



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 51 OF 2020**

**MOHAMED HIRBO SHANDE.....1<sup>ST</sup> APPELLANT**

**GAMO KANE.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**GEORGE MWENDA MWITI (Legal Representative of**

**the Estate of Miriam Makena).....RESPONDENT**

**JUDGMENT**

***Introduction***

1. The Appeal challenges the Judgment of Hon. E. Ngigi delivered on 30<sup>th</sup> June 2020 in Isiolo PMCC No. 4 of 2018 on the three (3) grounds of appeal as set out in the Memorandum of Appeal dated 15<sup>th</sup> July 2020, as follows: -

***i) The Learned Principal Magistrate erred in law and fact in making an award under the head of loss of dependency where the Court awarded damages to the brother and sister of the deceased person whereas they are not dependents under the Fatal Accidents Act.***

***ii) The Learned Principal Magistrate exhibited open bias by failing to consider the Appellant's submissions on the defects in the Plaintiff's pleadings especially in his prayer for general damages.***

***iii) The Learned Principal Magistrate erred in law and fact in failing to consider the submissions and authorities relied upon by the Appellants and thus arrived at an erroneous decision on the damages payable.***

2. The Appellants seek to have the judgment of the trial Court set aside and to have the Court re-evaluate the evidence and make its own findings. This Court takes issue with the general nature of the prayers sought for lack of specificity. However, from the grounds as set forth in the Memorandum of Appeal, it is clear that what the Appellants seek is to have a re-assessment of the damages awarded under the Fatal Accidents Act, upon determination on whether or not the Deceased's brother and sister could rightfully be considered as Dependents for purposes of recovering damages under the said Act.

3. The Respondent opposed the Appeal and also filed a Notice of Cross Appeal dated 18<sup>th</sup> August 2020. The Cross Appeal is based on a set of five (5) grounds as follows:

***i) The Learned Honourable Trial Magistrate erred in law and in fact in failing to recognize that the Deceased Plaintiff was a pillion passenger at the time of the accident who could have done nothing contributory to the said accident.***

***ii) The Learned Honourable Trial Magistrate erred in law and in fact in using a multiplier of 29 years and opining that the deceased would have worked to the age of 45 years bereft of the fact that the deceased's life cut short at a tender age of only 16 years.***

***iii) The Honourable Trial Magistrate erred in law and in failing to apportion liability at 100% in favour in favour of the Plaintiff as against the Defendant.***

***iv) The Honourable Trial Magistrate erred in law and in fact in his award of Ksh 680,018/= which was a nominal amount in the circumstances.***

**v) *The Learned Trial Magistrate erred in law and fact by failing to take into consideration the Plaintiff's submissions on the matter.***

The Respondent, consequently, seeks for a review of the award of Ksh 680,018/= by an enhancement of the quantum so awarded and seeks to be awarded the costs of the cross appeal.

4. The Appeal was canvassed by way of written submissions. The submissions filed addressed issues raised in both the Appeal and the Cross Appeal.

*Appellant's submissions*

5. The Appellants filed their submissions on 9<sup>th</sup> December 2020. They attack the Respondent's arguments on liability as raised in the Cross Appeal and contend that the liability apportioned by the trial Court being 90:10 in favour of the Respondent was binding, since parties had entered into a consent dated 26<sup>th</sup> May 2020 agreeing to have liability determined as per the findings of the test suit namely Isiolo CMCC No. 3 of 2018. They contend that despite the findings thereof being binding, the evidence adduced in the test suit proves that the Deceased contributed to her own demise and as such, there is no reason to disturb the finding of the trial Court on liability.

6. On quantum, the Appellants contend that the trial Court ought not to have awarded damages under the Fatal Accidents Act for the reason that under the said statute, under which the Respondents had brought their claim for loss of dependency, brothers and sisters to a deceased person are not recognized as person eligible to claim compensation following a fatal accident. The Appellants submit that under Section 4 of the Fatal Accidents Act, the only persons eligible to bring a claim for compensation are a deceased person's spouses, parents and children.

