



**REPUBLIC OF KENYA**

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

**HCCA NO. 173 OF 2017**

**KIMUNYA ABEDNEGO alias ABEDNEGO MUNYAO.....APPELLANT**

**-VERSUS-**

**ZIPPORAH S. MUSYOKA ..... 1<sup>ST</sup> RESPONDENT**

**JOHN M. KAVOI ..... 2<sup>nd</sup> RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

1. The Respondent instituted under Fatal Accident Act on Law Reform Act claim in a plaint dated 20/02/2015 in which she claimed on behalf of Estate of Shadrack Muendo Kavoi deceased who died in a fatal accident on a road traffic accident.

2. The Appellant and/ or his driver/agent was pleaded as to blame for the occurrence of the accident of 11/10/2014 along Masii Tawa road.

3. After case was heard, the Trial Court awarded Respondent:-

?Loss of Dependency                      **Kshs.2,174,720/=**

?Special Damages                         **Kshs.68,420/=**

?Pain and Suffering                        **Ksh.20,000/=**

?Loss of Expectation of Life    **Kshs.100,000/=**

4. Being aggrieved by the above decision, the appellant lodged instant appeal and set out the following grounds:-

1. **THAT** the Learned Magistrate erred in law and in fact by finding that the Appellant was at all liable for the accident while he did not contribute in any way to the occurrence of the accident.

2. **THAT** the Learned Magistrate erred in law and in fact by failing to take into consideration evidence adduced by the Defendant while considering his judgment.

3. **THAT** the Learned Magistrate erred in law and in fact in apportioning liability at 100% liability on the Defendant.

4. **THAT** the Learned Magistrate erred in law and in fact by failing to take into consideration the award under the Law Reform Act while making the award under the Fatal Accidents Act.

5. **THAT** the Learned Magistrate erred in Law and in fact by failing to take into account the principle on double enrichment when arriving at the award.

6. **THAT** the Learned Magistrate erred in Law and in Fact in awarding a multiplier of 20 years for a 41 year old.

7. **THAT** the Learned Magistrate erred in and in fact by failing to take into consideration the vicissitudes of life and the nature of the work of the Plaintiff whilst awarding the multiplier.

8. **THAT** the Learned Magistrate erred in law and in fact in awarding a multiplicand of Kshs.13, 592/= in the absence of any evidence.

9. **THAT** the Learned Magistrate erred in law and in fact in failing to apply proper legal principles regarding quantum and thus arriving at a bad decision.

10. **THAT** the Learned Magistrate erred in law and in fact in awarding costs to the Plaintiff when demand and notice had been denied and not proved in evidence.

5. On directions, the parties agreed to canvass the appeal via submissions which they filed and exchanged.

#### **APPELLANT'S SUBMISSIONS**

6. The appellant submitted that it is trite that the mere fact that an accident occurred does not follow that a particular person has driven negligently and or negligence *ipso facto* must be inferred "... it is always absolutely necessary and vital that a party who sues for damages based on the tort of negligence must prove such negligence with cogent and credible evidence as he who asserts must prove ..." see **JAMAL RAMADHAN YUSUF –VS- RUTH ACHIENG ONDITI & ANOR (2010) eKLR.**

7. The appellant contended that the plaintiff was bound to prove that, the Defendant owed him a duty of care which he breached in order for negligence to attach, see **STAT PACK INDUSTRIES LIMITED –VS- JAMES MBITHI MUNYAO NAIROBI HCCA. NO. 152 OF 2003.**

8. It was submitted that, the Plaintiff did not prove fault on the part of the Defendant hence their claim of negligence must fail since there is no liability without fault as was held in **EAST PRODUCE (K) LIMITED –VS- CHRISTOPHER ASIADO OSIRO IN CIVIL APPEAL NO. 43 OF 2001.**

9. The Appellants urged this court to note that both PW 2 and PW 3 who were the eye witnesses confirmed during cross examination that they only saw one motor cycle coming from Masii.

10. Further, they submit that in the event that PW 2 and PW 3 were present at the time of the accident they could easily have spotted the other motor cycle. Therefore the evidence of Titus Kavoi ought to have been struck out.

11. Both PW 1 and PW 2 gave evidence that they witnessed the accident, it was their testimony that motor vehicle registration number KAW 166V failed to give way at the junction thus hitting motor cycle KMDA 020B which was allegedly alone coming from Masii heading to Tawa.

12. Both PW 1 and PW 2 confirmed the accident occurred on the 2<sup>nd</sup> lane, the sketch maps in the police file produced by the PW 1 showed that the final resting place of motor vehicle KAW 166V was a distance ahead of the motor cycle.

