



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIVASHA

(CORAM: R. MWONGO, J)

CIVIL APPEAL NO. 22 OF 2016

PATRICK KALAVA KULAMBA..... 1ST APPELLANT

MBURUGU TIMOTHY.....2ND APPELLANT

TRISTAN K LIMITED.....3RD APPELLANT

VERSUS

PK & RNP(suing as the legal administrators of the estate of PW).....RESPONDENT

(Being and appeal from the Judgment of Hon E Kimilu, then S.R.M.

delivered on 15th March 2016 in Naivasha CMCC No 399 of 2012)

JUDGMENT

Background

1. This is an appeal against both the finding of negligence and on the quantum of damages awarded by the lower court under the **Law Reform Act, Cap 26** and the **Fatal Accidents Act, Cap 32**. Judgment was entered against the defendants/ appellants jointly and severally in the amount of Kshs 2,396,200/= made up as follows:

Liability:	100%		
Pain and suffering	Kshs	100,000/=	
Loss of expectation of life	Kshs	100,000/=	
Loss of dependency	Kshs	2,160,000/=	
Special damages	Kshs	<u>36,200/=</u>	
Total	Kshs	<u>2,396,200/=</u>	

2. The plaintiffs availed three witnesses during the hearing, and the defendants opted not to call any witnesses.

3. PW1, PC Frederick Gitare stationed at Gilgil Police station and performing general duties. He was called to court to produce the police abstract of the fatal accident involving the deceased reported at the police station on 30th September, 2010 as per OB 71/30/9/2010. The abstract was issued to the family of the deceased. He stated that he was neither the investigating officer nor a witness to the accident. He pointed out that the accident reported to the station involving the deceased was a self-involved accident, and was pending under investigation. He produced the police abstract as P.Exb 1.

4. In cross examination he said he couldn't tell where the investigating officer was currently working, and he couldn't trace the police file.

5. PW2, PK testified that he was a peasant farmer and the father of the deceased JNP. On 30th September, 2009, whilst he was at home in Machakos Mutituni, he received a call from one Musembi Makau who informed him that his daughter had been involved in an accident and died on the spot. He immediately set out for Gilgil Police Station, got there and the news was confirmed. He then went to the mortuary and identified the body of the deceased and later made arrangements for her burial.

6. He said he was issued with a Police Abstract (P.Exb 1), and later was issued with the Death Certificate which he produced as (P.Exb 3). He said he conducted a search on the vehicle – KBD 572D and trailer – ZC 5294 – involved in the accident. He found they were registered in the names of the second and third respondents respectively. He produced the search records as Exb 6(a) and (b).

7. He admitted that he did not witness the accident and was at home when the accident occurred. He further testified that the deceased was a clothes vendor and left behind an eight (8) year old daughter, FNN, who currently resided with his elder daughter RN. That the deceased died at the age of 22 years.

8. In cross examination he testified that he did not come with the deceased's birth certificate, and that the deceased gave birth at the age of fourteen (14) years. That she used to send him Kshs 10,000/= per month for the upkeep of her siblings and himself.

9. PW3 Rhoda Ndanu, the deceased sister, testified that the deceased died following an accident and referred to the Death Certificate PExb 3. She said that she took over taking care of the deceased's daughter, RN. That the deceased was a single parent who died at age of 22 years. She added that she pays tuition of Kshs 1,000/= per month for the deceased's daughter. She said that she spends about 15,000/= per year for her education in [particulars withheld] School. That the deceased used to support her with between 2,000/= and 5,000/=

10. In cross examination, she added that she was a peasant farmer; that her deceased sister dropped out of school in 2008; that the deceased gave birth after dropping out of school; that she was did not depend on deceased for basic needs and that she had applied for the F's birth certificate.

11. In re-examination, PW3 stated that N – that is F, the deceased's daughter – was eight years old when J dropped out of school.

Negligence

12. The appellant argues that there was no eyewitness to the accident that was called to give evidence as all three of the plaintiff's witnesses admitted that they were not eyewitnesses. As a result, that the duty of care and causal link between the deceased and the defendants was not proved. That the standard of proof on balance of probability was not achieved.

