REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT THIKA

CIVIL APPEAL NO. E297 OF 2024

SIMON NGIGI THUKU……
……APPELLANT

VERSUS

CHARITY WAITHIRA MAINA &
BRIAN GACHAU WAITHERA (Suing as the Legal representative of the Estate of the deceased JAMES MAINA CHEGE)……
RESPONDENTS

(Being an Appeal from the Judgment and Decree of Hon. J. A. Agonda (PM) delivered on 23rd May 2023 in Ruiru SPMCC No. E014 of 2021)

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Ruiru Principal Magistrate in SPMCC No. E014 of 2021 arising from a road traffic accident claim. The court found the appellant 100% liable and awarded the respondents general damages for pain and suffering at Kshs. 50,000/-, loss of expectation of life at Kshs. 100,000/-, loss of dependency at Kshs. 1,200,000/- and special damages at Kshs. 70,025/-.

2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 8 grounds of appeal summarized as follows:-

a) The learned trial magistrate erred in law and in fact in finding the appellant 100% liable for the accident.

b) The learned trial magistrate erred in law and in fact in awarding the sum of Kshs. 1,420,025/- as compensation which was inordinately high and excessive in the circumstances thus occasioning a miscarriage of justice.

3. Parties put in written submissions.

The Appellant's Submissions

4. The appellant submits that the respondents called three witnesses during the hearing. PW1, a police officer said that he did not witness the accident and further confirmed that the driver of motor vehicle registration KBH 306Q was never charged with a traffic offence and that the case was still pending under investigation. PW2, the deceased's wife, also confirmed that she did not witness the accident. PW3, the supposed eye witness testified that he was looking ahead and did not see the impact but he only felt the vehicle being hit. The appellant refers to the decision in **Statpack Industries vs James Mbithi Munyao CA No. 152 of 2002** and argues that there cannot be liability without fault. The appellant further argues that none of the respondents' witnesses established negligence on the prat of the driver of motor vehicle registration number KBH 306Q as none witnessed the accident. Further no

documentary evidence was tabled in court to show that indeed the driver of the suit motor vehicle was charged or convicted of a traffic offence. To support his

contentions, the appellant relies on the case of **David Abraham Techeyo vs Kinyua Morris Civil Appeal No. 40 of 2017**.

5. Relying on the cases of **Simon Bogonko vs Alfred Mongare Mecha & Another (Suing as the legal representatives of the Estate of Akama Mong'are (Deceased) [2019] eKLR** and **Omanga Fish Limited vs CKB & JM (Suing as the legal representatives of the Estate of JMM (Deceased) [2019] eKLR**, the appellant submits that the trial court ought to have awarded a sum of Kshs. 20,000/- for pain and suffering as the deceased died on the same date as the date of accident. The appellant further relies on the case of **Devshibhai & Sons Limited vs Lule Kaluve Nyamai & Another (Suing as the legal representatives of Francis Kilonzo Lelu (Deceased) [2019] eKLR** and submits that the trial court ought to have awarded Kshs. 100,000/- for loss of expectation of life.

6. The appellant submits that the deceased was 57 years when he died. The appellant further argues that Section 4(1) of the Fatal Accidents Act provides for who can benefit from an estate of the deceased and as such, the court ought to make a finding of 1/3 as the dependency ratio as save for the spouse and two minor children of the

deceased, the rest of the children listed as dependants in paragraph 7 of the plaint, are adults and the respondents did not produce evidence to show that all the seven dependants were dependent upon the deceased.

7. The appellant submits that the death certificate dated 26/9/2018, it is indicated that the deceased was a mechanic and as per PW2's evidence, the deceased was earning Kshs. 90,000/- per month. In the absence of documentary evidence to proof income, the appellant argues that the court should adopt the minimum wage under the Regulation of Wages Order. To support his contentions, the appellant refers to the decision in **Nyamira Tea Farmers Sacco vs Wilfred Nyambati Keraita & Another [2011] eKLR**. The appellant further submits that the deceased used to reside in Juja as per the death certificate dated 18th March 2020 and therefore the Regulation of wages (General) (Amendment) Order 2018 which stipulates Kshs. 7,240.95/- as the general monthly wage for someone who works and resides in other areas outside cites and former municipalities is applicable as the multiplicand.

8. The appellant relies on the case of **Muasya Mbuvi Kiseli vs Martin Mutisay Kiio & Another [2010] eKLR** and submits that the court ought to adopt a multiplier of 3 years as the deceased was 57 years. Thus loss of

dependency should work out as follows:- Kshs. 7240.95 x 4 x 12 x 1/3 = Kshs. 115,855.20/-.