13. From the above it is urged that, it is clear that the accident took place in the second lane, it is also clear the deceased was coming from Tawa and riding on the 2<sup>nd</sup> lane as such he ought to have noticed the Defendant joining the road while he was still in the 1<sup>st</sup> lane and braked, this shows the deceased was clearly over speeding and negligent.

14. It is contended that, faced with such rich evidence it is not understandable how the Learned Chief Magistrate apportioned liability at 100% as against the Defendants while it is clear the deceased was trying to overtake the Defendants vehicle without due regard.

#### **ON QUANTUM**

15. The appellant submits that, the principles which guide an appellate court faced with a quandary such as this one are those stated in **KEMFRO AFRICA LTD –VS- LUBIA AND ANOTHER, No. 2) 1987 KLR 30,** where Kneller JA identified the principles as follows:-

*“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 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 wholly erroneous estimate of the damage.”*

16. See **JOHNSON EVAN GICHERU –VS- MORTON & ANOTHER C.A NO. 314 OF 2000, JOHN KAMORE & ANOTHER SIMON IRUNGU NGUGI (2014 EKLR).**

17. It is submitted that, from the death certificate and the Plaintiff's testimony it is settled the deceased died on the same day as the accident. They also submit that taking into account inflationary factors an award Kshs.10, 000/= will suffice on the pain suffered. They also refer to the case of **LUCY M. NJERI –VS- FREDRICK MBUTHIA & ANOTHER (2006) eKLR** in which Kshs.5,000/= was awarded for pain and suffering and **KENYA RAILWAYS CORPORATION –VS- SAMWEL MUGWE GIOCHE (2012) eKLR** the Trial Court awarded Kshs.10,000/= under this header:-

#### **LOSS OF EXPECTATION OF LIFE**

18. Under this header they propose a figure of Kshs.60, 000/= will suffice being a conventional global figure ordinarily awarded by courts. See **Wanjiku Kahiga and Elizabeth Murugi Kahiga both deceased) –vs- WORLD VISION KENYA & 2 OTHERS (2014) eKLR** in which the appellate court upheld the trial court’s decision to award a sum of Kshs.60,000/=.

#### **CLAIM UNDER THE FATAL ACCIDENT ACT**

19. Under this heading, the Applicants opine that there should be no award, the plaintiff only states that the deceased was 41 years at the time of death, the plaintiffs provided no evidence to prove the age of the deceased or even the income he earned.

20. It does not indicate the amount he used to support the said dependents with, and as such it is clearly impossible to tell what the deceased’s income was or at what age he would have retired from his trade.

21. It is of their view that any award under this heading would merely be speculative and impossible to award and fortify this view with the following authorities; See English case of **Gammel –vs- Wilson & others (1981) 1 ALL ER 578** that was cited with approval in the Court of Appeal decision in **Sheikh Mushtaq Hassan vs- Nathan Mwangi Kamau Transporters & 4 Others (1986) KLR 457** for the submission that an award under this head can only be based on the probable estimate of one’s income.

22. On loss of dependency appellant urges, that this is a matter of fact which ought to be proved by he who asserts, there is no rule of law that 2/3 or indeed any fraction of deceased income is deemed to have been what is spent on family see BOR –V- ORIDOO (1988-92) 2KAR 288 see also **GERALD MBALE MWEA –V- KARIKO KIHARA & ANOR CIVIL APPEAL 112 OF 1995 (1995) LLR4877 (CAK) (AKIWUMI, TUNOI, SHAH JJA).**

23. Based on the above scenario where the age of the deceased has not been proved i.e. via birth certificate neither is there any proof of income or even the amounts he used to support the said dependents who also failed to prove dependency, then it is not clear how the trial magistrate used the multiplier method without engaging in fanciful speculations hence arriving at an erroneous amount which they beseech this court to interfere with.

24. They further associate themselves with the dicta of Ringera J. (as he then was) in the case of **KWANZIA –VS- NGALALI MUTUA & ANOR** where he stated superbly that “the multiplier approach is just a method of assessing damages it is not a principle of law or a dogma, it can and must be abandoned where facts do not support its application.

25. Applicants are urging this court to interfere with the trial magistrates finding on liability and award as follows:-

a) Loss of expectation of life Kshs.60,000/=

b) Pain and suffering                    Kshs.50,000/=

**Total    Kshs.110, 000/=**

26. The Plaintiff has based her claims under both the Law Reforms Act and the Fatal Accident Act. They submit that this court not to make an award under the Fatal accident Act since doing so would result in the Plaintiff being awarded twice.