13. I have carefully considered the appellants' arguments and the authorities cited. In particular, they relied on:

- **Civil Case No 1225 of 1993 Rehma Adhiambo Marjan v Fanuel Obwaro & Another [1999] eKLR** where the plaintiff was the sole witness and it was held:

“On the point of liability, the plaintiff was not an eyewitness. She was not present to (sic) the scene when the accident occurred. She was therefore not able to tell this court what actually occurred and who was liable”

- **Sally Kibii & Another v Francis Ogaro [2012] eKLR** whose facts the appellant considers similar to those in this case. There the police officer who investigated the case was not called to give evidence on liability and indicated that the accident was still pending under investigations. The Court held:

“The Plaintiff in the trial court only produced two witnesses who admitted they did not witness the accident and could not tell how it happened. The Police Abstract showed that the accident was by collusion of two vehicles and investigations were underway. The failure of the police to determine from the scene of the accident which motor vehicle was to be blamed and the absence of an eye witness evidence diminishes the Appellant's chance to prove a case for negligence against the Defendant.

The Plaintiff also elected or failed to call the witnesses listed in the police abstract and the investigating officer also listed with all their addresses. I am uncertain if those witnesses would have helped the court since the blame could not be apportioned at the scene by the police officers who stated in the police abstract that investigation was still pending.....

...To my understanding, “res ipsa loquitur” would apply where the subject matter is entirely under the control of one party and something happens while under the control of that party, which would not in the ordinary course of things happen without negligence.”

14. In the present case, there were no eyewitnesses. However, the distinction is that whereas in the **Sally Kibii** case the accident involved two vehicles, in the present case the Police Abstract produced showed that the accident was **“self-involved”**. That is to say that no third party vehicle was involved in the accident. Hence that the vehicle was entirely in the control of the defendant or driver when the accident occurred.

15. Under the aforesaid circumstances, and although the Abstract noted that the accident was pending under investigation, there is *prima facie* evidence that the person solely responsible for the control of the vehicle, and hence the accident, was the driver of the accident vehicle. It was necessary that such *prima facie* responsibility be rebutted at the hearing.

16. The 1st and 3rd appellants denied that they were the owners or sole owners of the lorry and trailer. However, the plaintiffs provided search records from the Registrar of motor Vehicles for both the lorry and the trailer, which also prima facie confirmed the appellants to be the owners. The appellants did not avail any witnesses to rebut the *prima facie* evidence availed. They had indicated that their list of witnesses included the 1st appellant, but he was not called.

17. Where evidence is adduced and not controverted, it stands the test. In **Interchemie EA Limited vs. Nakuru Veterinary Centre Limited Nairobi (Milimani) HCCC No. 165B of 2000**, Mbaluto, J. held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted. Mulwa J, however in the case of **Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another [2016] eKLR** stated:

“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.”

18. Similarly, in **Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007** Ali-Aroni, J. citing the decision in **Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter Civil Appeal No. 23 of 1997** held that:

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence”.

19. On the above basis that the accident was self- involved and that the owners of the lorry and trailer were the appellants, I find that they were responsible for the accident at 100%, jointly and severally against the defendants / appellants.

Damages

Pain and suffering

20. On this head I agree with the appellant that pain and suffering is awarded at amounts ranging from Kshs 10,000/= to Kshs 100,000/= and that, as was held in **Hyder Nthenya Musili & Another v China Wu Yi Ltd and Another [2017] eKLR** higher damages are awarded if the pain and suffering was prolonged before death.

21. In the present case, the evidence was that death was instant. There was therefore no real basis for an award on the higher side rather than on the lower side of the normal range. I would therefore award Kshs 20,000/= under this head.

Loss of expectation of life

22. In **Benedeta Wanjiku Kimani vs Changwon Chekoi & Another [2013] eKLR** Emukule J, observed as follows:

“In common law jurisprudence of which Kenya is part, the courts have enrolled the principles loss of expectation of life and pain and suffering by the deceased: for award of damages under the Fatal Accidents Act for pain and suffering....determined what is commonly referred to as continual sum which has increased over the years from Ksh.10,000/= to Ksh.100,000/= currently the basis of the increased award has basically been based upon the increase of life expectancy from 15 years to run 60 years currently, that life itself was until cut short by the accident ...”

23. In the present case, the award made under this head was Kshs 100,000/= which is well within the normal range for this type of case. I see no reason to interfere with the trial court’s determination.

Loss of dependency

24. Under this head, the trial magistrate awarded Kshs 2,160,000/=. She found that the deceased was survived by a child aged 8 years and that her father (PW2) and sister (PW1) were dependants.

25. I carefully perused the evidence availed in support of this head, and was left in a conundrum. It concerns the daughter of the deceased and her child. There was no birth certificate provided for the deceased’s child so the evidence of the father and sister of the deceased was critical. There was no dispute that the deceased died on 5th September, 2010 at age 22, and this was confirmed by the Death Certificate produced as P.Exb 3. The deceased was thus born in 1988.

