



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
CIVIL APPEAL NO. 15 OF 2018

MARGARET **WANGARI.....**
.....APPELLANT

VERSUS

JOEL KIOGORA.....1ST RESPONDENT
HELLEN MUTHONI MBAE.....2ND RESPONDENT
RICHARD NJIRU.....3RD RESPONDENT
(Being an Appeal from the Judgment of Honorable P.M Kiama (P.M) delivered on the 17/10/2017 at Wang’uru PMCC No. 74 of 2014)

JUDGMENT

- [1] By a plaint dated 10/6/2014, the Appellant sued the Respondents seeking general damages and costs of the suit plus interest. She pleaded that on or about 7/7/2013, Rupert Kyamati Mbogo, the deceased herein, was a lawful passenger aboard motor vehicle registration No. KAW 310 E along Sagana - Kenol road at Tana bridge, when the Respondents, their driver and/or servant so negligently drove, managed and controlled Motor Vehicle Registration No. KBD 310 W that it rammed into the vehicle he was travelling in, as a result of which he sustained fatal injuries. At the time of his death, the deceased, who was 43 years old, was leading a happy life, in good health and a mason cum carpenter with Netsole Kenya Ltd, and by his death, his estate suffered loss, expenses and damage.
- [2] The Respondents denied the claim vide their separate statements of defence dated 29/11/2014, 12/8/2014 and 13/1/2016, and prayed for the Appellant’s suit to be dismissed with costs.
- [3] Upon full hearing, the trial court apportioned liability at 10:30:30:30 in favour of the Appellant against each Respondent, and awarded Ksh. 20,000 for pain and suffering, Ksh.

100,000 for loss of expectation of life and Ksh. 480,000 for loss of dependency together with costs and interest.

The Appeal

[4] On appeal, the Appellant vide her memorandum of appeal dated 13/11/2017 set out 5 grounds as follows:

1. *The learned Trial Magistrate erred in law and fact by holding that the appellant was 10% liable.*
2. *The learned Trial Magistrate erred in law and fact by not applying the minimum wage of Kshs 10,107/=.*
3. *The learned Trial magistrate erred in law and fact by not applying a multiplier of 17 years and the dependency ratio of 2/3.*
4. *The learned Trial magistrate erred in law and fact in that he failed to give an award using the applicable law.*
5. *The judgment of the Trial magistrate is bad in law, unjust, unfair and offered no justice in the matter.*

Duty of the Court

[5] This being a first appeal, this court is duty bound to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same and arrive at its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify. (See **Selle & Another v Associated Motor Boat Company Ltd & Others [1968] EA 123**).

Oral Evidence

[6] **PW1 Margaret wangari**, the Appellant herein testified that, *“I am from Mbere South Sub-County. Embu County. I am a farmer. I am the plaintiff in this case. I filed the case on behalf of Rupert Kyamati Mbogo (husband). He died in road accident. I have the death certificate, limited grant to produce (limited grant - P. Exb 1). My husband was Rupert He was going back to work in Nairobi. He was coming from home going to Nairobi. The accused was travelling in a matatu. It is registration number KAW 201 E. He boarded the vehicle from Embu. At Tana bridge, the vehicle collided with another vehicle. The other vehicle was KBD 310W. After the impact, my husband was amongst the people who died on the spot was taken*

to Embu level 5 hospital. I buried the accused and later obtained the death certificate (P. Exb 2). I went to Makuyu police station where I obtained the police abstract (18/3/2014 P. MFI 3). I then went to Embu High court and applied for a limited grant. When I went to the police station, I obtained the vehicle ownership KAW 301 E was owned by Hellen Mbane (2nd defendant) Search certificate (P. Exb 4). The other vehicle was claimed by Joel Kiongora (1st defendant). I produced a certificate from the registrar of motor vehicles (not produced). My advocate wrote a letter demand to the defendants to pay me damages. They have not paid me to date. (demand letter P. Exb 5). I wanted to be paid because the defendants caused the death of my husband. My husband was a mason. He worked for a company as a mason. The accused left me with 4 children. The first born child is 18 years is called Francisa. She is studying a diploma. Certificate. (birth certificate - P. Exb 6). The other child is Catherine Muthoni in form 2 (Birth certificate - P. Exb 7) Mark Mureithi who attends a primary school. (Birth Certificate P. Exb 8) Monica Mwendia. That is her birth certificate. (P. Exb 9) These were the dependants. I blame the owner of the vehicle for the said accident. I pray that the court do order compensation so that I can educate my children.”

