



Waita (Suing as the the Legal Representative of the Estate of Anthanusi Waita Masila - Deceased) v Sky Jet Kenya Limited & 2 others (Civil Appeal E009 of 2020) [2024] KEHC 17232 (KLR) (2 August 2024) (Judgment)

Neutral citation: [2024] KEHC 17232 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL E009 OF 2020
TM MATHEKA, J
AUGUST 2, 2024**

BETWEEN

ANNAH MUNINI WAITA (SUING AS THE THE LEGAL REPRESENTATIVE OF THE ESTATE OF ANTHANUSI WAITA MASILA - DECEASED) APPELLANT

AND

**SKY JET KENYA LIMITED 1ST RESPONDENT
JOSEPH KOVI MWAU & ANOTHER & ANOTHER & ANOTHER &
ANOTHER 2ND RESPONDENT**

JUDGMENT

1. Through an amended plaint filed on 4/4/2012 the plaintiff/appellant filed suit against the defendant/respondent seeking judgment against the defendants jointly and severally for:
 - i. General Damages under the Law Reform Act and Fatal Accident Act.
 - ii. Special damages of Kshs.700/= Cash of the suit
 - iii. Interest on (a) (b) (c) at court rates.
2. The 1st defendant was the registered owner of motor vehicle cycle registration number KAZ XXXD and the 3rd defendant the rider of the motorcycle on material day. The 2nd defendant was the beneficial owner of the motorcycle
3. The gist of the suit was that on 2/5/2009 Athanas Waita Masila (deceased) was lawfully travelling on motor cycle registration number KAZ XXXD as a pillion passenger when the 3rd defendant being the employee, servant and/or agent of the 1st and 2nd defendants cycled, controlled managed the said



motor cycle so negligently that he permitted the same to lose control and collide with motor vehicle registration number GKA XXXB and as a result occasioned instant fatal injuries to the deceased.

4. The particulars of the negligence of the 3rd defendant were set out as follows: -
 - i Riding the motor cycle at an excessive speed in the circumstances.
 - ii Riding the motor cycle without sufficient attention and regard to the pillion passenger the deceased herein.
 - iii Failing to brake, stop, slow, swerve or in other manner avoid the accident.
 - iv Failing to observe the high way.
 - v Permitting the motor cycle registration number KAZ XXXD to collide with motor vehicle registration number GK AXXXB.
 - vi Causing the accident.
 - vii As a result of the accident the deceased died “instantly”.

It was pleaded that the deceased was at the material time a casual labourer earning kshs. 6,000 per month.

5. It was pleaded that the suit was filed on behalf of the estate of the deceased and Annah Munini Waita (Wife) Jacqueline Ndinda Waita (Daughter) Lenny Waita (Son) Janet Minoos Waita (Daughter) Mutindi Waita (Daughter) Kamina Waita (Son) Stephen Kyalo Waita (Son)
6. The 2nd and 3rd defendants filed defence on 5/5/2011 to the original plaint filed on 24/3/2011.
7. They denied all the allegations against them, they put the plaintiff to strict proof thereof and blamed the driver of motor vehicle registration number GKA XXXD for driving with speed, failing to keep look out for other road users, hitting the motor cycle registration number KAZ XXXD – they sought dismissal of the plaintiff’s suit.
8. The 1st defendant averred that it was in the business of selling motorcycles, had sold and transferred motor cycle registration number KAZ XXXD to 2nd defendant on or about 26/7/2007.
9. The 1st defendant denied ownership or possession of the said motor cycle at the material time, denied that the 2nd defendant was its employee or agent; denied the road traffic accident and all particulars of negligence and put the plaintiff to strict proof thereof without prejudice – claimed indemnity or contribution from 2nd defendant.
10. Upon closure of pleadings, plaintiff set out issues for determination
 - i. Whether on the material date the 1st defendant was the registered owner of motor cycle registration number KAZ XXX D and whether the 2nd defendant was the beneficial owner thereof and the 3rd defendant a rider thereof.
 - ii. Whether an accident occurred on 02/05/2009 at Wote Township involving motor cycle registration number KAZ XXXD and the deceased herein who was a pillion passenger aboard motor cycle registration number KAZ XXX D.
 - iii. Who was to blame for the accident. Whether the plaintiff is entitled to compensation by the defendants.
 - iv. Whether the deceased sustained fatal injuries as a result of the said accident.



- v. Whether the plaintiff has sustained loss and damage as pleaded.

Who bears the costs of the suit?

