



West Kenya Sugar Company Limited v Nyongesa (Suing as Administrator and Personal Representative of the Estate of Dennis Etobo - Deceased) (Civil Appeal 2 of 2020) [2023] KEHC 3865 (KLR) (4 May 2023) (Judgment)

Neutral citation: [2023] KEHC 3865 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL APPEAL 2 OF 2020
WM MUSYOKA, J
MAY 4, 2023**

BETWEEN

WEST KENYA SUGAR COMPANY LIMITED APPELLANT

AND

JOHN OSUKUKU NYONGESA (SUING AS ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF THE ESTATE OF DENNIS ETOBO - DECEASED) RESPONDENT

(Appeal from judgment and decree of Hon. RN Ng'ang'a, Resident Magistrate, RM, in Busia RMCCC No. 307 of 2018, of 16th December 2019)

JUDGMENT

1. The appellant had been sued by the respondent, at the primary court, for compensation arising out of the death of the deceased, following a traffic road accident on September 23, 2018, along Ojamong-Ang'orom murrām road. The deceased was riding a motorcycle, and was knocked down by a tractor registration mark and number xxxx, hauling trailer registration mark and number xxxx, said to have belonged to the appellant, and liability was attributed on the appellant on account of negligence. The appellant filed a defence, denying the accident, and everything else pleaded in the plaint. In the alternative, the appellant 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 the control of the appellant.
2. A trial was conducted. On liability, the court held the appellant 100% liable. On quantum, the court found in favour of the respondent, and awarded damages totaling Kshs 150, 000.00 under the *Law Reform Act*, Cap 26, Laws of Kenya, being for pain and suffering and loss of expectation of life; Kshs 1, 487, 816.00 under the *Fatal Accidents Act*, Cap 32, Laws of Kenya, being for loss of dependency; and Kshs 78, 650.00 special damages.



3. The appellant was aggrieved, hence the appeal. The appeal has raised several grounds: that the evidence and submissions on liability were treated superficially; contributory negligence was not considered; evidence and submissions on quantum were treated superficially; negligence was not proved; the wrong principles were applied in assessment of damages; among others.
4. On February 6, 2023, directions were given, for canvassing of the appeal by way of written submissions. Both parties filed written submissions.
5. On liability, it is submitted that the respondent did not prove negligence, yet the burden lay with him. *Statpack Industries Limited vs James Mbiti Munyao [2005] eKLR* (Alnashir Visram, J), *Treadsetters Tyres Limited vs John Wekesa Wepukhulu [2010] eKLR* (Ibrahim, J) and *Bonface Witaba Shivachi vs Eldoret Steel Mills Limited [2014] eKLR* (Ngenye-Macharia, J) are cited. The court is invited to consider apportioning liability at 50:50, in the event it disagrees. On pain and suffering, the appellant argues that, as there was evidence that the deceased died on the spot, a minimal award should have been made, of Kshs 10, 000.00, and cites *PI vs Zena Roses Ltd & another [2015] eKLR* (Kimondo, J) On loss of expectation of life, it cites *In the Estate of Susan Mandu (Deceased) [2011] eKLR* (Chemitei, J), to urge that an award of not more than Kshs 100, 000.00 should have been awarded. On loss of dependency, it is argued that there was no evidence to support income of Kshs 16, 907.00 per month, and the court should have been guided by the Regulation of Wages (General) Amendment Order 2017, as the deceased was an unskilled worker, and the court should have used the minimum wage of Kshs 6, 415.55; and awarded nothing more than Kshs 564, 568.40, from which should be deducted the award in respect of pain and suffering and loss of expectation of life.
6. On his part, on liability, the respondent refers to the record of appeal, and argues that it was the deceased who had the right of way, and it was the appellant who owed a greater duty of care before joining the road. He cites *Kennedy Macharia Njeru vs Packson Githongo Njau & another [2019] eKLR* (Gitari, J) and *Fage UK Ltd vs Chobani UK Ltd [2014] FSR 29* (Lewinson, LJ). He does not say much on quantum of damages.
7. The appeal turns on liability and on the awards under the *Law Reform Act* and the *Fatal Accidents Act*, on whether they were excessive.
8. On liability, I note that the respondent called an eyewitness, PW2, a boda boda operator. He said that he was near the scene, and that the deceased was already on the main road, and it was the tractor driver that was joining from a sideroad. He did not slow down, before getting into the main road. PW3 was a traffic police officer. He was not at the scene, and he could only testify to the fact that there was an accident, but he could not testify on who was to blame. No sketch of the scene was produced. The officer who visited the scene did not find the motorcycle at the scene. He said he found the body of the deceased at the scene. DW1 was the driver of the tractor. He said it was the deceased who was riding his motorcycle with his legs on both sides of the motorcycle, and when he saw the tractor, he panicked, and was unable to control the motorcycle. He said that the deceased was rushed to Alupe Hospital.
9. So, who was to blame? The trial court took the view that the tractor driver was to blame, by believing the version given by PW2 as opposed to that by the tractor driver, DW1. I have difficult agreeing with the trial court. The tractor was loaded with sugarcane, according to PW3 and DW1. Between the tractor and the motorcycle, the motorcycle was the lighter of the 2. I find it incomprehensible that a tractor would be driven at high speed, while loaded with cane, so much as to hit a motorcycle. This happened at daytime, at 4.00 PM. Both drivers were expected to keep a proper lookout, and I would have expected the motorcycle was the more maneuverable of the 2 vehicles. The tractor is a large vehicle, that other road users would have seen from afar, and taken evasive action. It would be more plausible that it was the motorcycle that ran into the tractor in the given circumstances. I did not