27. See **BETSY CHEBET (Suing as a personal Representative of the Estate of KENNETH KIPKOECH LANGAT –VS- PREMIER DAIRY LIMITED AND BENJAMIN KIPRUGUT KOECH KERICHO HCCC NO.88 OF 2003.**

#### **SPECIAL DAMAGES**

28. It is trite that special damages must be specifically pleaded and proved see **PROVINCIAL INSURANCE CO. EA LTD –VS- MORDEKAI MWANGA NANDWA, KSM CACA 1978 OF 1995 (ur)**. Where court held “... *it is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead.*”

29. They submitted that only those which have been specifically pleaded and proved be awarded.

30. They further submit that a revenue stamp must be affixed; as required by the Stamp Duty Act Section 19(1) of the Stamp Duty Act prohibits the receiving in evidence in any proceedings, any instrument chargeable with stamp duty without the requisite stamp. See **S.D.V Transami K. Ltd –vs- Scholastica Nyambura (2012) eKLR.**

#### **WHO IS TO BE BURDENED WITH THE COST OF THIS SUIT?**

31. Also submits that costs to follow the events.

#### **RESPONDENT’S SUBMISSIONS**

32. The respondent submitted that, eyewitnesses testified PW 3 and PW 4. Their evidence is found in page 46 and 47 of the record of appeal.

33. Their evidence was that motor cycle registration number KMDA 020 D was being ridden by the deceased on the main road from TAWA-MASII ROAD. At seven stage a lorry motor vehicle registration number KAW 166 U emerged from a feeder road and it failed to stop as it

joined the main tarmac road hence hit and knocked down the cyclist.

34. They blamed the driver of motor vehicle registration number KAW 166U for failing to stop to give way to the motor cyclist who was on the main road before entering the same.

35. The Appellant called one witness PATRICK KIMEU who was the driver of motor vehicle registration number KAW 166U. He admitted he was driving from KIONYWENI to MACHAKOS. When he joined TAWA-MASII road motor cycle registration number KMDA 020D knocked his motor vehicle from behind.

36. Cross examination (see page 49 of the record) he admitted that in the same lorry he was with two turn boys MUTUKU and MUTUA.

37. However, he never bothered to call the m as his witness to corroborate his evidence as to how the accident occurred. He also did not produce any inspection report to confirm where the lorry was damaged after it was allegedly knocked from behind by the motor cycle registration number KMDA 020D.

**38. The evidence as to how the accident occurred was well put by PW 3 and PW 4 who witnessed the accident and the same was not shaken even in cross-examination.**

39. The Respondent did prove on a balance of probabilities that the accident occurred due to the negligence on the part of the Appellant's driver for failing to stop to give way to vehicles on the main road before joining the same from a feeder road hence knocked down motor cycle registration number KMDA 020D and the cyclist died.

40. In the absence of any credible evidence controverting the Respondents eye witnesses, the trial court was correct in holding the Appellant's driver 100% liable for the accident. The findings of the trial court on the issue of liability cannot be faulted at all.

#### **USE OF HIGHER MULTIPLIER, MULTIPLICAND AND EXCESS AWARD ON LOSS OF DEPENDENCY**

41. From the death certificate and also the evidence of PW 2 the deceased was aged 41 years.

42. PW 2 testified that the deceased was doing boda boda business making Kshs.3, 000/= in a day. He was thus in private business and would have worked past the retirement age of sixty (60) years for public servants.

43. The Respondent further submit that the multiplier of 20 years adopted by the court for a deceased aged 41 years was not high but was quite reasonable in the circumstances.

44. On the multiplicand used of Kshs.13, 592/=, PW2 testified that the deceased was operating a boda boda business earning Kshs.3, 000/= per day. Although he did not produce any bank statement or books of accounts, this did not mean he was not earning an income. Out of the income of Kshs.3, 000/= the deceased used to give PW 2 Kshs.1, 500/= to support the family.

45. In the absence of proof of income, courts normally adopt the minimum statutory wage prevailing at the time as the multiplicand. The minimum statutory wage was Kshs.13, 592/= which the court correctly adopted.

46. Thus using the above multiplier and multiplicand, the court awarded Kshs.1, 174,720/= as general damages for los of dependency. The same cannot be said to be excessive in the circumstances.

