REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO 66 OF 2018

NATIONAL COUNCIL FOR PERSONS WITH DISABILITIES.....APPELLANT

VERSUS

PHILISTER ACHIENG AWUOR & RISPER OLOO OMOLO

(Suing as the Personal Representatives and Legal Administrators of the Estate of Dorina Auka Oyambo).....RESPONDENTS

(Being an Appeal from the Judgment and decree of Hon R.M. Ndombi (RM)

delivered at Kisumu in Chief Magistrate's Court Case No 344 of 2014

on 11th July 2018)

JUDGMENT

INTRODUCTION

1. In her decision of 11th July 2018, the Learned Trial Magistrate, Hon R.M. Ndombi, Resident Magistrate, found the Appellant to have been fully liable for the death of Dorina Auka Oyambo (hereinafter referred to as "the deceased") and entered judgement in favour of the Respondents herein against it in the following terms:-

a. Loss of expectation of life **Kshs 100,000/=**

b. Pain and Suffering **Kshs 10,000/=**

c. Loss of Dependency **Kshs 800,000/=**

d. Special Damages **Kshs 155,000/=**

Kshs 1,065,000/=

Plus cost of the suit and interests **(sic).**

2. Being aggrieved with the said decision, on 23rd July 2018, the Appellant filed a Memorandum of Appeal dated 22nd July 2018. It relied on ten (10) grounds of appeal.

3. Parties filed Written Submissions and they relied upon the same in their entirety. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

5. This was aptly stated in the case of **Selle & Another vs. Associated Motor Boat Co Ltd & Others [1968] EA 123** where the court therein rendered itself as follows:-

> **"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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..."**

6. The principle behind this conclusion is that as an appellate court will not have had the advantage of having seen and heard the evidence of witnesses, it should exercise its jurisdiction to review the evidence with caution and it is not enough that the appellate court might have come to a different conclusion.

7. Having looked at the Memorandum of Appeal, Record of Appeal, Appellant's and Respondent's Submissions, it was the considered view of this court that the issues that have been placed before it for determination were as follows:-

> **a. Whether or not the Learned Trial Magistrate erred in having found the Appellant herein to have been wholly liable for the death of the deceased;**
>
> **b. Whether or not the Learned Trial Magistrate erred in having awarded the Respondents quantum;**
>
> **c. If the Learned Trial Magistrate did not err, whether or not the quantum that was awarded was excessive in the circumstances warranting interference by this court.**
>
> **d. Whether or not special damages were strictly proved.**

8. The court therefore deemed it prudent to address the said issues under the following distinct heads.

I. LIABILITY

9. Grounds of appeal Nos (1), (2), (3) and (4) were dealt with together as they were related.

10. The Appellant argued that the Learned Trial Magistrate did not consider that the evidence of PW1 and PW2 was not consistent as they each gave two (2) different versions of how the accident occurred. It pointed out that Philister Achieng Awuor (hereinafter referred to as "PW 1") testified that she and the deceased, who was her mother, were walking on the right side of the road when the deceased was hit by a motor vehicle from behind and she sustained fatal injuries.

11. It averred that during Cross-examination, PW 1 stated that she successfully crossed the road and that it was while the deceased was trying to cross the road that she was knocked and died instantly. It pointed out that during her Re-examination, PW 1 had contended that she did not read her Witness Statement and that what she had told the court was the truth. It therefore urged this court to find her not to have been a credible witness.

12. It was their submission that No 38078 PC Bwire Wanjala (hereinafter referred to as "PW 2") who was the Investigating Officer stated both in his Examination-in-Chief and Cross-examination that the deceased died as she was crossing the road.

13. The Appellant argued that the Respondents' evidence did not attain the required standard of proof for the burden to shift to it and thus urged this court to find and hold that the Respondents had failed to discharge the evidential burden of proof as required in civil cases, which was proof on a balance of probabilities and consequently, it was not liable for the deceased's death.

14. It relied on the case of **Milka Akinyi vs Kenya Power & Lighting Company Limited & Another [2018] eKLR** to buttress its point.

15. On the other hand, the Respondents argued that they proved their case on a balance of probabilities as was required by law in civil cases for the reason that the Appellant failed to adduce any evidence to the contrary and the facts were *res ipsa loquitor*. They placed reliance on the case of **John Kanyungu Njogu vs. Daniel Kimani Maingi [2000] eKLR** in support of their case.

16. A perusal of the proceedings shows that PW 1 filed a Witness Statement at the time she filed suit. She affixed her thumbprint on the same. She adopted the said Witness Statement as her evidence in chief. She had indicated that on 22nd April 2013, she was escorting the deceased when she crossed the road at a place called Shirika. She testified that the deceased was killed as she crossed the road.

17. In his decision, the Learned Trial Magistrate determined that the Appellant was wholly to blame for the deceased's death as there was nothing to show that the deceased contributed to the causation of the accident, the Appellant having failed to call any evidence.