7. The Appellants aver that although the trial Court agreed with them that the Deceased was a school going girl and could not have simultaneously been a casual labourer, the Court failed to agree with them on their contention that brothers and sisters are not dependents for purposes of recovery of damages under the Fatal Accidents Act.

8. The Appellants further attack one of the Respondents arguments as raised in the Cross Appeal with respect to the multiplier used by the trial court. The Respondents fault the trial Court for using a multiplier of 29 years. According to the Appellants, the issue of multiplier ought not to have arisen for the reason that the Fatal Accidents Act does not recognize siblings as dependents and there was therefore no basis to consider the appropriate multiplier. The Appellants contend that even if damages under loss of dependency were awardable to brothers and sisters, no evidence was led as to what the Deceased would have become in the future and that no evidence was led as to the degree of dependency upon the Deceased.

9. The Appellants further contend that the trial Court failed to consider their submissions wherein they argued that the Respondent's Plaintiff was defective for having identified the Deceased's dependents as his brothers and sisters at paragraph 5 thereof but praying for damages on behalf of the Deceased's widower and children at paragraph 12 thereof. They contend that the prayers sought were inconsistent with the particulars and for that reason, the Plaintiff ought to have been struck out as parties are bound by their pleadings.

10. The Appellants seek that the award on damages for loss of dependency be nullified and that the Court makes a finding that the Deceased's siblings are not entitled to damages under the Fatal Accidents Act.

*Respondent's submissions*

11. The Respondent filed his submissions on 17<sup>th</sup> December 2020. Therein, the Respondent attacks the Appellants' argument that a deceased person's siblings are not recognized as dependents under the Fatal Accidents Act. He contends that pursuant to Section 39 (1) of the Law of Succession Act, brothers and sisters are recognized as dependents to whom a deceased person's estate shall devolve to in the event there is no surviving spouse or children.

12. The Respondent further contends that the award of Ksh 680,018/= as damages was erroneous given the circumstances of the Deceased's death. He contends that in awarding liability, the trial Court failed to consider that the Deceased was a mere pillion passenger who could not have been able to do anything to prevent the accident from happening and neither could she have been the cause of the accident. He prays that the Respondent should shoulder 100% liability.

13. On the multiplier used, the Respondent contends that prior to her demise, the Deceased, being a young lady of 16 years had a bright future ahead of her and were it not for the accident, she would have proceeded to college, gotten employment and/or ventured into a business and ultimately started a family of her own. He contends that she would have probably worked until the age of retirement being sixty (60) years and as such, he prays that the proper multiplier should have been 44 years and not 29 years.

14. On the multiplicand, the Respondent contends that the Deceased was a casual labourer who was earning a minimum wage of Ksh.12,522.70. He argues that as held in the case of **Jacob Ayiga Vs Simon Obayo (Suing as personal representatives of the Estate of Thomas Ndaya Obayo)** (2005) eKLR proof of earnings is not only limited to production of documents as such a stand would do a lot of injustice to very many Kenyans who are illiterate, keep no records and yet earn their livelihoods in various ways.

15. On the basis of the foregoing, the Respondent submits that general damages under the header of loss of dependency should be enhanced from Ksh 630,576/= to Ksh 4,418,550.40 calculated as follows: - Ksh 12,522.70x44yearsx12monthsx2/3.

***Issues for Determination***

16. From the grounds as per the Memorandum of Appeal, the Notice of Cross of Appeal and the submissions filed by both parties, the

following

(3) issues arise for consideration by this Honourable Court: -

**i) Whether or not the trial Court should have awarded damages for loss of dependency.**

**ii) If the answer to i) above is in the affirmative, whether or not the trial Court applied the right multiplier and deduced the correct income.**

**iii) Whether or not the trial Court erred in apportioning liability at 90:10.**

*Whether or not damages for loss of dependency awardable.*

17. According to the Appellant, these should not have been awarded for two reasons. First, because the prayer for loss of dependency in the Respondent's Plaintiff made reference to the Deceased's widower and children, persons who were non-existent and in fact strangers to the suit; and secondly, because the Respondent, being a brother to the Deceased was not recognized as dependent under Section 4 of the Fatal Accidents Act, and neither was his sister.

