REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 131 OF 2018

JOSHUA NTIKA.....APPELLANT

VERSUS

SM (Suing as the Legal Representative

of the Estate of MM-Deceased).....RESPONDENT

(An appeal from the Judgment and Decree of Hon. G.N Wakahiu (C.M) in Maua CMCC No. 100 of 2014) delivered on 14/11/2018)

JUDGMENT

1. Before the trial court was a claim commenced by a plaint dated 22/05/2014 which was subsequently amended on the 10/4/2015 in which the respondent sued the appellant seeking general and special damages for personal injuries under both the Law Reform Act and the Fatal Accidents Act together costs of the suit and interests on such damages and costs. The suit was initiated by the plaintiff in his capacity as the personal representative to the estate of the deceased while the defendant, now appellant was sued, very ambiguously in paragraphs 2 and 3 of both plaints, on the basis that he was the driver or registered owner of the motor vehicle Registration Number KBQ 730 E, TOYOTA PROBOX.

2. The gist of the claim was pleaded to be that on or about 5/11/2011, the deceased was lawfully walking along a pedestrian path along Meru-Maua Road, at Mailitatu, when the appellant so negligently, recklessly and carelessly drove the motor vehicle aforesaid, that it veered off the road and valiantly and negligently knocked down the deceased, thereby fatally injuring him. The deceased was said to have been enjoying good health and was living a happy and vibrant life, which was prematurely cut short by the said accident. By her death, her estate has suffered great loss and damages. For the accident, the respondent blamed the appellant under the tort of negligence and sought liability for payment of damages against him for the loss suffered by the estate and the deceased dependants.

3. The appellant vigorously denied the claim by his statement of defence dated 23/9/2014 and prayed for the respondent's suit to be dismissed. In the statement of defence filed, ownership and driving of the motor vehicle were denied as much as the manner of the occurrence of the accident. Alternative and further alternative and without prejudice pleading was made that that the accident was wholly caused or substantially contributed to by the deceased and that the accident was inevitable and caused by circumstances beyond the control of the appellant. The particulars of the negligence attributed to the deceased were all set out.

4. At the conclusion of production of evidence and in a reserved judgment, the trial court found that the respondent had proved his case on a balance of probability, apportioned liability at 80:20% in favour of the respondent then assessed and awarded Kshs 480,000 for loss of dependency and special damages of Kshs15,000.

5. The appellant was aggrieved by the said decision and thus filed the Memorandum of Appeal herein on 11/12/2018 listing four (4) grounds of appeal. A closer reading of the grounds shows that the appellant attacks the judgment on three prongs; that the trial court misapprehended the applicable principles in awarding the sum of Kshs 480,000 for loss of dependency, contended to be erroneous and inordinately high; that the trial court erred by apportioning liability at 90:10(sic) against the evidence tendered; that there was no proof of the claim by the respondent and lastly that the judgement is self-contradictory with glaring errors on the face of it.

6. Based on that background, I find that the issues for determination are whether the apportionment of liability finds support in the evidence on record and secondly, whether the award of damages for loss of dependency was inordinately high and erroneous. I take the complaint of contradictions in the judgment and whether the claim was proved to the requisite standards to be all encompassing and must be the foundation of this decision.

7. 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 ***Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212***.

8. In evidence, **PW1 David Kinyua Chokera,** recalled seeing the deceased, who was carrying firewood and jembe, coming from Maua towards Mailitatu. He then saw a motor vehicle which entered the tarmac road at a very high thereby hitting the deceased. During cross examination, he confirmed that although he was present when the accident occurred, he did not see the registration number of the motor vehicle. He further affirmed that it was dark and the motor vehicle entered the junction at high speed.

9. **PW2 Inspector Abdi Godana**, Deputy Base Commander Maua, produced the police abstract, motor vehicle record and the post mortem in respect of the deceased. He however clarified during cross examination that, he did not visit the scene because he was not the investigating officer.

10. **PW3, SM**, the respondent herein and the son to the deceased, testified that he was informed through the phone that his mother had been knocked down by motor vehicle registration number KBQ 730 E at Maili tatu. He rushed to the scene but was informed that the deceased had been taken to Maua Methodist Hospital. Upon his arrival at the hospital, he learnt that his mother had already passed on. He stated that the deceased was taking care of them as their father was sickly. During cross examination, he maintained that although they were all self-reliant, the deceased was working and helping them. He went on to state that he was the representative of his mother's estate, although he did not have any grant.

11. In defence of the appellant, one **Isaac Murira M'Mwaine, DW1,** admitted that he was driving motor vehicle registration number KBQ 730 E on the material day but driving slowly at 80 Kph, when the deceased, abruptly and absentmindedly dashed on the road. According to him, he did everything humanly possible to avoid hitting the deceased but, it was inevitable because there was an oncoming lorry and children on the other side of the road. To him had he swerved, he would have hit the children. He wholly blamed the deceased for causing the accident. During cross examination, he stated that there were bumps near the scene and he was driving slowly, carefully and keenly at 80 kph and that the place was a market.

