REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

CIVIL APPEAL NO. E049 OF 2023

CARROLINE ZAWADI MANGI..............................1ST APPELLANT

KHADIJA MOHAMED BULE..............................2ND APPELLANT

VERSUS

DANIEL NZIOKA MUSYOKA..............................1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATION......2ND RESPONDENT

THE ATTORNEY GENERAL..............................3RD RESPONDENT

(Being an appeal arising from the judgment and decree of Hon. M.W. Wachira, Principal Magistrate, in Lamu PM`s Court Civil Case No. E001 of 2023 delivered on 21/9/2023)

JUDGMENT

1. The appellants herein brought suit against the respondents after their kin was killed in a road traffic accident involving a motor vehicle belonging to the 2nd respondent and which at the time of the accident was being driven by the 1st respondent. The appellants blamed the 1st respondent for causing the death of the deceased through careless driving and sought for general and special damages. The respondents denied the claim and in turn blamed the

Original

deceased for being responsible for his own death. The trial court after a full trial found both the deceased and the driver of the motor vehicle to have been equally to blame for the accident and apportioned liability equally between the appellants and the respondents. The court thereupon awarded damages as follows:

Pain and suffering…………………Ksh.50,000/=

Loss of expectation of life……..Ksh.200,000=

2. The court awarded the appellants half of the costs of the suit plus interest thereon. The award was subject to 50% liability on the part of the Appellants. The appellants` claim on loss of dependency was dismissed for lack of proof. The appellants were aggrieved by the decision and lodged the instant appeal.
3. The grounds of appeal as formulated by the Appellants are that:
   1) The learned Magistrates erred in law and fact in finding that the deceased was equally to blame for the accident and in apportioning the liability for the accident at 50% against the deceased and 50% against the 1st Defendant.
   2) The learned Magistrates erred in law and fact in awarding damages for pain and suffering at the sum of Ksh.50,000/= which award was manifestly low in

Original

the circumstances as to amount to an erroneous estimate of the damages for pain and suffering.

3) The learned Magistrates erred in law and fact in finding that the Plaintiffs had not proved dependency and in disallowing the Plaintiffs claim for damages for loss of dependency under the Fatal Accidents Act.

4. The appeal was canvassed by way of written submissions of the respective counsels for the Appellants and the Respondents.

Appellants` Submissions

5. The appellants through their counsels submitted on two issues: on liability and on the quantum of damages. On liability they faulted the trial court for failing to properly evaluate the evidence adduced before the court and arrived at a wrong finding that the deceased was 50% liable for occasioning the accident.
6. It was submitted that liability is only apportioned equally between the parties, as held in the case of **Hussein Omar Farah v Lentu Agencies Ltd (2006) KECA 388 (KLR)**, where there is no concrete evidence to determine as to who is to blame for occasioning the accident. That in the present case there was evidence that the driver of the motor vehicle, the 1st Respondent, was wholly to blame for causing the accident as no negligence was proved on the part of the

Original

deceased. More so that the only logical inference that can be drawn from the facts is that the driver of the motor vehicle was not a truthful witness and that he was not careful. That had he been careful while driving at moderate speed he would have seen the deceased in sufficient time to avoid the accident. Therefore, that this court should find the driver wholly liable for the accident.

7. On quantum of damages, the appellants submitted that though the deceased died at the scene of the accident, he must have endured extreme pain and suffering as a result of the serious injuries that he had sustained. That the award of Ksh.50,000/= for pain and suffering was manifestly low for the pain suffered. Counsel for the appellants relied on the case of **Nahashon Chege & another v Dennis Muthaura Jeremy & another, HCCA No.340 of 2023**, where a sum of Ksh.100,000/= was awarded to the estate of the deceased who had met his death at the scene of the accident. The appellants urged the court to enhance the award to Ksh.100,000/=.

8. On dependency, the appellants submitted that the first appellant was a daughter to the deceased and that she had 3 siblings who did get assistance from the deceased. That the 2nd appellant was a wife to the deceased with whom she had one child. That though the deceased was a retired civil servant he still assisted the family.

