



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 54 OF 2018

ALEX KIPRUTO MALEL.....1ST APPELLANT

CHERANGANI HILLS LIMITED.....2ND APPELLANT

VERSUS

**EVERLYNE KAVUKA KANYERE (Suing as the legal administrator of the
estate of the late KENNEDY AYIGA BULUKU EMBUKANE)**

**(BEING AN APPEAL FROM THE JUDGEMENT OF HON. WAHOME (CHIEF MAGISTRATE) IN CIVIL CASE NO. 76 OF 2017
AT MOLO DATED 17TH APRIL 2018).**

JUDGEMENT

1. This appeal stems from an accident that occurred on **14th November 2015** involving motor vehicles registration number KBX 953D and KBU 962D. The respondent sued in the capacity of a legal representative of the Estate of her deceased husband who died in the said accident vide suit **No. Molo CMCC No. 76 of 2017**. The deceased was a fare paying passenger in motor vehicle registration number KBX 953D and it was averred that the said motor vehicle was being negligently driven along Nakuru- Eldoret highway.

2. The matter proceeded to its logical conclusion where the court rendered its judgement and apportioned liability at 90% against the 1st and 2nd appellants and 10% against the 3rd, 4th and 5th defendants. On quantum the court awarded **Kshs. 30,000** for pain and suffering, **Kshs. 120,000** for loss of expectation of life, **Kshs. 10,727,264.8** for loss of dependency and **Kshs. 30,000/=** for special damages.

3. The appellants who were the 1st and 2nd defendants in the original suit, being aggrieved by the judgement of the trial court, have filed a memorandum of appeal under the following grounds;

a) That the learned magistrate erred in Law and in fact in finding that the 1st and 2nd defendant was 90% liable for the deceased fatal injury in view of the plaintiff's and defendant's evidence on record.

b) That the learned magistrate erred in Law and in fact in finding on liability and disregarded the defendant's evidence and submissions while arriving at his judgment.

c) That the learned magistrate misdirected himself in Law and in fact in failing to note that the plaintiff failed to prove particulars of negligence pleaded in the plaint against the appellants and failing to appreciate the fact that the appellants' vehicle was hit from the rear.

d) That the learned magistrate erred in law and in fact in holding that the appellants were 90% to blame for the occurrence of the suit accident contrary to trite rule of evidence that allegations of negligence must be proved strictly which the plaintiff and co-defendants didn't.

e) That the learned magistrate erred in law and in fact in holding that the plaintiff had strictly proved his allegations of the negligence yet the factual evidential materials and testimonies before him did not amount to the same nor support and justify such a holding.

f) That the learned magistrate erred in fact and ended up misdirecting himself in awarding exorbitant quantum of damages by failing to appreciate and be guided by the prevailing range of comparable awards on deceased of closely related age and applied

a multiplier that was high and unjustified.

g) That the learned magistrate's award on multiplier was made without considering the vicissitudes and contingencies of life and hence applying a multiplier that was high.

h) That the learned magistrate erred in Law in making such a high award on loss of dependency as to show that the magistrate acted on a wrong principle of law.

i) That the learned magistrate's applied a monthly income that was not specifically pleaded and proved in evidence and did not comply with the requirement of the Law as regards taxation and Statutory deductions in arriving at the monthly income.

j) The learned magistrate erred in Law and fact in making a high award on pain and suffering in view that the deceased died the same day.

k) That the learned magistrate erred in law and fact in awarding exorbitant damages on loss of expectation of life in view of deceased's age.

l) That the learned magistrate erred in Law and fact in failing to take into account the award under the Law Reform Act and the Fatal Accidents Act.

m) That the learned magistrate erred in awarding special damages that were not specifically pleaded and proved contrary to the Law.

n) That the whole judgment on quantum and liability was against the weight of evidence before the court.

4. The appellants pray that the judgment in the subordinate court be set aside on liability and quantum.

5. Parties were directed to canvass the appeal by way of written submissions which they have complied.

Appellants Submissions

6. The appellants on grounds 1-5 and 14 relating to issues of liability submitted that the finding on liability ought to be overturned and the other vehicle driver be found 100% to blame for the accident. That the trial court was legally misguided as it failed to consider the probative value of the 1st appellant's evidence as it seems its mind was made from the onset. The appellant submitted further that the trial court reliance on the base commander sole testimony to anchor the respondent's testimony in regard to liability against their driver led to a wrong finding on liability.

