REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 173 OF 2019

JOSEPH GATONE KARANJA..APPELLANT

VERSUS

MICHAEL OUMA OKUTOYI & BRIGITA

ANYANGO MUKARA (Suing as Administrators to the estate of

Peter Khasenye Mukara – Deceased)...RESPONDENTS

(Being an appeal from the Ruling of Principal Magistrate Hon. N Wairimu in Eldoret

Chief Magistrate's Case no. 502 of 2018 delivered on 1st November 2019)

JUDGMENT

1. The Appellants lodged an Appeal challenging the decision of Hon. N. Wairimu delivered on 1st November 2019 in Eldoret Chief Magistrate's Case no. 502 of 2018.

2. The Respondent filed the primary suit by way of a plaint seeking damages for injuries and the death of the deceased as a result of a road traffic accident that occurred along Eldoret Uganda road on or about 12th February 2018.

3. The trial court found the Appellant 100% liable for the accident and awarded general damages of kshs. 3,604,359 and costs. The appellant being aggrieved with the entire decision of the trial court appealed against the same vide a Memorandum of Appeal dated 29th November 2019 which had 14 grounds of appeal which can be consolidated into the following;

a) Whether the trial court erred in finding the appellant 100% liable.

b) Whether the trial court erred in making awards under the Law Reform Act

c) Whether the trial court erred in making awards under the Fatal Accidents Act

d) Whether the trial court erred in awarding special damages

4. The appellant filed submissions on 19th July 2021. He submitted that the burden of proof of the particulars of negligence was on the respondent. Further, that pedestrians owe themselves a duty of care while using the road.

5. The appellant referred to page 100 of the record of appeal and submitted that PW1 testified that an accident occurred on 12th February 2018 along the Eldoret Uganda road involving motor vehicle KBZ 321S Isuzu lorry and a motorcycle which was not found at the scene, and 2 pedestrians. The witness did not have the police file in court or the sketch plans. He was not the investigating officer and only produced the abstract. The appellant contended that the abstract is not conclusive proof for cause of the accident.

6. The appellant contended that the trial court erred in relying on the respondent's evidence which was uncorroborated. Further, that PW2 did not explain why he was not listed as a witness on the abstract and his evidence had no probative value.

7. The appellant submitted that the trial court's award under the Law Reform Act was excessive as the deceased died immediately and did

not suffer. Further, that the award for loss of expectation of life was not backed up and should be reduced to kshs. 30,000/-.

8. The appellant contended that the trial court erred in making awards under the fatal accidents act by applying a multiplier of 21 years without justifiable reasons. The court also erred in applying a multiplicand of kshs. 20,000/- without any sufficient reasons.

9. The trial court erred in adopting the 2/3 ratio as there was no proof to prove that the deceased and alleged dependants had a relationship. An award of kshs. 300,000/- was proposed in substitution of the award of kshs. 3, 360,000/-.

10. The appellant submitted that the court failed in adding up the award under the two Acts instead of subtracting to avoid double compensation.

11. The appellant contended that the respondents did not plead any funeral expenses thus the reason why the court proceeded to award kshs. 50,000/- was not advanced.

12. The respondents filed submissions on 26th July 2021. They contend that the appellant's case was closed without tendering any evidence. The evidence of PW1 and PW3 was relevant for the purposes of determining the issue of liability. The trial court found the applicant liable for the accident properly.

13. The respondents further submitted that the deceased was a welder and the income of kshs. 20,000/- adopted by the court was reasonable in the circumstances. The dependency ratio of 2/3 adopted by the courts was reasonable as the deceased was the sole bread winner of his family and relatives. The court adopted a multiplier of twenty-one years which is reasonable considering the deceased was a welder aged thirty-nine years and would have worked upto sixty years. The respondents cited Kakamega HCCC No. 12 of 1985 Mrs Miriam Sei & 2 others vs John Njega Khuyu & Anor in support of this submission.

14. The award of kshs. 150,000/- for damages for loss of expectation of life was reasonable as the deceased was aged thirty nine years of age and had prospects of staying longer in this world. The award of kshs. 50,000/- for pain and suffering was reasonable as the deceased suffered a lot of pain before his death. The court also awarded kshs. 94,359/- for special damages which were specifically pleaded and proved by way of receipts.

