REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. E066 OF 2024

ISLAND DISTRIBUTORS ….…….....APPELLANT

VERSUS

MATANO MWAMORO DZUNGU & JOSEPHINE MYAZI SHINDO
(Suing as the legal representatives of the estate of
Grace Kanze Matano …….
RESPONDENTS

JUDGMENT

1. The Respondents filed Kaloleni PMCC No. E075 of 2023 against the Appellant, as legal representatives of the estate of Grace Kanze Matano (the deceased) seeking damages under the Fatal Accidents Act and the Law Reform Act on their own behalf and on behalf of the estate of the deceased. In their plaint dated 16.6.23 and amended on 9.10.23, the Respondents claimed both general and special damages arising from a road traffic accident that occurred on 3.1.23 at Mkapuni-Kibao Kiche Murram Road at Mwanjama area in which the Appellant's rider, employee, servant or agent so negligently rode motor cycle registration number KMFV 097K that it veered off the road and hit the deceased, a pedestrian, as a result of which the deceased sustained fatal injuries.

2. In its statement of defence dated 12.9.23 and reply to amended plaint dated 13.10.23, the Appellant denied liability and all the allegations made by the Respondents. It denied that the motor cycle was involved in an accident and the rider thereof was its authorized rider. The Appellant further claimed that the alleged fatal injuries sustained by the deceased was occasioned by her own negligence and urged that the suit be dismissed with costs.

3. The matter proceeded to hearing and at the conclusion, the trial Magistrate entered judgment for the Respondents against the Appellant in the following terms:

Liability		100%
Pain and suffering	Kshs.	50,000.00
Loss of expectation of life	Kshs.	100,000.00
Lost dependency	Kshs.	700,000.00
Special damages	Kshs.	69,500.00
Total	**Kshs.**	**928,533.00**

Costs and interest from date of judgment till payment in full.

4. Being aggrieved, the Appellant filed the Appeal herein against both liability and quantum of damages. The Appellant prayed that the finding on liability be set aside and that the suit be

dismissed with costs. The Appellant also urged that the awards for damages under the Law Reform Act and Fatal Accidents Act be set aside and assessed downwards.

5. Being a first appeal, this Court is called upon to re-evaluate and analyze the evidence on record being mindful that it neither saw nor heard the witnesses testify. (**See Selle v Associated Motor Boat Co. [1968] EA 123**). The Court is also guided by the Court of Appeal decision in **Samuel Mwanasokoni v kenya Bus Services Ltd [1985] eKLR**, where it stated:

> ***Although this Court on appeal will not lightly differ from the judge at first instance on a finding of fact it is undeniable that we have the power to examine and re-evaluate the evidence on a first appeal if this should become necessary. As was said by the House of Lords in Sotiros Shipping v Sauviet Sohold, The Times, March 16, 1983:***
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> > ***"It is uncertain whether their Lordships should have reached the same conclusion on the evidence, but it is important that, sitting in the appellate Court they should be ever mindful of the advantages enjoyed of the trial judge who saw and heard the witnesses and was in a comparably better position than the Court of Appeal to assess the significance of what was said, how it was said, and, equally important, what was not said."***

6. Parties filed their written submissions which the Court has duly considered.

7. The Appellant faults the trial court for finding the Appellant 100% liable for the accident. It was submitted that the trial court misdirected itself by relying on hearsay evidence. The Appellant argued that the legal and evidentiary burden of proof placed upon the Respondents was not diminished by the fact that the Appellant did not call any evidence in rebuttal.

8. For the Respondents, it was submitted that the deceased minor was 10 years old and that the trial Magistrate took this into account in finding that the deceased could not be held to have contributed to the accident on account of her age. Further, that the law tends to place strict liability on the driver and shifts the burden on them to show that minor children are expected to take precautions for their own safety.

9. In its judgment, the trial court noted that the Appellant's rider a direct witness was not called to testify and no evidence was adduced to rebut that of the Respondents. Relying on the case of **Tayab v Kinanu [1983] KECA 23 (KLR)**, the trial court found the Appellant 100% liable and proceeded to state as follows:

> ***The accident involved a minor aged 10 years old. There was no evidence that he (sic) had the ability to understand and or appreciate the dangers involved while on the road. There was no evidence as to how the said minor contributed to the occurrence of the accident. The rider was fully in control of the motor cycle when he caused the accident and therefore no contributory negligence can attach to the said minor.***

10. The record shows that there were no independent eye-witnesses to the accident. The police evidence was also not helpful as PW1 PC Victor Etyang was not the investigating officer and did not produce the sketch map. He also stated that the matter was still pending investigations. The rider of the motorcycle who was the only eye witness to the accident and who would have shed light on what exactly happened was not called to testify. What is before the Court therefore, is the Respondents' version which remains uncontroverted.