18. This court took the view that the Learned Trial Magistrate applied the wrong principles that the Appellant was fully liable for not having called evidence. He acknowledged that PW 1 testified that a vehicle approached from behind and hit the deceased and in the same breathe indicated that PW 2 who was the Investigating Officer stated that the deceased was crossing the road when she was knocked.

19. Having analysed PW 1's oral and documentary evidence vis-a vis that of PW 2, it was clear that PW 1 was not truthful while giving her oral evidence and the Learned Trial Magistrate ought to have treated her evidence with caution. She was not a credible witness when she stated that they were walking on the right side of the road when the deceased was hit from behind.

20. The Learned Trial Magistrate ought to have placed a lot of weight on PW 2's evidence as he was an independent witness and the Investigating Officer in the case. Indeed, in his Cross-examination, PW 2 admitted that the deceased ought to have checked the road before crossing the road. He also stated that the driver hooted and tried to avoid hitting the deceased but she was too close and was hit. This meant that she crossed the road while the vehicle was quite close.

21. It was therefore incumbent upon the deceased to have checked whether it was safe to cross the road before doing so. As a road user, she was under a duty to pay due care and/or attention. The fact that she was hit while crossing the road rendered the doctrine of *res ipsa loquitor* that the Respondents relied upon inapplicable in the circumstances of the case and the deceased could not therefore escape liability.

22. The fact that lorries were parked on both sides of the road and pedestrians were crossing the road implied that it was a built up area. Further, the fact that the deceased sustained fatal injuries on the spot was sufficient proof that the driver of the vehicle that hit her was driving at an excessive speed. He was in a charge of a machine that could cause serious injury and/or damage to other third parties if it was not controlled properly.

23. This court found and held that liability of 65%-35% in favour of the deceased would be fair in the circumstances of the case herein.

24. In the premises foregoing, the court found and held that Grounds of Appeal Nos (1), (2), (3) and (4) were merited and the same be and are hereby upheld.

II. QUANTUM

25. The Appellant withdrew the 8th ground of appeal. Grounds of Appeal Nos (5), (6) and (9) were dealt with under this head as they were related. The court opted to consider the same under the following distinct sub-heads.

A. FATAL ACCIDENTS ACT CAP 32 (LAWS OF KENYA)

26. The Appellant argued that dependency was not established on a balance of probabilities because taking into consideration the age of the deceased and her children, they could not be deemed to have been dependent on her. It added that even if the deceased was taking care of her grandchildren, whom it challenged, the said grandchildren could not claim dependency under Section 4(1) of the Fatal Accident Act. It also contended that the Respondents had not proved dependency because the deceased had left them her farm.

27. The Appellant urged this court to analyse the evidence and hold that the Respondent failed to prove dependency on a balance of probabilities. In support of this argument it relied on the case of **W. E Tilley Muthaiga Limited & Another vs Nelson Owen Ongayo [2013] eKLR** and other unreported cases.

28. On the other hand, the Respondents submitted that the deceased took care of three of her grandchildren. It was their submission that grandchildren were deemed as children under Section 2(1) of the Fatal Accidents Act. They added that under Section 4(1) of the Fatal Accidents Act, action was brought for the benefit of the wife, husband, parent and child of the deceased person.

29. It was their further submission that as the deceased was aged eighty five (85) years of age and was past her retirement age, PW 1 urged the court to treat her like child of tender age. They relied on the case of **Kenya Breweries Ltd vs Saro [1991] eKLR** where the court awarded a global sum of Kshs 100,000/= to a deceased minor who was aged six (6) years. It was therefore the Respondents' argument that the Learned Trial Magistrate did not err when he awarded a global sum of Kshs 800,000/= under this head, a figure the said Learned Trial Magistrate found to have been reasonable.

30. As was rightly pointed out by the Respondents, under Section 2 of the Fatal Accidents Act, a child is defined as:-

> **"…a son, daughter, grandson, granddaughter, stepson or stepdaughter;**

31. Under Section 4(1) of the Fatal Accidents Act, it has been stated that:-

> **"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:"**

32. As can be seen hereinabove, children and grandchildren can claim under the Fatal Accidents Act. In her testimony, PW 1 told the Trial Court that the deceased's children were all adults and although they all had their farms, the deceased would give them whatever they had and that they would give her whatever they had. She did not adduce any evidence that such giving was supportive or merely exchanging gifts as any mother and adult children would do whenever they visited each other. This court was not therefore satisfied that any of the deceased's children were dependent on her.

33. In her Cross-examination, PW 1 told the Trial Court that the three (3) grandchildren were her deceased brother's children. She admitted that the Chief's letter did not mention the said deceased brother. A perusal of the said letter dated 7th June 2013 showed that the three (3) grandchildren were mentioned therein. They were also mentioned as the deceased's dependents in Paragraph (7) of the Plaint dated and filed on 24th July 2014. In the absence of any evidence to the contrary, this court was satisfied that the grandchildren were dependants of the deceased's estate.