18. As to whether the wording of the prayer in the Plaintiff ought to have been a deterrence on the trial Court to entertain the claim for loss of dependency, this Court observes that it is indeed true that whereas the claim was purported to have been brought for the benefit of the Deceased's brother and sister, the prayer in the plaintiff for loss of dependency is posed as being for the benefit of the Deceased's widower and children.

19. Paragraph 5 of the Plaintiff reads as follows: -

**a) The names of the persons for whose benefit this action is brought are as follows: -**

**i) George Mwenda Mwitii, Brother of the Deceased aged 36 years.**

**ii) Kanana Susan, Sister of the Deceased aged 30 years.**

20. Paragraph 12 i) on the other hand reads as follows: -

**a) General Damages under both the Fatal Accidents Act, for the benefit of the widower and the aforesaid children of the deceased and the Law Reform (Miscellaneous Provisions) Act.**

21. Indeed, having perused the entire Record of Appeal and the evidence adduced, this Court observes that at the time of her death, the Deceased was a young lady of 16 years of age, still unmarried and without any children. It was not shown that such widower and/or children of the Deceased existed.

22. The pleadings in this case were drawn with less than due care as to the applicable provisions of the law and counsel for the plaintiff is responsible for the fate that befalls the plaintiff's claim.

23. The Appellant's contention on the award of damages for loss of dependency, is that having been brought under the Fatal Accidents Act, Respondent's claim for benefit of the Deceased's brother and sister was incompetent by virtue of Section 4 of the said Act, which excludes such person from claiming compensation. In response, the Respondent argues that as per the provisions of Section 39 of the Law of Succession Act, brothers and sisters are recognized as some of the persons who may benefit from a deceased's estate.

24. It is apparent that parties hereto are relying on two different sets of laws to support their respective positions on whether damages for loss of dependency should have been awarded. It is a rule of drafting pleadings, which is restated in Order 2 rule 9 is that a party may in its pleading raise a point of law, and in this regard, a plaintiff should state the law under which he brought his claim. In the Respondent's Plaintiff, it was expressly stated at paragraph 12 and as submitted in its submissions at the trial Court that the claim for loss of dependency was brought under the Fatal Accidents Act. There was no mention of the Law of Succession Act. This notwithstanding, this Court has looked at the objects of these two statutes and the definition of terms therein before making a finding on this issue.

25. The object of the of the Fatal Accidents Act as set out in its Long Title is: -

***An Act of Parliament for compensating the families of persons killed in accidents.***

The Long Title of the Law of Succession Act provides that the same is: -

***An Act of Parliament to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased persons; and for purposes connected therewith and incidental thereto.***

26. From the foregoing, it is clear that the former law, the Fatal Accidents Act is what this Court and what the trial Court was concerned with as what was being sought was compensation following a fatal accident. The latter law will be relevant once all that is due to a Deceased's estate has been identified and this would involve filing a succession matter under the Probate and Administration procedures of the Court.

27. For this reasons, this Court finds that for purposes of determining compensation due, the applicable law is the Fatal Accidents Act. Section 4 thereof describes the persons for whose benefit an action under the Act may be brought. It provides as follows: -

***4. Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought.***

28. There is no mention of brothers and sisters of a Deceased, and the Court, therefore, finds that no damages were awardable for loss of dependency. In so finding, I respectfully agree with the finding of Majanja J in the case of ***John Mungai Kariuki & Another Vs Kaibe Kangai Ndethiu & 2 Others*** Kiambu Civil Appeal No. 29 of 2018 at paragraphs 12 to 15 thereof where it was held that: -

*'...Back to the issue at hand, the appellants elected to make their case under the Fatal Accidents Act which at section 4(1) states;*

*Every action brought by nature of the provisions of this act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused [and shall ..... be brought by and in the name of the execution or administrator of the person deceased]..... [Emphasis mine]*

*The brothers and sisters of the deceased are not dependants for purposes of the statute and language of the statute cannot be read, even by creative interpretation, to expand the list of dependants to include siblings of the deceased. Even in the cases relied on by the appellant, the principle that in African culture children are expected to support their parents is supported by the words of the statute as the deceased parents are named a dependants....*

*...For the reasons I have set out above, the trial magistrate did not err in failing to award damages for loss of dependency and for lost years as urged by the appellants....'*

See also ***Ishmael Nyasimi & another v David Onchangu Orioki suing as personal representative of Antony Nyabando Onchango Civil Appeal No. 98 of 2016 (Deceased)*** [2018] eKLR.

