



Approved Logistics Limited v EW & another (Suing as the Administrator of the Estate of LWW - Deceased) (Civil Appeal E078 of 2022) [2023] KEHC 3648 (KLR) (2 May 2023) (Judgment)

Neutral citation: [2023] KEHC 3648 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E078 OF 2022**

DK KEMEL, J

MAY 2, 2023

BETWEEN

APPROVED LOGISTICS LIMITED APPELLANT

AND

MNO 1ST RESPONDENT

EW 2ND RESPONDENT

SUING AS THE ADMINISTRATOR OF THE ESTATE OF LWW - DECEASED

*(An appeal from the judgement and decree of Hon C M Wattimah
SRM in Sirisia PMCC No 35 of 2020 delivered on 17th August, 2022)*

JUDGMENT

1. In the suit at the trial court, the respondents claimed general and special damages against the appellant which arose out of a road traffic accident that occurred on April 30, 2020 along the Bungoma-Malaba road. It was pleaded that the deceased was lawfully riding a motor cycle when the appellant's motor vehicle registration number KCH 866H was negligently and recklessly managed that it knocked the motorcycle occasioning serious bodily harm which led to the death of the deceased.
2. The appellant duly entered appearance and filed its statement of defence denying the respondent's claim. The suit was therefore set down for hearing.
3. MNO testified as PW1. She stated that the deceased was her child aged 17 years old and that she did not witness the accident but visited the scene afterwards.
4. PW2, GWB testified that he witnessed the accident in that the rider was overtaking the trailer when the trailer knocked him from behind while riding on his lane. He blamed the driver of the trailer for not waiting for the rider to overtake.



5. PW3, PC (W) Jackline Were stated that she was not the investigating officer and was not aware as to who was to blame for the accident. She produced the police abstract showing the appellant as the registered owner of the accident motor vehicle.
6. The Appellant's case was subsequently closed without calling any witnesses.
7. By a judgement of the trial court, the trial magistrate held the appellant 100% liable and awarded Kshs 50,000/- for pain and suffering, Kshs 100,000/- in loss of expectation of life, Kshs 1,500,000/- in lost years and Kshs 152,570/- in special damages.
8. The appellant was aggrieved and preferred the instant appeal raising the following grounds;
 - a. That the learned trial magistrate erred in law and fact in holding the appellant 100% liable in negligence in view of the evidence adduced and or on record.
 - b. The learned trial magistrate erred in law and fact in failing to apportion liability on the basis of contributory negligence on the part of the deceased in view of the evidence on record.
 - c. The learned trial magistrate erred in law and fact in failing to consider the submissions by the appellant on both the issue of liability and quantum.
 - d. That the learned trial magistrate erred in law and fact in awarding Kshs 1,500,000/- as damages for lost years without taking into account relevant factors and the fact that the deceased was a minor thereby awarding an inordinately high award hence arriving at an erroneous decision.
 - e. The learned trial magistrate erred in law and fact in adopting the wrong principles in the award of damages for lost years thereby arriving at an erroneous decision.
9. Subsequently, the appeal was disposed of by way of written submissions. The appellant filed its submissions dated February 17, 2023 while those of the respondents are dated March 7, 2023. I have duly considered the same.

Analysis and determination

10. Having considered the record and the duty bestowed upon this court being a first appellate court, as observed in *Peters v Sunday Post Limited (1958) EA 424*, Sir Kenneth O'Connor stated as follows:

It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.
11. The trial magistrate's judgement is challenged on the finding of liability and quantum. The appellant submits that the evidence of PW3, the police officer did little in aid of the respondent's case in that the abstract only proved the occurrence of the accident and not the circumstances leading to the accident. Further that the said witness was not the investigating officer in the matter.



12. Having put into perspective the rival arguments put forth in this appeal, I am alive to the provisions of section 107 and 109 of the Evidence Act which provides;

107.

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

13. There is a plethora of authorities on the subject showing that the court ought to balance the issue of liability based on the evidence on record.

14. In *Hussein Omar Farar v Lento Agencies [2006] eKLR*, the Court of Appeal observed that-

In our view it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs, the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.

15. Having put the witness' testimonies into perspective particularly, PW2 and PW3, I am inclined to find that on the basis of the evidence adduced by the respondent's witnesses, the appellant's truck hit the motorcycle from behind leading to the fatalities stated. This fact is coupled by the fact that the appellant failed to call any witness to rebut the respondent's assertion. In the circumstances, I find in the absence of any rebuttal testimony from the appellant, liability as against the appellant was properly established. As the motorcycle rider was hit while having already overtaken the appellant's driver, there was clear evidence of negligence on the part of the appellant's driver. Its common knowledge that the highway code of traffic that motorists being overtaken are obliged to slow down to allow those overtaking to complete the process of overtaking. It seems the appellant's driver failed to observe this rule and thus hit the deceased from behind and was thus clearly negligent. The trial court's finding on liability was thus sound and must be upheld.

16. The appellant seems to have no qualms about the awards on the other heads of damages save for that on loss of dependency. On the issue of lost years, the appellant submits that the trial magistrate should have awarded a global sum of Kshs 800,000-1,000,000/-

17. It is a fact that the deceased was aged 17 years at the time of the accident and a student at a technical college. No evidence though was produced in proof of this fact though the death certificate speaks otherwise. The respondent on the other hand argues that the deceased upon leaving college would have assisted his family financially and used to help his parents with house chores.

18. In the trial court, the respondents relied on the authorities in *Francis Odhiambo Nyanja & 2 others v Josephine Malala Owinyi, (2020) eKLR* and *Twokay Chemicals Limited v Patrick Makau Mutisya & another (2019) eKLR* where the sum of Kshs 1,500,000/- was awarded.



19. This limb of damages is normally awarded and the authority in *Chunibhai J Patel and Another v P F Hayes and Others* [1957] EA 748, 749, stated the law on assessment of damages and held as follows:

“The Court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependants, the net earning power of the deceased (i.e his income less tax) and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years’ purchase”

20. Considering the deceased’s age, the fact that he was not making any income, case law; particularly, *Francis Odhiambo Nyanja* (supra), *Charles Makanzie Wambua v Nthoki Munyao & Prudence Munyao (suing as personal representatives of the Estate of Lilian Katumbi Nthoki (Deceased))* [2020] eKLR and in *Twokay Chemicals Limited* (supra), the appellate court upheld a global sum of Kshs 1,500,000/= for loss of dependency where the deceased was aged 17 years.

21. Taking into account the fact that award of damages is within the discretion of the court, I have carefully considered the authorities supplied by both parties and I am inclined to find the award of Kshs 1,500,00/- in lost years as reasonable in the circumstances. It is common knowledge that a 17 year old is not a toddler and can assist his/her parents and if schooled could achieve better in life and be able to assist his/her parents as well as himself/herself. Hence, the finding on quantum on lost years by the trial court was sound and ought to be upheld. As the appellant did not object to the other heads of damage, then the same shall remain undisturbed.

22. For the above reasons, I find no merit in the appeal and proceed to dismiss it with costs to the respondent.

23. Orders accordingly.

DATED AND DELIVERED AT BUNGOMA THIS 2ND DAY OF MAY 2023.

D KEMEI

JUDGE

In the presence of :

Mechi for Onyinkwa for Appellant

Okaka for Mukisu for Respondent

Kizito Court Assistant

