REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 42 OF 2020

STEPHEN MURATHI.....APPELLANT

VERSUS

BRENDA MAKENA (Suing as the legal representative of the estate of

Andrew Muthuri (deceased).....RESPONDENT

(An appeal from the Judgment and Decree of Hon. C.K Obara (P.M)

in Maua CMCC No. 44 of 2018) delivered on 30/04/2020)

JUDGMENT

1. By a Plaint dated 12/03/2018, the respondent, as the widow and administrator of the estate of the deceased, sued the appellant seeking general damages under both the Law Reform Act and the Fatal Accidents Act, special damages of Ksh. 142,500/= and costs of the suit. The respondent's claim was that on or about 23/07/2018 at about 11:30 p.m. at Kwa Njilu stage along Maua-Kiutine Road, the deceased was lawfully riding his motorcycle Registration No. KMDF 598G on his lane while carrying a pillion passenger, namely Reuben Mugambi when the appellant negligently drove Motor Vehicle Registration No. KCH 169S Toyota Probox, that it hit a bump, lost control, veered off its lane, swerved onto the opposite lane and knocked down the deceased together with his passenger thereby occasioning him fatal injuries that led to his demise. At the time of his death, the deceased was aged 31 years, was a husband and father to three children and in good health but his life was cut short due to the said accident. As a consequence of the death, the widow and her 3 children together with the estate had suffered loss and damage and claim damages.

2. The appellant denied the claim by his statement of defence dated the 12/07/2018 and prayed for the respondent's suit to be dismissed. The gist of the defence was that the relation with the motor vehicle was denied as much as the occurrence of the accident and wrongdoing by the appellant with an alternative plea that if any accident ever occurred, then it was wholly caused by if not substantially contributed to by the negligence of the deceased. The particulars of the alleged negligence were then set out to include high and unreasonable speed in the circumstances, riding in a zig zag manner onto a highway and path of the appellant and thus hitting self against the motor vehicle while on its lane in violation of the law.

3. After the conclusion of the trial, the trial Court found that the respondent had proved her case on a balance of probability, apportioned liability between the parties at 90:10 by laying the bigger burden upon the appellant and awarded damages in the aggregate sum of Kshs 2,792,000 comprising; Pain and suffering Kshs 50,000, Loss of expectation of life Kshs 100,000, Loss of dependency Kshs 2,500,000 and Special damages Kshs 142,000. When subjected to the adjudged contribution, the court calculated the net at Kshs **Kshs 2,512,800.**

4. Aggrieved by the said decision, the appellant filed his Memorandum of Appeal on 12/05/2020 setting out five (5) grounds of appeal. A reading of the grounds shows that the appellant's complaint to be two pronged; that the trial Court erred in apportioning him 90% liability against the weight of evidence and in awarding Kshs 2,500,000 for loss of dependency when same was never pleaded nor proved and that the sum was in any event inordinately high and excessive. Based on that appreciation, I see the appeal to present two issues for determination. The issues beg the questions whether the apportionment of damages find support in the evidence on record and secondly, whether the award of damages under the heading loss of dependency was duly done.

5. This being a first appeal, this Court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. In doing so, the Court must bear in mind that it did not have the advantage of seeing the witnesses testify. See ***Gitobu Imanyara & 2 others v Attorney General*** ***[2016] e KLR.***

6. At the trial, the respondent as plaintiff called 5 witnesses, **PW1, Mark Onsongo,** the executive office, Maua Law courts whose duty was to produce the court file in Maua CMCC 53 of 2018 in which judgment was entered against the appellant; **PW2 P.C Noor Adan** produced the police abstract and a post-mortem report then told court that the accident in deed occurred on 23/07/2017 at about 11.30 p.m along Maua-Kiutine Road involving a Toyota Probox No. KCH 169 S driven by the appellant and a motor cycle No. KMDF 598 G at Kwa Njilu stage,

after the appellant's motor vehicle hit a bump, lost control, veered off its lane, swerved into the opposite lane and knocked down the deceased together with his pillion passenger (namely Reuben Mugambi) thereby occasioning him fatal injuries. That the appellant was charged with causing death by dangerous driving in Traffic Case No. 464/2017 which was still pending as he gave evidence. On the complete police file, he said that having taken over the matter from the previous investigating officers in 2019, he did not have the police file or the sketch map.

