



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAJIADO**

**CIVIL APPEAL NO. 30 OF 2019**

**DISMAS MUHAMI WAINARUA.....APPELLANT**

**VERSUS**

**SOPON KASIRIMO MARANTA**

**(suing as administrator and or**

**personal representative of the estate**

**of Partinini Supon (Deceased).....RESPONDENT**

***(Appeal from the judgment and decree (Hon. M. Kasera, SPM) delivered on 16<sup>th</sup>***

***October, 2019 in Kajiado CMCC No. 199 of 2018 at the Chief Magistrate's Court Kajiado)***

**JUDGMENT**

1. The respondent brought a claim for general damages under both the Law Reform Act and Fatal Accidents Act on behalf of the estate of Partinin Sapon, who died in a road accident involving motor vehicle KCA 073Q, Isuzu Lorry, owned by the appellant. The accident occurred on 23<sup>rd</sup> September, 2017, along Olgos-Kikuro road attributed to the negligence of the driver of the said motor vehicle. The respondent also sought special damages.

2. The appellant filed a defence denying the respondent's claim and particulars of negligence. He blamed the accident on the deceased's contributory negligence. After hearing the case, the trial court held the appellant 100% liable for negligence. It awarded Kshs. 50,000 for pain and suffering, Kshs, 100,000 for loss of expectation of life and Kshs 2,839,458 for loss of dependency. It also allowed special damages of Kshs 37,000, costs and interest.

3. The appellant was aggrieved with the decision on both liability and quantum. He filed a memorandum of appeal dated 28<sup>th</sup> October, 2019 and raised three grounds thus:

***1. That the learned magistrate erred in law and in fact in apportioning 100% liability against the appellant herein.***

***2. That the learned magistrate erred in fact and in law in adopting a dependency ratio of 2/3 without any proof supporting the same.***

***3. That the learned magistrate failed to deduct the award under the Law Reform Act from the total damages as the dependents were the same.***

4. Parties filed written submissions and the appeal was disposed of through those submissions. The appellant submitted through his submissions dated 21<sup>st</sup> October 2020 and filed on 27<sup>th</sup> October 2020, that the trial court erred in holding his driver wholly to blame for the accident. He argued that the evidence from the witnesses pointed to the fact that the deceased was to blame for not fastening his seat belt when the vehicle brakes and overturned. He argued that the driver had done all he could to avert the accident to no avail.

5. According to the appellant, there was no evidence that why the driver was to blame for the accident and that the respondent merely alleged negligence without proof. In the appellant's view, the deceased sustained fatal injuries because he had not fastened his seat belt.

6. The appellant again argued that the respondent never called an eyewitness on how the accident occurred, and that the plaintiff was not at the scene but was only informed about the accident. According to the appellant, the driver testified that he had his seat belt on and although

he was injured, he full recovered. This, he argued, showed that had the deceased fastened his seat belt, he would not have sustained fatal injuries.

7. The appellant submitted that the police abstract produced did not blame the driver for the accident. He argued that the accident was due to a mechanical problem which was beyond the driver's control. He maintained that the adverse effects of the accident the deceased sustained could have been mitigated had he fastened the seat belt. He relied on *EMK & Another v EOO* [2018] eKLR, for the argument that failure to fasten the seat belt contributed to the injuries that caused his death and he was held 20% to blame. The appellant faulted the trial court for holding the driver 100% liable.

8. The appellant again relied on *Nickson Muthoka Mutavi v Kenya Agricultural Research Institute* [2016] eKLR and *Rahab Wanjiku Nderitu v Daniel Muteti & 4 Others* [2016] eKLR for the proposition that the burden of proof in actions for damages for negligence rests on the plaintiff.

