



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 169 OF 2018**

**1. SHIVA CARRIERS LTD**

**2. JOSEPHAT MWAI MACHARIA.....APPELLANTS**

**-VERSUS-**

**1. MEJUMAA SAID ABDALLA**

**2. SAUMU JUMA (Suing as the administrators and beneficiaries of the**

**estate of the late ALI OMAR OMAR).....RESPONDENTS**

*(Being an appeal against the judgment of Hon. C.N Ndegwa, Principal Magistrate delivered on 31<sup>st</sup> July, 2018*

*in CMCC No. 2216 of 2016, Mombasa, Mejumaa Said Abdalla & Saumu Juma (Suing as the administrators*

*and beneficiaries of the estate of the late ALi Omar Omar)-vs-Shiva Carrier Limited & Josphat Mwai Macharia)*

**JUDGMENT**

1. The suit was commenced by **Mejumaa Said Abdalla** and **Saumu Juma** who sued as the Legal representatives of the Estate of the deceased namely **Ali Omar Omar** who was aged thirty five (35) years at the time of death. The suit arose from a road traffic accident which allegedly occurred on the 29<sup>th</sup> day of December, 2012, along **Nairobi-Mombasa Road**. In the plaint, the Plaintiffs claimed for damages under **the Law Reform Act** and also under the **Fatal Accidents Act**.

2. According to the further amended plaint, on or around 29/12/2012, the Deceased was lawfully riding motor cycle registration No. KMCJ 560S along Nairobi-Mombasa road at Kibarani, when the 2<sup>nd</sup> Defendant being the 1<sup>st</sup> Defendant's authorized driver, servant and/or agent and/or while in the course of his employment with the 1<sup>st</sup> Defendant, negligently and carelessly drove the 1<sup>st</sup> Appellant's motor vehicle registration No. KTR 880/ZA117 that it collided with the deceased motor causing him fatal injuries. The particulars pursuant to statute law and negligence were pleaded.

3. It was pleaded that at the time of his death, the deceased was married with children and was a shopkeeper with a net monthly income of Kshs.20,000/= per month. It was averred that the deceased enjoyed good health and lived a happy life and as a result of the deceased's death, his estate suffered loss and damage particulars whereof were pleaded.

4. In support of their case, the Respondents called four witnesses. The first witness who testified as PW1 was **Naima Kenga Walege**. In her witness statement, she stated that she was the deceased's widow and that the deceased passed away on 29.12.2012 at the scene of accident. It was her testimony that she was travelling with the deceased a pillion passenger when the accident occurred. According to her, there was an accident at Kibarani and the deceased slowed down but their motor cycle was hit from behind by the 1<sup>st</sup> Appellant's Motor Vehicle registration KTR 880/ZA117. She stated that a similar suit was instituted against the Appellants to wit Mombasa RMCC No.1349 of 2013 and the Appellants were held 100% liable.

5. In her testimony, PW1 produced a receipt of payment for Kshs.10,400/= to Coast General Hospital as exhibit 7 and further stated that they

spent Kshs.20,000/=for the funeral. She also produced a sale agreement and logbook for the motorcycle as exhibit 8. She prayed for compensation.

6. In cross examination she stated that they spent Kshs.15,000/= on transport and Kshs.20,000/= for burial but there was no documentary proof to that effect.

7. PW2 was **Zakayo Wanduyi Otieno**. He is the Executive officer at Mombasa Law Courts and he produced file in RMCC No. 1349 of 2013 as exhibit 4 where the Appellants were sued with regard to same accident and judgment entered against them on 28.10.2015.

8. **Mejumaa Said Abdalla** testified as PW3. She testified that the deceased was her husband and was supporting his children and parents. It was her oral testimony that the deceased was operating a shop where he could generate income.

9. In cross-examination she conceded that there was no evidence produced to show that the deceased operated a shop. She also said she did not know the age of the deceased.

10. In re-examination, she said that she was not present when the accident occurred.

11. The fourth witness for the plaintiff was **Corporal John Nyamwea** who testified as PW4 who was called to produce the police abstract report. According to him the accident occurred on 29.12.2012 involving three motor vehicles being KTR 880/ZA117 Mercedes Benz belonging to the 1st Appellant herein, KAU 216 J Isuzu and motorcycle KMCJ 560S. He testified that the police blamed the driver of motor vehicle registration number KTR 880/ZA117. He confirmed that the driver, one **Josephat Mwai Macharia** was charged with causing death. It was his testimony that the actual report from the police file shows the registration number of the motorcycle is KMCJ 560S and not KMCT 560S as indicated in the police abstract.

12. In cross-examination, he stated that he is not the investigating officer in the matter. He added that the then investigating officers were transferred and one of them demised.

