REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CIVIL APPEAL NO. 1 OF 2019

BENARD KIMETO.....APPELLANT

VERSUS

EMMY CHEBET KOSKEI (suing as Administratrix and/or Personal

Representative of the Estate of NIXON

KIPROTICH KOSKEI (DCD).....RESPONDENT

(Being an Appeal from the Judgment and Decree of Honourable B. Omwansa (PM) dated 13th December 2018 in the Principal Magistrate's Court at Sotik, Civil Suit Number 71 of 2017)

JUDGMENT

1. The Plaintiff/Respondent sued the Defendant/Appellant on behalf of the estate of Nixon Kiprotich Koskei (Deceased) for general and special damages arising out of a road traffic accident involving motor vehicle KCB 629C owned by the Defendant and motor cycle Registration No. KMCA 638P driven by the deceased. According to the plaintiff, the accident was wholly attributable to the negligence of the Defendant's driver who hit the deceased while overtaking another motor vehicle.

2. In a judgment delivered on 13th December 2018, the court found for the plaintiff and held the Defendant, Benard Kimeto 100% liable for the accident that occurred on 21st October 2015. On Quantum, the court awarded the plaintiff as follows:-

- **Pain and Suffering** **Kshs. 30,000**
- **Loss of Dependency** **Kshs.768,000**
- **Special Damages** **Kshs. 11,530**

- **Total Amount awarded** **Kshs.809,530**

The Plaintiff was also awarded costs of the suit and interest thereof.

3. Being aggrieved with the decision of the trial Court, the Appellant filed his Memorandum of Appeal dated 8th January 2019 and further his Record of Appeal dated 6th June 2019 on the following grounds:-

i. The learned Magistrate erred in law and fact in finding the Appellant 100% liable solely on the ground that the Appellant did not adduce any evidence.

ii. The learned Magistrate erred in law and fact in holding that the Respondent had proved her case against the Appellant on a balance of probabilities despite overwhelming evidence to the contrary.

iii. The learned magistrate erred in law and fact in adopting the wrong principles in assessment of damages awardable/payable to the Respondent.

iv. The learned magistrate erred in law and fact in awarding Kshs.768,000 for loss of dependency which award was manifestly excessive and unjustified.

v. The learned magistrate erred in law and fact in adopting a multiplier of 12 years without factoring in the vicissitudes of life.

vi. The learned magistrate erred in law and fact in awarding Kshs.30,000 for pain and suffering which award was excessive and unjustified.

vii. The learned magistrate erred in law and fact in adopting a multiplicand of Kshs.8,000 contrary to the evidence on record.

viii. The learned magistrate erred in law and fact in awarding damages which were manifestly excessive in the circumstances.

4. The Appellant filed his Supplementary Record of Appeal dated 19th June 2019 where he attached written submissions and list of authorities dated 13th November 2018.

5. On 3rd December 2019, parties took directions to canvass the Appeal by way of written submissions.

6. I have considered the Appellant's grounds of appeal, written submissions and authorities filed on 6th January 2020; and the Respondent's written submissions filed on 10th July 2020. The two main issues which arise for my determination are whether the Appellant was 100% liable for the accident that occurred on 21st October 2015, and;

whether the award for general and special damages was manifestly excessive or inordinately low.

Whether the Appellant was 100% liable for the accident that occurred on 21st October 2015

7. As a first appellate court my duty is to re-evaluate the evidence in the trial court on both points of law and fact and reach my own findings and conclusions. See **Selle & Another Vs Associated Motor Boat Co. Ltd & Others (1968) EA 123; Ephantus Mwangi & Another Vs Duncan Wambugu (1984) eKLR.**

8. As already stated, the trial court found that the driver of Motor Vehicle Registration Number KCB 629C was to blame for the accident and held the defendant 100% liable.

9. In his submissions, the Appellant stated that only two witnesses testified i.e. the police officer and the administrator of the deceased's estate. The Appellant further submitted that there was no eye witness evidence and therefore the case was not proved.

