

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CIVIL APPEAL NO. 169 OF 2023**

**WEST KENYA SUGAR COMPANY LIMITED .....  
APPELLANT**

**VERSUS**

**TERESIA AMBOKA RACHAEL & GREGORY OUNDO MURUKA (Suing as  
the administrators of the estate of KELVIN ONGOMA MURUKA  
(DECEASED)) ..... 1ST  
RESPONDENT**

**RENTCO AFRICA LIMITED ..... 2ND  
RESPONDENT**

***(Being an appeal from the judgment delivered on 11th April 2024 by  
Hon. T. Obutu, Senior Principal Magistrate, in Mumias SPMCC No.  
E138 of 2022)***

**JUDGMENT**

1. This is an appeal from the judgment of the Senior Principal Magistrate delivered on 11th April 2024 in Mumias SPMCC No. E138 of 2022. The suit arose from a road traffic accident which also gave rise to Mumias SPMCC No. E028 of 2022. Both matters involved the same accident, the same parties, and were heard and determined by the same trial magistrate.
2. In Mumias SPMCC No. E028 of 2022, that was delivered on 12<sup>th</sup> October 2023, the learned magistrate found the motorcycle rider, Michael Wanyama Okutoyi, to be 100% liable for the accident and dismissed the claim therein.

3. However, in Mumias SPMCC No. E138 of 2022, the learned magistrate held West Kenya Sugar Company Limited and Rentco Africa Limited jointly and severally liable at 100% and awarded damages to the 1st respondent in Civil Appeal No. E092 of 2024. This was based primarily on:
  - a. Evidence of PW1 the widow of the deceased who presented the deceased pay slips, death certificates, burial costs, and other documentary proof.
  - b. The plaintiff's (Appellant in E169 of 2023) testimony in Civil Suit No E028 of 2022
  - c. Testimony of PC Stephen Kyalo (the investigating officer and other police officers)
  - d. The testimony of Fredrick Kisika a motor vehicle inspector No. 942/2/2016.
4. The evidence of witnesses in SPMCC E028 OF 2022 was adopted in SPMCC E138 OF 2022.
5. Aggrieved by the contradictory findings on liability and the assessment of damages, the Appellant lodged the present appeal. This appeal has been consolidated with the earlier SPMCC No E028 OF 2022 (HCCA E091 Of 2024 and HCCA E092 Of 2024) for purposes of determining liability across the files.

### **List of Grounds of Appeal By Appellant in HCCA E092 OF 2024 (West Kenya Sugar)**

6. The appeal is premised on the grounds:-

1) THAT the Learned Magistrate erred in fact and law in holding the Appellant jointly and severally liable for causing the accident in total disregard of the evidence adduced and the Appellant's submissions.

2) THAT the Learned Magistrate erred in fact and law in holding the Appellant jointly and severally liable in total disregard of his finding in the sister file Mumias E028 of 2022 which parties had agreed would be the lead file for purposes of liability.

3) THAT the Learned Magistrate erred in fact and in law in calculating the deceased's net income and in so doing, applied a multiplicand that was way above the deceased's correct net salary hence arrived at an erroneous amount for loss of dependency.

4) THAT the Learned Magistrate proceeded on wrong principles when assessing damages to be awarded to the 1st Respondent and failed to apply precedents and tenets of the law applicable.

**List of Grounds of Appeal By Appellant in HCCA E91 OF 2024 (Rentco Africa LTD)**

7. The appeal is premised on the grounds:-

1. THAT the learned trial magistrate erred in law and fact by delivering judgment not consistent with the evidence and exhibits tendered at the trial and hence his judgment is not supported by evidence on record.

2. THAT the trial magistrate misapplied and misapprehend evidence adduced by witnesses in Mumias SPMCC E28 of 2022 which laid the basis of his judgment in a matter arising from the same accident wherein he absolved the appellant from liability and his finding and determination went against his own judgment.
3. THAT the trial magistrate erred in law in holding the appellant liable to the respondent when no evidence has been tendered by the respondents to establish its culpability and liability for the accident in issue.
4. THAT the trial magistrate erred in law and fact by failing to have regard and consider the appellants submissions hence falling into an error.
5. THAT the trial magistrate erred in law and fact in failing to hold that the limited grant issued to the first respondent was anullity and a forgery as the advocate who is purported to have obtained the limited grant ceased practicing law 10years ago and held no practicing certificate since then and hence could not have obtained the grant on behalf of the first Respondent and indeed she confirmed on cross-examination that she never met the advocate who purportedly obtained the grant on her behalf.

