



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CIVIL APPEAL CASE NO. 10 OF 2011**

PAUL N. KINYANJUI..... APPELLANT

VERSUS

ESTHER W. MBUGUA.....RESPONDENT

*(An Appeal from Judgment and decree of the Chief Magistrate Embu dated 11th January, 2011 in Embu CMCC No. 183 of 2009)*

**J U D G M E N T**

**1. INTRODUCTION**

This an appeal against the judgment of the Embu chief Magistrate delivered on the 11<sup>th</sup> January 2011 in Embu CMCC No. 183 of 2009. The appellant was sued by one Esther Mbugua in her capacity as the administrator of the estate of Benjamin Mungai Mbugua for damages under the Law Reform Act and the Fatal Accidents Act. The claim arose from a accident which occurred on the 8<sup>th</sup> August 2006, along Embu Makutano road involving the deceased who was said to be lawful riding a motor cycle Registration Number KAV 719 allegedly caused by the negligence of the appellant being driver of vehicle registration number KAU 556 S.

The appellant was found fully liable and the respondent awarded a total of Kshs.1,280,000/= for general and special damages under various heads. The appellant was aggrieved by the judgment and lodged this appeal.

**2. THE GROUNDS OF APPEAL**

The appellant's grounds of appeal may be condensed as follows:-

1. That the magistrate erred in finding the appellant fully liable for the accident and by failing to consider the submissions of the appellant on liability and quantum.
2. That the magistrate awarded damages which were excessive and manifestly high resulting from the failure to apply the principles applicable.
3. That the magistrate erred in failing to deduct the damages under the law reforms Act from the award and the Fatal Accident Act.

The appeal was disposed of by way of written submissions. The appellant was represented by Munene Wambugu & Co. Advocates while the respondent's counsels were L.K. Waweru & Co. Advocates.

**3. THE SUBMISSIONS**

The appellant faulted the finding on liability arguing that the motor cyclist was not licensed as a motorbike rider and that the lack of training contributed to the accident. This fact ought to have been considered by the trial magistrate as a basis to apportion liability at 50:50.

The court adopted a multiplicand of Kshs.10,000 as the monthly wage of the deceased as opposed to the appellant's proposal of the minimum wage for unskilled workers proposed by the appellant at Kshs.5,349. It is the appellant's argument that there was no evidence to prove that the deceased earned Kshs.1,000/= a day. Even assuming that he did, the amount was shared between the deceased and his employer. A figure of Kshs.500/= per day ought to have been adopted by the court.

It was an error by the trial court to adopt a multiplier of 30 years without any basis and in disregard of the laid down principles. The appellant tendered several authorities he believed would have been of assistance to the magistrate. The appellant's proposal was to peg the retirement age at 55 years which was applicable in 2006 when the deceased died. The magistrate adopted 60 years as the age of retirement which was a misdirection.

The respondent argued that she presented credible and reliable evidence on how the accident occurred which blamed the appellant. He did not tender any evidence to rebut that of the respondent regarding the negligent manner in which he drove the vehicle. Liability was bound to be full against the appellant.

Regarding the earnings of the deceased, the respondent submitted that proof of earnings was not only by documentary evidence, the evidence of PW3 should be regarded as sufficient.

Each party relied on various authorities to support their arguments which have been of benefit to this court dealing with the issues raised in this appeal.

#### **4. THE ISSUES FOR DETERMINATION**

This appeal raises three issues for determination as follows:-

- a. *Whether the finding of the trial court of full liability against the appellant was supported by cogent evidence;*
- b. *Whether the award was manifestly excessive to justify interference by this court;*
- c. *Who shall bear the costs of this appeal.*

#### **4. THE DUTY OF THE COURT**

The duty of the first appellate court was spelt out by the Court of Appeal in the case of **ABOK JAMES ODERA T/A A.J. ODERA & ASSOCIATES VS JOHN PATRICK MACHIRA T/A MACHIRA & CO. ADVOCATES [2013] eKLR** as follows:-

*“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”*

#### **5. THE EVIDENCE**

The respondent called PW2 who was an eye witness to the accident. He testified that he was walking on the road going towards his home at Kimbimbi market when a motorcycle passed him. He then saw a vehicle coming from the opposite direction with an indicator to overtake. The vehicle hit the cyclist knocking him down. PW2 and the cyclist were on the left side of the road heading towards Nairobi while the motor vehicle was being driven towards Embu. The vehicle registration number KAU 556 S was

overtaking a pick-up with words “Heshimu Punda” inscribed on it. The accident occurred about 30 metres from where he was and he was able to see what happened. He said that when the motor vehicle swerved to the left to overtake the pick-up, he hit the motor cyclist on the left side of the road as a result of which he lost control and hit a tree. The motor cyclist died on the spot.

PW4 PC Bonface Elude confirmed the occurrence of the accident. Upon completing investigation, the file was forwarded to the state counsel with a recommendation that the driver of the motor vehicle be charged with causing death by dangerous driving. The driver was still at large during the hearing of the case. PW4 produced the police abstract in evidence.