10. The Appellant submitted that the trial court came up with its own imaginary facts and speculations in holding the Appellant 100% liable. He submitted that the evidence before the trial court was hearsay.

11. The Appellant further submitted that the Respondent did not discharge the standard of proof which is on a balance of probabilities. He relied on Sections 107 and 109 of the Evidence Act and also relied on the cases of **Butler Vs Butler Civil Appeal NO. 49 OF 1998 and Kiema Muthungu Vs Kenya Cargo Handling Services Ltd** to support his submission.

12. The Respondent submitted that she had proven her case on a balance of probabilities based on the evidence of PW1 who confirmed that indeed an accident occurred on 21/10/2015 at Kapchelobon along Sotik-Kaplong road involving Motor Vehicle Registration Number KCB 629C and Motor Cycle Registration Number KMCA 638P. That PW1 also confirmed that Nixon Kiprotich Koskei passed away during the accident. He contended that the Appellant did not call any witness to controvert the testimony of PW1 and PW2 but opted to close the defence case without calling any witnesses.

13. It was the Respondent's submission that the DPP recommended that the driver of Motor Vehicle Registration Number KCB 629C be charged with the offence of causing death by careless driving. The Respondent further contended that the Appellant was to blame for the accident as he overtook carelessly thus hitting the motor cycle rider (Nixon Kiprotich Koskei) who was coming from the opposite direction.

14. The Respondent submitted that based on the evidence placed on the court record by PW1 and PW2, it is probable that the accident occurred in the manner pleaded in the Plaint and supported by the evidence adduced in court. That from the evidence presented in court, it is apparent that the evidence met the threshold being that of a balance of probabilities. The Respondent relied on the cases of **Mwangi Vs Wambugu (1984) KLR 453 and William Kabogo Vs George Thuo (2010) KLR 526** to support her submission.

15. The Respondent rehashed the evidence relied on in the trial which is borne by the record as follows. In his testimony, PW1 testified that he had a Police Abstract detailing the accident which occurred on 21st October 2015 between Motor Vehicle Registration Number KCB 629C and Motor Cycle Registration Number KMCA 638P. The Police Abstract was produced as P-Exhibit 1. PW1 further testified that one, Nixon Kiprotich Koskei passed away during the accident. That the deceased was the rider of the Motor Cycle. PW1 testified that the DPP directed that the driver of the motor vehicle be charged with the offence of causing death by careless driving. That the driver has never been arrested to date.

16. PW2 testified that she went to the scene of the accident after being called by her neighbour where she was informed about the accident. On arrival at the scene of the accident, she found Nixon Kiprotich Koskei critically injured. He had injuries on his head and leg. They picked him and took him to hospital where he was pronounced dead. PW2 produced a Death Certificate as P. Exh 2.

17. The Defence chose to close its case without calling any witness or tendering any evidence.

Analysis

18. It is not in dispute that there was an accident between Motor Vehicle Registration Number KCB 629C and Motor Cycle Registration Number KMCA 638P along Sotik-Litein road on 21st October 2015. It is also not in dispute that the registered owner of Motor Vehicle Registration Number KCB 629C was the Appellant. The accident had one fatality i.e. Nixon Kiprotich Koskei on behalf of whose estate the primary suit was premised.

19. In the case of **East Produce (K) Ltd Vs Christopher Astaido Osiro (2006) eKLR,** the court held that:-

> ***"It is trite law that the onus of proof is on he who alleges and in matters where negligence is alleged, the position was well laid out in the case of Kiema Mutuku vs Kenya Cargo Hauling Services Ltd 1991 where it was held that there is as yet no liability without fault in the legal system in Kenya, and a Plaintiff must prove some negligence against the defendant where the claim is based on negligence".***

20. This court finds that even though the Appellant did not call any witness or adduce any evidence, it was incumbent upon the Respondent to convince the trial court that the accident happened as she had alleged. The issue before this court is whether the Respondent (then Plaintiff) proved that the accident did indeed happen and that the accident was attributable to the negligence of the Appellant (then Defendant). PW1 produced the Police Abstract (P-Exhibit 1) which showed that an accident occurred on 21st October 2015 at 9:30 am along Sotik-Litein involving motor vehicle Registration No. KCB 629C Make Toyota Probox and motor cycle KMCA 638P. His evidence which was not controverted by the defendant was that the driver of the motor vehicle was overtaking another motor vehicle when he hit the motor cycle which was on coming.