9. The appellant submits that sum of Kshs. 70,275/- as special damages was not proved.

The Respondents' Submissions

10. The respondents submit that the appellant neither called any witnesses nor did he adduce any documentary evidence. The

respondents rely on the cases of **Albert Odawa vs Gichumu Githenji NKU HCCA No. 15 of 2003 [2007] eKLR** and **Beatrice Wangui Tahiru vs Hon. Ezekiel Barngetuny & Another Nairobi HCCC No. 1638 of 1988** and submits that the multiplier approach as applied by the trial court was the most suitable in the circumstances.

11. The respondents submit that the deceased at the time of his death was earning Kshs. 90,000/- per month as a mechanic but they submitted that a multiplicand of Kshs. 17,561/- per month based on the Regulation of Wages (General) (Amendments) Order 2018 should apply. To support their contentions, the respondents relied on the cases of **Mosonik & Another vs Cheruiyot (Suing as the legal administrator of the Estate of Stanley Kipchumba Kemboi (Deceased) (Civil Appeal 113 of 2019) [2022] KEHC 11823 (KLR) (29 July 2022)** and **Gachoka Gathuri vs John Njagi Timothy & 2 Others**

(2015) eKLR and submit that trial court adopted a multiplicand of Kshs. 10,107.10/- per month as the minimum wage based on the Regulation of Wages (General Amendment) Order 2015 for a general labourer working in Kiambu. Thus, even if the actual monthly income was not shown during the trial, the lower court was within the legal principle to arrive at the amount used.

12. The respondents relies on the cases of **Midland Media Limited & Another vs Pauline Naukot Aule (Suing as the legal representative of the estate of Esinyon Esokon Ekai) [2020] eKLR** and **Crown Bus Services Ltd & 2 Others vs Jamilla Nyongesa & Amida Nyongesa (legal representatives of Alvin Nanjala**

(Deceased) [2020] eKLR and submit that the deceased was 57 years old, healthy and engaged in mechanic activities and may have worked beyond 70 years thus a multiplier of 13 years would suffice.

13. The respondents submit that the deceased was survived by a wife and six children who were fully dependent on him. PW2 testified that at the time of the accident, the deceased would cater for household needs for his family and the children included minors whom he paid their school fees. The court adopted 2/3 dependency ratio which the respondents argue is within the legal principles.

14. Relying on the case of **Joseph Kivati Wambua vs SMM & Another (Suing as the legal representatives of the Estate of EMM) [2021] eKLR**, the respondents argue that the court ought to have awarded a sum of Kshs. 120,000/- for pain and suffering due to the inflation and the age of the case. On the issue of loss of expectation of life, the respondents argue that the sum of Kshs. 100,000/- as awarded by the trial court is fair and reasonable however the same would have been revised to Kshs. 200,000/- in line with recent case of **West Kenya Sugar & Co. Ltd vs Philip Sumba Julaya & Another** (no citation given).

15. The respondents refer to the decision in **Kijana Muringi M'kindia (Suing as the legal representatives of the Estate of the deceased Rael Karema Ntongai) vs Iman Ali & 2 Others [2015] eKLR** and submit that PW3 an eye witness testified and adopted his written statement and his evidence was never controverted. Further, the

appellant did not object to the production of the police abstract and the death certificate.

Issues for determination

16. The main issues for determination are:-

a) Whether liability apportioned by the trial court was against the weight of the evidence adduced.

b) Whether the damages awarded by the trial court are too high as to amount to an erroneous estimate.

The Law

17. Being a first Appeal, the court relies on a number of principles as set out in **Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123:**

"…..this court must 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 this respect. In particular,, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence."

18. In **Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR** the Court of Appeal stated that:-

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must 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 this respect.

19. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-

a) That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

b) That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and

c) That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Whether liability apportioned by the trial court was against the weight of the evidence adduced

20. The appellant seeks to have the court substitute the trial court's findings of 100% liability against him and and argues that the respondents failed to show that his driver of motor vehicle

registration number KBH 306Q was negligent and therefore caused the accident.

21. The principles guiding the appellate court's power to interfere with the trial court's finding on liability are well settled. In **Khambi & Another vs Mahithi & Another [1968] EA 70** it was held 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 circumstances, 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.

22. The record shows that PW3 was the only eye witness of the accident. PW3 testified that he was a lawful fare paying passenger in motor vehicle registration number KAU 392H when motor vehicle registration number KBH 306Q was recklessly, negligently and carelessly driven at a high speed that it lost control and hit motor vehicle registration number KAU 392H from the rear side causing the accident. The witness blamed motor vehicle registration number KBH 306Q as it lost control and hit their vehicle. On cross examination, PW3 testified that he and the deceased were fare paying passengers in motor vehicle registration number KAU 392H and that he was seated on the left side of the vehicle on the third row while the deceased was seated on the right side on the third

row. He further testified that motor vehicle registration number KBH 306Q hit their motor vehicle from behind.