13. On Part of the Appellant, they chose not to call any witness and closed their case.

14. After hearing the evidence, the learned magistrate found that in Mombasa CMCC No. 1349 of 2023, the court found appellants liable at 100%. He accordingly, found the appellant 100% liable for the accident. The court then proceeded to award the Respondents Kshs.30,000/= for pain and suffering, Kshs.150,000/= for loss of expectation of life, loss of dependency in the total sum of Kshs.1,956,000/- and special damages in the sum of Kshs.127,400.00.

15. Aggrieved by the said judgment the Appellants now appeals to this court on the following grounds:

*a) That the learned trial magistrate erred in law and in fact in finding that the Appellants were liable at 100%.*

*b) That the learned trial magistrate erred in law and in fact in holding the Appellants liable for negligence yet there was no conclusive evidence that the Appellants were to blame for the occurrence of the accident.*

*c) That the learned magistrate erred in awarding the Respondents the award of Kshs.150,000/= and 1,956,000/- under the heads of loss of expectations of life and loss of dependency respectively.*

*d) That the learned trial magistrate erred in law and in fact in adopting a multiplier of 25 years and multiplicand of 2/3.*

*e) That the learned trial magistrate erred in law and in fact in making his determination on the quantum of damages payable which determination was clearly against the weight of the evidence.*

*f) That the learned magistrate erred in law and in fact in awarding an amount of damages that is so high as to be an erroneous and an unjust estimate.*

*g) That the learned trial magistrate erred in law and in fact by totally disregarding the submissions of the Appellants and thereby arriving at a wrong decision.*

16. It is worth noting that the parties recorded a consent dated 9/4/2019 in the following terms;

*a) The magistrate choice of the multiplier of 25 years be set aside and be replaced with a multiplier of 23 years.*

*b) That the magistrate finding on loss of dependency of Kshs.1,956,000/= be set aside and replaced with an award of Kshs.1,799,520/=.*

17. This court will therefore not belabor itself in making a determination on what has been agreed on by the parties. The rest of the appeal was canvassed by way of written submissions. The Appellants' submissions are dated 25<sup>th</sup>March, 2019 and filed on 26/03/2019. The Respondent's submissions on the other hand are dated 8/4/2019 and filed on 5/4/2019.

#### Appellant's Submissions

18. The Appellants' submissions are mainly on the issue of liability. It is submitted therein that the evidence adduced by the Respondents shows that the subject accident occurred in an area that was an accident scene and therefore the Appellants' vehicle was not the only active agent at the scene of accident. According to the Appellants, the deceased slowed down and joined the crowd of people at the scene where there was an accident. The Appellant avers that the deceased was the author of his misfortune and had contributed to the accident because had the deceased proceeded with his journey without stopping, then the misfortune would not have befallen him. On that basis, the Appellants are of the view that the trial magistrate ought to have apportioned 30% liability as against the deceased.

19. On the issue of quantum, the Appellants submitted that the awards on pain and suffering and loss of expectation of life could stand as awarded by the trial court. However, the controversy was on the award on loss of dependency. I note that these submissions were filed before the filing of the consent dated 9/4/2019 above. Since parties have agreed on the award on loss of dependency, then it would be an academic exercise to consider what the Appellants' contentions on the same were then.

20. The Appellants did not appeal on the award of special damages as they were agreeable to the award of Kshs.127,400/= by the trial court.

### **The Respondents Submissions**

21. The Respondents submitted that the Appellants' motor vehicle rammed into the deceased's motor cycle from behind at a scene where a previous accident had occurred. And that the finding of liability at 100% against the Appellants was in consonance with a similar finding by a magistrate in RMCC No.1349 of 2013 arising from the same accident, thus it would be an abuse of the court process to relitigate on similar facts.

22. It is further submitted that this court as the first appellate court, cannot interfere with the subordinate court's court finding on negligence against the Appellants because there is no evidence on record adduced by the Appellant on the negligence of the deceased. That the burden was cast upon the Appellants to show that there was negligence on part of the deceased but there is no material proof to that effect and there is no way this court can hold that the trial court was wrong in holding the Appellants 100% liable for the accident. This argument was buttressed by excerpts from the cases of *Ndiritu –vs-Ropkoi & Another C.A No. 345 of 2000 Nyeri, Linus Nganga Kiongo & 3 Others –vs-Town Council of Kikuyu (2012) HCCC No. 79 of 2011, Edward Muriga Through Stanely Muriga –vs-Nathaniel D. Shulter Civil Appeal No.23 of 1997, Trust Bank Ltd-vs- Paramount Universal Bank Ltd & 20 others Nairobi Milimani HCC No. 1243 of 2001 and Kenya Power & Lighting Co. Ltd –vs- Pamela wino Onguyo C.A No. 313 and 315 of 2012.*

### **Analysis and Determination**

23. This being a first appeal, this court's role as the first appellate court, is to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court saw and heard the parties whilst giving allowance for it to reach an independent conclusion as to whether to uphold the judgment of the trial court.(see the case of *Selle v Associated Motor Boat Co. [1968] EA 123*).