7. They added that there was no indication in the proceedings that the trial court considered the 1st appellant's evidence to come up with the finding on liability. The appellant while placing reliance in the case of **Nakuru HCCA No. 116 of 2013 (Lilian Birir & Another vs Ambrose Leamon)**, urged the court to find that the trial court erred in finding the first appellant culpable for the accident against the weight of the evidence tendered.

8. On grounds 6-13 and 14 of the memorandum of appeal in relation to quantum of damages the appellants submitted that the award was not commensurate with awards of other deceased married adults like the deceased as the trial court used the wrong formula of calculating the monthly earnings. That the trial court dissuaded itself from using the net pay as the multiplicand bearing in mind that some loans form his gross salary.

9. The appellants submitted further that the exhibits tendered which were at page 22-28 of the record of appeal, did not prove the pleaded dependency on the deceased as there was no indication of any payment of school fees or whether the fee structures were specifically for the deceased children. The appellants added that the plaintiff had indicated that she had some earnings from her self-employment hence the deceased was not the sole bread winner. That the deceased had 15years remaining from the statutory age of retirement which was to be reduced.

10. The appellants went on to submit that the multiplicand of Kshs. 95,779.15/= and multiplier of 14 years was overly exaggerated leading to an excessive award under loss of dependency. That further, the award of Kshs. 10,727,264.8 and Kshs. 120,000/= were excessive and not commensurate. The appellant urged the court to reduce the award of Kshs. 120,000/= to the average submitted by the parties which was Kshs. 95,000/= to 100,000/=.

11. The appellant stated that the award under pain and suffering was excessive bearing in mind that the deceased died on the spot. They added that no explanation had been given as to why the court arrived at the award of loss of dependency when both parties had submitted for Kshs. 11,742,820 and 1,458,480/=. They urged the court to allow the appeal with costs.

Respondents Submissions

12. The respondents identified the issues for determination as follows;

a) Liability- did the trial magistrate consider all the factors in holding the 1st and 2nd appellants 90% liable.

13. Quantum- did trial magistrate use the wrong principles in assessing general damages under the Law Reform Act and Fatal Accident Act and special damages.

14. On the issue of liability, the respondent submitted that the trial magistrate considered all factors in holding the 1st and 2nd appellants 90% liable. That from the evidence by PW2 it was clear that the appellants' driver did not put any reflective life servers to warn other motorists. That further, there was a question as to the legality and experience of the appellants' driver as during cross examination he stated that he had not produced a driving license.

15. On the issue of quantum, the respondent submitted that the trial magistrate used the right principle in assessing damages. She urged the court not to interfere with the same and to dismiss the appeal with costs. She draws the court's attention to the case of **RKO EMPW (Suing as the administratrix of the estate of the late JOO) vs Kenya Power & Lighting Company Ltd Eldoret HCC No. 159 of 2009.**

Analysis and determination

16. This being the first appeal, it is this court's duty under section 78 of the Civil Procedure Act to re-evaluate the evidence tendered before the trial court and come to its own independent conclusion taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of **Selle v. Associated Motor Boat Co. Ltd (1968) EA 123** cited by the appellants where Sir Clement De Lestang (V.P) stated that:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally”.

17. I have carefully perused the proceedings, the judgement, and the record of appeal as a whole including the parties' submissions. Two issues fall for determination;

i. Whether the apportionment of liability was well founded.

ii. Whether the award on quantum was excessive in the circumstances.

18. On the first issue, whether the apportionment of liability was well founded. **PW1 Evelyn Kavuka Kanyere**, the respondent testified that her deceased husband on 14th November 2015 left home and travelled to Matunda but got a road accident and died. She stated that the deceased had travelled vide KBX 953 North Rift Shuttle as a passenger, that the accident was at Kibunja in Molo and the deceased died on the spot.

