



Ngebile & another v Mayabi (Suing as the legal and personal representative of Josephat Sikana Mayabi - Deceased) & 2 others (Civil Appeal 29 of 2022) [2023] KEHC 20598 (KLR) (21 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20598 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL 29 OF 2022
WM MUSYOKA, J
JULY 21, 2023**

BETWEEN

BONIFACE NDALU NGBILE 1ST APPELLANT

WEST KENYA SUGAR COMPANY LIMITED 2ND APPELLANT

AND

BRIGTA AWINO MAYABI (SUING AS THE LEGAL AND PERSONAL REPRESENTATIVE OF JOSEPHAT SIKANA MAYABI - DECEASED) 1ST RESPONDENT

SAMMY NDIWA 2ND RESPONDENT

ROBERT NYONGESA WANYAMA 3RD RESPONDENT

(Appeal from judgment and decree of Hon. TA Obutu, Senior Principal Magistrate, SPM, in Mumias SRMCCC No. 42 of 2018, of 19th May 2022)

JUDGMENT

1. The appellants had been sued by the 1st respondent, jointly with the 2nd and 3rd respondents, at the primary court, for compensation, on behalf of the estate of the deceased, who died, following a traffic road accident on 25th August 2017, along Mumias-Busia road. The deceased was a passenger in motor vehicle registration mark and number KAS 865V, belonging to the 2nd and 3rd respondents, which was in a collision with vehicle registration mark and number KTCB 892Q/ZE 9413, said to have belonged to the appellants, and liability was attributed to both the appellants and the 2nd and 3rd respondents, 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. The appellants also attributed liability on the 2nd and 3rd respondents. The 2nd and 3rd respondents did not file a defence.
2. A trial was conducted. Both sides presented witnesses. On liability, the court held the appellants and 2nd and 3rd respondents equally liable, at 50:50. On quantum, the court assessed damages at Kshs. 40,000.00 for pain and suffering, Kshs. 2,400,000.00 for loss of dependency and Kshs. 100,000.00 damages under the Law Reform Act, making a grand total of Kshs.2,540,000.00.
 3. The appellants were aggrieved, hence the appeal. 6 grounds are listed, around the issue of liability and quantum.
 4. The appeal was canvassed by way of written submissions, and it turns on only the 2 issues, liability and quantum.
 5. The accident was a collision between 2 vehicles, the matatu in which the deceased was a passenger and the truck owned by the appellants. In such cases liability has to be attributed as between the 2 vehicles involved in the collision. In this case, the appellants filed a defence, the owners of the matatu, although made a party to the proceedings, did not enter appearance nor file defence. The allegations made by the appellants against them, the 2nd and 3rd respondents, were not controverted in writing. The appellants presented a witness, DW1. Curiously, the trial court did not record his name. Anyhow, he testified that the vehicle he was driving was hit by the matatu. He attributed liability to the driver of the matatu, who he said was trying to overtake, then when he saw an oncoming vehicle, he tried to get back to his lane, and hit the vehicle DW1 was driving. The 2nd and 3rd respondents offered no defence, and presented no witnesses. The testimony of DW1 was, therefore, not controverted.
 6. The trial court did not deal with this aspect, and proceeded to hold that the appellants shared liability equally with the 2nd and 3rd respondents, yet the said respondents had not offered any evidence to counter that by the appellants. The 1st respondent did not lead any evidence on how the accident happened, save to call a police officer, who confirmed that an accident happened between the 2 vehicles, but offered no explanation on the circumstances of the accident. The police witness attributed liability to none of the parties, saying that he did not investigate the matter. The 1st respondent merely demonstrated that the deceased was a passenger in the vehicle belonging to the 2nd and 3rd respondents, but did not lead any evidence pointing to negligence on the part of the appellants. The trial court was in error in apportioning liability against the appellants, when their evidence was not controverted. Liability should have been attributed to the 2nd and 3rd respondents, who did not defend the suit. I agree with the appellants that no case was made out against them, and they should have been absolved. Burden of proof was on the 1st respondent to establish negligence on the part of the appellants, she failed in that score.
 7. On quantum, the appellants raise issue with the multiplicand of Kshs. 20,000.00, on grounds that it was not justified. I agree, the trial court did not indicate where it got it from. Of course, the 1st respondent indicated that the deceased was a welder, who earned Kshs. 40,000.00 per month, and was self-employed. She produced no documents to support that income. Faced with that, the trial court should have reverted to the applicable subsidiary legislation on minimum wages, for a welder.
 8. According to the Regulations of Wages (General)(Amendment) Order 2018, the minimum wage for a machine tool operator was fixed at Kshs. 13,975.00. I shall adopt that as the multiplicand. The loss of dependency should work out as follows $13,975 \times 12 \times 1/2 \times 20 = 1,677,000.00$.
 9. I find merit in the appeal herein, with respect to both liability and quantum. The judgment of the trial court in Mumias SRMCCC No. 42 of 2018, of 24th May 2022, is set aside on liability, and the



finding that the appellants were 50% liable shall be substituted with a finding and holding that liability is apportioned at 100% against the 2nd and 3rd respondents. Loss of dependency is revised to Kshs. 1,677,000.00. The awards by the trial court on the other heads shall remain. Each party shall bear their own costs.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 21ST DAY OF JULY 2023

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

Mr. Onyinkwa, instructed by Onyinkwa & Company, Advocates for the appellants.

Mr. Namatsi, instructed by Namatsi & Company, Advocates for the 1st respondent.

