



**Hasham Logistics Limited v Jebichi (Suing as the Personal Representative  
of the Estate of Zedrick Lumbasi Deceased) (Civil Appeal 36 of 2023)  
[2024] KEHC 14433 (KLR) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14433 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CIVIL APPEAL 36 OF 2023  
SC CHIRCHIR, J  
NOVEMBER 14, 2024**

**BETWEEN**

**HASHAM LOGISTICS LIMITED ..... APPELLANT**

**AND**

**JANET JEBICHI ..... RESPONDENT**

**SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF  
ZEDRICK LUMBASI DECEASED**

*(Being an Appeal from the Judgment of Hon. R.S Kipngeno(PM) delivered on  
8th August 2023 in Butali Chief Magistrate's curt Civil case No. E192 of 2022)*

**JUDGMENT**

1. The respondent filed suit in the lower court, seeking for damages on behalf of the Estate and dependants of the Zedrick Lumbasi ( Deceased), following a road traffic Accident which caused fatal injuries to the deceased. The accident is reported to have occurred along Eldoret-Webuye Highway and involved motor vehicle Registration Number KDD 862 Y( The Trailer) and a motorbike. The deceased was a pillion passenger in the motorbike.
2. In a Judgment delivered on 8<sup>th</sup> August 2023, the trial court apportioned liability in the ratio of 30% against the deceased and 70% against the Appellant. The court further awarded general damages of ksh. 3,891,622.40 and special damages of ksh. 74,700.

**Memorandum of Appeal**

3. Aggrieved by the judgment, the Appellant filed this Appeal and set out the following grounds:



1. The learned trial magistrate erred in law and or fact in holding the appellant (defendant) liable to the respondent (plaintiff) in negligence which finding was against the weight of evidence and the material on record.
  2. The learned trial magistrate erred in law and in fact in holding the appellant 70 % liable to the respondent in negligence which finding contradicted the evidence on record which evidence was to the effect that the deceased and the rider of the motorcycle on which the deceased was a pillion passenger were entirely to blame for the mishap and that the defendant did not cause or contribute to the accident at all and the trial magistrate's finding and apportionment of liability was baseless ,erroneous and unsupported.
  3. The learned trial magistrate erred in law and in fact by shifting the burden of proof, relying on conjecture and opinion and or by failing to analyse and evaluate the evidence and the material on record critically and or as a whole and his judgment was arrived at in a cursory and perfunctory manner.
  4. The learned trial magistrate erred in law and or fact in awarding the plaintiff loss of dependency of kshs.3,891,622.40 without demonstrating how he arrived at the said figure and or he erred by applying an erroneous ,exaggerated and unmerited multiplier, multiplicand and dependency ratio.
  5. The learned trial magistrate applied the wrong principals and or he failed to apply the correct principles in determining the awards of general damages and special damages leading him into err and his awards were flawed, excessive ,unmerited and have resulted in a miscarriage of justice .
4. The respondent filled a cross- appeal ,setting out the following grounds:
1. The learned trial magistrate erred in law and fact in attributing 30% liability to the deceased who the court observed was a mere pillion passenger.
  2. That the learned trial magistrate erred in law and in fact in failing to find that the respondent was 100% liable for the occurrence of the accident.
  3. That the learned magistrate erred in failing to consider and critically analyse the evidence and submissions made on behalf of the Appellant.
5. The appeal was canvassed by way of written submissions.

### **Appellant's submissions**

6. It is the Appellant's submissions that it was evident from the witnesses' accounts that the Rider of the motorcycle failed to exercise their due care and caution before overtaking the trailer
7. On general damages, it is submitted that the trial court did not lay a basis for use of the multiplier of 32 years and the monthly income of ksh.15,201.65; that there was no evidence of the income that the deceased earned or his occupation. In the circumstances, it is argued, the court should have awarded a global figure of ksh. 500,000 on general damages. The court's decision in the case of M'rarama M'nthieri vs. Luke Kiumbe Murith (2015) eKLR, has been relied on , in this regard.
8. On special damages, the Appellant submits that there was no strict proof . It is cited for instance that the receipt Kshs. 40,000/= was in the name of one Juliet Jebichii and not the respondent while the receipt for Kshs. 17,000/= was not in the name of the payee and did not have a revenue stamp.



