



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CIVIL APPEAL NO. 73 OF 2018**

**PARESH PATEL .....1<sup>ST</sup> APPELLANT**

**ASL LIMITED.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**CHARLES ODIWUOR ODONGO(Suing as the Legal Representative in the**

**Estate of GABRIEL ODONGO DIMBA – Deceased) .....RESPONDENT**

**[Being an Appeal from the Judgment and Decree of the Chief Magistrate, Kisumu in KISUMU CMCC NO. 219 OF 2015 delivered on 25<sup>th</sup> July 2018]**

**JUDGMENT**

The learned trial magistrate delivered her judgment on 25<sup>th</sup> July 2018.

1. On the issue of liability, the same was apportioned 50:50 between the Appellants and the deceased, **GABRIEL ODONGO DIMBA**.
2. And on the issue of compensation, the trial court awarded the sum of Kshs 350,000/=, which was then reduced by 50% to account for the contributory negligence attributed to the deceased.
3. By their Memorandum of Appeal the Appellants raised 9 Grounds, which can be summarized as follows;
  1. **The trial court treated the issue of liability superficially, and arrived at a wrong conclusion.**
  2. **The accident was not the proximate cause of the death of the deceased.**
  3. **The trial court treated the issue of *quantum superficially, thus arriving at a wrong conclusion.***
  4. **The trial court ignored the Applicable *principles which were contained in the legal authorities cited by the appellants.***
  5. **The trial court failed to sufficiently take *into account the evidence tendered.***
  6. **The Respondent did not discharge the *onus, to prove negligence on the part of the appellant.***
  7. **The trial court failed to apply precedents and tenets of law that are applicable in assessing the Damages awarded.**
  8. **The trial court awarded Damages that were inordinately high in the circumstances.**
  9. **The trial court did not adequately evaluate the evidence tendered, and thus arrived at a decision that was unsustainable in law.**

4. When prosecuting the appeal the Appellants pegged their submissions on 2 issues, namely;

**1. Whether the Respondent's suit had abated; and**

**2. The Damages awarded were inordinately high.**

5. Being a first appellate court, I have an obligation to re-evaluate all the evidence tendered during the trial, and to draw my own conclusions.

6. However, whilst drawing conclusions from the re-evaluation, I have to remain alive to the fact that, unlike the learned trial magistrate, I did not have the benefit of observing the witnesses when they gave evidence.

7. The Plaintiff indicated that Gabriel Odongo Dimba (Deceased) was aboard a motorcycle, when he had an accident with the Appellants' motor vehicle.

8. It was the Plaintiff's assertion that the deceased was riding his motorcycle lawfully, when the Appellants' vehicle approached from the opposite direction and suddenly turned right, directly onto the path of the deceased.

9. As the vehicle turned onto his path without any warning, the deceased was unable to avoid ramming onto the rear part of the said vehicle.

10. Following the collision, the deceased is said to have sustained severe injuries.

11. In their Defence, the Appellants denied that an accident occurred, involving their vehicle and the motorcycle that was being driven by the deceased.

12. However, if any such accident occurred, the Appellants asserted that it was either due to the sole negligence of the deceased or due to the contributory negligence of the deceased.

13. On 2<sup>nd</sup> November 2015 the parties informed the trial court that they were holding negotiations.

14. On 21<sup>st</sup> November 2015 the parties notified the court that they had a consent on the issue of liability. Hon. A. Odawo RM adopted the consent, which was in the following terms;

**“By Consent, liability be apportioned at ratio of 50:50.”**

15. Thereafter, the record of the proceedings shows that the parties continued to hold negotiations on the issue of the quantum of Damages. However, the said negotiations did not yield a settlement in that respect.

16. On 13<sup>th</sup> June 2018 the Plaintiff testified. He is a son to Gabriel Odongo Dimba. He exhibited the Letters of Administration that were issued to him, and which, therefore, granted him the requisite legal authority to continue prosecuting the case that had originally been filed by his father.

17. The Plaintiff made it clear that his father's death was not attributable to the injuries which he had sustained in the traffic accident which was the cause of action in this case.

18. The cause of death was described as “*Pressure*”.

19. During cross-examination, **PW1** said that it was possible that the said “*pressure*” had developed after the Road Traffic Accident. However, as he was not a Medical Doctor, **PW1** conceded that he was unable to confirm whether or not the cause of death had any nexus with the accident involving the Defendants' vehicle.

20. The Medical Records produced in evidence showed that Gabriel sustained a crush injury to his left hand, which led to the complete amputation of the left-hand middle finger.

21. He also had mild chest pains and back aches.

22. After **PW1** testified, the Plaintiff closed his case.

23. Thereafter, the Defendants tendered no evidence at all.

24. Both parties filed their respective submissions.

25. In their submissions before the trial court, the Defendants urged the court to dismiss the suit because the death of Gabriel was not attributable to the accident.

26. Having perused the pleadings, the evidence tendered and the submissions made both before the trial court and also before this court, I find that the Plaintiff's claim was never for compensation for Gabriel's death. The claim was always for compensation for the personal injuries which Gabriel sustained in the road traffic accident. Therefore, the fact that Gabriel's death had no nexus with the accident could not be the basis for dismissing the suit.