26. PW2, the deceased’s father, testified that his deceased daughter left behind a daughter aged 8 years old. According to him, his daughter gave birth to FN, also called N, when she was aged 14. The birth would therefore have occurred in 2002 given that the deceased died aged 22 in 2010.

27. On the other hand, PW3, the deceased’s sister, testified that she took care of F who was 8 years old on the deceased’s death. In cross examination however, she said that the deceased dropped out of school in 2008 – when she would have been aged twenty – and gave birth after dropping out of school. Thus, F would have been born in or after 2008, which would make her two years old at her mother’s death. In re-examination, PW3 stated that N was eight years when J dropped out of school. If J dropped out of school in 2008, then FN was born in

2000, meaning she would have been aged 10 when her mother died.

28. This contradictory evidence between PW2 and PW3, and within PW3s evidence, makes it impossible to verify and ascertain whether there was a child or not, and if so, what was the child's age.

29. The deceased was confirmed to be 22 years at the time of death. It was not in dispute that she was unmarried. With regard to evidence of income in the absence of documentary thereof, it is customary for the courts to rely on the minimum wage under the **Regulation of Wages Order**. See for example **Nyamira Tea Farmers Sacco v Wilfred Nyambati Keraita and Another Kisii Civil Appeal No. 68 of 2005 [2011] eKLR** where Asike-Makhandia J (as he then was) stated:

“In absence of proof of income, the Trial Magistrate ought to have reverted to Regulation of Wages (General Amendment) Order, 2005”

30. This was also the case in **Naivasha High Court Civil Appeal No. 47 of 2016 Kweri Peter and 2 Others v Njoki Kariu Wanyange suing as the Legal Administrators of the Estate of Joan Wambui Ngigi** where this court adopted the use of Wages Orders.

31. In the present case, the **Regulation of Wages (General) (Amendment) Order 2010**, effective from 1st May, 2010 would be the applicable provision for determining the deceased's income. The basic minimum wage under the 2010 Regulation of Wages Order in municipalities, of which Naivasha is one, was Kshs 6,221/=.

32. In the case of **Jacob Ayiga Maruja & Another v Simeon Obayo CA167/200 [2005] eKLR** the Court of Appeal rendered itself on the question of failure to adduce proof of income, as follows:

“We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things. In this case, the evidence of the respondent and the widow coupled with the production of school reports was sufficient material to amount to strict proof for the damages claimed.”

33. It would appear from a review of the decisional law on this point that our Courts tend to lower the dependency ration when the deceased is an unmarried child and the claimant is the parent. This is occasioned by the presumption that such a child spends less at home by virtue of being unmarried, a presumption that can be rebutted by actual evidence. See the following cases where the court used a dependency ratio of ½ for young unmarried ladies: **Mary Kerubo Mabuka v Newton Mucheke Mburu & 3 others (2006) eKLR**; **Alice O. Alukwe v Akamba Public Road Services Ltd (2013)eKLR**, and **Lucy Wambui Kihoro (Suing As Personal Representative Of Deceased, Douglas Kinyua Wambui) v Elizabeth Njeri Obuong [2015] eKLR**,

34. In light of the above cases I would also use a dependency ratio of ½ in the present case, as the deceased was unmarried, and I am unable to ascertain that she had a child. In this case I would use a multiplier of thirty years.

35. Thus, the ultimate calculation for loss of dependancy will be as follows:

$$6,221/= \times 12 \times 30 \times \frac{1}{2} = 1,119,780/=$$

Special damages

36. This award was also challenged on the ground that there was no specific proof of their incurrence. However P.Exb 2 was a payment voucher and there was evidence that two vehicle records searches were done; and that letters of administration were applied for. Clearly, these, together with the fact that courts acknowledge that reasonable funeral expenses are incurred, is sufficient dissuade me from interfering with the trial court's award under this head

Disposition

37. In the end, the appeal succeeds and I enter judgment for an award of Kshs 1,275,980/= jointly and severally against the defendants/appellants. The award is made up as follows:

Liability: 100%

Pain and suffering	Kshs	20,000/=
Loss of expectation of life	Kshs	100,000/=
Loss of dependency	Kshs	1,119,780/=
Special damages	Kshs	<u>36,200/=</u>

Total

Kshs 1,275,980/=

38. Interest shall accrue on the award at court rates from the date of judgment in the lower court.

39. The appellant shall have the costs of this appeal.

40. Orders accordingly.

Dated and Delivered at Naivasha this 14th Day of March, 2019.

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Awuor holding brief for Kisila for the Appellants
2. Chege holding brief for Mung'ata for the Respondent
3. Court Clerk - Quinter Ogutu