## **Respondent's submissions**

9. The respondent presented two issues for consideration, namely;
  - a). whether the magistrate erred in law and in fact when apportioning liability at 30% to the respondent
  - b) whether the general damages of ksh. 3,891,622.40 awarded to the Respondent was extremely high

## **Whether the apportionment of liability was erroneous**

10. It is the respondent's submission that the Appellant did not prove that he was not negligent for the accident; that despite blaming the rider of the motor cycle he was not enjoined in the proceedings. The respondent relied on the case of James Gikonyo Mwangi vs DM( 2016 ) e KLR, to buttress his submissions in this regard. It is further submitted that the deceased was only a passenger in the motor cycle and therefore he should not be blamed for causing the accident. It is submitted that, in the circumstances, the Appellant should have been held fully liable for the accident.
11. On damages, it is submitted that the income adopted was the minimum wage as per the Regulation of wages (General) Amendment order, 2022. On the dependency ratio, it is contended that the deceased was married and had children, and therefore the ratio of 2/3 applied was therefore the correct one.

## **Analysis and determination**

12. This is a first Appeal and the role of this court is well settled. It is to review the evidence tendered in the trial court, evaluate it, and arrive at its own conclusion. However due allowance must be made to the fact that unlike the appellate court, the trial court had the benefit of hearing and seeing the witnesses first-hand. ( see Selle and another –vs- Associated Motor Boat Company Ltd.& Others (1968) EA 123)
13. I have considered the memorandum of Appeal and the cross- appeal, the evidence tendered, the parties' submissions and the Authorities relied on, and I have identified the following issues for determination:
  - a. What is the appropriate apportionment on liability
  - b. Damages

## **Liability**

14. The accident was between a trailer and a motorbike. Both vehicles were headed in the same direction. The evidence of PW2, PW3 and DW1 are relevant in this regard. PW2 told the court that the Trailer was overtaking the motorbike when the accident occurred, while according to DW1, it was the motorcycle that was overtaking. Thus there are divergent versions of how the accident occurred. There is however common ground that the deceased was a passenger on the motor cycle and that it was in that process of overtaking that the deceased's jacket was caught by the twist locks handles of the trailer. As a result, the deceased fell off and was run over by the trailer. Faced with this divergent positions on how the accident occurred, the court would have been entitled to apportion the blame equally.
15. In this case, however, the respondent opted to sue the Appellant, and the Appellant shifted the blame to the Rider and the deceased. However the Rider was not made a party to the suit.



16. Order 1 Rule 15 of the Civil Procedure Rules provides as follows: -

- “(1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)—(a)that he is entitled to contribution or indemnity; or(b)that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or(c)that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.
- (2) A copy of such notice shall be filed and shall be served on the third party according to the rules relating to the service of a summons.
- (3) The notice shall state the nature and grounds of the claim, and shall, unless otherwise ordered by the court, be filed within fourteen days of service, and shall be in or to the effect of Form No. 1 of Appendix A with such variations as circumstances require and a copy of the plaint shall be served therewith..... “

17. Thus once the Appellant shifted the blame to the Rider of the motor cycle , it was the duty of the Appellant to take out the third party proceedings against the said Rider . The court would then have been given the opportunity to decide who, between the Rider and the driver was to blame. In default the Rider can not be apportioned some of the blame as the rider is not part of the proceedings. The Appellant must therefore shoulder the Rider’s fault .