27. The trial court did not determine the issue of liability. It is the parties who resolved the issue of liability through a consent which the trial court adopted as an order of the court, on 21<sup>st</sup> November 2015.

28. Therefore, I find that the Appellants erred when they asserted that the trial court had treated the issue of liability superficially, and that by so doing, the court arrived at the wrong conclusion.

29. I also find that the Appellants failed to identify any evidence that was tendered in court, but which was then ignored by the learned trial magistrate.

30. On the issue of negligence, I find that the trial court was not expected to make any determination, and that is because the parties had already invited the court to adopt the consent which apportioned liability 50:50.

31. It cannot therefore be said that the Respondent failed to discharge the onus of proof, regarding the negligence attributable to the Appellants.

### **Had the suit Abated?**

32. First, it is important to emphasize that in their Memorandum of Appeal, the Appellants did not raise any issue pertaining to the assertion that the suit could not result in a judgment against them, as the said suit had abated.

33. Strictly speaking, therefore, it was not available to the Appellants to canvass an issue that had not been raised as one of the Grounds of Appeal.

34. In any event, it must be borne in mind that the appeal before me arises from the Judgment dated 25<sup>th</sup> July 2018. In the said judgment there was no determination on the question as to whether or not the suit had abated. Therefore, this appellate court cannot now be called upon to make a determination on an issue that does not emanate from the judgment which is appealed from.

35. Pursuant to **Section 79G** of the **Civil Procedure Act**;

**“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of the decree or order. Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”**

36. In the case of **LAWRENCE NGUTHIRU RICCARD AHW, CIVIL APPEAL NO. 103 OF 2012** Ngaah J. held as follows;

**“It is apparent here that a decree or order appealed from is a pertinent and inextricable part of an appeal filed in the High Court against a decision from the subordinate court; without the decree or order appealed from there is, in effect, no appeal.”**

37. In compliance with the provisions of **Section 79G** of the **Civil Procedure Act**, the Appellants incorporated into the Record of Appeal, the Decree issued on 25<sup>th</sup> July 2018.

38. There was no other Order or Decree which the Appellants indicated that this appeal related to.

39. Therefore a matter that does not arise from the Decree which the Appellants have appealed from, does not fall for determination.

40. However, it is clear from the record of the proceedings before the trial court that on 23<sup>rd</sup> August 2017, that the trial court delivered a Ruling through which it ordered the revival of the suit.

41. If the Appellants were dissatisfied by that Ruling, they ought to have lodged an appeal within 30 days from the date it was delivered.

42. As the Appellants failed to appeal against the Ruling dated 23<sup>rd</sup> August 2017, it was not open to them to sneak into this appeal, issues which could have been canvassed if they had lodged an appeal in respect to orders emanating from the said Ruling.

43. In any event, following the revival of the suit, by a court of competent jurisdiction, the suit which had abated, was duly revived, and therefore the Respondent was entitled to prosecute it.

### **Quantum of Damages**

44. It is well settled that an appellate court will not disturb an award of damages unless the same was so inordinately high or low as to

represent an entirely erroneous estimate.

45. The award of damages that was either too high or too low is ordinarily an indication that the trial court had applied the wrong principles when determining the quantum.

46. The Appellants invited the court to rely on the decision in **EASTERN PRODUCE (K) LTD Vs ALLAN OKISAI WASIKE, HCCA NO. 14 OF 2013**, in which the Court upheld the award of Kshs 201,500/= as General Damages.

47. In that case the Respondent had suffered a cut on his left index finger.

48. I find that the Respondent in this case had sustained a more serious injury. He had a crush injury to the left-hand middle finger, which had to be completely amputated.

49. In the case of **RODGERS SHIJENJE ATSAYA Vs FRANCIS WAFULA ANGOYE, HCCA NO. 67 OF 2013**, the left small finger of the Respondent was amputated.

50. The High Court reviewed the quantum upwards, from Kshs 100,000/= to Kshs 200,000/=.

51. In the said **HCCA NO. 67 OF 2013**, Tuiyot J. had occasion to give consideration to the following authorities;

***“1. Shabana Hardware & General Stores Ltd. –Vs- Samuel Okumu (2010) eKLR where Musinga J. (as he then was) did not think that a sum of Kshs 300,000/= for an amputated left thumb was so excessive as to warrant interference.***

***2. Senate Boi Khaukha –Vs Warimwe General Contractors Ltd (2015) eKLR where Aroni J. made an award of Kshs 250,000/= General Damages for an amputated right middle finger.***

***3. Woodtex (K) Limited –Vs- Moses Otiangala Solomon (2005) eKLR where Visram J. (as he then was) did not think that General Damages of Kshs 290,000/= was inordinately high for the amputation of the 1<sup>st</sup> finger on the right hand.”***

52. In the light of those comparable authorities I hold the considered view that the award of Kshs 350,000/= as General Damages was not inordinately high.

53. In the result, there is no merit in the appeal, both against liability and against the Quantum of Damages.

54. The appeal is dismissed with costs to the Respondent.

**Dated, Signed and Delivered at Kisumu This 28<sup>th</sup> day of January 2021**

**FRED A. OCHIENG**

**JUDGE**