



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

(CORAM: CHERERE-J)

CIVIL APPEAL NO. 33 OF 2020

PETER M. K. MUGAMBI..... 1ST APPELLANT

JAMES MWONGERA MUGUONGO.....2ND APPELLANT

VERSUS

MARY KANANU & JOEL MUTHEE GAKUBU (Suing as the legal representative

of the estate of JAPHETH KIAMBI)..... RESPONDENT

(Being an appeal from the decision and judgment in CMCC NO. 130 OF 2012 at Senior Principal Magistrate's Court at NKUBU (Hon. E.Ayuka- SRM) delivered on 21.03.2019)

JUDGMENT

1. On 08.05.2019, **Japheth Kiambi (Deceased)** was lawfully travelling in motor vehicle **KAH 905F ISUZU lorry (accident motor vehicle)** owned by **JAMES MWONGERA MUGUONGO (1st Appellant)** which was being driven by **JAMES MWONGERA MUGUONGO (2nd Appellant)** as a result of which he suffered fatal injuries.
2. **Mary Kananu** and **Joel Muthee Gakubu (Respondents)** in their capacity as wife and brother to the deceased (respectively) filed suit against Appellants seeking damages.
3. Appellants in their statement of Defence denied the claim and pleaded the doctrine of res ipsa loquitor.
4. At the conclusion of the trial, the learned trial magistrate entered judgment on liability at 100% against the Appellants jointly and severally and proceeded to award damages as follows:

1) Pain and suffering	Kshs.	100,000/-
2) Loss of expectation of life	Kshs.	100,000/-
3) Loss of dependency	Kshs.	1,486,560/-
4) Special damages	Kshs.	66,580/-

The Appeal

5. The Appellants dissatisfied with the lower court's decision on l quantum preferred this appeal mainly disputing both liability and quantum.

Analysis and Determination

6. I have considered the evidence at the trial and the submissions and the authorities cited by counsel on behalf the parties.
7. Concerning liability, the police abstract confirms that deceased was a passenger in the accident motor vehicle. I therefore entirely agree with the holding in the case of **Thuranira Karauri – Vs – Agnes Ncheche, CA 192/96** where the Court of Appeal stated that: -

“The memorandum contained on the reverse side of the abstract originates from the police clearly indicate that such abstracts give only the salient facts of the occurrence of an accident without purporting to be an active copy of a police report and the memorandum further states that the police cannot accept responsibility of the accuracy of the same”

8. On whether deceased contributed to the accident, I have considered the principles on contributory negligence enunciated by the court in **De Frias v Rodney 1998 BDA LR 15** as follows:

“Contributory negligence required the foreseeability harm to oneself. A person is guilty of contributory negligence, if she ought reasonably to have foreseen that if she did not act as a reasonable prudent person she might be hush and in reckoning must take into account the possibility of others being careless. All that is required here is that the plaintiff should have failed to take reasonable care for her own safety. I do not find that the plaintiffs conduct was in any way contributory negligence. In the agony of the circumstances she made an unsuccessful attempt to avoid the conclusion.”

9. There is no evidence that the deceased who was only a passenger and not being in control of the vehicle failed to take reasonable care for his own safety. The accident was self-involving. 2nd Appellant who was the driver of the accident motor vehicle did not explain why the accident occurred. Consequently, I find that the learned trial magistrate rightly found that the 2nd Appellant was negligent and 1st Appellant vicariously liable for the action of his driver and that the deceased did not contribute to the accident.

10. Concerning assessment of damages, the principle stated by **Kneller JA in Kemfro Africa Limited t/a Meru Express Services (1976) & Anor. vs Lubia & Anor, No. 2 [1987] KLR 30** at page 35 is instructive:

“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 that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

11. In dealing with the issue of quantum, I shall address each heading separately as hereunder.

Pain and suffering

12. At the hearing, Respondents asked for Kshs. 150,000/-. Reliance was placed on **Benedeta Wanjiku Kimani v Changwon Cheboi & another [2013] eKLR** where Kshs 200,000/- was awarded for a deceased who died after four months following the accident and **Kenya Railways Corporation V Samwel Mugwe Gioche[2012]eKLR** where the court awarded Kshs. 10,000/-. Appellants made no offer for pain and suffering and placed reliance on **Monica Muthoni Mwangi v. Peterson Wanjohi & Another [2004] eKLR**.

13. Unlike in **Benedeta Wanjiku Kimani v Changwon Cheboi & another case**, deceased died a few hours after the accident. The generally accepted principle is that very nominal damages will be awarded on this head claim if death followed immediately after the accident. Higher damages will be awarded if the pain and suffering was prolonged before death. I find that Kshs. 100,000/- awarded under this heading was against the weight of evidence and the same is substituted with an award for Kshs. 30,000/-.

Loss of expectation of life

14. In common law jurisprudence of which Kenya, the courts have determined awards for loss of expectation of life as a conventional sum which has increased over the years from Kshs 10,000/- to Kshs. 100,000/- currently. In this case, the conventional figure of Kshs 100,000/- awarded for loss of expectation of life is therefore reasonable.

15. The court in **Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another Nairobi HCCC No. 1638 of 1988 (UR)** set out the guidelines applicable in assessment of damages under the Fatal Accident's Act as follows:

The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependents and the chances of life of the deceased and dependents. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature.

16. The general rule is that in the absence of proof of earnings, courts have adopted the minimum wages guidelines in calculating the award for loss of dependency. (See **Beatrice W Murage v Consumer Transport Ltd & another [2014] eKLR**; **Monica Njeri Kamau v Peter Monari Onkoba [2019] eKLR** and **Patrick Barasa v Serah Wambui Karumba (Suing as the legal representative to the estate of the late ALBERT CHEBAYA) [2019] eKLR**).

17. There being no evidence that the deceased's earnings, I find that the trial magistrate correctly applied the minimum wage at the time of deceased's death and came to the correct conclusion.

18. Deceased who was 41 years was married and I similarly find that the multiplier of 19 and dependency ratio of 2/3 adopted by the trial court was well considered.

19. In the final analysis, this appeal succeeds partially in the following terms:

1) *The award of Kshs. 100,000/- for pain and suffering is substituted with (Thirty thousand shillings) Kshs. 30,000/-*

2) Appellants shall bear 75% costs of this appeal

DATED AT MERU THIS 02ND DAY OF DECEMBER, 2021

WAMAE. T. W. CHERERE

JUDGE

Court Assistant - Morris Kinoti

For Appellants - Mr.Kariuki for Mithega & Kariuki Advocates

For Respondents - N/A for Kiautha Arithi & Co. Advocates