[7] *On cross examination by counsel for the 1st Respondent, she stated that, “I am a peasant farmer. I don’t sell any crops. I used to support my family. My husband travelled in vehicle KAW 301 E. It belongs to Hellen (2nd defendant). I have the document in court (police abstract) (police officer to questioned) I have not produced any document to show where my husband worked. I cant tell how much salary my husband used to earn. I blame both drivers for the said accident. I don’t know how the accident occurred.”*

[8] *On cross examination by counsel for the 2nd Respondent, she stated that, “When I went to the police station, I learned the vehicle the deceased travelled in. I did not witness the accident. I blame both drivers because my husband died in the accident. I don’t know which driver caused the accident.”*

[9] *On cross examination by counsel for the 3rd Respondent, she stated that, “It is true I did not witness the accident. KAW 301 E, and KBD 310 W were involved in the said accident. (KBD 126 W) If there was another vehicle, I am not aware. It is true I learned that the 1st and 2nd defendants were the owner. My husband worked for Nixon limited. I don't have any letter. I don’t know how much the deceased earned. It is true my daughter Francis studies at a college in Embu. I don’t have any letter to show. I have a report form for my other daughter. I did not produce it in court.”*

[10] In re-examination, she stated that, “*I blame the owners of the vehicle for the said accident.*”

[11] **PW2 PC John Shikuku** of Makuyu Traffic Base, produced the police abstract as P. Exb 2. He testified that, “*I have a police abstract dated....It concern a fatal road accident on 7/7/2013 around 630 pm along Sagana-Kenol road at Tana bridge. It involved motor vehicles involving the abstract it involved KAW 301 E and KBK 126 W, KBD 310 W KAW is owned by Joel Kiogora KBK.... Richard Njiru Mbogo. KBD 210 W by Hellen Muthoni Muhae. We received the information from the occurrence book. Normally after the accident, we found the owner was not the driver. We got the information when the Occurrence book. We obtained the information from the scene ie stickers. The person injured is Reuben Nyamati. He died in the said accident.*”

[12] On cross examination by counsel for the 1st Respondent, he stated that, “*I was not the investigating officer. I only came to produce the abstract. At that time I was not at Makuyu police station. I joined February 2015. The abstract indicate vehicle KAW (reads) KAW ...to blame. The matter is indicated to be under investigation. The investigations have not been.....*”

Submissions

[13] The Appellant faults the trial court in its apportionment of liability yet it was clear that the deceased was a passenger with no control of the accident motor vehicles. She proposes a multiplier of 17 and the minimum wage of Ksh. 10,107 as the multiplicand.

[14] The 2nd Respondent cites **Selle v Associated Motor Boat Co. L td (1968) E.A** on the duty of a first appellate court. She insists that the deceased contributed to the occurrence of the accident and the apportionment of liability was thus proper. She urges that the awards made by the trial court were reasonable, and cites **West Kenya Sugar Co. Limited v Philip Sumba Julaya (Suing as the Administrator and personal representative of the estate of James Julaya Sumba) (2019) eKLR and GKN & another (suing as Personal Representatives of the Estate of the Estate of GNL (Deceased) v Civiscope Limited (2021) eKLR**. She urges that there was no guarantee that the deceased would have lived to a ripe old age as the average life expectancy of an average Kenyan has drastically reduced due to increased vagaries of life and poverty. She urges the court to uphold the multiplicand and multiplier adopted by the trial court, and cites **Justo Mungathia Mwithalie & another v Joseph Maore**

Angacia & another (Suing as the legal representative of the estate of EKM – deceased)
(2022) eKLR.

[15] The 1st and 3rd Respondents did not file any submissions.

Analysis and determination

[16] From the grounds of appeal as framed, the twin issues for determination are whether the apportionment of liability was proper and whether the award for loss of dependency was erroneous.

Liability

[17] The Appellant herein testified that the deceased was a passenger in motor vehicle registration number KAW 201 E which collided with motor vehicle registration number KBD 310 W. It was untenable to apportion liability to the deceased, who was a mere passenger with no control over the accident motor vehicles, merely because no eye witness testimony was adduced.

[18] It is indicated in the police abstract that the driver of Motor Vehicle registration No. KAW 301 E was to blame for the accident.

[19] The Respondents did not lead any rebuttal evidence on how the accident occurred, and this court finds that the Appellant proved on a balance of probabilities that the Respondents were entirely liable for the accident.

Loss of dependency

[20] The deceased herein was 43 years old enjoying a happy and healthy life. The Appellant testified that the deceased was a mason. On cross examination, she stated that, ***“I have not produced any document to show where my husband worked. I cant tell how much salary my husband used to earn.”***

[21] In view of the uncertain earnings of the deceased, the trial court properly resulted to the minimum wage of Ksh.5,000 as a multiplicand, and a multiplier of 12 years, in view of the vicissitudes and uncertainties of life, which could potentially shorten human working life.

ORDERS

[22] Accordingly, for the reasons set out above, the Court finds the Appellant's appeal to be partially merited and it is hereby allowed in the following terms:

1. The apportionment of liability at 10% against the deceased is hereby set aside.
2. The 2nd and 3rd Respondent shall each bear 30% liability while the 1st Respondent shall bear 40% liability.
3. The award for loss of dependency remains unchanged.
4. The appeal has only partially succeeded and there shall, therefore, be no order as to costs.

Order accordingly.

DATED AND DELIVERED THIS 28TH DAY OF NOVEMBER 2025.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Mr. Mogusu for the Appellant.

Mr. Njuguna for the 1st Respondent.

Mr. Amwayi for the 2nd Respondent.