29. In the event, it is not necessary for this Court to delve into the next issue which arose from the Cross Appeal i.e whether the trial Court erred in applying a multiplier of 29 years and in deducing the income used to calculate the damages. However, for completeness, I would reiterate my decision in the case of ***Crown Bus Services Limited & 2 Others Vs Jamilla Nyongesa and Amida Nnyongesa (Legal Representatives of Alvin Nanjala) (Deceased) Kabarnet HCCA No. 9 of 2019*** where I dealt with the formula for calculation of dependency: -

***"Both parties agree as to the formula for computation of dependency as observed by Ringera, J. as he then was in Beatrice Wangui Thairu case, supra. Indeed, Ringera J's observation was based on the principles for assessment of dependency in Kenya developed in the 1957 case of Peggy Frances Hayes and Others v. Chunibhai J. Patel and Another cited by the Court of Appeal for Eastern Africa in Radhakrishen M. Khemaney v. Mrs Lachaba Murlidhar (1958) E.A. 268, 269 (per Air Owen Corrie Ag. JA with whom Briggs, V-P and Forbes, JA agreed) as follows:***

***"I have no doubt as to the principles which are to be applied to this appeal. In Civil Case No. 173 of 1956, delivered on March 26, 1957, in the Supreme Court of Kenya in an action brought by Peggy Prances Hayes and others against Chunibhai J. Patel and another, the principles applied by the learned chief justice, as he then was, were as follows:***

***"The court should find the age and expectation of working life of the deceased, and consider the wages and expectations of the deceased (ie. his income less tax) and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase. The multiplier will bear a relation to the expectation of earning life of the deceased and the expectation of life and dependency of the widow and children. The capital sum so reached should be discounted to allow for the possibility or probability of the re-marriage of the widow and, in certain cases, of the acceleration of the receipt by the widow of what her husband left her as a result of his premature death. A deduction must be made for the value of the estate of the deceased because the dependants will get the benefit of that. The resulting sum (which must depend upon a number of estimates and imponderables) will be the lump sum the court should apportion among the various dependants."***

***Upon an appeal against this judgment this court held ([1957] RA. 748 (C.A.):***

***"That the method of assessment of damages adopted by the learned chief justice was correct."***

***Simply, the formula for dependency, therefore, is the multiplicand, that is the annual net income multiplied by a suitable multiplier of expected working life lost by the deceased by the premature death, and further by a factor of the dependency ratio, that is the ratio of the deceased's income utilized on her dependants.***

30. Concerning the age of the Deceased, it is not in dispute that she passed on at the tender age of 16 years. This Court finds fault at the finding of the trial Court in concluding that the Deceased could have worked for 45 years. This Court finds that in the absence of any evidence inferring doubts as to the Deceased's physical condition and abilities to work, the trial Court ought to have stuck at the normal retirement age, which is sixty-five (65) years and at the very least sixty (60) years. Since the Respondent submitted 44 years, this Court would have awarded the same.

31. For the income earned, although this Court agrees with the submission by the Appellants that production of certificates and/or documents is not the only way of proving earnings, which argument is indeed very inviting, this Court also agrees with the finding of the trial Court that the deceased could not possibly have been a student and simultaneously a casual labourer as claimed by the Respondent. She was either a student full time or a casual labourer.

32. The Court cannot disregard the prospects of her future life. It was submitted and found that she was a bright student. Although no school remarks and/or results slips were adduced as evidence, it is possible that she had a bright future ahead and could have studied well up to college to become a doctor, a lawyer, an engineer or a reputable business lady. Were it available, this Court would therefore have agreed with the trial Court and used the minimum wage in light of the uncertainty. There seems to be a disparity on what the trial Court found the minimum wage to be i.e Ksh 5,436/= and what the Respondent deems should have been the minimum wage i.e Ksh 12,522.70/=. As per Legal Notice No. 1 of 2019, the minimum wage for casual labourer is Ksh 13,572/=.