19. She testified further that the post mortem was done at Molo and they buried him in Matunda. She added that her deceased husband was a Chief Accountant at TSC and that they had 4 children. She produced the following documents marked as exhibits 1-12 respectively in support of her case; her identity card, the limited grant certificate, death certificate, post mortem report, police abstract, motor vehicle search, birth certificate of her 4 children, fees structure for the children, copy of the chief's letter, deceased pay slip, demand letters to the appellants and receipt for Kshs. 350,000/= for body preservation at Chiromo. PW1 concluded by testifying that the deceased was 45 years at the time of his death and he supported his mother and that they also lost financial dependency from the deceased. She prayed for compensation and costs of the suit.

20. On cross examination, PW1 confirmed that the deceased used to earn Kshs.129,000/= and herself between Kshs.5,000/= to 10,000/=.

21. **PW2 CIP Moses Nderitu** the Base Commander Molo division, testified that on 14th November 2015 an accident occurred along Nakuru- Eldoret road at Kibunja Trading Centre, involving a lorry KBU 962D and a Toyota Shark KBX 953D a matatu heading to Eldoret. He testified further that the said accident occurred at 0030 hours and he visited the scene with Cpl. Juma. **PW2** went on to testify that the matatu which had 11 passengers rammed at the rear side of the lorry and one passenger who was on the right side was fatally injured. That the other passengers that were injured were taken to Molo district hospital. **PW2** added that upon inquiry, he learnt that the said lorry was stationary and that the driver of the matatu did not know that the lorry was there as no life savers but only branches had been placed on the road.

22. **PW2** testified that the driver of the matatu swerved to the right but there was an oncoming vehicle and to avoid a head on collision he swerved again to the right and hit the lorry. He testified that the deceased died in the accident and that the lorry was at the left lane as one goes to Eldoret from Nakuru. He testified further, that the lorry was to blame for the accident. He produced the police abstract and the same was marked as P. exhibit 5.

23. **DW1 Alex Kipruto Malel**, the driver of the lorry **KBU 962D** adopted his witness statement dated 21st November 2015 and testified that he was not to blame for the accident as he was hit from behind. He testified further that his vehicle had a mechanical problems and he had put a life saver sign. He added that he was hit by a matatu **KBX 953D**.

24. On cross examination he confirmed that he was the driver of **KBU 962D** which was hit by motor vehicle **KBX 953D**. That he could not remove the motor vehicle from the road as there was ditch and that he had put branches and reflector but the same were damaged by the matatu. He testified further that he had not produced a driving licence and that he was never charged with a traffic offence.

25. From the above evidence the question that arises is, who was to blame for the accident? For this court to interfere with the conclusions of facts by the trial court, it must be convinced that the finding is based on factual evidence as truly presented during trial. This court only needs to employ flowing logic which means that a decision is arrived at which reasonably flows from a premised foundation. In **Simplicious Maende Osiche & another v Cleophas Kundu Masibo (suing as the legal administrator and representative of Estate of Salton Walunywa Kung'u – Deceased) [2020] eKLR** the court cited with approval the case of **Shapley Vs Gypsum Mines Ltd (1953) 2 AC 663 at page 681** where Lord Reid in explaining this stated: -

“To determine what caused an accident from the point of view of new legal liability is a most difficult task. If there is any valid logical or scientific theory, it is quite irrelevant in this connection to a court of law. This question must be decided as a properly instructed and reasonable jury would decide it. The question must be decided by applying common sense to the facts of each particular case one way find that as a matter of history several people have been at fault and that if any of them had acted properly the accident would not have happened but that does not mean that the accident must be discarded and those which must not. Sometimes it is proper to discard all but one and to regard one as the sole cause but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally.”

26. Further, in **Khambi and Another vs. 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.

27. In the instant case the learned trial magistrate apportioned liability 90% against the 1st and 2nd appellants/defendants and 10% against the 3rd, 4th and 5th defendants. The 1st and 2nd appellants dispute this finding on the ground that PW1 and PW2 testimony failed to discharge burden of proof in regard to particulars of negligence leveled against the 1st appellant. That there was no logical explanation on how liability attached at 90% against the appellants. That further, the police abstract tendered by PW2 never indicated that the 1st appellant was to be blamed for the accident and that there was a warrant pending arrest.