9. The appellant blamed the trial court for adopting a dependency ratio of 2/3 without proof. He argued that the deceased was 24 years old and unmarried; that there was no evidence on the relationship between the deceased and the people who claimed to be his parents or siblings and that a dependency ratio of 1/3 would have been appropriate in this case. He relied on *West Kenya Sugar Co. Limited v Philip Sumba Julaya (suing as the administrator and personal representative of the estate of James Julaya Sumba)* [2017] eKLR, where the court adopted 1/3 dependency ratio in the case of a 27-year-old farmer.

10. The appellant further relied on *Beatrice Wangui Thairu v Ezekiel Barngetuny & Another* (HCCC No. 1638) cited in *James Mutuma Kirimi vs PCEA Kikuyu Hospital & Another* [2017] eKLR for the argument that there is not rule of law that two thirds of a person's income is available for his family expenses. The extent of dependency is a question of fact to be determined in each case. He also cited *Boru Onduu* [1982 – 1992] 2 KAR 288 and *Benedeta Wanjiku Kimani v Changwon Cheboi & Another* [2013] eKLR to support that proposition.

11. The appellant went on to argue that there was no evidence of dependency and that the deceased's income was not proved save what the witness stated that the deceased was earning Kshs. 1400/- daily as a sand loader. He relied on *James Murimi v PCEA* (Supra) on the assessment of damages under Fatal Accidents Act.

12. The appellant again blamed the trial court for not relying on the minimum wage where there was no proof of earning. He relied on *Gachoki Gathuri (suing as the legal representative of the estate of James Kinyua Gachoki (Deceased) v John Ndiga Njagi Timothy & Another* [2015] eKLR. He stated that since the deceased died in 2017, the trial court should have been guided by Regulations of Wages (General Amendment) Order 2017, LN No. 112 of 2017 which put the deceased's minimum wage at Kshs, 7,967.95.

13. The appellant further faulted the trial court for failing to deduct the award under the Law Reform Act from the award under the Fatal Accidents Act, since both awards were for the benefit of the same people. He relied on *Patrick Barasa v Serah Wambui Karumba (suing as the legal representative of the estate of Late Albert Chebaya)* [2019] eKLR; *Francis Wainaina Kirungu (suing as personal representative of the estate of John Karanja Wainain (Deceased) vs Elijah Oketch Adellah* [2015] eKLR and *Hellen Warungu Waweru (suing as the legal representative of Peter Waweru Menja (Deceased) v Kiarie Shoe Stores Ltd* [2015] eKLR.

14. On moderate awards, the appellant relied on *Benham v Gambling*, [1941] AC 157, to argue that moderate awards should be granted under this head. And on the cross appeal, he argued that there was no evidence that the trial court adopted the minimum wage.

15. The respondent filed undated written submissions on 15<sup>th</sup> December 2020. On liability, he submitted that the deceased was a passenger in the motor vehicle when it overturned and he died due to injuries he sustained. According to the respondent, DW1, the driver of the lorry testified that brakes failed and causing the accident to happen. The trial court was right in holding that the driver was to blame since the deceased could not have contributed to the occurrence of the accident.

16. According to the respondent, in assessing liability the court considers causation and blameworthiness. He relied on *Isabella Wanjiku Karanja v Washington Malele* [1983] eKLR. He argued that since the accident occurred due to brakes failure, the deceased did not contribute to its occurrence and could not shoulder any liability. He contended that passengers cannot be held liable for negligence and relied on *Patrick Ngului v Mutie Mutune & Another* [2019] eKLR.

17. In the respondent's view, vehicles do not ordinarily develop brake failure and the appellant had the burden to show that the vehicle was properly maintained. He relied on *Titus Kamau Gachanga v Wahogo Edward & Another* [2017] eKLR and *Nandwa v Kenya Kazi Ltd* [1988] eKLR to support his argument.

18. On the application of 2/3 dependency ratio, the respondent admitted that the deceased was unmarried and, therefore, the dependence of 2/3 was on the higher side. He suggested a dependency ratio of ½ for unmarried deceased persons. He cited *Joseph Ndungu Thuo & Another v Kamau Nguji (Suing as the legal administrator of estate of Peter Waweru)* [2019] eKLR.