21. The deceased's wife PW2 testified that she went to the scene of the accident and found her husband on the tarmac injured. They picked him and rushed him to Kapkatet hospital and he was pronounced dead on arrival. She produced a death certificate (P-Exhibit 2).

22. The Appellant filed a Defence where he denied the particulars of negligence levelled against him. The Appellant blamed the deceased as the rider of the motor cycle for the accident particulars of which were captured in paragraph 7 of the Defence. The Appellant therefore denied any liability in the accident. However, the Defendant closed its case without calling any evidence thereby leaving the Plaintiff's testimony uncontroverted. I therefore find that the plaintiff proved her case on a balance of probability.

23. In the case of **Farah Vs Lento Agencies (2006) 1 KLR 124,125,** the Court of Appeal held that:-

> ***"The trial court had two conflicting versions of how the accident occurred. It was not reasonably possible to decide on the evidence of the witness who testified on both sides as to who was to blame for the accident.***
>
> ***Where there is no concrete evidence to determine who is to blame between the two drivers, both should be held equally to blame. As no side could establish the fault of the opposite party, liability for the accident could be equally on both the drivers. Therefore, each driver was to blame."***

24. In the circumstances of the present case I find that the trial court misdirected itself when it held the Appellant 100% liable. Although the Appellant chose not to ventilate his side of the story it is more probable than not that the accident occurred as a result of some contributory negligence by the Respondent. I find liability at 90:10 in favour of the Respondent.

Whether the award for General and Special Damages was manifestly excessive.

25. The issue before me is whether the award should be disturbed. The guiding principle in this regard was restated by the Court of Appeal in the case of **Johnson Evan Gicheru Vs Andrew Morton & Another (2005) eKLR**, thus:-

> ***"In order to justify reversing the trial judge on the question of the amount of damages it was generally necessary that the court of appeal should be convinced that either the judge acted upon some wrong principle of law or, that the amount awarded was so extremely high or so very small as to make it, in the judgement of the court, an entirely erroneous estimate of the damage to which the appellant was entitled."***

26. In this case, the Appellant has argued that the award was manifestly high and that the court made a double compensation. The Respondent on the other hand submitted that the Appellant had not demonstrated in any way how the trial court erred in arriving at its decision with respect to the various heads of damages payable under the Fatal Accidents Act and Law Reform Act. That the Appellant was seeking a second bite of the cherry in regards to the various heads of damages payable under the aforementioned Acts.

27. In the case of **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) Vs KIarie Shoe Stores Limited (2015) eKLR** the Court of Appeal stated:-

> ***"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 the 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 those are only awarded under the Law Reform Act hence the issue of duplication does not arise."

28. Guided by the above-cited authority, this court finds that the Respondent was entitled to damages for pain and suffering available under the Law Reform Act and the Loss of Dependency available under the Fatal Accidents Act.

29. With regard to the pain and suffering, the trial court awarded Kshs.30,000. The court stated that the deceased had been knocked down and died and must have experienced excruciating pain.

30. The Appellant submitted that the award of Kshs.30,000 was excessive and unjustified as the deceased was pronounced dead upon arrival at the hospital. That the death certificate showed that the deceased died on the same day that the accident occurred. The Appellant submitted that an award of Kshs.10,000 was therefore reasonable. The Appellant relied on the case of **James Gakinya Karienye and Nancy Murugu Gakinya Vs PremiuM Kariuki Githinji Nairobi HCC NO. 91 OF 2014.**

31. I have reviewed the evidence on record. The Plaintiff produced the Death Certificate of Nixon Kiprotich Koskey (P-Exhibit 2). The Certificate shows that the deceased died as a result of a severe head injury. In the case of **Sukari Industries Limited Vs Clyde Machimbo Jumba (2016) eKLR** the court stated:-

"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 after 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 the sum of Kshs 50,000 awarded under this head is unreasonable."