11. The matter proceeded for hearing on 29/10/2019 by way of viva voce evidence. The plaintiff testified that her husband left home on 2/5/2009 around 5pm as pillion passenger of Gregory Kituku Musyimi on the motor cycle of one Joseph Kovi Mwau.
12. At the hospital gate, a motor vehicle belonging to the hospital was coming through the wrong way causing a collision which led to the death of the husband – this she said she learned from the police. she produced the requisite documents; letter from chief, limited grant, search certificate for the motor bike
13. She testified that the police refused to give her advocate the postmortem for her husband. On cross examination she said she blamed the rider of the motor cycle and that it belonged to Joseph Kovi, 2nd defendant.
14. Each of the defendants called one witness. DW1 Samuel Nzova Kimile the Operations Manager at the 1st defendant denied any knowledge of an accident involving motor cycle KAZ XXXD. He testified that the motorcycle was purchased by 2nd defendant, and all transfer documents given to him – that it did not belong to the 1st defendant. He said on cross examination that motor cycle was sold on 26/7/2007, search certificate was for 2010 when motor cycle was in possession and control of 2nd defendant.
15. 1st defendant did not call any other witness.
16. The 2nd defendant testified that he was the owner of motor cycle registration KAZ XXXD. That the deceased was his friend, borrowed the motor cycle to go to hospital. He said motor cycle was not insured. He said the 3rd defendant was riding the motor cycle – that he told the deceased that the motorbike was not insured but he forced him. He said he learnt that the motor cycle was hit by the hospital van – only to realize later that the blame had been put on him. He blamed the deceased for forcing him to give him the motorbike when it had no insurance.
17. DW3 Gregory Kithuka Musyimi testified that 2nd defendant and the deceased were both his friends - he testified that the deceased forced him against his will to take him to the hospital on the motor bike saying that his (deceased's) daughter had phoned him. He said he later found himself in hospital. He was charged and fined Kshs. 80,000/=. He said on cross examination that the deceased was sick on the material day and forced him to take him to hospital – that on that day he did not want to come to Wote.

Parties all filed written submissions.

18. The subordinate court framed two issues

whether the defendants were liable or how much quantum of damages.

19. The trial court considered the evidence and submissions and made the following findings:-
 - i. That the 1st defendant was not liable – guided by *Civil Appeal Number 192 of 2007* – Court of Appeal Nairobi – on interpretation of section 8 of Traffic Act found that the motor cycle KAZ XXXD did not belong to 1st defendant or was not in its possession or control.



- ii. Secondly, that the 2nd and 3rd defendants were liable 50% and the plaintiff 50% liable for pestering the defendant to take him on the motorbike while it was not insured. He proceeded to make the following award on quantum –

Loss of dependency $6000 \times 12 \times 3 \times 1/3 = 72,000$

Pain and suffering – 50,000/= Loss of expectancy – 100,000/= Special damages
700/=

Total 222,700/= Less 50% 111,350/=

Plus costs and interests.

20. Aggrieved, the plaintiff filed this appeal dated 30/9/2020 on the following grounds:-
- i The learned trial magistrate erred in law and fact and misdirected himself when he placed excessive weight on the defence testimony which was not plausible at all.
 - ii. The learned magistrate erred in law and fact and misdirected himself by failing to consider the appellant's submissions and the authorities cited therein.
 - iii. The learned trial Judge erred in law and fact and misdirected himself by apportioning liability at 50% which was inappropriate in the circumstances.
 - iv. The learned trial magistrate erred in law and fact and misdirected himself when he awarded a very small amount for general damages under the Law Reform Act and Fatal Accidents Act.
21. Parties agreed to canvass the appeal by way of written submissions – which I have considered.

Issues for Determination

22. The issues for determination are;
- i. whether there was an error in the apportionment of liability and
 - ii. whether the award is too low to warrant disturbance by this court.
23. I am guided by *Selle v Associated Motor Boat Comp* (1969) EA 123 where it was held that the appellate court is called upon to evaluate the trial court's evidence, analyze the same and come up with its own conclusion but in so doing the same court ought to take into account that it never had an opportunity of neither seeing nor heard the witnesses testify.
24. I was also urged to be guided by Court of Appeal in the case of *David Brown Kipkoriri Chebii v Rael Chebii* [2016] eKLR while quoting the decision of Sir Charles Newbold P. in *Mbogo and amp; Another v Shab* (1968) EA where it was held as follows:

“... a court of appeal should not interfere with the exercise of the discretion of a single judge unless I is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice...”

