on how the accident occurred. However, there are some constant points that remain. PW2 testified that the deceased overtook him and went ahead of him. DEx 3 provided that the accident occurred when the deceased who was riding towards the side of Kisian, overtook a car that was in front of him carelessly and ended up colliding with the appellant's vehicle left side which vehicle was headed towards the Kisumu side along the Busia - Kisumu road at Otonglo area.
33. The evidence adduced in my view point towards a deceased person who was speeding and riding carelessly. This is because after overtaking PW2, the deceased had already created a 300m distance, this is indicative of the speed that he was travelling at. It is also not lost on this court as testified by PW2 that the deceased wore no helmet. This court takes judicial notice that the Otonglo area is a centre where road users are supposed to ride and drive with caution and at a reasonable speed.
34. That notwithstanding, the appellant's driver similarly being in charge of a lorry, which is a more lethal machine than a motorcycle, had the duty to regard other road users with care. The testimony of the appellant's driver was that he saw the deceased prior to the accident as the deceased overtook him. He does not indicate whether he took any action to avert the accident by either swerving or applying his brakes or even slowing down. Such conduct cannot go un-condemned and it should not be rewarded.
35. I am thus in agreement with the trial magistrate that the deceased was largely to blame for the accident and as to the level of blame, it was in the discretion of the trial court who had the opportunity to hear and see witnesses as they testified. I therefore find no reason to interfere with that discretion. I uphold the finding and holding on liability in the ratio 60:40 for the deceased as against the appellant.

Quantum

36. Regarding the circumstances under which an appellate court will disturb a lower court's assessment of quantum of damages, the court in the case of *Butt v Khan* 1982 -1988 1 KAR pronounced itself as follows:

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.

37. In *Kemfro Africa Ltd T/A Meru Express Services, Gathogo Kanini v A M Lubia & Olive Lubia*, the Court of Appeal set the principles to be considered before disturbing an award of damages as follows:

“The principles to be observed by this appellate court, in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are, that it must be satisfied that either, the judge is assessing the damages took into account an irrelevant factor, or left



out of account a relevant one, or that short of this, the amount is so inordinately high that it must be wholly erroneous estimate of the damages”

38. This Court in *P. J. Dave Flowers Ltd v David Simiyu Wamalwa Civil Appeal No. 6 of 2017* [2018] eKLR rendered itself on the matter of assessment of quantum as below:

“... it is generally accepted from the laid down legal principles on assessment of quantum that personal injuries are difficult to assess with precision and accuracy so as to satisfy the claimant. The courts discretion has been left to individual judges to exercise judicious in respect of the circumstances of each specific case. The sum total of the evidence and the medical reports positive findings will form part of the consideration in the award of damages. The trial court will also be expected to apply the principles in various case law and authorities decided by the superior courts on the matter.”

Damages Under the Law Reforms Act
Pain and Suffering

39. Damages for pain and suffering are recoverable by the estate of a deceased person as compensation for the pain suffered before death which results from an accident. In *Sukari Industries Limited v Clyde Machimbo Juma* [2016] eKLR, Majanja J. observed thus:

“...it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased’s estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death.”

40. In the instant case, it is not disputed that the deceased died on the spot. Given that the sums awardable under this head have ranged from Kshs 10,000/- to Kshs 100,000/- from past precedents, I am unable to say that the sum of Kshs 20,000/- awarded by the trial court is inordinately high or unreasonable as to warrant interference. See *Sukari Industries Limited supra*. I therefore decline to upset the award. Loss of Expectation of Life

41. The conventional award for loss of expectation of life is Kshs 100,000/=-, see the case of *Hyder Nthenya Musili & another v China Wu Yi Limited & another* [2017] eKLR. The trial magistrate’s award of Kshs 100,000/- is therefore not so unreasonable as to present an erroneous estimate. It is thus upheld.