19. On failure to deduct the award under the Law Reform Act from that under the Fatal Accidents Act, he argued that duplication occurs when beneficiaries under the Law Reform Act and Fatal Accidents Act are the same. In the present appeal, he submitted that he and the deceased's parents are the dependents under the Fatal Accidents Act, while beneficiaries of the estate are the deceased's siblings. In his view, the issue of duplication did not arise.

20. On whether the court could use minimum wage, the respondent argued that the deceased was earning Kshs. 1400/- daily as a turn boy which was supported by DW1 that the deceased would make Kshs. 800/- from every Lorry he loaded. On average, the deceased would load 2 to 3 lorries a day which meant he would make about Kshs. 1600 daily including weekends.

21. According to the respondent, his burden to prove income was on a balance of probability. He argued that he had proved income and,

therefore, the trial court was in error in applying minimum wage. He relied on Isaack Kimani Kanyingi & Another v Hellena Wanjiru Rukanga [2020] eKLR that documents are not only way of proving a person's income. He urged the court to dismiss the appeal. He also urged the court to find that the deceased earned Kshs. 42,000 per month. He contended that since there was no appeal on the multiplier of 24 years. The court should assess damages on dependency at Kshs. 6,048,000.

22. I have considered this appeal, submissions and the decisions relied on. I have also perused the trial court's record and considered the impugned judgment. This being a first appeal, it is the duty of this court as the first appellate court, to reassess, reevaluate and reconsider the evidence afresh and come to its own conclusion on it. The court should however bear in mind that it did not see witnesses testify and give due allowance for that.

23. In Williamson Diamonds Ltd and another v Brown [1970] EA 1, the court held that:

***“The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion.”***

24. Further, in PIL Kenya Limited v Oppong [2009] KLR 442, it was held that:

***“It is the duty...of a first appellate court to analyze and evaluate the evidence on record afresh and to reach its own independent decision, but always bearing in mind that the trial court had the advantage of hearing and seeking the witnesses and their demeanor and giving allowance for that”.***

25. Similarly, in Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] e KLR, the Court of Appeal stated;

***“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”***

26. The respondent testified, relying on his witness statement filed together with the plaint, that her son died aged 24 years and was unmarried. He told the court that he worked as a lorry turn boy and earned Kshs. 1400 daily. He would give them Kshs, 10,000. She relied on documents attached to her list of documents, including a letter from Sand Harvester Co-operative Society as exhibits. In cross-examination, she admitted that she was not present when the accident occurred and that she had nothing to show that the deceased used to give them money.

27. Dennis Mwangi, the driver of the motor vehicle also testified relying on his witness statement dated 6<sup>th</sup> September, 2018, that on the material day he went to fetch sand and as the vehicle went downhill, its brakes failed and it overturned. There were three people in the vehicle but only the deceased had not buckled up. He told the court that he also sustained injuries and was rushed to hospital while the deceased sustained head injuries. According to the witness, the deceased was paid Kshs, 800 per lorry and they would do 2 to 3 trips a day.

28. From that evidence, the trial court was satisfied that the respondent proved his case on a balance of probability and held the driver 100% liable for the accident. It awarded both general and special damages, prompting this appeal.

29. The appellant blamed the trial court for holding them wholly liable given that there was no proof of negligence on the part of the driver. He also blamed the trial court on the level of damages awarded. The respondent on her part argued that the trial court was right in holding the driver wholly liable for the accident. He supported the award of damages.

30. From the contestations in this appeal, the issues that arise for determination are whether the trial court was wrong on liability and whether the was in error on the level of damages awarded.

## **Liability**

31. I have considered respective parties' arguments in this appeal. There is no denial that the deceased was a passenger in the motor vehicle which was being driven by DW1. According to DW1, the lorry lost brakes as it went downhill. It rolled and as a result, the deceased sustained fatal injuries and died as a result. The driver did not give reasons why brakes failed. Brake failure could signal failure on the part of the appellant to maintain the vehicle.