12. Despite directions by the court on 27/07/2020, that the appeal would be canvassed by way of written submissions, it appears only the appellant filed such submission. The defendant's submissions are not on record and even on the date set for mention for further directions no appearance was made on his behalf.

13. In the submissions, the appellant contended that the respondent did not sufficiently prove negligence on his part, hence liability ought to have been apportioned equally between the parties. The appellant agreed with the multiplicand of Ksh.4000 but takes an issue with the dependency ratio and the multiplier applied, given all the deceased children were independent adults. He contended that the judgement had glaring errors which he called upon this court to rectify. The contradictions highlighted and which are beyond denial is the finding on liability and its apportionment which talks of 80:20 and 90:10 as well as the multiplier. The appellant cited the cases of **Hussein Omar Farah v Lento Agencies (2006) eKLR, Nelson Njihia Kimani v David Marwa & anor (2017)eKLR ,Muasya Mbuvi Kiseli v Martin Mutisya Kiio & anor (2010) eKLR** and **Omar Sharif & 2 others v Edwin Matias Nyonga & Maxwell Musungu (Suing as legal representatives and administrators of the estate of Enos Nyonga-Deceased (2020) eKLR** in support of his submissions that the appeal be allowed.

14. It is firmly established that an appellate court will only interfere with the trial court's discretion on assessment of damages, if it is satisfactorily established that, the trial court took into account an irrelevant factor or left out of account a relevant factor or the award was too high or too low as to amount to an erroneous estimate or the assessment of damages**.** *(See **Gitobu Imanyara & 2 others v Attorney Genera**l [2016] eKLR).* On the other hand, this court sitting as an appellate court of the first instance can only reverse the trial court on factual findings when there is a clear demonstration that the finding is grounded on misapprehension of the evidence, when the two cannot be reconciled or where there is employment of wrong principles to arrive at the finding. See ***Mwangi v Wambugu** [1984] KLR 453* where reiterated the law in the following words; -

> **"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 account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanor of a witness is inconsistence with the evidence in the case generally."**

15. The foregoing brings me to the ground on whether there were glaring errors in the judgement by the trial court that demand rectification and if such rectification will resolve the contention on the award being inordinately high and erroneous.

16. Having carefully perused the judgement of the trial court, I concur with the appellant that there are indeed errors and glaring contradictions in the judgment. At page 68 of the record of appeal, the trial court in its decision expressed itself thus: -

> **"Bearing all the circumstances of this case in mind, I am of the opinion that 20% contributory negligence on the part of the deceased is appropriate. I therefore entered judgement in the ratio of 80% against the defendant and 20% against the deceased."**

17. Yet at page 76 of the same record of appeal, the trial court states that, **"The above figure shall be subjected to the 10% contributory negligence apportioned to the deceased."** This was rather an obvious departure from its initial decision. Similarly, at page 74 of the record of appeal, the trial court observed, **"The other issue for consideration is what a multiplier to apply. The deceased in this case was aged 65 years. I am of the opinion that a multiplier of 10 years would be suitable in the circumstances. The claim under this rubric should therefore be computed as follows; $4,000\times12\times15\times{}^{2}/_{3}$=480,000 and I award the sum of Kshs 480,000 under this head."**

18. My reading of this record tells me that there are indeed self- contradictions in the judgment which ideally call for correction by the trial court under section 99 of the Act. These are to me clear contradiction that are resolvable by just seeking a flow of thought from the judgment and are best handled by the trial court rather than on appeal.

19. I take the view that if an appellate court was to set itself on the path of correcting such errors, it would be deviating from the duty to appraise the evidence afresh with a view to coming to own conclusions without feeling bound by the findings of the trial court. Albeit very glaring, I am hesitant to do a mere cleaning exercise but will seek to execute the mandate of this court as a first appellate court. I must therefore embark on that mandate.

20. The burden upon the respondent was at all times within a balance of probabilities and no higher. The record reveals that the testimonies of PW1 and PW3 were not meaningfully challenged during cross examination. DW1 in his testimony stated that he was driving slowly and keenly at a speed of 80 kph. I find that a speed of 80kph at a market center can never be termed reasonable, diligent or prudent. In my understanding of the law, in such places one is prohibited from driving at more than 50kph. By own testimony that he was doing 80kph, the appellant's driver confessed to have been doing an illegal speed. He was over-speeding. It is that speed that he says could not allow him control the vehicle otherwise for any swerve was bound to cause a collision. In his words he said: -

> "**there were children on the left hand side. I could not go to their side.**
>
> **I would have hit the children. If I swerved to the right, I would have had a head on collision with the lorry."**

21. In my finding, the appellants driver acted without due diligence in the manner he drove and in failing to maneuver the vehicle in a way to be able to avoid hitting the deceased. That was outright negligent and tortious. He could as well have qualified to shoulder the entire blame but the evidence of the eye witness, PW1 was equally not very explicit on where the accident occurred in relation to the road. In conclusion, I hold that had the appellant been driving carefully and slowly within the statutory limits, he would have seen the deceased in good time and timeously applied breaks, in order to avoid the accident. I therefore concur with the trial court that the appellant was driving at a high speed in the circumstances, and he should shoulder a bigger portion of liability. Since I lack the benefit the trier of fact had in taking the evidence first-hand I am hesitant to interfere with the finding on liability and its apportionment. I do find as the trial court did that the appellant's driver contributed more to the accident, in approaching a junction at a market center, at a speed higher that the statutory set limit. I assess his contribution at 80% while the deceased shoulders 20% in contributory negligence.