6. THAT the trial magistrate erred in law and fact by allowing special damages of ksh.45,000/= that had not been specifically proved as the law requires.
7. THAT the trial magistrate erred in law by awarding excessive damages under the loss of dependency hence falling into error.

**List of Grounds of Appeal By Appellant in HCCA E169 OF 2023  
(MICHAEL WANYAMA OKUTOYI)**

8. The appeal is premised on the grounds:-
  1. THAT the Learned Trial Magistrate erred in law and in fact by failing to appreciate the standard of proof in civil cases.
  2. THAT the Learned Trial Magistrate erred in law and in fact by arriving at a finding against the weight of evidence tendered by the Appellant thereby occasioning miscarriage of justice.
  3. THAT the Learned Trial Magistrate erred in law and in fact by finding that it is the Appellant who caused the accident.
  4. THAT the Learned Trial Magistrate erred in law and in fact by entirely relying on DW1's evidence as an investigating officer when the Police Abstract does not name him as the investigating Officer.
  5. THAT the Learned Trial Magistrate erred in law and in fact by entirely relying on DW1's evidence to the effect that the Appellant

was to blame for the accident and that he was charged for the same when there was no documentary evidence to prove the same.

6. THAT the Learned Trial Magistrate erred in law and in fact by disregarding the Plaintiff's testimony in its entirety without any legal basis

## **ISSUES FOR DETERMINATION**

9. From the grounds of the 3 appeals, and the looking at the material on record on the two lower court files the issues for determination are:-

- a. Whether the learned trial magistrate erred in law by arriving at inconsistent findings on liability;
- b. Whether liability was properly imposed .
- c. Whether the assessment of damages in SPMCC 138 of 2022. particularly loss of dependency, was based on correct principles.
- d. Whether the damages which could have been due to the Plaintiff in SPMCC 028 of 2022 were properly assessed if he had won that case.

## **ANALYSIS**

### **Duty of the First Appellate Court**

10. This Court, as a first appellate court, is obligated to re-evaluate the evidence and draw its own conclusions, while bearing in mind that it neither saw nor heard the witnesses testify as held in **Selle v Associated Motor Boat Co. Ltd [1968] EA 123.**

## **LIABILITY**

### **Inconsistent Findings**

11. It is not disputed that both Mumias SPMCC No. E028 of 2022 and Mumias SPMCC No. E138 of 2022 arose from the same road traffic accident and were founded on identical evidence. In SPMCC No. E028 of 2022, the trial court found the motorcycle rider, Michael Wanyama Okutoyi, 100% liable for the accident. That finding was not appealed against and therefore remained undisturbed.
12. The subsequent decision in SPMCC No. E138 of 2022, holding the West Kenya Sugar and the Rentco African LTD liable for the same accident without first vacating the finding in SPMCC E028 of 2022 and thereafter admission of new or additional evidence, the trial court could not hold otherwise on the issue of liability for this would result to contradictory outcomes.
13. I have looked at the Judgment in SPMCC E138 OF 2022 , the Magistrate did not mention about the finding on liability in

SPMCC E028 of 2022 despite that file being a lead file ( test case on issue of liability). He proceeded as if case no. SPMCC E028 OF 2022 did not exist.

14. In **Hahn v Singh [1985] KLR 716** it was held that Courts are required to maintain consistency and certainty in adjudication. Contradictory findings arising from the same facts amount to an error of law.
15. Recent appellate jurisdiction has emphasized that such inconsistency mounts to an error of law.
16. This Court finds that the learned trial magistrate erred in law by departing from the earlier finding on liability without justification .
17. In **Njoroge & Another Versus Wanjugu & Another (2024) KEHC 14957**,the High Court held that where liability findings are inconsistent and unsupported by evidence ,an appellate court is duty bound to intervene.