have the advantage of seeing the witnesses testify, but from the record I find it hard to hold that the tractor driver was wholly to blame. I am persuaded that the deceased could have contributed more to the accident, or was wholly to blame. Since I did not have the benefit of hearing the witnesses, I will hold that both contributed to the accident on a 50:50 basis.

10. On pain and suffering, the courts conventionally award sums ranging between Kshs 10, 000.00 and Kshs 100, 000.00, depending on whether the deceased died on the spot or instantaneously. Where death was instantaneous, the award would be in that range. See *Sukari Industries Limited vs Clyde Machimbo Juma [2016] eKLR* (Majanja, J). Where he died later, an award above Kshs 100, 000.00 would suffice. In this case, PW3 testified to finding the body at the scene, meaning that the deceased might have died on the spot. DW1 talked of the deceased having been rushed to Alupe Hospital. PW3 was not at the scene, it was DW1 who was at the scene, and so the trial court should have gone by his word. It meant that the deceased did not die on the spot, and he must have experienced some pain and suffering. For loss of expectation of life, Kshs 100, 000.00 seems to be the conventional figure. A combined award of Kshs 150, 000. 00, for pain and suffering and loss of expectation of life, does not appear to be unreasonable. See *Beatrice Mukulu Kang'uta & Another vs Silverstone Quarry Limited & Another (2016) eKLR* (Nyamweya, J) and *Caleb Juma Nyabuto vs Evance Otieno Magaka & another [2021] eKLR* (Wendoh, J). Should the said award, for pain and suffering, and loss of expectation of life, be deducted from the award under the *Fatal Accidents Act*? Caselaw states that there is no law which compels the deduction, and it should not be made. See *Omar Sharif & 2 others vs Edwin Matias Nyonga & Maxwell Musungu (Suing as legal representatives and administrators of the Estate of Enos Nyonga Deceased [2020] eKLR* (Mwongo, J).
11. On loss of dependency, I note that the deceased was an 18-year-old young man, operating as a boda boda rider. The trial court used a multiplicand of Kshs 16, 907.00, on the basis that that was what he earned per month, yet what was pleaded in the plaint is Kshs 15, 000.00. A party is bound by their pleadings. His employer, the owner of the alleged motorcycle would have been the proper person to lead evidence on what he was earning, from his daily collections, after deducting expenses. The trial court should have based its findings on the pleadings and the recorded evidence rather than relying on the suggestions by the respondent's Advocate. There was no evidence that he earned Kshs 16, 907.00 per month. At age 18, he was just out of school, and PW3, confirmed that he was not a licensed motorcycle rider. He was, no doubt, in the class of unskilled labourers. The trial court should have settled for the lower figure, the minimum wage, going by the current labour regulations. The current minimum wage is Kshs 6, 415.55, and that should have been the multiplicand. The final figure for loss of dependency should be Kshs 564, 568.40 worked out as follows: 6, 415.55X12X1/3X22.
12. Overall, I find merit in the appeal. I hereby allow it in the following terms:
 - a. That liability is reduced from 100% against the appellant to 50:50;
 - b. That the figure for pain and suffering and loss of expectation of life shall remain at Kshs 150, 000.00, and shall not be deducted from the loss of dependency award;
 - c. That loss of dependency shall be calculated as follows: 6, 415.55X12X1/3X22, making a total of Kshs 564, 568.40;
 - d. That special damages shall remain at Kshs 78, 650.00; and
 - e. That the final figure works out as Kshs 793, 218.40, less 50%, making Kshs 396, 609.20.
13. The appeal is disposed of on those terms. Costs shall be in the cause.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 4TH DAY OF MAY 2023



W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Appearances

Mr. Ngesa, instructed by LG Menezes & Company, Advocates for the appellant.

Mr. Mukisu, instructed by Mukisu & Company, Advocates for the respondent.

