Enk Enterprises v Magolo & another (Suing as the administrators of the Estate of Gabriel Odinga Otieno - Deceased) (Civil Appeal E007 of 2022) [2023] KEHC 26978 (KLR) (19 December 2023) (Judgment)

Neutral citation: [2023] KEHC 26978 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CIVIL APPEAL E007 OF 2022

KW KIARIE, J

DECEMBER 19, 2023

BETWEEN

ENK ENTERPRISES ..... APPELLANT

AND

REBECCA ANYANGO ..... 1ST RESPONDENT

JOHN OCHIENG MAGOLO ..... 2ND RESPONDENT

SUING AS THE ADMINISTRATORS OF THE ESTATE OF GABRIEL ODINGA OTIENO - DECEASED

(Being an Appeal from the judgment and decree in Homa Bay Chief Magistrate's CMCC No. 93 of 2018 by Hon. Tom Mark Olando – Senior Resident Magistrate)

JUDGMENT

1. ENK Enterprises the appellant, was the defendant in the case of Homa Bay Chief Magistrate's CMCC No 93 of 2018. The appellant was sued for general and special damages after a road traffic accident that occurred on the Ndhiwa-Sori road. The accident involved ENK Enterprises' motor vehicle KCQ 651C and a motorcycle with registration number KMDW 452V, which was being ridden by the deceased. Unfortunately, the deceased was fatally knocked down in the accident. The learned trial magistrate held the appellant 100% liable. The respondent was awarded Kshs 1,736,712 in general damages and Kshs 70, 550.00 in special damages.

2. The appellant was aggrieved by the said judgment and filed this appeal through the firm of Kimondo Gachoka & Company Advocate. The following grounds of appeal were raised:

    a. That the learned magistrate erred in law and in fact in basing his findings on irrelevant issues not supported by any evidence adduced or applicable law.

b. That the learned trial magistrate erred in law and fact in failing to attach due weight to the appellant's evidence and submissions and authorities attached.

c. That the learned trial magistrate erred in law and fact in assessing and awarding general damages and special damages wherein the respondent failed to prove her case.

d. That the learned trial magistrate erred in law and in fact in apportioning liability at 100% against the defendant despite overwhelming evidence to the contrary.

e. That the learned magistrate erred in law and fact for holding the appellant strictly liable despite overwhelming evidence that the rider of the motorcycle was to blame entirely.

f. That the learned magistrate erred in law and fact in failing to consider and/or record the testimonies of the defence witnesses thus coming up with an erroneous finding.

g. That the learned trial magistrate erred in law and in fact in finding the KCQ 651C was to blame despite the fact the rider of the motorcycle abruptly turned right without indicating.

h. That the learned trial magistrate erred in law and fact by finding that the plaintiff had proved his case yet the plaintiff failed to call any eyewitnesses not tender any evidence by the investigating officer to prove negligence on the part of the defendant herein.

i. That the learned trial magistrate erred in law and fact in finding that the evidence of the plaintiff was unchallenged yet the defendant filed their statement of defence and called the driver who narrated the circumstances under which the accident happened.

j. That the learned trial magistrate erred in law and fact by applying strict liability in a tort of negligence matter.

k. That the learned magistrate erred in fact and law injudiciously, arbitrarily, and exorbitantly awarding the respondents a sum of Kshs one million eight hundred and seven thousand two hundred sixty-two (1,807,262) as general damages which amount was manifestly excessive and high in the circumstances and connotes an erroneous estimate of damages.

l. That the learned trial magistrate erred in law and fact by using a dependency ratio of two-thirds (2/3) even though the plaintiff did not produce any evidentiary documents to prove that the deceased was married with children.

m. That the learned trial magistrate erred in law and fact by awarding special damages of Kenya shillings Seven Thousand Five Hundred and fifty (70,550) when no receipts were produced to prove the same.

n. That the learned trial magistrate erred in law and fact by failing to consider and appreciate the applicable principles in the assessment of damages and thereby arriving at an excessive and unjustified award.

o. That the trial magistrate erred in law and fact by failing to consider the appellants' evidence and submissions on record.

p. That the learned trial magistrate erred in law and fact by failing to consider and appreciate the applicable principles in the assessment of damages and thereby arriving at an excessive and unjustified award.

q. That the trial magistrate erred in law and fact by failing to consider the appellant's evidence and submissions on record.

3. The appeal was opposed by the respondents through the firm of Simiyu Opondo Kiranga & Company Advocates. They contended that the appeal lacked merits.

4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of *Selle v Associated Motor Boat Co. Ltd.* [1965] E.A. 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its conclusions in the matter.

5. The appeal is on liability and quantum in respect of general damages.

6. During the trial, Corporal Joseph Sarara (PW2) stated that the driver of the motor vehicle registration number KCQ 651C was speeding at the time of the accident with the motorcycle bearing registration number KMDU 458V. However, it is important to note that this witness was not present at the scene of the accident and did not provide any information on what led to his opinion.

7. Dalmas Oduk Oguta (DW1) was the driver of the vehicle which is the subject of this accident. His evidence is that he was driving at 78 KPH at the time of the accident. He said when he saw a motorcycle turning to his lane, he drove off the road. The motorcyclist hit the tyre of his motor vehicle while he was outside the road. Had this been the position, then he could not have been charged with the offence of causing death by dangerous driving.

8. The evidence on record does not establish who was to blame and to what extent for the accident between the driver of motor vehicle registration number KCQ 651C and the motorcyclist. It is a well-established principle in many jurisdictions, ours included. that when two drivers are equally responsible for an accident and there is no concrete evidence to determine who is to blame, both parties should be held equally liable. In the case of *Hussein Omar Farah v Lento Agencies* [2006] eKLR the court observed:

> "The trial court, as we have said, had two conflicting versions of how the accident occurred. Both parties insisted that the fault lay with the other side. As no side could establish the fault of the opposite party we would think that liability for the accident could be equally on both the drivers. We therefore hold each driver equally to blame."

9. In the instant case I am persuaded to interfere with the finding of the trial court on liability. I set it aside and substitute it with a liability of 50:50.

10. It was contended by the appellant that the award was inordinately high. It is trite law that an appellate court will only interfere with an award of the trial court if certain circumstances are satisfied. In *Butt v Khan* [1981] KLR 349 at page 356 Law JA stated:

> "...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 a figure which was either inordinately high or low."

11. Other than the averment, there was no proof of the deceased's earnings. In *Albert Odawa v Gichimu Githenji*; Nakuru HCCA No 15 of 2003 (2007), eKLR Justice Ringera expressed himself as follows:

> "The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the

amount of annual or monthly dependency and the expected length of the dependency are known or are knowable without undue speculation; where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do."

The learned trial magistrate used a multiplier approach. The global sum approach ought to have been the best in this case. After analyzing the cases relied on by both parties at the trial, I find that even if I were to use the global sum approach, the difference may not amount to much, either way. I do not find the award of Kshs 1,807,262/= inordinately high. This award will not be disturbed.

12. It is common to incur expenses incidental to a death, but often the bereaved forgets to keep receipts during the period of mourning. However, courts have been known to award special damages for funeral expenses. The only criterion for such awards is the reasonableness of the amount claimed. Therefore, I find the claim of Kshs 70,550/= for funeral expenses to be reasonable and will not overturn the decision.

13. The appeal therefore partially succeeds on liability. The appellant will be entitled to half the costs of this appeal.

DELIVERED AND SIGNED AT HOMA BAY THIS 19TH DAY OF DECEMBER 2023

KIARIE WAWERU KIARIE

JUDGE