### **Proper Apportionment of Liability**

18. Liability in negligence must be proved on a balance of probabilities and cannot be inferred merely from ownership or presence at the scene as was held ***in* David & Another Versus Kibwi & 2 Others (2024)KEHC 14631.**

19. In SPMCC E028 of 2022 the Plaintiff(Appellant in HCCA 169 OF 2023 testified that he decided to overtake the truck from the right side, the truck came to his side and hit him and he found himself on the other side of the road. On cross-examination, he said there was another oncoming motorcycle involved and that he was not blamed for causing the accident.
20. DW1 PC Stephen Kyalo said he was the investigating officer, he testified that the Plaintiff, a rider of motorcycle KMFC 343Q, overtook the trailer and collided head-on with another oncoming motorcycle KMDZ 129Q TVS Star and as a result of the accident motorcycle registration No. KMFC 343Q landed under the right tyre of the first axle of the trailer. The rider of KMFC 343Q was charged, and that the trailer did not hit the motorcycle KMFC 343Q.
21. DW2 Fredrick Kisika motor vehicle inspector told the court that upon examination of the prime mover and the trailer there was no physical damage noted.
22. It is noteworthy that Michael Wanyama Okutoyi , the Appellant in HCCA E169 of 2023 did not tell the trial court how the other rider of motorcycle KMDZ 129Q TVS Star was involved.
23. He did not say that in the process of overtaking, there was head-on collision of his motorcycle with the motorcycle driven by

the other rider as confirmed by the investigating officer PC Kyalo who went to the scene.

24. From the evidence of the investigating officer, and the motor vehicle examiner, it is the Appellant (Michael Wanyama Okutoyi ) who choose to overtake without ascertaining whether it was safe to do so. So he was to blame for causing the accident.

25. This court therefore finds that the imposition of 100% liability upon West Kenya Sugar Company Ltd and Rentco Africa was unsupported by evidence and amounted to an error in law.

### **DETERMINATION ON QUANTUM (IN THE ALTERNATIVE)**

26. Although this Court has found that liability was wrongly imposed, it will address quantum for completeness. An appellate court will only interfere with an award of damages where the trial court applied wrong principles or arrived at an inordinately high or low award as was illustrated in **Butt v Khan [1981] KLR 349.**

### **Loss of Dependency**

27. The deceased was a teacher. While evidence of gross salary was produced, the trial court failed to consider statutory deductions. The court of appeal was very clear on what income

should be used when calculating loss of dependency under the Fatal Accidents Act in **Board of Governors of Kangubiri Girls High School v Jane Wanjiku [2014] eKLR** where it stated that the loss of dependency must be calculated using the deceased's Net earnings, not gross income, because dependency is based on what the deceased actually took home for the benefit of dependants.

28. The correct multiplicand ought to be the net income, which was Kshs. 52,928/= after deducting NHIF and PAYE taxes.
29. The deceased was survived by a spouse and one child. A dependency ratio of two-thirds ( $\frac{2}{3}$ ) is reasonable in the circumstances for most of his income went towards supporting his family.
30. The Deceased 32 years by the time of his death, ordinarily he was expected to have retired at the age of 60 but because of uncertainties in life I find a multiplier of 25years reasonable.
31. The correct computation would therefore be:
  - Net monthly income: Kshs. 52,928/=
  - Dependency ratio:  $\frac{2}{3}$
  - Multiplier: 25 years
  - Loss of dependency:  $52,928 \times 12 \times 25 \times \frac{2}{3} = 10,585,600/=$

32. Had the estate of the deceased (Muruka Kelvin Ongoma) proved liability I would have awarded loss of dependency as shown above.

### **Law Reform Act Damages**

33. The awards for pain and suffering and loss of expectation of life were reasonable and are upheld. These awards are not to be deducted from damages under the Fatal Accidents Act as illustrated in **Hellen Waruguru Waweru v Kiarie Shoe Stores Ltd [2015] eKLR**.

### **FINAL DETERMINATION**

34. The appeal on liability succeeds.
35. The finding holding West Sugar Company Ltd and Rentco Africa Ltd jointly and severally liable is hereby set aside.
36. Michael Wanyama Okutoyi's suit Mumias SPMCC E028 of 2022 stands dismissed therefore the lower court Judgment is upheld and Teresia Amboka Raphael and Gregory Oundo Mureka's suit ( SPMCC E138 of 2022) against the West Sugar Company Ltd and Rentco Africa Ltd is hereby dismissed the lower court Judgment is set aside.
37. West Sugar Company Ltd and Rentco Africa Ltd shall have the costs of the appeals and of the suits in the lower court.
38. It is so ordered.

39. Right of Appeal 30 days explained.

**DATED, SIGNED AND DELIVERED at KAKAMEGA this 28<sup>TH</sup> day of JANUARY, 2026.**

**S.N.MBUNGI**

**JUDGE**

**In the presence of:-**

**CA:** Ang'onga/Nekesa

Parties and advocates absent though aware of the date and time of delivery of the Judgment.

The Court Assistant to upload the Judgment in the CTS fourthwith.