Original

9. It was submitted that the trial magistrate misdirected himself on the applicable law on proof of dependency and as a result came to an erroneous finding that the appellants had not proved dependency. That the court failed to consider that the Appellants had produced a limited grant of letters of administration ad litem. That the same could not have been issued if the appellants had no relation with the deceased. That the action was brought by the appellants on their own behalf and as personal representatives and dependents of the deceased. The appellants cited the case of **Juliana Mwende Simon & anotherr v China Raod & Bridges Corporation of Kenya, HCCA No.E029 of 2022** where the Court awarded damages for loss of dependency based on of the grant of letters of administration notwithstanding there having been no certificate of marriage or letter from the area chief in proof of relationship between the deceased and the plaintiffs. The Court went ahead and held that proof of loss of dependency is on balance of probabilities and that between a husband and wife, the presumption is that they depend on each other unless there is evidence to the contrary.

10. The appellants also relied on the case of **Naomi Wawira Kimani v Michael Munyi Nyaga & another HCCCA No. E108 of 2022** where the court held that:

> **"Although the appellant stated in her submissions that she produced a letter from the**

Original

chief to prove dependency, no such letter was produced in her list of documents. The appellant only annexed letters of administration ad litem. The Court presumes that the said letter of the chief is what the appellant used to apply for letters of administration ad litem in P & A Cause No. 289 of 2017 – Kerugoya. It is thus my considered opinion that the appellant proved dependency and thus the ratio of 2/3 is applicable.

11. The appellants urged the court to award a global sum of Ksh.1,000,000/= for loss of dependency. They relied on **Moses Maina Waweru v Esther Wanjiru Githae, HCCA No.22 of 3020** where the actual income of the deceased was not established and the Court awarded a global sum of Ksh.800,000/- in respect of a deceased aged 68 years.

Respondents` submissions

12. The respondents submitted on 3 issues touching on liability, assessment of damages on pain and suffering and on whether loss of dependency was proved.

13. On liability, the respondents submitted that the driver of the motor vehicle, the 1st respondent, was the only eye witness on how the accident occurred. That his evidence that the deceased threw himself onto the road was not challenged by any other evidence. That the appellants did

Original

not prove liability and as such the trial court was right in apportioning liability equally between the parties. The respondents placed reliance in the case of **Githinji & another v Orege & 2 others (2023) KEHC 26526 (KLR)** where the court quoted the case of **Khambi 7 another v Mahithi & another (1968) EA 70** that:

> **It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.**

14. On the award on pain and suffering, the respondents submitted that there was no evidence on how long the deceased lived after the accident but he seemed to have died immediately after the accident. That based on the case **Hyder Nthenya Musili & another v China Wu Yi Ltd & another (20170 eKLR** the acceptable range where there is prolonged pain and suffering is between Ksh.10,000/= and Ksh. 100,000/=. That the award of Ksh.50,000/= by the trial court was reasonable.

15. On loss of dependency, the respondents submitted that the appellant did not prove that they were daughter and wife

Original

of the deceased respectively. Nor was it proved that the deceased had any children as no documents to prove the same were produced. That it is trite law that dependency is a matter of fact and evidence has to be adduced to prove the same. Reliance was placed in the case of **Rahab Wanjiru Nderitu v Daniel Muteti & 4 others (2016) eKLR** where it was held that:

> **The plaintiff must prove dependency. If a wife, she must prove marriage to the deceased either by customary marriage or by production of marriage certificate or by any other acceptable manner, by a letter from the Chief confirming that the plaintiff is a wife of the deceased and that the children are children of the deceased in the absence of birth of certificates or any other documents to confirm the same.**
>
> **The plaintiff did not produce any of the above documents to confirm being a wife and widow of the deceased. I have looked at the Grant of Letters of Administration issued in the** Nakuru High Court **vide** HC P&A No. 135 of 2000……
>
> **Any person who has a beneficial interest or otherwise in a deceased's estate may apply for grant of Letters of Administration. It is not always that the person so applying is a wife or husband, or indeed a relative of the deceased. Stating in evidence that one is a wife or husband of a deceased person without proof is not enough. If the plaintiff was indeed the widow of the deceased as she stated, it would have been very easy for her to produce the marriage certificate she alluded to, or event the chief's**

Original

letter to confirm customary marriage and the children's documents, say Baptismal certificates or school certificates. The above having not been done, the court is left with no option but to find that dependency has not been proved, following which no award on loss of dependency can be made.

16. The respondents urged the court to find that no dependency was proved. They urged the court to dismiss the appeal with costs.

Analysis and determination

17. It is the duty of this court, as the first appellate court, to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, drawing its own conclusions from that analysis and bearing in mind that the court did not have an opportunity to hear the witnesses first hand - see the Court of Appeal case of **Gitobu Imanyara & 2 Others –vs- Attorney General** [**2016] eKLR**.

