



**Mariko (Suing as the Legal Representative of the Estate of Martin
Wekesa Mariko - Deceased) v GH Tanna & Sons Limited (Civil Appeal
E051 of 2021) [2024] KEHC 14121 (KLR) (13 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14121 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CIVIL APPEAL E051 OF 2021
AC MRIMA, J
NOVEMBER 13, 2024**

BETWEEN

**DOMINIC JUMA MARIKO APPELLANT
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MARTIN
WEKESA MARIKO - DECEASED**

AND

GH TANNA & SONS LIMITED RESPONDENT

*(Being an appeal from the Judgment and decree of Hon. M. G.
Moranga (Senior Principal Magistrate) in Kitale Chief Magistrates
Civil Case No. 193'B' of 2018 delivered on 24th February, 2020)*

JUDGMENT

Background:

1. On 13th January 2018, Martin Wekesa Mariko, [hereinafter referred to as ‘the deceased’], being the rider of Motor cycle No. KMEB 399L [hereinafter referred to as ‘the Motor Cycle’] was fatally wounded in a road traffic accident involving the motor cycle and Motor vehicle registration number KAW 454G make Nissan UD Lorry [hereinafter referred to as ‘the Lorry’] belonging to the Respondent herein, G.H. Tanna & Sons Limited.
2. Through the Complaint dated 21st May 2018 [which was later amended], Dominic Juma Mariko, the Appellant herein instituted Kitale Chief Magistrates Civil Case No. 193'B' of 2018 [hereinafter referred to as ‘the suit’] on behalf of the deceased’s estate. It was his case that the Respondent was negligent and responsible for causing the accident.



3. The Appellant sought damages under the *Law Reform Act* for loss of expectation of life and damages for lost years, loss of dependency and loss of earning capacity under the *Fatal Accidents Act*.
4. The Respondent challenged the suit through the Statement of Defence dated 4th June 2018. It denied the Appellant's claims and asserted that if indeed there was an accident, it wholly happened on account of the deceased's negligence.
5. The suit was eventually fully heard and determined. The Appellant [then Plaintiff] testified as PW1 and called three witnesses being one Edwin Kiplimo Kipruto [PW2], Dr. Nancy Kegode [PW3] and No. 74524 PC Vincent Nyakundi Nyamai [PW4] then attached to Kitale Police Station Traffic Section.
6. The Respondent testified through one Kennedy Omondi [DW1] who was the driver of the lorry.
7. In its judgment delivered on 24th February 2020, the trial Court apportioned liability equally between the deceased and the Respondent. It also awarded the estate Kshs. 50,000/- for pain and suffering and Kshs. 100,000/- for loss of expectation of life.
8. The trial Court then assessed loss of dependency based on Section 4 of the *Fatal Accidents Act*. It utilized the multiplier approach as opposed to the global/lumpsum approach. On the basis of the deceased's age at the time of death and his work as a security guard, the Court settled for a monthly salary of Kshs. 10,400/-, adopted the multiplier of 28 years and a dependency ratio of 1/3. Accordingly, it entered judgment for loss of dependency at Kshs. 1,164,800/-.
9. The Court also awarded Special damages of Kshs. 76,550/- and Kshs. 70,000/= for funeral expenses thereby making a decretal sum of Kshs. 1,391,400/=. Consequently, a net award of Kshs. 695,675/= was made in favour of the estate as against the Respondent. Out of the said sum, Kshs. 500,000/= was ordered to be deposited in an interest-earning account in the joint names of the Appellant and the Court's Executive Officer in favour of one Cecilia Nasambu, a minor and a daughter of the deceased, until the minor attained the age of majority. The balance of Kshs. 195,678/= was decreed to be released to the Appellant to take care of the educational needs, among others, of the minor.
10. The Appellant was also awarded the costs of the suit and interest.

The Appeal:

11. The Appellant was dissatisfied with the trial Court's decision. He then filed a Memorandum of Appeal dated 19th October 2021. He mainly challenged the apportionment of liability and the order directing the depositing of the sums of Kshs. 500,000/= in the minor's favour.
12. The Respondent opposed the appeal.
13. On the directions of this Court, the appeal was heard by way of written submissions. Both parties duly filed their respective submissions. They referred to various decisions in urging their respective cases.

Analysis:

14. From the foregoing appreciation of the disputants' respective cases, the issues that arise for determination are as follows: -
 - i. Whether the trial Court correctly assessed liability between the parties.
 - ii. Whether the order directing the sum of Kshs. 500,000/= be held in favour of the minor was fair and reasonable.
15. The Court will, hence, consider the issues sequentially, but first the Court's role in this appeal.



16. This Court is called upon to reconsider the evidence on record, evaluate it and reach its own conclusion. (See *Selle & Ano. vs. Associated Motor Boat Co. Ltd* (1968) EA 123). This Court, nevertheless, appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in *Mwanasokoni – versus- Kenya Bus Service Ltd* (1982-88) 1 KAR 278, *Abdul Hammed Saif v Ali Mohamed Sholan* (1955) 22 E.A.C.A. 270 and *Kiruga –versus- Kiruga& Another* (1988) KLR 348 among others.
17. On the basis of the foregoing guidance, this Court now looks at the two main issues in this appeal.