32. The appellant or his driver did not adduce evidence to show that the vehicle was regularly maintained and when last the brakes were checked and or serviced. Only cogent evidence would assist the appellant in demonstrating that there was no fault on their part.

33. The appellant blamed the deceased for contributory negligence for not fastening his seat belt. I do not find the appellant's argument persuasive. According to DW1, the driver, the accident occurred due to brake failure. The deceased had nothing to do with it. Even if the deceased had fastened, the accident would still have occurred. There was no nexus between failure to fasten the seat belt and occurrence of the accident. That is; there was no way failure to fasten could have caused the accident or contributed to its occurrence. For that reason, I am unable to fault the trial court's finding on liability.

## **Quantum**

34. On quantum, the appellant complained in his grounds of appeal that the trial court was wrong in adopting a dependency ratio of 2/3

without any proof, and that it failed to deduct the award made under the Law Reform Act from the total award of damages.

35. The court awarded Kshs. 50,000 for pain and suffering; Kshs. 100,000 for loss of expectation of life and Kshs. 2,839,458 for loss of dependency. The appellant did not challenge the awards for pain and suffering and loss of expectation of life. The challenge, as far as it can be gleaned from the grounds of appeal and submissions, was on the award for loss of dependency.

36. In arriving at the award of Kshs. 2,839,458 for loss of dependency, the trial court took into account the deceased's earning of Kshs. 11,831.20 Per month. The court stated:

***“on the issue of dependency, the plaintiff proved the deceased earned Kshs. 11, 831.20 per month which is the minimum wage and used half of it to support his parents. I adopt 2/3 dependency ratio and a multiplier of 30...”***

37. The appellant argued that there was no proof of earning and, therefore, the trial court should have used the minimum wage. He also argued that a ratio of 1/3 would have been appropriate since there was no proof that the 2/3 of the deceased's earning was used to support his parents.

38. I have considered respective parties' arguments on this issue, and perused the impugned judgment. According to the appellant's submissions filed before the trial court and dated 11<sup>th</sup> June 2019, he argued that the respondent did not prove earning and therefore the minimum wage was applicable. In his view, according to the **Regulations of Wages (General) Amendment Order, 2013**, the minimum wage in the deceased's category was **Kshs. 11,831.20** per month. That was the amount the trial court applied when calculating the award on loss of dependency.

39. In the present appeal, the appellant turned around and submitted that since the deceased died in 2017, the applicable Regulations were the 2017 Order, Legal Notice No. 112 of 2017. He proposed the minimum amount of Kshs. 7,967.95.

40. The appellant suggested the figure of **Kshs. 11,831.20** to the trial court which it accepted. Whether it was a mistake on his part or not, the trial court acted on his proposal and made a decision as the appellant wished. It would be improper for the appellant to turn away from that stand and suggest a different figure on appeal. I therefore find no justifiable reason to interfere with the trial court's decision on the deceased's earnings.

41. The appellant also blamed the trial court for applying the dependency ratio of 2/3, contending that there was no proof of dependency. In any case, he argued, a dependency ratio of 1/3 would have been appropriate. The respondent disagreed and contended that the trial court should have applied a dependency ratio of ½.

42. I have perused the plaint filed before the trial court. The suit was brought under the Law Reform Act and the Fatal Accidents Act on behalf of the estate and dependants of the deceased. The dependants named were parents and siblings of the deceased. During the hearing, the respondent testified that the deceased used to give them Kshs. 10,000. In the witness statement filed with the plaint, he stated that the deceased used two-thirds of his income to support them.

43. Dependency is a fact that should be proved by evidence. The respondent stated that the deceased used to give them Kshs. 10,000 while he stated in his statement that the deceased spent two-thirds of his income to support them. Obviously, the respondent did not understand what was meant by two-thirds of the deceased's income. That notwithstanding, the ages of his siblings were not given to show that they depended on the deceased in any way. There was need to prove through evidence, that the deceased's brothers and sister were his dependants which the respondent did not do.