11. In such circumstances, where should liability lie? The victim of the accident is a deceased minor aged 10 years as per the birth certificate on record. The respondents contend that strict liability should be placed upon the rider of the motorcycle on account of the deceased minor's age.

12. Our superior courts have had occasion to consider this issue and have pronounced themselves on the same. In the case of **Patrick Muli v EM (Minor suing through her Mother and Next Friend WG) [2021] KEHC 9034 (KLR)**, Odunga, J. (as he then was) had this to say on liability in cases involving young children:

> ***50. In my judgement, it is clear that the learned trial magistrate properly took into account, the age of the plaintiff and whether in those circumstances she could be deemed to have negligently contributed to the accident or negligently caused the accident. The law when it comes to accidents involving children of tender years seem to place strict liability of the drivers and shifts the burden onto the drivers to show that the child is of such an age as to be expected to take precautions for his or her own safety.***

13. Musyoka, J. was of the same view and in **AO (Minor suing through next friend of father JOO) v Khainga & another (Civil Appeal E038 of 2022) [2025] KEHC 1860 (KLR) (21 February 2025) (Judgment)**, stated:

> ***18. Age 9 would place the appellant minor within the bracket of a child of tender years, although very close to the margin. PW1 was careful not to offer him as a witness, and, therefore, the trial court did not get a chance to see and hear him, to enable it to assess whether he possessed adequate intelligence, to have been***

> ***expected to take precautions for his own safety. Nevertheless, there was still material that could guide the court in ascertaining whether he had such intelligence. PW1, his father, testified that the minor used to go to school alone, unescorted. That could be a pointer that he trusted him to be sufficiently intelligent to be in a position where he could be precautious for his own safety, and where liability could be attributed against him, for contributing to the cause of an accident, through his negligence.***
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> ***19. The burden is, however, on the defendant to establish that the minor was sufficiently intelligent to take precautions for his own safety. The respondents herein were the defendants. They did not lead any evidence to establish that.***

14. The deceased herein was a minor aged 10 years old. Although PW2 stated that the deceased walked to school alone and knew how to cross the road, that in my view, is not sufficient evidence that she had the ability to fully appreciate the dangers involved while on the road. The questions that then linger in the mind of the Court are: Did the minor have sufficient intelligence to be anticipated to take measures for her own safety? Did she do anything to place herself at risk? Did the rider of the motor cycle keep a proper look out? Did he have his attention on the road? Did he see the child? His evidence would have shed light on the steps he took to avoid the accident and how if at all, the child contributed to the occurrence of the same.

15. In spite of the fact that the deceased minor used to walk to school alone, the burden still lay on the Appellant to lead evidence demonstrating that the deceased minor was sufficiently intelligent to take precautions for his own safety. Additionally, and given her tender age, the burden shifted to the Appellant to establish the minor deceased's contribution to the occurrence of the accident. This burden was not discharged. I accordingly find that the deceased minor was not blameworthy and no contributory negligence can attach to her. In the premises, I do not fault the trial court for arriving at 100% liability against the Appellant.

16. I am fortified in my finding by the decision in the case of **Tayab** (supra) where the Court of Appeal cited Lord Denning who in **Gough v Thorne [1966] WLR 1387** stated:

> ***A very young child cannot be guilty of contributory negligence. An older child may be. But it depends on the circumstances. A judge should only find a child guilty of contributory negligence if he or she is of such an age as to be expected to take precautions for his or her own safety; and then he or she is only to be found guilty if blame is attached to him or her. A child has not the road sense of his or her elders. He or she is not to be found guilty unless he or she is blameworthy.***

17. On quantum, no submissions were made by the Appellant in this regard. In any event, it is trite that the award of damages is discretionary and an appellate court should be slow in interfering with a trial court's exercise of discretion in this regard. In the case of **Butt v. Khan [1981] KLR 349** Law, J.A stated as follows:

> ***An appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.***

18. The Court is also guided by the decision in **Catholic Diocese of Kisumu v Tete [2004] eKLR** where the Court of Appeal stated:

> ***It is trite law that the assessment of general damages is at the discretion of the trial court and an Appellate Court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a difference figure if it had tried the case at first instance. The Appellate Court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, as by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to present an entirely erroneous estimate (see Kemro v A M Lubia & Olive Lubia (1982-88) 1 KAR 727 and Kitavi v Coast Bottlers Limited [1985]KLR 470).***

19. Duly guided, I find no reason to interfere with the award of damages.

20. The upshot is that the Appeal is devoid of merit and is dismissed with costs to the Respondent.

DATED SIGNED and DELIVERED in Malindi this 30th day of September 2025

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M. THANDE

JUDGE