28. In **Zarina Akbarali Shariff and Another vs. Noshir Pirovesha Sethna and Others [1963] EA 239**, it was held that:

“A driver on the main road...is bound to exercise the right of being on the main road in a reasonable way. He has to watch and conform to the movement of other traffic which is in the offing, and he must take due care to avoid collision with it. The answer as to whether the court is entitled to think that the driver, despite his prima facie right of way, should surrender that right in anticipation of possible failure on the part of the driver on the side road to note the safe course, must turn on the conduct of the driver on the side road and on the opportunities which the driver on the main road has of observing it. There must be something in the conduct of the driver on the side road which the driver on the main road ought to have seen and which would have disoriented him, had he been taking proper care, that the driver on the side road was not going to pass behind but was going to try to pass in front of the driver on the main road. There is no doubt that anyone driving on the main road is entitled to keep his proper place on the road, and to do so in reliance on the side traffic heaving itself as the rules of the road desires, until it may be the very last moment observation of a gross infringement by others calls for a special attempt to deal with it...If the possibility of danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions...A driver is never entitled to assume that people will not do what experience and common sense teach him that they are, in fact, likely to do...It is not correct that drivers are entitled to drive on the assumption that other road users whether drivers or pedestrians, would behave with reasonable care. It is common experience that many do not. A driver is not, of course, bound to anticipate folly in all forms, but he is not entitled to put out of consideration the teachings of experience as to the form those follies commonly take...He cannot be expected to cope with every form of recklessness or outrageous conduct on the part of other road users, but ordinary prudence would require him to approach at a speed which, combined with a proper look-out, would leave him able to take reasonable avoiding action if the need became apparent. What is reasonable is a question of degree depending on the particular circumstances. If he did not do so, or deprived himself of his opportunity to take avoiding action by not keeping a proper lookout, that could be negligence contributing to an accident...This does not mean that the driver on the major road can disregard the existence of the cross-roads: it is his duty to keep a proper look-out of all the vehicles or pedestrians who are using or may come upon the road from any direction and if he fails to do so and as a result an accident happens, then he is negligent even though there has been greater negligence on the other party. It is the duty of every driver to guard against the possibility of any danger which is reasonably apparent, but it is not his duty to proceed in such a way that he could avoid an accident no matter how reckless the other party may be.”

29. Further, in in **Masembe vs. Sugar Corporation and Another [2002] 2 EA 434** it was held that:

“When a man drives a motor car along the road, he is bound to anticipate that there may be things and people or animals in the way at any moment, and he is bound not to go faster than will permit his course at any time to avoid anything he sees after he has seen it...There is no act or omission that has static blameworthiness and therefore each case must be assessed on its own circumstances and the apportionment ought to be a result of comparing the negligent conduct of the tortfeasors, to determine the degree to which each one was in fault, both in regard to causation of the wrong and unreasonableness of conduct...Whereas a driver is not to foresee every extremity of folly which occurs on the road, equally he is not certainly entitled to drive on the footing that other users of the road, either drivers or pedestrians, will exercise reasonable care. He is bound to anticipate any act which is reasonably foreseeable, that is to say anything which the experience of the road users teaches them that people do albeit negligently.” (Emphasis mine).”

30. In view of the above cited authorities it is my finding that there is no hard and fast rule when it comes to apportionment of liability

where one driver is prima facie on the right. In other words, a driver on the road must always keep at the back of his mind that some road users are likely to be negligent and give allowance for that. He ought not to adopt an attitude that as long as he is driving properly on the road, he ought not to take action which a reasonable driver is expected to take when there appears to be a possibility of danger posed to other road users. If he fails to do so, he could be liable in negligence if not wholly to a certain extent. In the instant case the 1st appellant failed to take up precaution as required for a reasonable driver by failing to place a reflector on the road to warn other motorists. As a matter of fact there was no evidence of the damaged reflector and if it was perhaps would have found at least the remnants from the damage.

31. Further, the appellants have not furnished any evidence to this court proving the fact that they did not deserve to be held 90% liable for the accident. In **Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR** it was held that:

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore, the evidential burden...is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side.”

32. The evidence on record that not only was DW1 took no action to avoid the collision however little while the driver of the matatu upon seeing the stalled lorry belonging to the 2nd appellant swerved to avoid knocking the said lorry but he could not as there was an oncoming vehicle was enough to indicate how the accident occurred. I do not respectfully find that that apportionment of liability was clearly wrong, or based on no evidence or on the application of a wrong principle or that it was manifestly erroneous.