23. PW1, a police officer testified that an accident occurred on 12th February 2020 along Thika Road at Kihunguro round about involving motor vehicles registration numbers KBH 306Q, KAP 054X, KBL 906Q and KAU 392H. The witness testified that all the motor vehicles were headed to Thika when motor vehicle registration number KBH 306Q lost control and rammed into motor vehicle registration number KAU 392H which went ahead and hit motor vehicle registration numbers KBL 906Q and KAP 054H. PW1 testified that motor vehicle registration number KAU 392H rolled severally and two people died on the spot and the others were injured according to OB No. 2/13/2/2020. The witness testified that motor vehicle registration number KBH 306Q was blamed for the accident. On cross examination, the witness testified that he was not the investigating officer and that the driver of motor vehicle registration number KBH 306Q had not been charged with any offence.

24. It is trite law that he who alleges must prove. **Section 107 (1) of the Evidence** Act, Cap 80 Laws of Kenya, provides that:-

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

25. In **Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another [2005] 1 EA 334**, the Court of Appeal held that:-

As a general proposition under Section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.

26. PW 3 testified that the vehicle KBH 306Q lost control and hit motor vehicle registration number KAU 392H in which PW3 was travelling. The driver of the lorry KBH 306Q did not testify to exonerate himself. The evidence of PW1 was therefore corroborated by PW3 to the effect that vehicle registration number KBH 306Q is the one which was to blame for the accident. The police abstract and OB records corroborate the evidence of the two witnesses. The appellant did not call his driver as a witness to give his account of how the accident occurred.

27. It is, therefore, my considered view that the respondents proved that the appellant's driver caused the accident and thereby discharged their burden of proof. It

is worth noting that the appellant did not demonstrate how the deceased contributed to the occurrence of the accident and as such, the issue of contributory negligence does not arise. It is, therefore, my considered view that the appellant was fully liable for the occurrence of the accident.

Whether the damages awarded by the trial magistrate were inordinately high as to amount to an erroneous estimate.

28. The Court of Appeal in **Catholic Diocese of Kisumu vs Sophia Achieng Tele Civil Appeal No. 284 of 2001 [2004] 2 KLR 55** set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:-

"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 won for that awarded by the court below simply because it would awarded different figure if it had tried the case at first instance. The appellant 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 leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

29. Similarly in **Sheikh Mustaq Hassan vs Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457** that:-

"The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect….A

member of an appellate court when naturally and reasonably says to himself "what figure would I have made" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own."

30. It is therefore, the duty of this court to apply the principles set in the foregoing cases in order to determine whether the award of damages was exaggerated.

Damages under the Law Reform Act

31. In the case of **Hyder Nthenya Musili & Another vs China Wu Yi Limited & Another [2017] eKLR** the court stated:-

As regards damages awarded under the Law Reform Act, the principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death…The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life in most cases is Kshs. 100,000/- while for pain and suffering the awards range from Kshs. 10,000/- to Kshs. 100,000/- with the higher damages being awarded if the pain and suffering was prolonged before death.

32. In the instant case, it is not disputed that the deceased died on the same day of the accident. PW2 testified that the deceased died on arrival at the hospital. The trial magistrate awarded a sum of Kshs. 50,000/- on the basis that the deceased endured a period of prolonged pain from the accident until his arrival in the hospital where he was pronounced dead. Given that the sums awardable under this head range from Kshs. 10,000/- to Kshs. 100,000/- from past authorities, the sum of Kshs. 50,000/- awarded by the trial court was reasonable and

comparable to conventional awards. Consequently, I find no reason to interfere with the award of this head of damages.

33. On the issue of loss of expectation of life, the trial magistrate awarded Kshs. 100,000/- which in my view, is not unreasonable as to present an erroneous estimate. The respondents have admitted that the said sum is reasonable but still urge this court to revise the amount to Kshs. 200,000/- without giving reasons. It is my considered view that the sum of Kshs. 100,000/- was reasonable in the circumstances and the same is upheld.

Damages under the Fatal Accidents Act
Loss of Dependency

34. The Court of Appeal in **Chunibhai J. Patel & Another vs P. F. Hayes & Others [1957] EA 748, 749** stated the law on assessment of damages under the Fatal Accidents Act and held:-

The Court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependents, the net earning power of the deceased (i.e his income less tax) and the proportion of his net income which he would have made available for his dependents. From this it should be possible to arrive at the annual value of dependency, which must then be

capitalized by multiplying by a figure representing so many years' purchase.