7. **PW3 Brenda Makena,** the widow to the deceased and the respondent herein, told court that the deceased was a *boda boda* operator who he earned Kshs 1,000 per day, had left behind 3 children having died as a consequence of an accident which occurred on 23/07/2017. She produced demand notice together with its receipt (PExh 4 and 5) respectively, Limited grant and the receipt thereto (PExh 6 and 7) respectively, copy of chief's letter (PExh 8), receipts for burial expenses (PExh 9) and the death certificate (PExh 10) in support of her case and reiterated to the Court that the deceased was at the time of his demise aged 31 years.

8. **PW4 Gerald Gitonga** testified as having been at the scene of the accident while buying credit from a kiosk around the stage when he saw the appellant's motor vehicle KCH 169 S coming from Maua direction at a very high speed went off the road and hit the deceased who was dropping a passenger at the designated area for dropping and picking of passengers. He was among the people who took the deceased to Maua Methodist Hospital where he died shortly thereafter.

9. **PW5 Henry Gitonga** testified that he also witnessed the accident and that while at Kwa Njilu stage, at around 11.30 p.m, he saw the appellant's motor vehicle KCH 169 S coming towards Kwa Njilu stage from Maua at a very high speed that he lost control of the motor vehicle and it veered off its lane and hit the deceased and his passenger who were on the other side of the road. That the deceased and the pillion passenger were both wearing helmets and reflective jackets. It at the time was drizzling but there was no fog and the place was well lit by street lights. He blamed the driver of the motor vehicle for driving the said motor vehicle in a wrong lane and at an excessive speed thereby causing the accident. He was among the people who took the deceased to Maua Methodist Hospital where he died shortly thereafter.

10. For the appellant, **Dw1 Stephen Murathi,** the sole witness**,** testified that he was the registered owner and the driver of motor vehicle No. KCH 169 S on the material day, was driving along Maua-Kiutine Road at an average speed of about 60-80 Kph in a bit foggy weather with his headlights on. He said that the deceased motor cycle suddenly made a U-Turn to join his lane to Kiutine. The rider of the said motor cycle and the pillion passenger who were neither wearing helmets nor reflective jackets hit his vehicle on the left side consequently damaging it but he had no proof that his motor vehicle was damaged. He was charged with a traffic offence was acquitted but did not have the traffic proceedings and judgment.

11. Upon the directions by the court, the parties filed their submissions in respect to the appeal on 30/09/2020 and 29/10/2020 respectively. In the submissions, appellant takes the position that the respondent failed to establish to the requisite standards that the appellant was to blame for causing the accident. It was additionally submitted that the trial court having found that both the deceased and the appellant failed to observe their respective obligations on the road, erred in apportioning liability at 90:10 in favour of the respondent and therefore liability ought to be apportioned in the ratio of 50:50 against the parties. On assessment of damages, it was submitted that the trial court erred in awarding the exorbitant sum of Ksh. 2,500,000 for loss of dependency which had not been proved it being concluded that a sum of Kshs. 500,000 for loss of dependency would sufficiently compensate the respondent. In support of such submissions, the appellant cited the decisions in ***Selle & anor v Associated Motor Boat Co.Ltd & others (1968) EA123, Abbaby Abubakar Haji & anor v Marair Freight Agencies Lts (1984) eKLR, Ann Wambui Ndiritu v Joseph Kiprono Ropkoi & anor (2004) eKLR, Tom Oluoch Oloo (suing as the legal representative of the estate of George Ochieng Ngoche (deceased) v African Safari Club (2019)eKLR, and Kenya Power & Lighting Company Ltd v Charles Obegi Ogeta (suing as the legal representative of the estate of Esther Nyanchoka Obegi (2016) eKL.***

12. For the respondent, submissions were offered and made to the effect that the appellant was wholly to blame for the accident on the basis of the evidence of the two independent eye witnesses (PW4 & PW5) who testified in court and the fact that the appellant had been charged in a traffic court for causing death by dangerous driving. It was the stressed that the trial court considered the age, health and physical stamina of the deceased in order to arrive at the sum of Kshs 2,500,000 for loss of dependency. The cases of ***Mwangi v Wambugu (1984) klr 453, Peter Chege& 2 others v Joyce Litha Kitonyi and 2 others (suing as the legal representatives of the estate of Joseph Kitonyi Muema-deceased) (2016) eKLR, and Jacob Ayiga Maruja &anor v Simeon Obayo (2005)*** **eKLR** were relied on in support of her submissions.