On liability

25. it was submitted in the subordinate court that between the 1st and 2nd defendants – there was no evidence of transfer of the said motor cycle from 1st defendant to 2nd defendant – despite the 2nd



defendant stating that the motor cycle was his. The record shows that the copy of record shows that the motor cycle was registered in the name of the 1st defendant/respondent. DW1 testified that it was sold on 26/7/2007, that there was a delivery note, and that they had even given out their KRA pin to the 1st defendant for purposes of the transfer. However, neither of these two provided the court with any evidence of the alleged transaction, not even a receipt or delivery note or any evidence to support the said alleged transaction.

25. I am alive to the fact that section 8 of the Traffic Act states –

“The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.”

26. I am also aware of the jurisprudence around the interpretation of this section: of alternative ownership of motor vehicle – described as actual, beneficial, possessory – and the fact that the person whose name appears in the certificate of registration may not be fully responsible for the motor vehicle. In this case – the registration was there – but there was no evidence as alleged by 1st defendant that it had sold the motor cycle to 2nd defendant and even though 2nd defendant had “beneficial ownership” – the 1st defendant was still the registered owner of the motor cycle – and hence could not escape vicarious liability.

27. In the circumstances I am of the view that the defendants were entirely and severally liable for the accident, as the owner, beneficial owner and the rider.

Did the deceased contribute in any way to the Road Traffic Accident?

28. The trial court took it as hard evidence that the deceased had forced the 2nd and 3rd defendants against their collective will from using the said motor cycle. Dead men tell no tales is a true saying for this case. The deceased was not here to dispute these allegations. The defendants ‘sound’ like adult men from the record. The deceased did not take the motor cycle and run away with it. The 3rd defendant rode the motorcycle. Hence other than their words, there is no evidence that the deceased did anything to contribute to the actual happening of the accident. He was a pillion passenger – and I must disagree with the submissions based on the averments by the 2nd and 3rd defendants that deceased forced them to give out the motor bike and to ride him to hospital respectively. Hence on the issue of contribution to the accident by the deceased – I find that the allegations made against him were untenable and the same – rejected.

29. The finding that the deceased contributed to the accident is set aside.

30. The 3rd defendant attributed liability to motor vehicle registration GKB XXX. It is noteworthy that none of the defendants raised any claim in the matter against the said m/vehicle or the driver. No one applied to have them joined in the matter, they are not parties to this case. They cannot be heard to place blame on someone they did not sue. That claim must allowed to remain just remain there.

31. The finding on liability by the trial court is set aside and substituted with 100% liability on the part of all the three defendants jointly and severally.

On quantum:

32. None of the defendants disputed the deceased’s income or age in their submissions in the subordinate court.

33. The submissions by plaintiff for general damages were not challenged.



34. I have perused the submissions by parties before the subordinate court which in my view represent reasonable assessment of the expected damages. The deceased was 62 at the time of death, he earned 6000 as a casual laborer.

35. In *Sokoro Plywood Limited & Another v Njenga Wainaina* the High Court, while sitting on appeal, upheld the decision of the lower court to adopt a multiplier of 10 years in a case where the deceased was 60 years old. The court, while upholding the decision of the trial magistrate stated that:-

" Regarding the multiplier of 10 years, the deceased was 60 years at the time of her death. In the case of *Rahab Wanjiku Gitonga v Almas Njoroge Mungai (supra)* which was cited by the deceased was aged 64 years and the court adopted a multiplier of 8 years. In the circumstances of this case the multiplier of 10 years was reasonable."

36. I find this persuasive. There is usually no retirement age for casual labourers. The lived reality in many communities is that many people work past their 70s. and in the rural areas people are abit more active with physical work. It would be unfair and not the reality not to acknowledge that reality.

37. I would allow a multiplier of 8 years and multiplicand of 2/3

$$= 6000 \times 8 \times 12 \times 2/3 = 384,000/=.$$

38. Then I would retain the rest of the award – Ultimately, the appeal succeeds and the follow orders issue.

39. Judgment of the subordinate court is set aside and substituted with the judgment as follows:-

Liability – 100% against the defendants jointly and severally.

Quantum:

Loss of expectation of life – 100,000

Pain and suffering - 50,000

Loss of dependency 384,000 Special damages 700

Total 534,700

40. Plus costs and interests from the date of the judgment in the subordinate court.

41. Appellant will have costs of this appeal.

DATED, SIGNED AND DELIVERED VIA CTS THIS 2ND AUGUST 2024

MUMBUA T MATHEKA

JUDGE