33. On the ratio to be used, the trial Court adopted 1/3 for the reason that the Deceased did not have a family. This Court agrees with this conclusion and further rightfully observes that the Deceased, having passed on at the tender age of sixteen (16) years, it is questionable as to whether she really had any Dependents as claimed. It could have well been possible that she was the one being provided for by her said older siblings. This Court observes that her brother was 36 years old and her sister was 30 years older. In essence both of them were twice her age if not more. This Court finds that in the absence of sufficient evidence to prove dependency, there is indeed a paltry chance that the Deceased was providing for her said siblings. It most likely was the other way round. The figure of 1/3 was appropriate.

34. Based on the foregoing, in the event that the court is wrong on point of competency of a claim for the benefit of brother and sister of the deceased under the Fatal accidents Act, the Court would have substituted the figure awarded by the trial Court for the sum of Ksh.2,388,672/= arrived at as follows: - Ksh.13,572x12x44yearsx1/3 totaling.

#### *Liability of a pillion passenger*

35. The final issue is whether the trial Court erred in apportioning liability at 90:10 instead of 100:0 in favour of the Respondent.

36. This Court respectfully disagrees with the Appellants' submissions that by virtue of the consent recorded in Isiolo Civil Suit No. 3 of 2018 agreeing that the said suit would be used as a test suit for purposes of determining liability in Isiolo Civil Suit No. 4 of 2018, then the Respondent is barred from challenging the finding on liability. The consent is to extent of test suit procedure not the finding of the court in the test suit. The essence of the said consent was to ensure that all parties agreed to having the issue of liability be decided on the basis of the findings of the Court in the test suit despite there being no full trial in the other matters. This does not imply that there can be no challenge on the finding of the Court.

37. However, the Court observes is that the Respondent did not bother to file a supplementary Record of Appeal exhibiting the Judgment and/or proceedings of the trial Court for the test suit, for purposes of determining this issue.

38. This Court accepts the position that a pillion passenger ordinarily has no control over how the rider of a motorcycle on which he is riding and/or a driver of a motor vehicle which collided with the motor cycle drove.

39. However, this Court did not have the benefit of the proceedings and Judgment from the test suit to determine the facts adduced during hearing. There probably may have been reason to disturb the findings on apportionment of liability, but the Court cannot act on speculation or in the dark as regards the facts of the case. The Respondent had a duty to avail the proceedings and Judgment of the Court from the test suit by way of supplementary Record of Appeal or Record of Appeal for purposes of the Cross-Appeal for this Court to peruse as it determines this issue.

40. The upshot of the foregoing is that the Judgment of the trial Court with respect to damages for loss of dependency is hereby set aside for the reasons that under the Fatal Accidents Act, a brother and sister to a deceased person are not recognized as persons eligible to claim compensation following the death of a deceased. The court is unable to determine the question of apportionment of liability in the absence of the facts of the case.

#### **Orders**

41. Accordingly, for the reasons set out above, the court makes the following orders:

1. The judgment of the trial court delivered on the 29<sup>th</sup> June 2020 is set aside to the extent that the award of Ksh.630,576 general damages under the Fatal Accidents Act is set aside.

2. The court affirms the award of the **General Damages under the Law Reform Act.**

**i) For pain and suffering    Ksh 10,000/=**

**ii) For loss of expectation of life    Ksh 100,000/=**

**iii. Special Damages            Ksh 15,000/=**

**Total awarded                    Ksh 125,000/=**

3. Liability is retained at the ratio of 90:10 in favour of the Respondent/plaintiff.

**Less 10% contribution      Ksh.112,500/=**

4. There shall be judgment in favour of the respondent against the appellant in the sum of **Ksh.112,500/-** together with interest and costs as ordered by the trial court.

42. There shall be no orders as to costs in the Appeal and the Cross- Appeal.

*Order accordingly.*

**DATED AND DELIVERED THIS 11<sup>TH</sup> DAY OF FEBRUARY, 2021.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

M/S Wambugu & Muriuki Advocates for the Appellant

M/S Mutuma Gichuru & Associates Advocates for the Respondent.