34. As the deceased was a senior citizen with no income and/or proof of income, the court agreed with the Respondents that the Learned Trial Magistrate did not err when he awarded a global sum under the Fatal Accidents Act. Indeed, there was no evidence that the deceased made any income from her land. Having said so, bearing in mind that the grandchildren benefited and would continue benefitting from her land which was the only asset that was mentioned by PW 1, it was the considered view of this court that a sum of Kshs 800,000/= was excessive in the circumstances.

35. As the deceased had two (2) oxen that ploughed the land and she would assist the grandchildren in tilling the land, her children would need to get more work force to assist the grandchildren till the land. In the absence of any evidence to the contrary, this court took the view that in the event the land was sold as PW 1 had alluded to in her evidence, the grandchildren would be left to fend for themselves. It was therefore necessary to put a cost to their loss.

36. Accordingly, considering inflationary trends, this court found and held that a sum of Kshs 200,000/= would be reasonable under this head.

37. In arriving at the said conclusion, this court had due regard to the case of **Moses Mairua Muchiri vs Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased) [2016] eKLR,** where Ngaah J held as follows:-

> **"It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case."**

38. In the premises foregoing, this court found and held that Grounds of Appeal Nos (5), (6) and (9) were partially successful.

B. LAW REFORM ACT CAP 26 (LAWS OF KENYA)

39. The Appellant submitted that in the event this court found that liability had been proved on balance of probabilities, the damages awarded under the Law Reform Act could be upheld as it was not opposed to the said damages.

40. Having found and held that the Appellant herein was liable and having noted that it was not opposed to the award under the Law Reform Act, which this court found to have been fair, this court left the award for pain and suffering and Loss of Expectation of life at Kshs 10,000/= and Kshs 100,000/= undisturbed.

III. SPECIAL DAMAGES

41. Ground of Appeal No (7) was dealt with under this head.

42. The Appellant submitted that the Respondents did not prove the claim for special damages because PW 1 had admitted during her Cross-examination that the incident was fast and contributions were mostly from her uncles and that although she contributed a cow, there was no receipt to prove the same. It therefore urged this court to hold that the Respondents failed to prove on a balance of probabilities that they were entitled to an award of special damages.

43. On the other hand, the Respondents submitted that they pleaded and proved the special damages. PW 1 adduced in evidence, receipts for the coffin, hearse, tents and chairs. It placed reliance on Section 107 of the Evidence Act Cap 80 (Laws of Kenya) that 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."**

44. It is trite law that special damages must be strictly pleaded and proved. However, there are some expenses courts can take judicial notice to have been paid. These are costs for the Police Abstract, Death Certificate, Search and Limited Grant of letters of Administration *ad Litem.*

45. Whereas the Respondents did not tender in evidence receipts in respect of the Police Abstract and Death Certificate, it found and held that the documents which were Government documents could not have been issued had monies not been paid. It was therefore satisfied that the Respondent had proved these expenses in addition to the claim for Copy of Records for which PW 1 adduced in evidence a receipt for Kshs 500/=.

46. Going further, it is also accepted in African traditions that during funerals, family members spend some amount of money even when the bulk of the monies are contributed by members of the community. Courts should therefore not hesitate to award some amount under this head even in the absence of receipts.

47. Having said so, PW 1 adduced in evidence receipts, in her name, for the coffin, flowers, hearse, tents, chairs and lowering gear. The total

came to Kshs 154,500/=. This was by no means a very conservative figure for African funerals and the court was not therefore persuaded that it should disturb the same.

48. In the premises foregoing, this court found and held that Ground of Appeal No (7) was not merited and the same be and is hereby dismissed.

DISPOSITION

49. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 23rd July 2018 was partly merited and the same be and is hereby allowed. The effect of this judgment is that the Judgment of the Learned Trial Magistrate that was delivered on 11th July 2014 be and is hereby set aside and/or vacated and replaced with the following:-

> **"Judgment be and is hereby entered in favour of the Respondents against the Appellant herein for the sum of Kshs 302,250/= made up as shown hereunder:-**
>
> **Damages under the Fatal Accidents Act Kshs 200,000/=**
>
> **Loss of expectation of life Kshs 100,000/=**
>
> **Pain and suffering Kshs 10,000/=**
>
> **Special damages Kshs 155,000/=**
>
> **Kshs 465,000/=**
>
> **Less 35 % contributory negligence Kshs 162,750/=**
>
> **Kshs 302,250/=**
>
> **plus costs and interest at court rates on special damages from the date of filing suit and interest at court rates on damages from the date of judgment until payment in full.**

50. As the Appellant succeeded on his Appeal only partly as shown hereinabove, each party will bear its own costs of the Appeal herein.

51. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 26TH DAY OF APRIL 2021

J. KAMAU

JUDGE