#### **DUTY OF COURT**

47. The duty of the first Appellate Court is to subject the whole of the evidence to a fresh exhaustive scrutiny and make any of its own conclusions about it bearing in mind that it did not have the opportunity of seeing or hearing the witnesses first hand. See the case of **SELLE & ANOR –VS- ASSOCIATE MOTOR BOAT CO. LTD 1968 EA 123.**

#### **ON EVIDENCE**

48. PW 1 PC Benjamin Kimayo testified that on 11<sup>th</sup> October, 2014, he received an accident report involving motor vehicle KAW 166U, Isuzu lorry and a motor cycle KMDA 020B. He produced the police abstract as an exhibit. On cross-examination, PW 1 testified that he did not visit the scene.

49. PW 2 Zipporah Syombua testified in court that the deceased Shadrack Muendo was her husband. She further testified that the deceased was driving boda boda business and was making an average of Kshs.3, 000/= per day.

50. Her five children were entirely depending on the deceased. She further testified that she obtained letters of administration from the High Court at Machakos. On cross-examination, she testified that her husband use to give her Kshs.1,500/= per day

51. PW 3 Mbula Stephen testified that on 11/10/2014 at 6:30 pm while he was heading to Sevens stage along Masii-Tawa road he saw a lorry coming from Kionyweni approaching Masii-Tawa road. The lorry of registration no. KAW 166u entered the main road and hit the motor cycle on the right side.

52. On cross examination, PW 3 testified that the deceased was hit on the main road.

53. PW 4, Damaris Nduku testified that on 11/10/2016 while she was at sevens stage selling vegetables she saw a lorry which entered Tawa-Masii road abruptly. The lorry knocked the driver of the motor cycle.

54. The Plaintiffs closed their case at that point. The defense called one witness. DW 1 Patrick Kunze testified that on 11/10/2014 at 6:30 pm he was involved in an accident. He was driving a lorry KAW 166U from Kionyweni to Machakos.

55. One motor bike overtook him and the 2<sup>nd</sup> motorbike knocked him from behind and thus the accident.

56. On cross-examination DW 1, testified that he had two turn boys in the lorry who are not his witnesses. He further testified that he does not have an inspection report in court to show that his vehicle was knocked from behind.

#### **ISSUES, ANALYSIS AND DETERMINATION**

57. After going through materials before the court, I find the issues are;

**a) Who was to blame for the accident and to what extent?**

**b) How much was the estate of the deceased entitled to?**

**c) Was trial court to blame in making a verdict it arrived at?**

**d) What is the order as to costs?**

58. On this court address to the 1<sup>st</sup> issue, the court notes that, PW 3 Mbula Stephen testified that on material date, he saw a lorry KAW 166U coming from Kionyweni approaching Masii.

59. The lorry did not stop at the junction; it entered the main road abruptly and hit the motor cycle on the right side, the evidence of PW 3 was well corroborated by the evidence of PW 4, who further testified that the driver of the lorry was over speeding. DW 1 testified that it was the deceased who knocked his lorry from behind.

60. However, he did not produce an inspection report to that effect ct. it is clearly evident from the evidence of PW 2 and PW 4 that the driver of the lorry joined the main road abruptly without slowing down, thereto causing, the fatal accident.

61. The Dw2 had 2 turn-boys in his M/V but he opted not to call them to corroborate his fashion of evidence. The trial Magistrate therefore held the Defendant 100% liable for the occurrence of the accident which this concurs with.

62. The court will thus address the second issue PW2, Zipporah Syombua testified that the deceased died instantly and thus trial court award was as follows, :-

**a) Pain and suffering Kshs.20,000/=**

**b) Loss of expectation of life, Kshs.100,000/=**

**c) Loss of Dependency Ksh.2,174,720/=**

63. PW 2, Zipporah Syombua testified that her husband used to make Kshs.3, 000/= per day out of his boda boda business and he could give her Kshs.1, 500/= per day to buy food for their five children. Though no books of accounts were produced, the Trial Magistrate adopted the statutory minimum wage which is Kshs.13, 952/=.

64. The evidence tendered by the pw2 was un rebutted and credible taking to account that boda boda riders hardly keep account or records a fact this court can take judicial notice of. In the case of **NELSON RINTARI VS CMC GROUP LTD (2015) EKLK** the court held ;

**“.....I agree a wrong doer must accept the victim as he finds him. The respondent cannot therefore urge the court to deny the Appellants earnings because of his failure to keep records or develop a system of keeping accounts. I agree if the Respondent's submissions are accepted this would do a lot of injustice to many Kenyans who have invested in informal sector and do not worry about keeping books of accounts. Further this would go against Article 159 (2) (d) of the constitution of Kenya 2010 which obliges court's to do justice without procedural technicalities.....”**

65. The trial court to have applied same amount as pleaded and orally proved and un-rebutted. Therefore this court adopts a multiplicand of Ksh.3000/=.