15. Upon perusal of the pleadings and submissions by both parties, I have identified the following issues for determination;

a) Whether the trial court erred in finding the Appellant 100% liable.

b) Whether the trial court erred in making awards under the Law Reform Act and the Fatal Accidents Act.

c) Whether the trial court erred in making awards under special damages

WHETHER THE TRIAL COURT ERRED IN FINDING THE APPELLANT 100% LIABLE

16. The only eye witness who was at the scene of the accident was PW3. He testified that he witnessed the accident occur. The Appellant did not produce any witnesses to controvert this testimony. I note that the evidence of PW1 and 3 was adopted from suit no. 477 of 2018. The defendant was not opposed to the adoption of that evidence.

17. In ***Ephantus Mwangi v Duncan Mwangi Wambugu*** [1984] eKLR, the Court of Appeal rendered itself thus:

> ***A court of appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding and an appellate court is not bound to accept the trial Judge's finding of fact if it appears either that he has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.***

18. The appellant has not shown that this particular finding of fact was based on no evidence or misapprehension of evidence. Further, there is no proof that the trial court acted on a wrong principle. In the premises I find that the trial court's finding on liability was in order and do not interfere with the same.

WHETHER THE TRIAL COURT ERRED IN MAKING AWARDS UNDER THE LAW REFORM ACT AND THE FATAL ACCIDENTS ACT.

19. Under the Law Reform Act, the court awarded kshs. 50,000/- for pain and suffering and kshs. 150,000/- for loss of life expectancy. Upon perusal of comparable authorities, I find that the award of kshs. 50,000/- was not excessive. Hon. Majanja J. in **Sukari Industries Limited vs. Clyde Machimbo Juma Homa Bay HCCA NO. 68 of 2015 [2016] eKLR** held;

> ***On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased's estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs 10,000 to Kshs 100,000 over the last 20 years hence I cannot say that the sum of Kshs 50,000 awarded under this head is unreasonable.***

20. On loss of expectation of life, the trial court awarded kshs. 150,000/-. The deceased was 39 years of age. The conventional award for loss of expectation of life ranges from kshs. 100,000 to 200,000 as per comparable authorities. The appellant has not brought anything before this court to suggest that the award was inordinately high. In the premises, I find that the award for loss of dependency was not excessive.

21. The trial court adopted a multiplicand of kshs. 20,000/- and a multiplier of 21 years. There was evidence tended to show that the deceased earned kshs. 30,000/. However, in his jua kali practice, it was possible for the deceased to occasionally exceed kshs.35,000. Therefore I will not interfere with this figure of kshs.20,000/- adopted by trial court. Further I do not find any fault in the multiplier of 21 years.

22. As for the dependency ratio Section 4 (1) of the Fatal Accidents Act Cap 32 Laws of Kenya provides as follows: -

> **Action to be for benefit of family of deceased**
>
> **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; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct:…"**

As per section 4 of the fatal Accidents Act, only the deceased's mother would qualify as a dependant. In the premises I find that a dependency ratio of 1/3 would suffice.

WHETHER THE TRIAL COURT ERRED IN MAKING AWARDS UNDER SPECIAL DAMAGES

23. It is trite laws that special damages must be specifically pleaded and proved. Funeral expenses and the grant ad litem were awarded kshs. 94,359 as special damages. Upon perusal of the record of appeal and the list of documents I find that the same was specifically pleaded and proved.

24. In the premises the appeal succeeds to the extent that the multiplicand and the dependency ratio are varied to kshs. 15,000 and a dependency ratio of 1/3. The judgment sum is varied to the extent that the loss of dependency is calculated as 25,000 x 21 x 12 x 1/3 = 1,680,000/-

25. With regard to the deduction of loss of expectation of life, the Court of Appeal in **Civil Appeal No. 22 of 2014 Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja) vs Kiarie Shoe Stores Limited (2015) eKLR.** held;

26. This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under The Law Reform Act and dependants under The Fatal Accidents Act are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under The Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under The Law Reform Act, hence the issue of duplication does not arise.

27. In the premises, given that the claim for lost years and dependency will go to the same persons, I find it prudent to deduct the same to avoid double compensation.

28. This court therefore sets aside the judgment in the trial court and substitutes the awards for damages as follows;

> **Pain and suffering – kshs. 50,000/-**
>
> **Loss of life expectancy Kshs.150,000/-**
>
> **Loss of dependency – kshs. 1,680,000/-**
>
> **Funeral Expenses and Ad Litem – kshs. 94,359/-**
>
> **Total – kshs. 1,974,359/=**

Dated, Signed and Delivered at Eldoret this 25th day of January 2022.

E. O. OGOLA

JUDGE