18. Though the primary cause of the accident was the overtaking by either of the machines when it was not safe to do so , the deceased was not entirely innocent. Witnesses from both sides testified that the deceased’s jacket was caused by the hook handles of the trailer. “Flying” clothes like a jacket, not properly secured, is prone to cause such accidents to persons riding on a motorbikes and in the other motorists. It clearly emerged that notwithstanding the overtaking, the accident would have been avoided if the pillion passenger clothe’s were not caught on the hooks. And the jacket was only caught by the hooks because the jacket was not held in place. This conclusion is informed by the fact that the Rider escaped unhurt. It lends credence to the witnesses testimony to the effect that the passenger fell off when his jacket was caught by the trailers hooks. To this extent the deceased’s careless handling of his wearing apparel while atop a motorbike played some role in the causation of the accident. I will hold him liable to a degree of 10 % percent.

19. For reasons earlier stated the Appellant will take the rest of the blame at 90%.

20. I have taken note of the judgment of the trial court. The court apportioned liability at the rate of 30% against the deceased and 70% against the Appellant. However the trial court failed to lay a basis for this finding. The trial court also seems to have apportioned liability as though the accident was between the passenger and the trailer only.



## Damages

21. The general principle when it comes to assessment of damages is that in the assessment of damages a trial court exercises its discretion and the appellate court will not interfere with such exercise unless the trial court either acted on wrong principle or awarded so excessive or so inordinately low or the court considered irrelevant matters or failed to take into consideration relevant matters and as a result arrived at the wrong decision.( see *Butler vs Butler*(1984) KLR 225.
22. In assessing general damages the trial court applied a multiplier of 32 years, a dependency ratio of 2/3 and income of ksh. 15,201.65. The dependency ratio is not a ground of Appeal and therefore I will not address myself to it.
23. On the multiplier, the trial court noted that farming , which was the occupation of the deceased, is not subject to the limitation of the retirement age of 60 years. I find no fault in this observation. The 32 years applied was therefore reasonable, considering that based on the said observation , the court would have been justified in applying a multiplier in excess of 32 years.
24. The court adopted the income of ksh. 15,201.65 proposed by the plaintiff without laying any basis. The respondent submitted that it was the minimum wage based on the Regulations of wages( general) Amendment order of 2022. However the 2022 regulation came into effect in May 2022, while the accident herein occurred in March 2022. The Applicable regulation of wages order at the time was therefore the one of the year 2018, published under [Legal Notice 2 of 2018](#). There was therefore an error in principle and this court has a reason to intervene.
25. The accident happened in kipkaren area. The applicable wage is therefore column 4, which is the column which sets out the minimum wage for areas outside the former municipalities. The minimum wage then at the time of the accident was ksh. 7, 204.20, and which I hereby adopt.
26. The Appellant has faulted the trial court for not applying a global figure of ksh. 500, 000 on general damages , arguing that there was no proof of the deceased' income. However the global as well as multiplier approach are acceptable methods of assessing damages . The trial court was at liberty to use any approach. Further, it is trite law that documents are not the only way to prove a deceased person's occupation or income.
27. On special damages, I noted that a sum of ksh. 40,000 on account of “ demand letter and statutory Notice was included” such costs are not part of damages . Subject to proof, they form part of the costs. The other items forming part of special damages were proved. This head of damages is therefore reduced by ksh. 40,000.
28. Final orders:
  - a) The lower court judgment is hereby set aside in its entirety .
  - (b) Judgment is hereby entered for the plaintiff as against the defendant on liability in the ratio of 10 % against the deceased and 90% against the defendant
  - (ii) Special damages in the sum of Ksh. 69,700,
  - (iii) General damages- ( 7204.20 x 12x2/3 x32 years)= sh. 1,853,683.2

Grand total.....ksh. 1,923, 383.20

Less 10%.....(ksh 192,338.32)

Net..... Ksh. 1,731,044.88



- c). Each party to meet their own costs in this Appeal.
- d). For avoidance the respondent has costs in the lower court.
- e). The awards will attract interest at court rates from the date of judgment at the lower court.

**DATED , SIGNED AND DELIVERED AT KAKAMEGA THIS 14<sup>TH</sup> DAY OF NOVEMBER 2024.**

**S. CHIRCHIR**

**JUDGE.**

In the presence of :

Godwin Luyundi – Court Assistant

Ms. Njambi for the Respondent.