Liability:

18. There is no doubt that an accident which claimed the life of the deceased occurred on 13th January 2018 and as pleaded in the Plaintiff.
19. According to the record, two eye-witnesses testified on how the accident occurred. They were PW2 and DW1.
20. It was PW2's evidence that at the material time, the deceased was riding the motor cycle along the Kitale-Endebes road while carrying some metal rods that protruded backwards. That, it was DW1 who then drove the lorry and stepped on the metal rods thereby causing the deceased to lose control of the motor cycle. Subsequently, the deceased fell and was run over by the lorry.
21. On his part, DW1 stated that as he was driving the lorry along the Kitale–Endebes road, he saw the deceased's motor cycle from behind with the aid of the side mirrors. The motor cycle carried some metal rods. That, another motor cycle stepped on the iron rods and the deceased lost control, hit the lorry at the back and fell on the road. DW1 stopped as the offending motor cycle disappeared. The police then arrived at the scene.
22. PW4 was a Traffic Police officer attached to the Traffic Section at Kitale Police Station where the accident was reported. He testified on behalf of the investigating officer who could not attend Court on that day. Referring to the police records, PW4 stated that the evidence gathered was that the deceased carried some metal rods on the rear of the motor cycle and successfully overtook the lorry. Thereafter, the lorry stepped on the metal rods that protruded behind the motor cycle thereby causing the accident. According to PW4, he wondered why DW1 was not charged with a traffic case.
23. The evidence on how the accident occurred is relatively straight-forward. There is comity between PW2 and PW4 that it was DW1 who caused the lorry to step on the metal rods that protruded on the rear of the motor cycle thereby causing the accident. However, DW1 had a different version of it. According to him, it was the deceased who knocked the lorry from behind after the metal rods were stepped on by another motor cyclist.
24. It is, therefore, evident that the accident occurred when the metal rods were stepped on leading to the deceased losing control of the motor cycle. The elephant in the room is, hence, who stepped on the metal rods. Could be it be DW1 or the other motor cyclist?
25. PW2 arrived at the scene after the accident had already occurred. He saw the deceased lying on the road and the lorry having stopped some few meters ahead. PW2, therefore, did not witness the accident. DW1 stated that the deceased hit the lorry at the back when the metal rods were stepped on by another motor cyclist. He did not state how the deceased died though. Likewise, PW4 neither visited the scene nor produced the police file on the accident.



26. This Court has carefully considered the submissions by the parties on this issue as well as the record. It is true there was an evidential lacuna in the manner in which the accident occurred. The Court notes that attempts by Counsel for the Respondent for the police file to be produced were resisted by the Appellant's Counsel and that the Appellant opted not to have the police file produced. PW3, who conducted the post mortem examination on the body of the deceased, stated that the deceased died as a result of massive bleeding due to rupture of internal organs. PW3, however, did not state the possible cause of the said injuries. Could it be a vehicle's tyres? Likewise, there is no evidence on the state of the lorry as to whether there was any blood on the tyres and the possible point of contact between the lorry and the deceased.
27. The upshot is, therefore, that one cannot safely deduce how the deceased met his death. However, it is clear that the death involved the lorry and the motor cycle. It is on such state of evidence that the trial Court found it safe to apportion liability equally.
28. In the unique circumstances of this case, it will be remiss of this Court to upset the finding of the trial Court on the aspect of liability. It has been held in decisions by superior Courts [including those referred by the trial Court and the Respondent's Counsel], times without number, that in instances where a Court is not able to clearly ascertain how a road accident involving more than one vehicle occurred, then liability ought to be apportioned equally between the parties. That was exactly what the trial Court did in this case. The trial Court cannot, hence, be faulted.
29. As a result, the appeal on liability fails.

Whether the order directing the sum of Kshs. 500,000/= be held in favour of the minor was fair and reasonable:

30. This Court has equally considered this issue with care. Whereas the trial Court made the impugned order investing the sum of Kshs. 500,000/= in favour of the deceased's minor, the monies were part of the estate of the deceased.
31. Since the grant made to the Appellant was limited to the filing of a suit on behalf of the estate of the deceased with no powers to distribute the estate, the Appellant has the option of filing a substantive succession petition wherein the issues of the assets and liabilities of the deceased and the distribution of the estate will be dealt with. Depending on the outcome, appropriate orders will be accordingly made including those on the Counsel's entitlement.
32. It will, therefore, be inappropriate for this Court to reverse the order investing the money at this point in time.
33. The ground also fails.

Disposition:

34. As there was basically no contest on the damages awarded, the appeal can now be safely determined.
35. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 and later elected to the Judicial Service Commission thereby mostly being away from the station. Apologies galore.
36. Having said as much, the appeal is hereby determined as follows: -



- a. The appeal is unsuccessful and is hereby disallowed.
 - b. Each party shall bear its own costs of the appeal.
- Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 13TH DAY OF NOVEMBER, 2024.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Wanyonyi, Counsel for the Appellant.

Miss Walker, Counsel for the Respondent.

Chemosop/Duke – Court Assistants.