The appellant did not adduce any evidence to rebut that of the plaintiff on the occurrence of the accident.

The scene of accident was lighted by electricity at the scene according to PW2. The appellant’s driver hit the deceased as he overtook another vehicle. The cyclist was on the left side of the road off the tarmac which was his correct lane. After the impact, this motor vehicle KAU 556 S lost control and hit a tree. There was evidence of over speeding and failure to manage the vehicle on the part of the driver. The driver had a duty to ensure it was safe to overtake which he failed to do. The accident was fatal which demonstrates the intensity of the impact. In the absence of any evidence to the contrary, the appellant’s driver had to bear responsibility single handedly.

The magistrate found that the appellant’s driver overtook when it was not safe to do so, failed to control his vehicle and invaded the motor cyclist on his correct side of the road.

The issue of contributory negligence does not arise just because the motor cyclist was not a trained rider. There was no evidence attributing negligence on him to justify part of liability being invoked on him.

It is my finding that the magistrate’s finding on liability against the appellant who was vicariously liable was based on cogent evidence. I reach the same conclusion upon the foregoing analysis of the evidence.

The principles guiding appeal courts on whether or not to interfere with a damage awards was explained in the case of **ARROW CAR LTD VS BIMONO & 2 OTHERS [2004] 2 KLR 101** where the case of **KEMFRO AFRICA LTD VS GATHOGO KANINI VS A.M.M LUBIA & ANOTHER** was cited. The court held:-

*“In deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge, an appellate court must be satisfied 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.”*

The magistrate adopted the ratio of 1/3 for dependency which was agreed by both parties and which is not a subject of this appeal.

The evidence of PW3 who was a motorcycle operator was that the deceased earned Shs.1,000/= per day. He later testified that during the year 2006 when deceased died, motor cycles were few unlike today and the earnings were higher. The respondent testified that the deceased earned Kshs. 10,000 a month and gave her Shs.300 – Shs.400/= for her maintenance. The deceased was not married at the time of his death.

It is established law that earnings must not be proved through documentary evidence of pay slip and related documents. In Kenya, majority of people are not salaried employment and rely on small businesses to earn their living. It was held in the case of **JACOB AYIGA MARUJA & ANOTHER VS SIMEON OBAYO [2005] ECLR** that:-

*Proof of earnings and profession is not only by way of documentary evidence as that would cause a lot of injustice to Kenyans who are illiterate, keep no records and earn the livelihood in various*

ways.

Having established that proof of earnings can be achieved through other evidence. I am of the considered opinion that the evidence of PW1, and PW3 was sufficient. The magistrate had a sound basis of adopting the figure of Kshs. 10,000 as the monthly salary of the deceased.

The deceased was aged 23 years and the court adopted a multiplier of 30 years. The appellant relied on the following cases to support his argument that the multiplier was on the higher side:-

1. *HCCC No. 1503 OF 1999 Bernard Maina suing on behalf of the estate of Joshua Kinyua Maina Vs Francis Ndicu the deceased was 23 years old at the time of death and a casual worker (mason). The court held that the deceased would have remained gainfully employed until the age of 60 years but that it would have been wrong to assume that he would have enjoyed a long healthy life. The court used a multiplier of 20 years in 2001.*
2. *Mohamed Salim & 4 others [1990] KLR where the deceased was aged 24 years and the court adopted a multiplier of 18 years.*

I wish to rely on the authority of **RICHARD OMEYO OMINO VS CHRISTINE A. ANYANGO [2009] EKLR** where the deceased was aged 22 years and a multiplier of 23 years was adopted by the court.

From the above authorities I find that the multiplier adopted by the trial magistrate was on the higher side and not based on comparable decisions. All considered including the ages of the deceased herein, I hereby adopt a multiplier of 25 years.

The magistrate awarded Kshs.10,000 for pain and suffering and Kshs.70,000 for loss of expectation of life which was not contested in this appeal. However, the appellant argued that the award for loss of expectation of life ought to have been subtracted from the award for lost years.

The deduction of the damages under Law Reform Act from the award under Fatal Accident Act is meant to avoid giving double benefit. The trial court ought to have deducted the Kshs. 70,000/= from the lost years award.

The lost years damages are to be worked out as follows  $10,000 \times 12 \times 25 \times 1/3 = 1,000,000$ .

The final judgment will be as follows:-

Lost years	1,000,000
Loss of expectation life	70,000
Pain and suffering	<u>10,000</u>
	1,080,000
Less	<u>70,000</u>
	<b><u>1,010,000</u></b>

The award of Kshs.1,280,000/= made on 11/01/2011 is hereby set aside. The award of **Kshs.1,010,000/=** is therefore payable to the respondent by the appellant.

The appellant will be given half costs since the appeal is only partly successful.

**DELIVERED, SIGNED AND DATED AT EMBU THIS 5TH DAY OF MAY, 2015.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Ms. Wanjiru for Appellant**