18. I have considered the grounds of appeal, the record of the trial court and the submissions tendered by the respective counsels for the parties. The issues for determination are:

(1) Whether the trial court erred on its finding on liability.

(2) Whether the trial court erred on its award on damages for pain and suffering.

Original

(3) whether the trial court erred in dismissing the claim on loss of dependency.

Liability

19. The appellants pleaded in their plaint that the deceased was on the 23rd January 2022 lawfully walking off the main Mokowe-Hindi road near a mosque when the 1st respondent drove his motor vehicle reg. No. GKB 299Y so negligently that he caused it to knock down the deceased off the road as a result of which the deceased sustained fatal injuries. The respondents denied the claim and pleaded that if at the accident occurred, the deceased was to blame for the same due to negligence while walking along Mokowe- Hindi road.

20. The 1st respondent testified in the case and adduced evidence that he was on the material day driving towards Mpeketoni from Hindi. That on reaching near Madina Mosque he was negotiating a corner to the left when he realized that a person had moved into the road and had been hit by left side passenger door of his vehicle. That he had not seen the person before the accident. The body of the person fell on the middle of the road. Members of the public started to gather at the scene. He feared for his life and did not stop. He drove to Mpeketini police station where he made a report.

21. The appellants did not call any witness to testify on how the accident occurred. The 1st appellant said that she went to the scene after the accident and found the deceased`s body

Original

in a police vehicle. Their witness, Omar Adam Ali PW3 said that he went to the scene after the accident occurred and he never knew how the same happened. He found the body of the deceased on the road and the accident motor vehicle on the left side of the road as one faces Mpeketoni direction.

22. The standard of proof in a civil case is on a balance of probabilities. In **William Kabogo Gitau v George Thuo & 2 others (2010) KLR** it was held that:

> **"In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party, is said to have established his case on a balance of probabilities."**

23. Counsel for the appellant argued that the accident could not have occurred in the manner explained by the 1st respondent and urged the court to find the respondents wholly liable for the accident. In view of the fact that the appellants did not call evidence on how the accident occurred, their pleading that the deceased was hit while walking off the road was not substantiated. The fact on how

Original

the accident happened has to be made from the evidence of the 1st respondent and inference from his evidence.

24. The 1st respondent in his evidence in court said that the deceased threw himself into the road. It was his evidence that he did not see the deceased throwing himself to the road and only realized it after the person was hit by the vehicle.

25. The 1st respondent in his written statement of defence which he adopted as his evidence in court stated that he was driving and when he reached near Madina mosque he saw an old man who had emerged from the nearby bushes on the left side of the road where he was driving. That the man jumped on his car and was hit by the left side door of his vehicle.

26. The question is whether the 1st Respondent saw the deceased jumping into the road or not. The 1st respondent gave contradictory evidence as to how the accident occurred. That creates doubt as to whether the accident happened as testified by the 1st respondent. It is trite that where the court is not in a position to decide from the evidence adduced before it as to which party is to blame for causing the accident, both parties should be held equally to blame. This was the position taken by the Court of Appeal in **Hussein Omar Farah v Lento Agencies** (supra). In view of the unclear evidence of the driver of the motor vehicle as to how the accident happened, I find that the trial court was

Original

correct in holding the deceased and the driver of the motor vehicle equally to blame for the accident. wThe finding of the trial court on liability is therefore upheld.

Award on pain and suffering

27. The principles to be considered by an appellate court in deciding whether to disturb the trial court's assessment of damages were set out by the Court of Appeal for East Africa in the case of **Bashir Butt v Khan** Civil Appeal No. 40 of 1977 [1978] eKLR thus;

> **"An appellate Court will not disturb an award of damages unless it is so 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."**

28. The trial court in this matter held that the deceased died on the spot and awarded the estate of the deceased Ksh.50,000/= for pain and suffering. The court in arriving at that decision relied on the case of **Joseph Gatone Karanja v John Okumu Soita & Esther Chepkorir (Suing as admin of the estate of Benard Soita Nyongesa (DCD) [2022] KEHC 2839 (KLR)** where a similar sum was awarded. The appellant submitted that the award

Original

was manifestly low and urged the court to award Ksh.100,000/= while relying on the case of **Nahashon Chege & another v Dennis Muthaura Jeremy & another HCCA No.E340 of 2023** where a sum of Ksh.100,000/= was awarded.