44. The deceased left behind parents. He must have supported them in some way. In that regard the ratio could not have been 2/3. The respondent's counsel agreed that the dependency ratio of 2/3 was on the higher side and suggested a ratio of ½. Although the deceased was not married, it would be difficult to assume without evidence that he gave ½ of his income towards his parents' support. The ratio of 1/3 would be appropriate.

45. The trial court's award was arrived at as follow: **11, 831.20x12x30x2/3**. The appellant did not challenge the multiplier of 30 year used by the trial court. His focus was on the ratio of 2/3. In the absence of challenge to the multiplier, and bearing in mind that the deceased was only 24, I see no reason to interfere with the multiplier. In the circumstances, the appellant having succeeded on the ratio, the award should be **11,831.20x12x30x1/3= Kshs. 1,419,744**.

46. The appellant argued that the trial court made a double award when it failed to deduct the award under the Law Reform Act from that under the Fatal Accidents Act. The law is settled that there cannot be awards under both the Law Reform Act and the Fatal Accidents Act where the beneficiaries are the same. The suit was filed for and on behalf of the same beneficiaries. The trial court should have, therefore, deducted the award under the law Reform Act from that under the Fatal Accidents Act.

47. Section 2(5) of the Law Reform Act provides:

***“The right conferred by this part for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conformed on dependants by the Fatal Accident's Act or the carriage by Air Act 1932 of the United Kingdom”***

48. In ***Maina Kaniaru & another v Josephat M. Wangondu*** [1995] eKLR, the Court of Appeal stated:

***“The rights conferred by section 2(5) of the Law Reform Act (cap 26 Laws of Kenya) for the benefit of the estates of deceased***

*persons are stated to be “in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accidents Act.” This does not mean that damages can be recovered twice over but that if damages recovered under Law Reform Act devolve on the dependants the same must be taken into account in reduction of the damages recoverable under the Fatal Accidents Act. The House of Lords held in the case of Davies and another v Powell Duffryn Associated Collieries Ltd (1942) All ELR p 657 that in assessing damages under the Fatal Accidents Act, 1846, damages under the Law Reform (Miscellaneous Provisions) Act, 1934, must be taken into account in the case of dependants who will benefit under the latter Act.”*

49. In that regard, the award under loss of expectation of life was deductible from the total award. This would work out to **Kshs. 1,419,744-100,000=Kshs. 1,319,744**. Add **Kshs. 50,000** for pain and suffering would make **Kshs. 1,369,744**.

50. Lastly, the appellant argued that the deceased should have been held for contributory negligence. However, as the trial court held, and this court agrees, failure to fasten a seat belt could not have caused or contributed to the occurrence of the accident. It could, however, have mitigated the extent of the injuries, saved life or minimized the level of injuries the deceased sustained.

51. The driver of the vehicle testified that the deceased had not fastened his seat belt. This evidence was not controverted. In that regard, therefore, the deceased should bear some level of blame. I find 10% contribution for failure to fasten his seat belt appropriate. This would reduce the award to **Kshs. 1,232,769.60**. The respondent was awarded special damages of Kshs. 37,000 which were not challenged in this appeal, making the total award **Kshs. 1,269,769.60**.

52. In the end, the appeal partially succeeds and is allowed. The award of **Kshs. 3,026,488** by the trial court is hereby set aside, and in place therefor, the respondent is awarded **Kshs. 1,269,769.60**. He shall also have costs and interest as awarded by the trial court. Since the appeal has substantially succeeded, each party shall bear own costs of the appeal.

53. I find no merit in the purported cross appeal. Although the appellant submitted on it, the respondent did not. It is dismissed with costs to the appellant.

**DATED SIGNED AND DELIVERED AT KAJIADO THIS 12TH DAY OF MARCH, 2021.**

**E.C. MWITA**

**JUDGE**