



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CIVIL APPEAL NO. 201 OF 2010**

**SHIVA CARRIERS LIMITED .....APPELLANT**

**VERSUS**

**WINSTON M. RUNYA (as the administrator of  
the estate of AUGUSTUS KADODO (DECEASED)).....RESPONDENT**

(An Appeal against the Judgment of Hon. R. Kirui, Principal Magistrate delivered on 19<sup>th</sup> August, 2010  
in Mombasa CMCC No. 2378 of 2003)

**JUDGMENT**

1. The appellant being dissatisfied with the Judgment of the lower court delivered on 19<sup>th</sup> August, 2010 filed a Memorandum of appeal on 17<sup>th</sup> September, 2010 raising the following grounds of appeal:-

- (i) That the learned Magistrate erred in law and in fact in finding that the plaintiff's suit was properly instituted out of time and hence (sic) not statutorily time barred;
- (ii) That the learned magistrate erred in law and in fact in holding that the defendant was 100% vicariously liable without giving any reasons and basis for the same;
- (iii) That the learned magistrate erred in law and in fact in holding the defendant liable for negligence yet the evidence and report of PW2, police officer was not conclusive of who was to blame for the occurrence of the accident;
- (iv) That the learned magistrate erred in awarding the plaintiff the sum of Kshs. 600,000/= as loss of dependency by using a dependency ratio of 2/3 yet the deceased was not married and there was no proof of legal dependants;
- (v) That the learned Magistrate erred in law and fact in holding that the claim of loss of dependency had been proved;
- (vi) That the learned Magistrate erred in law and in fact in awarding excessive (sic) amount of damages for pain and suffering, loss of expectation of life and dependency thereby arriving at an unjust decision; and
- (vii) That the learned trial magistrate erred in law and fact by totally disregarding, ignoring and trashing aside (sic) the submissions of the appellant and thereby arriving at a wrong decision.

2. The appellant filed his record of appeal on 1st December, 2011. The appeal was admitted for hearing on 9th February, 2016. It proceeded by way of written submissions with Counsel for both parties being given an opportunity to highlight their submissions.

### **APPELLANT'S SUBMISSIONS**

3. Mr. Muchiri, Learned Counsel for the Defendant/Appellant started his submissions by informing the court that the respondent's counsel had in his written submissions conceded that the award for dependency made by the trial Magistrate was erroneous. He addressed the court on the said issue contained in ground No. 5 of his written submissions by stating that section 4(1) of the Fatal Accidents Act provides that dependants are spouses, parents and children. He referred the Court to the plaint which lists down the 4 dependants of the deceased as brothers and an uncle thus the award of Kshs. 600,000/= for loss of dependency was erroneous.

4. The court's attention was drawn to the case of **Tombe Tea Factory Ltd. vs Samuel O. Araka**, [2010] eKLR where the Judge was categorical that section 4(1) of the Fatal Accidents Act is conclusive. The appellant's counsel informed the court that he had no objection to the rest of the award made to the plaintiff/respondent. He prayed for part costs of the appeal.

### **RESPONDENT'S SUBMISSIONS**

5. Ms Obura, Learned Counsel for the respondent did not submit on ground Nos. 1 and 7 of the appeal on noting that the appellant had abandoned the same. On ground Nos. 2 and 3 of the appeal, she submitted that the issues of negligence and vicarious liability were not controverted as the appellant called no witness in that regard.

6. It was submitted that the learned magistrate relied on the doctrine of *res ipsa loquitur* and arrived at the finding of 100% liability on the part of the appellant. Counsel relied on the case of **Obed Mutua vs Wells Fargo & Another** [2014] eKLR where the said doctrine was addressed at length.

7. On vicarious liability, it was argued that the ownership of the motor vehicle was ascertained as belonging to the appellant, thus the finding by the learned magistrate that the respondent was vicariously liable. Counsel cited the case of **Kenya Bus Services Ltd. vs Dina Kawira Humphrey** [2003] eKLR where the court held that it is sufficient that the relevant facts are pleaded and evidence led showing the legal relationship between the driver of the vehicle and the owner of the vehicle from which vicarious liability can be inferred as a matter of law.

8. Ms Obura submitted that the learned magistrate was correct in finding the appellant 100% liable and prayed that liability should not be apportioned. She submitted that the other awards under pain and suffering, loss of expectation of life and special damages should not be disturbed. She prayed for costs to be awarded to the respondent.

9. On ground Nos. 5 and 6, she conceded that an award should not have been made for loss of dependency as the persons named in the plaint namely, an uncle and brothers of the deceased do not qualify as dependents under the provisions of section 4(1) of the Fatal Accidents Act.