29. The respondents on the other hand submitted that the award of Ksh.50,000/= was reasonable.

30. In the case of **Mercy Muriuki & Another vs Samuel Mwangi Nduati & Another (suing as the Legal Administrator of the estate of the late Robert Mwangi) (2019) eKLR** the court stated that the conventional awards for pain and suffering range from Ksh. 10,000/= to Ksh.100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.

31.The deceased herein appears to have died on the spot. I have considered the case of **Antony Njoroge Ng'ang'a (Legal representative of the Estate of the late Fred Nganga Njoroge aka Fred Ng'ang'a Njoroge) v James Kinyanjui Mwangi & 2 others [2022] eKLR** where the deceased died on the spot of the accident and Ksh.30,000/= was awarded for pain and suffering. In the case of **Acceler Global Logistics v Gladys Nasambu Waswa & another [2020] eKLR,** the High Court upheld an award of Ksh. 50,000/= where the deceased was said to have died on the spot. In **Mosonik & another v Cheruiyot (Suing as the Legal Administrator of the Estate of Stanley Kipchumba Kemboi, Deceased) (Civil Appeal 113 of 2019)**

Original

[2022] KEHC 11823 (KLR), the High Court reduced an award of Ksh.150,000/= to Ksh.50,000/= for instant death. It is then clear that the award of Ksh.50,000/= by the trial court in damages for pain and suffering for death occurring on the spot finds support in High Court decisions. The Appellants did not show that the deceased underwent prolonged pain as to warrant an award of Ksh.100,000/=.

Dependency

32. Section 4(1) of the Fatal Accidents Act provides as follows:

> **"Every action brought under the Act shall be for the benefit of the wife, husband, parents and children of the deceased whose death was so caused."**

33. It is therefore the duty of a claimant for loss of dependency under the Fatal Accidents Act to prove that he/she comes within the provisions of section 4 of the Act as either the wife, husband, parent or child of the deceased.

34. The trial magistrate in dismissing the claim on loss of dependency stated that the appellants did not list the dependents of the deceased in their plaint nor did they produce documentation to prove their relationship with the deceased. The court relied on the case of **Rahab Wanjiru Nderitu v Daniel Muteti & 4 others (supra)** where the court held that:

Original

The plaintiff must prove dependency. If a wife, she must prove marriage to the deceased either by customary marriage or by production of marriage certificate or by any other acceptable manner, by a letter from the Chief confirming that the plaintiff is a wife of the deceased and that the children are children of the deceased in the absence of birth certificates or any other documents to confirm the same.

35. I have perused the appellants` plaint and noted that they indeed did not plead that they were daughter and wife to the deceased respectively. Neither did they plead that the deceased was survived by any wife, child/children or parents, for which a claim under the Fatal Accidents Act can be founded. In **Innocent Ketie Makaya Denge -v- Peter Kipkore Chererek & Aniter (2015)** the High Court held that;

"Only dependents recognized under the Fatal Accidents Act are supposed to benefit for loss of dependency………Section 4(1) defines dependents as wife, husband, parent and child of the deceased."

36. Dependency is a question of fact. It is therefore the duty of the dependent to show that he/she comes within the ambit of section 4 of the Fatal Accidents Act. Where there is no such evidence adduced, there is no basis for a claim for dependency.

Original

37. The fact that the appellants had obtained a grant of letters of administration ad litem to enable them file the subject suit did not by itself bring them within the ambit of section 4 of the Fatal Accidents Act. This is so because legal representatives may not be necessarily persons who are dependents of the deceased. The legal representatives have to bring the action on behalf of the estate of the deceased and in doing so must proof that the deceased was survived by dependents of a wife, husband, parents and/or children**.** Without such proof there is no basis of making an award on dependency. There was no such proof in this case. I therefore find that the trial court was correct in finding that dependency was not proved.

38. The upshot is that this court finds no merit on the appeal on the finding of the trial court on liability. Nor is there merit on the appeal on the award on pain and suffering. Thirdly there is no merit on the appeal on loss of dependency. Consequently, the appeal is dismissed in its entirety with costs to the Respondents.

Delivered, dated and signed at GARSEN this 13th day of November 2025.

J. N. NJAGI

JUDGE

In the presence of:

Mr. Shujaa for Appellants

Original

Miss Kiiru HB for Mr.Ojwang for Respondents

Court Assistant - Kambi

Original