



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO.E003 OF 2020

JANEROSE AUMA OCHUMBA.....APPELLANT

VERSUS

JOHN NYANGI.....1ST RESPONDENT

CATHERINE BWIRE T/A JADIDA INVESTMENT.....2ND RESPONDENT

J U D G M E N T

[1] In the statement of claim dated 6th February 2018, the appellant, **Janerose Auma Ochumba**, who was the plaintiff in Busia CMCC No.20 of 2018, prayed for judgement for general and special damages together with costs of the suit against the first and second respondents (**defendants**) arising from a road traffic accident which occurred on 31st December 2013, along the Busia/Kisumu Road involving a m/v Reg No.KAD 258U Isuzu lorry belonging to the second respondent and driven at the time by the first respondent and which the deceased husband of the appellant who was travelling in the vehicle as a lawful passenger suffered fatal injuries.

[2] The appellant contended that the respondents caused the accident in the manner that the vehicle was at the material time being driven at a high speed, in a zig zag manner and without due diligence.

The appellant therefore prayed for damages and costs of the suit against the respondents whose statement of defence dated 24th September 2018, was a denial of the allegations made against themselves by the appellant and a contention that if indeed the accident occurred, then it was wholly or substantially occasioned by the negligence of the deceased in that he boarded the vehicle with full knowledge that it was not a passenger vehicle and was standing in the vehicle without a fastened seat belt or at all thereby endangering his life.

The respondents therefore prayed for the dismissal of the appellant's claim with costs.

[3] The matter proceeded to hearing ex-parte the respondents with the appellant (**PW 1**) testifying and calling a witness called Josephat Okello (**PW 2**), a motor cycle taxi operator ("**boda boda**")

The trial court rendered its judgement on 28th September 2020, in which it apportioned liability at the ratio of 60:40 in favour of the appellant and awarded damages in the total sum of ksh.887,600/= made up as follows:-

(1) Pain and suffering	Kshs.10,000/=
(2) Loss of expectation of life	kshs.100,000/=
(3) Loss of dependency	ksh.1,296,000/=
Less contribution of 40%	kshs.777,600/=

[4] Ironically, the beneficiary of the judgment and award was the appellant, yet she felt aggrieved and preferred this appeal on the basis of the grounds set out in the memorandum of appeal dated 5th October 2020, seeking orders setting aside the judgement and for this court to proceed and assess quantum.

Without doubt, the appeal is against the judgement of the trial court in its entirety. Therefore, the prayer for this court to re-asses the quantum of damages is rather misplaced as this cannot be effected if the entire judgement is set aside or affirmed by this court.

[5] The hearing of the appeal proceeded by way of written submissions which appears to be in vogue these days.

In that regard, this appellant's submissions dated 19th March 2021, were filed by **Balongo & Co. Advocates**. The respondents did not take part in this appeal despite having been served with the necessary hearing notice though the second respondent.

[6] In effect, the appeal was unopposed and this court, having considered the supporting grounds and submissions and also having considered the evidence adduced before the trial court by the appellant's witness bearing in mind that the trial court had the advantage of seeing them, would take the view that the occurrence of the accident and the ownership of the ill-fated m/v Reg No.KAD 258M Isuzu lorry are factors that were not at all or substantially disputed by the respondents.

[7] The basic issue which arose for determination was whether the respondents were responsible or culpable for the accident on account of their negligence in the manner of driving and/or controlling their ill-fated m/vehicle.

Whereas the vehicle belonged to the second respondent, it was at the time being driven by her driver, the first respondent with her consent and permission. The driver's acts of negligence were therefore attributable to the second respondent as the owner of the vehicle.

[8] On the question of liability, the trial court apportioned the same at the ratio of 60:40 in favour of the appellant for reasons that the deceased failed to exercise due care and caution by boarding and travelling in a commercial m/vehicle which was not authorized to carry fare-paying passengers.

This court's view in that regard would be that the respondents were fully liable for the accident as the deceased being a mere passenger had no form of control of the vehicle. His presence in the vehicle was permitted and authorized by its driver who, as it were, was the controller and manager of the vehicle. There was no evidence that the deceased was a fare paying passenger. It cannot therefore be said that he disregarded his own safety as a fare paying passenger by boarding and travelling in unauthorized m/vehicle.

[9] If there was any person who disregarded the safety of the deceased, then it was the driver of the vehicle who invited the deceased into the vehicle and gave him a lift to a destination he never reached, thanks to the accident, knowing too well that the vehicle was not authorized to carry travelling passengers. Indeed in allowing the deceased into the vehicle, the driver must have been in breach of the terms of his employment with the second respondent, but the second respondent did not testify in court to deny or affirm the fact.

[10] The apportionment of liability between the appellant and the respondents was therefore unnecessary. There was no way that the deceased could be held fully or partly liable for the accident involving a m/vehicle he had no control over. It was therefore erroneous for the trial court to apportion liability at a whooping ratio of 60:40 in favour of the appellant.

This appeal would thus, be meritable on the question of liability which would invariably positively affect the award of damages made to the appellant.

[11] On the question of quantum of damages, the respondents were fully liable to the appellant for loss and damage arising from the accident. Since the deceased suffered fatal injuries, the appellant was entitled to damages from the respondents under the Law Reform Act and the Fatal Accidents Act.

Damages for loss of expectation of life and for pain and suffering would fall under the Law Reform Act on behalf of the estate of the deceased while damages for loss of dependency would fall under the Fatal Accidents Act on behalf of the dependants of the deceased.

[12] It is this court's opinion that the award of damages made under the various heads by the trial court was proper, reasonable and lawful there being no contributory negligence on the part of the appellant.

This appeal is otherwise allowed in terms of setting aside of the trial court's entire judgement made on 28th September 2020, not because of the grounds contained in the memorandum of appeal but for reason that the trial leading to the judgement was conducted in the absence of the respondents as there was no evidence that they had failed to appear in court having been served with the necessary hearing notice or notices. It is instructive to note that they filed a defence through an advocate who later ceased to act on their behalf. Nonetheless, their statement of defence was validly on record.

[13] No man or woman should suffer the indignity of being condemned without being heard.

In sum, this appeal is hereby allowed in terms of prayer (1) of the memorandum of appeal but for reasons stated hereinabove.

Ordered accordingly.

[DELIVERED AND SIGNED THIS 30TH DAY OF SEPTEMBER 2021]

J.R KARANJAH

J U D G E