33. On whether the award on quantum was excessive in the circumstances the appellants submitted that the deceased had 15years remaining from the statutory age and that the multiplicand of Kshs. 95,779.15/= and multiplier of 14years was overly exaggerated leading to an excessive award under loss of dependency. That further, the award of Kshs. 10, 727,264.8 and Kshs. 120,000/= were excessive and not commensurate. The appellant urged the court to reduce the award of Kshs. 120,000/= to the average submitted by the parties which was Kshs. 95,000/= to 100,000/=. The appellant stated that the award under pain and suffering was excessive bearing in mind that the deceased died on the spot.

34. In **Kemfro Africa Limited T/A Meru Express Service Gathogo Kanini v. A.m. Lubia and Olive Lubia (1982 –88) 1 KAR 727**. In the said case **Kneller J.A.** held that: -

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that; short of t his, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

35. In the instant case, I will first address the issue of the award for pain and suffering whereby the trial court awarded Kshs. 30,000/= after considering that the deceased died on the spot. The appellant submitted that Kshs. 10,000/= is what ought to have been awarded. In my view, Kshs. 30,000/- is nominal ,largely discretionary and standard therefore I see no basis of interfering with the same as the amount is neither inordinately high or low compared to the awards normally made under this head. In the case of **Peter Chege & 2 others v Joyce Litha Kitonyi & 2 others [2017] eKLR**, for instance, the court held that: -

“...there are number of authorities where more than a nominal figure was awarded even though the Deceased died instantly. See, for example, Jennifer Odhiambo and Another v. Elizabeth Mbuka Acham & Another and Meneza Odhiambo v. Agnes Susan Wairimu & others where Kshs. 20,000/= and 30,000/= respectively was awarded more than 10 years ago in respect of persons who died instantly.”

36. On the issue of the multiplicand and multiplier, the Court of Appeal of Eastern Africa in **Chanubai J Patel and Another Vs P F Hayes and Others (1957) EA 748 at 749** where it stated: -

“The court should find the age and expectation of working life of the deceased and consider the ages and expectations of life of the dependants the net earning power of the deceased (i.e. the income less tax) and the proportion of his net income which he would have made available for his dependents. From this it should be possible to arrive at the annual value for the dependency which must then be capitalized by multiplying by a figure representing some any years purchase. The multiplier will bear a relation to the expectation of the earning life of the deceased and the expectation of life and dependency of the widow and children. The capital sum so reached should be discounted to allow for the possibility or probability of the re-marriage of the widow and in certain cases of the acceleration of the receipt by the widow of what the husband left her as a result of the pre-mature death. A deduction must be made for the value of the estate of the deceased because the dependable will get the benefit of that. The resulting sum (which must depend upon a number of estimates and imponderables) will be the lump sum that the court should apportion among the dependants.

37. In view of the above, it is my opinion that the trial court’s final tabulation for loss of dependency as $95779.15 \times 2/3 \times 12 \times 14 =$ Kshs. 10,727,264.8 and the awards are sound and judicious as it was founded on the correct principles and factors required by the law and as enunciated by the Court of Appeal in the case of **Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v. A.m. Lubia and Olive Lubia (1982 –88) 1 KAR 727 (supra)** on the assessment of damages.

38. At any rate looking at the age of the deceased’s children, they were all generally young, the youngest being 8 years at the time of her father’s death. They therefore would need a lot of attention in their education and other necessities of life.

39. There was not much evidence of the respondent's contribution save to state that she earned between kshs5,000 to 10,000 per month from a sources not disclosed to the court. I do not find this contribution would affect the matter at hand as such. As a normal person and a mother or housewife she is expected definitely to offer her contribution in kind and materially as well as financially but all indicators point to the fact that the deceased who was a chief accountant at TSC was the main bread winner.

40. Consequently, I do not find the computation by the trial court erroneous or excessive in the circumstances. He had sufficient number of years to work barring and preponderances and vicissitudes of life.

41. The court has said much to indicate that it does not find any merit in the appeal and the same is hereby dismissed with costs to the respondent.

Dated signed and delivered via video link at Nakuru this 3rd day of February 2022.

H K CHEMITEI

JUDGE