35. In the instant case, the appellant is faulting the trial court for adopting a dependency ratio of 2/3 and a multiplicand of Kshs. 50,000/-. Dependency is a matter of fact and must be proved by evidence as was held in **Abdalla Rubeya Hemed vs Kayuma Mvurya & Another [2017] eKLR** as follows:-

Dependency is always a matter of fact to be proved by evidence. It is not that the deceased earned a sum and therefore must have devoted a portion or part of it to his dependence. Rather the claimant must give some evidence to show that he was dependent upon the deceased and to what extent.

36. Further in **Rahab Wanjiru Nderitu vs Daniel Muteti & 4 Others [2016] eKLR** the court 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 certificates or any other documents to confirm the same.

37. The respondents in this case produced a letter from the Chief Kalimoni location which indicated that the deceased married the 1st respondent and together were blessed with six children. From the court record, the said letter of the chief is what the respondents used to apply for letters of grant ad litem in Succession Cause No. 186 of 2020 Thika. The respondent, therefore, proved dependency of six (6) children and thus the ratio of 2/3 was applicable in the assessment of damages for loss of dependency.

38. On the issue of the multiplicand, the respondents pleaded in their plaint that the deceased was 57 years old and working as a mechanic earning around Kshs. 90,000/- per month. Notably, the respondents did not produce any documentary proof of the deceased's earnings and argued that despite not proving the earnings of the deceased, the trial court was within the legal principles to arrive at the amount given. The appellant faulted the trial court in adopting the multiplicand of Kshs. 50,000/- with no basis, as the respondents did not prove by way of documentary evidence, the deceased's earnings. Furthermore, the appellant argued that the deceased died in 2018 and therefore the applicable order is the Regulations of wages (General) Amendment) Order 2018. On perusal of the record, the trial magistrate adopted a multiplicand of Kshs. 50,000/- per month having been guided by the decision in **Martha Ndiro Odero (Suing as the administrator and personal representative of the**

estate of Willy Patrick Ochieng Ndiro (Deceased) vs Come Cons Africa Limited [2015] eKLR.

39. I have further perused the trial record and noted that the respondents have not produced any documentary evidence to show how much the deceased earned. In the absence of evidence of the deceased's earnings, the trial court ought to have applied the minimum wage to assess the damages for loss of dependency. This principle was stipulated in the case of **Petronila Muli vs Richard Muindi Savi & Catherine Mwende Mwindu [2021] eKLR** where the court stated:-

On the question of the multiplicand adopted by the trial court using a minimum wage guideline, it is apparent that the deceased was engaged in informal employment where it is difficult to tell the actual regular income. In such circumstances, the legal position is to adopt the minimum wage guideline as a guiding principle in assessing loss of income.

40. The deceased died on 12th February 2020 and thus the applicable guidelines as per the Regulation of Wages (General) (Amendment) Order, 2018. The respondents led evidence that the deceased used to be a mechanic and therefore we can classify him as a general labourer. From the burial permit the deceased resided at Juja Farm which falls under the column for "all other areas." The minimum statutory wage for a general labourer in Juja rural was Kshs. 7240.95/- as per the Regulation of Wages (General)

(Amendment) Order, 2018. Upon re-evaluation of the evidence tendered, it is my

considered view that the minimum wage applicable in respect of the deceased was Kshs. 7,240.95/- per month, which figure the magistrate ought to have used.

41. The appellant does not oppose the use of a multiplier of 3 years. The respondents argue that the court ought to have used a multiplier of 13 years since the deceased was middle aged and would have worked until the age of 70 years.

42. The trial court in adopting the multiplier of 3 years took into consideration the vagaries of life and the fact that the deceased could have worked until the retirement age of 60 years. The deceased was 57 years old at the time of his demise. Save for the accident that cut his life short, he was healthy and did not have any complications pertaining to his health. The choice of a multiplier, among other factors, would depend on the nature of the job the deceased was doing. He was said to be a mechanic. This is a trade the deceased would have carried on up to 65 years. However, the age of 70 years was a bit on the higher side. All considered, I am of the view that a multiplier of eight (8) years is reasonable. This court adopts a multiplier of eight (8) years in the assessment of damages under this head. The damages of loss of dependency is calculated as follows: -

Ksh.7241 x 12 x 8 x 2/3 = Kshs. 463,424/-

43. I hereby set aside the award of the court below and substitute it with Ksh.463,424/- which I hereby award.

44. In view of the foregoing, I find the appeal partially merited and it is hereby allowed to that extent.

45. Each party shall meet their own costs of this appeal.

46. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 23RD DAY OF APRIL 2026.

F. MUCHEMI

JUDGE