32. In this case, bearing in mind the circumstances of the accident and the fact that the deceased died on the same day, I find that the trial magistrate was correct in awarding Kshs.30,000 as a fair assessment for pain and suffering.

33. With respect to damages for loss of dependency, the trial court considered the testimony of PW2 that the deceased was a businessman in the business of buying and selling green tea leaves. That he was making about Kshs.20,000 a month. The court held that since there was no documentary evidence adduced, Kshs.8,000 would be reasonable. The court also held that a multiplicand of 12 years to be appropriate and reasonable.

34. The Appellant submitted that the retirement age in Kenya is 60 years. That the deceased would have worked for 13 more years. It is the Appellant's submission that the court ought to have considered the vicissitudes and vagancies of life and in the circumstances that nine (9) years would have been reasonable. The Appellant also submitted that the trial court's decision to award Kshs.8,000 was unsubstantiated. That the court ought to have adopted the minimum wage for an unskilled farmer as per the Minimum Wage Guidelines 2018 which is Kshs.6,000/=.

35. The Respondent on the other hand submitted that the trial court took into consideration submissions made by the Respondent and Appellant in arriving at the award.

36. The bone of contention under this head is the trial court's use of the multiplicand of Kshs.8,000/= and the multiplier of 12 years.

37. With respect to the loss of dependency, Section 4 of the Fatal Accidents Act provides as follows:-

"Every action brought by virtue of the provisions of this act shall be for the benefit of the wife, husband, parents and the child if the person, whose death 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 cost not recovered from the defendant shall be divided amongst those persons in such shares as the court by its judgment shall find and direct."

38. The general scope of assessment of damages was considered in the case of **Beatrice Wangui Thairu Vs Hon. Ezekiel Barngetuny & Another Nairobi HCCC NO. 1638 OF 1988** where Ringera J (as he then was) stated:-

"The Principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased and the dependants. The sum thus arrived at must then be discounted to allow legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature."

39. The evidence on record is that the deceased died aged 47 years as evidenced by the Death Certificate (Exhibit 2). It was PW2's testimony that the deceased was buying and selling tea and could make about Kshs 20,000/=. During cross examination, she stated that the deceased in addition to buying and selling of tea, he had planted tea bushes of his own. There is also a letter from the office of the Assistant Chief which stated that the deceased had one wife who is the Respondent and four issues as dependants. It is salient to note that this evidence was not challenged at the trial stage.

40. Regarding the issue of dependents, the presumption in law is that the deceased is taken to spend 1/3 of his income on himself and 2/3 is available as reserve for the dependents.

41. In determining the loss of dependency and calculation for damages arising out of a fatal accident, the court in **Cookson Vs Knowles (1978) 2 All ER 604** stated:-

> ***"This kind of assessment artificial though it may be, nevertheless calls for consideration of a number of highly speculative factors, since it requires the assessor to make assumptions not only as to the degree of likelihood that something may actually happen in the future, such as the widow's death, but also as to the hypothetical degree of likelihood that all sorts of things might happen in an imaginary future in which the deceased lived on and did not die when in actual fact he did. What in that event would have been the likelihood of his continuing work until the usual retiring age? Would his earnings have been terminated by death or disability before the usual retiring age or interrupted by unemployment or ill health? Would they have increased, and if so, when and by how much? To what extent if any would he have passed the benefit of any increases to his wife and dependent children?"***

42. It is clear therefore that the income or revenue received during the lifetime of a deceased person should not be subjected to a restrictive interpretation and some degree of assumption must be allowed.