22. It is not disputed that the deceased herein was quite elderly and she had self-reliant grown up adults, a fact buttressed by PW3. However, evidence was led that the deceased used to take care of her sickly husband, and to that extent, I find that, if not the children, the husband would be her dependant owing to the fact that the evidence of PW3 in that regard was never rebutted. That I find to be an irresistible conclusion when I note that the husband was said to have been sickly since the year 1975.

23. However, dependency being a matter of fact must be proved. A matter, or fact avails itself for proof only when pleaded because parties are bound by their pleadings. Here, there was no pleading pursuant to the provisions of section 7, Fatal Accidents Act in terms of for whose benefit the action was brought. I thus find it strange that the trial court found at paragraph 2 of page 73 of the Record of Appeal that there were four other dependants of the deceased, apart from the respondent, when the same are nowhere in the amended plaint. Submissions are never pleadings to found a decision of the court on factual matters. It would appear the trial court was misled by the submissions by the respondent which introduced the list of some 7 people as dependants. What is more, there are other findings of fact that some of those named as dependants were deceased. That is also a finding not supported by any evidence nor pleadings. To that extent, the finding of dependants was not based on evidence and cannot be left to stand. I do find that without evidence of dependency and particulars of dependants the claim for loss of dependency had no legs to stand upon. The same is thus set aside.

24. Having said and found so, the arguments as to whether the deceased had an income becomes moot save to say that in such circumstances when the court is minded to apply the multiplier formula, it ought to adopt the minimum wage but the better option is to award a global sum. In my view, this was a good case even to seek damages for loss of amenities, including damages for loss companionship, on behalf of the said husband. I must point out that a more elegant pleading in this regard would have served the interests of justice better.

25. Very lastly, I must reappraise the finding on special damages. This I do as part of my mandate to reexamine the entire record and come to own conclusion. While it is true that special damages must be proved strictly, it is also true that strict proof is not limited to proof by way of documents. That is the jurisprudence of the superior courts of Kenya since **Jacob Ayiga Maruja & another v Simeon Obayo [2005] eKLR.**

26. One of the heads of special damages was funeral expenses claimed in the sum of Kshs 160, 000 by the amended plaint dated 10.4.2015. In his evidence in chief, PW3 produced among other documents a receipt, marked EXHP5, from NExTGEN FUNERAL SERVICES, dated 11/11/2011 for Kshs 160,000, a receipt from his advocates for Kshs 8,000, being legal fees for a demand notice, copy of the records from KRA for the offending motor vehicle, death certificate, post mortem report and a police abstract. Once again a better draftsmanship should have revealed what expenses were incurred for postmortem, copy of records, death certificate and police abstract. No figures were given.

27. In his determination at page 74 of the record, the trial court declined the claim, despite finding that proof had been availed, on the basis that the plaint dated 24/05/2014 had not pleaded special damages. In coming to that conclusion the court overtly overlooked the amended plaint filed with the leave of the court granted on 9/3/2014. That is a glaring error which this court cannot leave to stand. I do find that funeral expenses were duly pleaded and proved in the sum of Kshs 160,000. To that extent, the award of special damages in the sum of Kshs 15,000, which I consider to have awarded gratis and as a token, is set aside and in its place substituted a sum of Kshs 160,000

28. By way of dictum, and while I have found that there was no pleading nor receipts for motor vehicle search, death certificate, post mortem and police abstract, those are expenses that are in public knowledge and their cost and should not require strict proof by independent receipts. Had the same been pleaded I would have awarded same for it is common knowledge, and I do take judicial notice, of what the cost thereof is, being document issued by public offices.

29. In conclusion, I do set aside the award of general damages for loss of dependency in entirety but substitute the award for special damages in the sum of Kshs 15,000 with an award of Kshs 160,000. On that sum, the respondent shall be paid interests at court rates from the date of the suit till payment in full.

30. On costs, I find that both sides have succeeded in equal measure and order that each shall bear own cost

DATED SIGNED AND DELIVERED AT MERU VIRTUALLY VIA MICROSOFT TEAMS, THIS 9TH DAY OF AUGUST 2021.

PATRICK J.O OTIENO

JUDGE

IN PRESENCE OF MISS KIMUNYO FOR APPELLANT

NO APPEARANCE FOR THE RESPONDENT

PATRICK J.O OTIENO

JUDGE