66. From the death certificate and also the evidence of PW 2 the deceased was aged 41 years. The age in the death certificate is a reflection of the age which was in his ID card which this court can take judicial notice of.

67. The appellant did not rebut the same thus court adopts deceased age as thereof reflected. PW 2 testified that the deceased was doing boda boda business thus in private business and would have worked past the retirement age of sixty (60) years for public servants. . There was no evidence that the deceased lived a sickly life. Nonetheless, it cannot be denied that in life there are preponderables and vicissitudes that can shorten one's life, besides an accident.it is however, a matter of discretion for the court to make that decision.

68. In the circumstances the multiplier of 20 years adopted by the trial court was reasonable in the circumstances. On dependency; it is not denied that the deceased was a family man with wife and children who depended on him.

69. It is therefore conventional for the court to apply the ratio of 2/3 as part of income deceased was using to maintain his family.

70. In **Boru v Ondu v (1988-1992) KAR 299** the court followed the pattern of court decisions showing that in claims for loss of dependency under the Fatal Accidents Act, the court had, as a rule, taken one third of the deceased's net income as his living expenses and two thirds of his net income as a dependency rule.

71. From the death certificate and the Plaintiff's testimony it is settled the deceased died on the same day as the accident. They also submit that taking into account inflationary factors an award Kshs.10, 000/= will suffice on the pain suffered.

72. The court finds that Ksh.20, 000/= awarded was not inordinately high to warrant this court interference.

73. It is within the range of the conventional figure where the deceased dies instantly or within a short while

74. Under loss of expectation of life appellant proposes a figure of Kshs.60, 000/= being a conventional global figure ordinarily awarded by courts.

75. Under this Act they rely on the authority of **JOSEPH KAHIGA GATHII & PAUL MATHAIYA KAHIGA –vs- WORLD VISION KENYA & 2 OTHERS (2014)eKLR** in which the appellate court upheld the trial court's decision to award a sum of Kshs.60,000/=.

76. I disagree with the appellant and adopt as awarded by trial court Ksh.100, 000/= under loss of expectation of life as same is within the range of the conventional figure and it is not inordinately high for this court to disturb it.

77. Kshs.100,000/= was awarded as conventional based on the decisions of **Makano Makonye Monyanche v Hellen Nyangena (2014) e KLR and Lucy Wambui Kohoro v Elizabeth Njeri Obuong (2015) e KLR.**

78. On the issues whether claim under Law reform Act should be deducted from the award, my view is that, the requirement in the Law Reform Act is to "take into account" and does not make it mandatory to deduct any sums awarded to the estate of a deceased from damages awarded for lost dependency.

79. This view is buttressed by Justice Mabeya in **Peres Wambui Kinuthia and another –vs- S.S. Mehta & Sons Limited, Nairobi Civil Appeal No. 568 of 2010 (UR)** where he held that:

**"In the case of Kemfro Africa t/a Meru Express Services (1976) & Anor –vs- Lubia & Anor (No 2) (1987) KLR 30 the Court of Appeal was categorical that the words "to be taken into account" and "to be deducted" are two different things.**

**That the words used in Section 4(2) of the Fatal Accidents Act are "taken into account." That the Section says what should be taken into account and not necessarily deducted.**

**That it is sufficient if the judgment of the trial court shows that in reaching the figure awarded under the Fatal Accidents Act, the trial court bears in mind or considers what has been awarded under the Law Reform Act for the non-pecuniary loss. There is absolutely no requirement in law or otherwise for the court to engage in a mathematical deduction"**

80. The respondent addressed the issue on special damages which was pleaded and proved with exhibits. The appellant never challenged same piece of evidence during trial Ksh.68,420/= thus the appellant contention is rejected. The issue of stamp duty was not raised during trial and thus court will not entertain the same at this stage.

81. In sum the court adjusts award as follows;

**a) Liability remains as per trial court verdict 100%**

**b) On Quantum the award was as follows;**

**i - Loss of expectation of life - Kshs.100, 000/=.**

**ii - Pain and suffering -Kshs.20, 000/=.**

**iii -Loss of dependency 20 x 12 x 3,000 x 2/3 = Kshs.480, 000/=.**

**iv - Special damages - Ksh.68,420/=**

TOTAL AWARD - Kshs.668, 420/=

c) Interest from the date of the lower court judgment.

d) Parties bear their own costs

DATED, DELIVERED, SIGNED THIS 6<sup>TH</sup> DAY OF FEBRUARY, 2019, IN OPEN COURT.

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C. KARIUKI

JUDGE