Damages Under the *Fatal Accidents Act*
Loss of dependency

42. From the evidence of PW1, it is not in doubt that the deceased was 28 years old and that they had two children together. PW1 testified that the deceased was an employee who used to take children to school with his motorcycle and that he earned 2000 per day. She did not produce any evidence of employment or of the deceased’s earnings.
43. The court did not apply Kshs. 2,000 per day in calculating the deceased’s monthly pay but instead adopted Kshs. 15,000 as the monthly earnings before proceeding to calculate the same using a minimum wage of Kshs. 13,572 per month.



44. At the time that the deceased died in February 2021, the minimum wage had not been reviewed for 3 years and stood at Kshs. 13,500 and was reviewed on 1st May 2022 to Kshs. 15,201.65. The trial court used a multiplicand of 13,572. I will not therefore interfere with multiplicand applied.
45. Regarding the multiplier, I note that the deceased died at the age of 28 years, the court applied a multiplier of 32 years taking into account that he had 32 years to attain age of 60 which is the statutory retirement age. It is important to consider the fact there are risks involved in the work of motorcycle riding besides other vulgarities of life which include illness and there are chances that a person may die before attaining the age of 60 or may be alive but unable to engage in active employment. In my view, an award of 30 years as a multiplier was on the higher side and I am inclined to interfere with it and reduce it to 22 years. See the case of *South Sioux Farms Ltd & 2 others v Selina Robi Mwita* (suing as legal representative of the Estate of the Late Julius Bonare Chacha [2021] eKLR).
46. As regards the dependency ratio, that of 2/3 is reasonable bearing in mind the fact that the deceased had a wife and 2 children. Furthermore, the appellant had no issue with this ratio applied by the trial magistrate.
47. The award under loss of dependency is thus calculated as follows:
 $13,572 \times 12 \times \frac{2}{3} \times 22 = 2,388,672$
48. Another issue raised by the appellant in their submissions and which is a point of law is that the award for loss of dependency ought to be reduced by the amount awarded under for loss of expectation of life since the net benefit will be inherited by the same dependents under the *Law Reform Act*. In support of this position, they relied on the case of *Hellen Waruguru Waweru* (Suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited [2015] eKLR where the court took a similar view.
49. I have looked at the authority relied on by the appellant in support of this point and it is my view that the appellant failed to understand the Court of Appeal's holding therein. From the above decision, there is no legal requirement for the court to deduct the amount awarded under the *Law Reform Act* from the award made under the *Fatal Accidents Act*. In my view, the issue of double compensation does not arise because the two statutes independently provide for award of damages. This was the view taken by the Court of Appeal in *Silverstone Quarry Limited & another v Beatrice Mukulu Kang'uta & another* (suing as Administrators of the Estate of Philip Musyoka Muthoka [2020] e KLR which was the latest Court of Appeal decision. The argument by the advocates for the appellant on the issue therefore does not stand.
50. As there was no challenge regarding the special damages, the same remain as awarded by the trial court.
51. In the end, the appeal against liability is dismissed. The appeal against quantum of damages is allowed to the extent stated as calculated below:
52. The trial magistrate's award is thus set aside and substituted as follows;
- | | |
|--|-----------------|
| Loss of dependency $13,572 \times 12 \times 22 \times \frac{2}{3}$ | Kshs. 2,388,672 |
| Pain & Suffering | Kshs. 20,000 |
| Loss of expectation of life | Kshs. 100,000 |
| Total Kshs. | 2,508,672 |
| Less 40% contribution (Kshs. 1,003,468.80) | |
| Total Balance Kshs. | 1,505,203.20 |



53. As the appeal is only partially successful, each party shall bear their own costs of the appeal.
54. The costs awarded in the lower court shall also bear 40% contribution.
55. The general damages awarded will earn interest at court rates from date of judgment in the lower court until payment in full.
56. This file is closed, to be returned to the lower court.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 19TH DAY OF JUNE, 2024

R.E. ABURILI

JUDGE