13. I have appreciated that the grounds of appeal although framed as five in number can be condensed into two as said herein before.

Apportionment of liability in the ratio of 90:10 against the appellant

14. While the appellant contends that liability should have been apportioned in the ratio of 50:50 because both the deceased and the appellant were equally to blame for the causation of the accident, the respondent contends that the appellant was wholly to blame for the occurrence of the accident. I have carefully weighed the two sets of evidence by both sides and in particular that of the two eye witnesses (PW4 & PW5) against that of the appellant. I have discerned that the evidence of the appellant is insufficient to negate the evidence of PW4 & PW5 on how the accident occurred. I find the evidence of the respondent to be more consistent and credible. That the motor vehicle hit a bump, lost control and hit the respondent while off the road is the credible understanding of the totality of the evidence. That could not have happened had the appellant observed the law that the speed at a built up area ought not exceed 50kph.

15. In the judgment, the trial court went into deep analysis of the evidence and concluded that; "

> **"The answer I have is that he was driving at a very high speed. In my view a speed of 60kms -80kms was still high considering that the scene was a market place and near a junction. In addition, the weather was foggy as per the evidence of the defendant. He testified that the rider hit the left hand side of his vehicle but he never availed any photographs."**

16. I find no misapprehension of the evidence on record but a very accurate and due analysis and appreciation. I am therefore inclined to agree with the trial court and find that the appellant was majorly to blame for causing the accident. In this regard, I am of the opinion that the trial court cannot be faulted for arriving at the decision it did.

The award of Kshs 2,500,000 awarded for loss of dependency

17. The principles under which the court can interfere with the findings of fact by the trial court on quantum are not in doubt but entrenched and trite. In ***Bashir Ahmed Butt v. Uwais Ahmed Khan [1982-88] KAR 5,*** and may other decision before and after it, the law remains that *'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. That it must be shown that the trial Court proceeded on wrong principles or that it misapprehended the evidence in some material respect and thereby arrived at a figure which was either inordinately high or low***.'**

18. To address the appellant's contention that the trial court erred in awarding Kshs 2,500,000 for loss of dependency yet the same had not been proved and that the same was exorbitant as a sum of Kshs. 500,000 for loss of dependency would suffice, the court must interrogate the decision to find determine if, in it, there is a misapprehension of the evidence, or any error that make the award attractive for interference for being too high or too low.

19. In coming with the sum awarded, the court below appreciated that there was insufficient evidence on income and chose to award a global sum rather than adopt the multiplier formula. For that the court cannot be faulted because it was within its right to do so because the multiplier formula is just one of the tools in assessing damages. It isn't a dogma and only applicable when appropriate. In *John Wamai and Two Other Vs. Jane Kituku Nziva and Another* (2017) eKLR the court stated 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."**

20. I find no error of application of principles nor misapprehension of the evidence. Am thus left with the duty to find out if the sum was excessive. The law remains that the duty of assessment of damages in personal injury claims is a difficult one and false within the discretion of the trier of fact which discretion ought not be interfered with slightly unless the appellate court sets out to substitute its discretion for that of the trier of facts. However, the court was bound to rely on the evidence adduced and applicable principles. In have given anxious regard to the appellant's complaint and I note that even if the court had opted for the multiplier formula and chosen the prevailing minimum wage as the multiplicand with a multiplier factor of say 20 years, the sum awardable could have not been so far from the impugned sum. I am equally satisfied that the deceased was the respondent's husband and he was also gainfully engaged. I find that dependency was sufficiently proved when the plaintiff said that the deceased used to take care of the family and was never challenged even on cross examination. What was disputed is whether the deceased had children or not. In deed the particular of the children was not provided. That indeed was a bad omission but such would not affect the quantum awardable but important for the application and pay-out of the sum awarded. For that reason, I direct that, if the sum has not been paid out, the respondents counsel shall make an appropriate application before the trial court to state how the sum shall be shared between the dependants and the share to any minor be appropriately invested for the benefit of such minors.

21. I therefore find and hold that the trial court cannot be faulted for awarding a global sum of Kshs 2,500,000 for loss of dependency considering the deceased age, good health and marital status.

22. The upshot from the foregoing findings is that the appeal is devoid of merit and I direct and order that it be dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY BY MICROSOFT TEAMS, THIS 19TH DAY OF APRIL, 2021

Patrick J O Otieno

Judge