43. In this case, the evidence on record is that the deceased earned Kshs.20,000/= monthly from his tea business. The Appellant never controverted this direct evidence from PW2. However, since there is nothing to demonstrate that this was a net income, I am inclined to use Kshs.15,000/= as a guide on the deceased's monthly income. I am guided by the Court of Appeal in the case of **Jacob Ayiga Vs Simon Obayo (2005) eKLR**, where it addressed the issue of lack of documentary evidence thus:-

> ***"We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. This kind of stand would do injustice to many Kenyans who are even illiterate, keep no records and yet earn their livelihoods in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things."***

44. Regarding the issue of multiplier, the trial court used a multiplier of 12 years. The case of **Shah Vs Mbogo Kemfro Africa Ltd & Another (1985) eKLR,** the Court Of Appeal stated;

> ***"I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken consideration and I doing so arrived at a wrong conclusion."***

45. The life expectancy in Kenya as per the 2019 World Bank Data was 67 years. The deceased worked in the informal sector with no statutory retirement age. There is also nothing on record to show that the deceased may have suffered from an ailment as life expectancy is dependent on good health at the very least. Taking into consideration the vicissitudes and vagrancies of life, this court agrees with the trial court on the use of 12 years as a reasonable multiplier.

46. Following the above, I am justified to disturb the award on the loss of dependency. The Respondent is awarded Kshs.15,000x12x12x2/3 which amounts to 1,440,000/=.

Special Damages

47. In this case the trial court did not award funeral expenses for reason that the same had not been proved. However, Section 2 (c) of the Law Reform Act provides that where the death of that person has been caused by the act or omission which gives rise to the cause of action, damages shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum of funeral expenses may be included. In principle that funeral expenses may be awarded where a claim has been made based on the fact that burials attract certain expenses borne by the relatives of the deceased.

48. Section 6 of the Fatal Accidents Act makes provision for funeral expenses. With respect to documentary proof of funeral expenses, the court of Appeal in the case of **Premier Dairy Limited Vs Amarjit Singh Sagoo (2013) eKLR,** that:-

> ***"We do take judicial notice that it would be wrong and unfair to expect bereaved families to be concerned with the issue of record keeping when their primary concern is that a close relative has died."***

49. Further, in the case of **Jacob Ayiga Vs Simon Obayo (2005) eKLR** (*supra*), court held that:-

> ***"We agreed and the courts have always recognized that a reasonable award ought to be made in respect of reasonable and legitimate funeral expenses. But when such a large sum is claimed for such expenses then there ought to be proof of what the money was spent on. We however must not be understood to be laying down any law that in subsequent cases Kshs.60,000 must be given as reasonable funeral expenses. Those items are and must remain subject to proof in each and every case and the Kshs.60,000 awarded herein apply strictly to the circumstances of this case."***

50. In the present case therefore, I find that the trial magistrate misdirected himself in failing to award the funeral expenses despite the same being specifically pleaded in the Plaint. The other expenses were proven by production of receipts as exhibits. The record shows that the

Defendant did not object to those exhibits. I award a sum of Kshs.50,000/= for funeral expenses bringing the award on special damages to Kshs.51,530/=.

51. In the upshot, the Appeal partially succeeds to the extent that the Respondent's award is revised as follows:-

a. Pain and suffering	Kshs.30,000
b. Loss of dependency	Kshs.1,440,000
c. Special damages	Kshs.51,530
TOTAL	**Kshs.1,521,530**
Less 10% contribution	Kshs.152,153
	Kshs.1,369,377

52. The Respondent is awarded **Kshs.1,369,377/=**, costs of the suit in the lower court and interest on the award at court rates until payment in full.

53. As the appeal has partially succeeded, each party shall bear their costs.

54. Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 22ND DAY OF JULY, 2021.

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R. LAGAT-KORIR

JUDGE

Judgement delivered to the parties electronically as per their consent at the following addresses:-

M/s Onyinkwa & Company Advocates for Appellant -

M/s Rono & Company Advocates for Respondent -