### **ANALYSIS AND DETERMINATION**

10. The duty of the first appellate court is to analyze and re-evaluate the evidence adduced before the trial court and reach its own independent decision based on the facts and application of the relevant law. In the case of **Peters vs Sunday Post Ltd** [1958] EA 424, at 429, Sir O'Connor P., said as follows :-

***“It is a strong thing for an appellate Court to differ from the findings, on a question of fact, of the Judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction***

***which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion.”***

11. After analyzing the evidence adduced before the learned trial magistrate, I identify the following issues for determination:-

(i) Whether the respondent is entitled to the other awards made by the learned trial magistrate save that of loss of dependency; and

(ii) If the appellant is entitled to part costs.

12. The plaintiff/respondent’s case was instituted by Winston Mzungu Runya, who was a nephew to the deceased, Augustine Kadogo. He adduced evidence as PW1 and stated that his uncle was aboard a motor vehicle belonging to the appellant on 4<sup>th</sup> June, 1995 when the said motor vehicle was involved in an accident resulting in his death. PW1 obtained the requisite grant of administration to enable him to file the suit in the lower court. He informed the court that he obtained a police abstract and death certificate. They spent Kshs.27,500/= for the burial and Kshs.30,000/= in obtaining letters of administration. He paid Kshs. 90/= for the police abstract and Kshs. 52/= for the burial permit. He produced a bundle of receipts as exhibit 4 and the other documents mentioned above. He conducted a search at the Registrar of motor vehicles and produced a search certificate as exhibit 5 to as proof of the identity of the owner of the motor vehicle. He informed the Court that the deceased was single and died at the age of 34 years. He used to support his 3 brothers and that as at the time of his death, he was working at Tropicana village at Mtwapa earning a salary of Kshs.5,000/= per month. He also informed the court that he sought leave to file the suit out of time. He produced the court order as exhibit 7.

13. PW2, No. 66143 Cpl. Abdi Kadubo from Kijipwa Police Station testified that a road traffic accident occurred on 4<sup>th</sup> June, 1995 along the Mombasa – Kilifi road at Kikambala. The accident was reported at the said Police Station. It was his evidence that Augustus Kadogo who was a passenger aboard motor vehicle registration No. KAA 180M Isuzu pick up belonging to Shiva carriers died as a result of the accident. He produced the police abstract as exhibit 8.

14. The learned trial Magistrate found the appellant 100% vicariously liable. She awarded the respondent Kshs.100,000/= for loss of expectation of life, Kshs.10,000/= for pain and suffering, Kshs.600,000/= for loss of dependency and special damages of Kshs.80,150/= thus making a total award of Ksh. 790,150/=. She also awarded costs as well as interest at court rates.

15. Both counsel were in agreement that the learned trial magistrate erred in law by making an award for loss of dependency and made reference to section 4(1) of the fatal Accidents Act, Cap 32 Laws of Kenya. The said section provides that:-

***“ Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused .....”***

16. I am in agreement with both counsel that the learned trial magistrate erred when she made an award for loss of dependency in respect to persons who do not qualify to be dependents. I hereby set aside the award of Kshs. 600,000/= for loss of dependency.

17. In the case of **Benedeta Wanjiku Kimani vs Changwon Chekoi & Another [2013] eKLR**, Emukule J, held thus:-

***“In common law jurisprudence of which Kenya is part, the courts have evolved two principles, loss of expectation of life and pain and suffering.....determined what is commonly referred to as conventional sum which has increased over the years from Ksh.10,000/= to Ksh.100,000/= currently. The basis of the increase has basically been based upon the increase of life expectancy from 45 years to run 60 years currently, that life itself was, until cut short by the accident worth something to the estate.”***

18. Counsel for the appellant did not object to the other awards made to the respondent by the trial magistrate. This court therefore upholds the award of Kshs. 100,000/= for loss of expectation of life, Kshs.80,150/= special damages and Kshs.10,000/= for pain and suffering which amounts to the total sum of Kshs.190,150/=.

19. Although the appellant has asked for half the costs. I see no justifiable reason why half the costs should be awarded to the appellant. The upshot of the foregoing is that the appellant's appeal partly succeeds as outlined above.

20. I award costs and interest to the plaintiff/respondent.

It is so ordered.

**DELIVERED, DATED and SIGNED at MOMBASA on this 8<sup>th</sup> day of September, 2016.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Mr. Muchiri for the appellant

Ms. Soni holding brief for Ms Obura for the respondent

Ms.  
Assistant

Rose

Echor

Court