24. The court has perused the pleadings, evidence on record and submissions with regard to the grounds of appeal raised herein, and find the issues emerging as follows:

***a. Who was to blame for the accident? b. Whether the trial magistrate reached the correct decision in finding the Appellants 100% liable for the accident.***

***b. What is the order as to costs?***

25. It is clear that the determination of this appeal revolves around the question of whether the Respondents proved their case on a balance of probabilities. That the burden of proof was on the Respondents who were expected to prove that their case is not in doubt. In the case of *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 Evidence Act, 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.”***

26. The question then is what amounts to proof on a balance of probabilities. **Kimaru, J** in the case of *William Kabogo Gitau vs. George Thuo & 2 Others* [2010] 1 KLR 526, stated that:

***“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”***

27. In this case there was evidence of PW2, an eye witness to the accident who narrated how the accident took place. According to her, she was travelling with her deceased husband along Nairobi-Mombasa road as a pillion passenger while her late husband was the rider. Upon reaching Kibarani area, they found an accident had occurred. That the deceased slowed down but their motor cycle was hit from behind by the Defendant's motor vehicle. It was her evidence that the deceased died at the scene of the accident and was taken to the mortuary while she was taken to Coast General Hospital.

28. PW1's evidence is corroborated by the evidence of PW4, Corporal John Nyamwea attached to Changamwe Police Station who confirmed that the accident occurred on 29.12.2012 involving the 1<sup>st</sup> Appellants Motor Vehicle registration KTR 880/ZA117 Mercedes Benz, the Deceased's motorcycle registration KM CJ 560S and another vehicle registration KAU 216 J Isuzu. PW4 testified that the 2<sup>nd</sup> Appellant herein was liable for the accident and was charged with the offence of causing death of Ali Omar Omar (the deceased) by dangerous driving. When cross-examined by counsel for the appellant, PW4 confirmed that he was not the investigating officer and had not visited the scene of the accident. The appellants did not call any evidence.

29. Was liability proved in these circumstances? Going through the evidence adduced in this matter, the evidence laid before the trial court by the Respondents to the effect that the deceased's motorcycle was hit from behind by the 1<sup>st</sup> Appellant's motor vehicle, was *prima facie* evidence of negligence on the part of the driver thereof (the 2<sup>nd</sup> Appellant). This explains why the 2<sup>nd</sup> Appellant was charged with the offence of causing death by dangerous driving.

30. In those circumstances the Appellants especially the 2<sup>nd</sup> Appellant was under a duty to explain from his perspective how the accident occurred, and to provide evidence of the alleged negligence of the Deceased pleaded in the statement of defence. By laying before the trial court evidence that Motorcycle was hit from behind by the 1<sup>st</sup> Appellant's motor vehicle which was being driven from behind, and without any offer of explanation by the Appellants how the 1<sup>st</sup> Appellant's motor vehicle came to hit the Deceased's motor cycle from behind, the Appellants discharged the burden of proof.

31. Every driver on a public road is duty bound to be on the lookout at all times to avoid possible injury and losses to other road users. Since the Deceased's motorcycle was hit from behind, it would have been very difficult, if not impossible, for the deceased to avoid the accident. The argument by the Appellants that the deceased was the author of his misfortune is not supported by the evidence on record.

32. The decision of the learned magistrate on liability is free from error in my considered opinion.

33. As regards quantum, this court adopts the consent by the parties dated 9/4/2019 and filed on 15/4/2019. The parties seem contented with the award made by the trial court on special damages as well as loss of expectation of life and award on pain and suffering. This court therefore will uphold the awarding made by the trial court under those headings. For avoidance of doubt award to the Respondent will be as follows:

- a) Pain and Suffering.....Kshs.30,000.00
- b) Loss of expectation of life.....Kshs.150,000.00
- c) Loss of dependency.....Kshs.1,799,520.00
- d) Special damages.....Kshs.127,400.00
- Total.....Kshs.2,106,920.00

34. The inevitable result and conclusion from the foregoing, is that this appeal fails save for the consent made by the parties and Costs thereto awarded to the Respondents.

It is so ordered.

**Dated, Signed and Delivered at Nairobi this 19<sup>th</sup> of May,2020.**

**D.O CHEPKWONY**

**JUDGE**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemics, and in light of the directions issued by His Lordship, the Chief Justice, on 15<sup>th</sup> March 2020. This ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable technology to enhance the overriding objective, which is to facilitate just, expeditious proportionate and affordable resolution of civil disputes