REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. E036 OF 2020

JULIUS NGOBITO MURIUNGI..... APPELLANT

VERSUS

JOHN GICHUNUKU MAIROKI.....RESPONDENT

(An appeal from the Judgment and Decree of Hon. R.Ongira (R.M) in

Tigania PMCC No. 92 of 2017) delivered on 25/11/2020)

Judgment

1. By a Plaint dated 11/10/2017, the respondent sued the appellant seeking special damages, damages under both the Law Reform Act and the Fatal Accidents Act and costs of the suit plus interest.

2. The respondent's claim was that on or about 20/12/2015, the deceased was walking along Meru-Mikinduri Road, when the appellant so negligently and carelessly rode motor cycle Registration Number KMCY 888U that he knocked down the deceased. At the time of his death, the deceased was aged 22 years. As a result of the accident, the deceased vigorous life was cut short which occasioned loss and damage to his dependants.

3. The evidence before the trial court was that, **PW1 John Gichunuku Mainuku,** the respondent herein and the father to the deceased aged 60 years, stated that he had sued the owner and the rider of the motor cycle. On the material day, he had come home from church since it was on a Sunday. At 3.00 pm- 4.00 pm, a boy, namely Amos Muchui came to his home in a rush to inform him that, his son had been hit by a motorcycle, from Meru-Mikinduri in a corner at Mwianda area, and he needed to rush to take him to hospital. He took his pick up and proceeded to the scene of the accident and with the help of good Samaritans, they put the victim and the rider of the motor cycle on the pick up. They passed by Mikinduri police station before proceeding to Meru General Hospital where the victim was pronounced dead on arrival, while the rider was put on treatment. On their way to the hospital the rider told him he was called Reuben Gitonga and he was coming from Meru to buy milk for a hotel owned by Julius Muriungi Ngoritu. On arriving at the police station, he informed the police that he already knew the owner of the motor cycle because he had interrogated him. The owner of the motor cycle was charged with permitting use of uninsured motorcycle and failing to keep records of the driver. The said owner was found guilty and convicted. The deceased was a healthy boy and he was depending on him as he was their hope at home. The deceased was survived by his son namely Melvin Karani Kobia, who was then 6 years. After the death of the deceased, the wife to the deceased re-married and left Melvin with them. He sought compensation to enable him educate his grandson. He produced the grant of letters of administration Ad Litem (PExh 1), Police Abstract (PExh 2), Death Certificate (PExh 3) and Proceedings of Traffic Case No.39/2017 (PExh 4) in support of his case.

4. During cross examination, he stated that person who was riding the motor cycle on the material day was not the owner. He stated that the owner was not present when the accident occurred. He went on to state that he could not tell whether the rider had permission to ride the motor cycle. Although he did not have a search, the owner admitted that the motor cycle was his. Melvin was the son to the deceased but he did not have documents to proof the same. His son, the deceased was a standard 7 drop out and a boda boda rider, although he did not produce the driving license to show that the deceased was a qualified rider. He had also not produced any documents to prove how much the deceased earned, because the deceased was living his life and running his business.

5. In re-examination, he stated that police the abstract produced in court indicated that the appellant was the owner of the motor cycle. He reiterated that Melvin Karani Kobia was a son to the deceased.

6. **PW2, Amos Modui Miriti**, an eye witness, was on the material day walking with the deceased off the road heading to the deceased home to give cows water. They heard the engine of a motor cycle behind them and moved further into the bush. The rider of the motor cycle, that was being ridden at high speed, lost control that it came where they were, hit the deceased and threw him into a nearby ditch. After hitting the deceased, the motor cycle flipped to the other side of the ditch. Upon seeing what had happened, he ran to inform PW1, who came with a vehicle to take both Reuben and the deceased to report to the police station. Thereafter, they took them to the hospital but the victim was pronounced dead on arrival while the rider was admitted for treatment. After taking the deceased to the mortuary, they checked on the rider, who was in a stable condition, and then went home. He confirmed that he had heard the rider inform PW1 that the motor cycle was

owned by the appellant. The rider further informed PW1 that it was the appellant who had sent him to collect milk for the hotel.

7. During cross examination, he reiterated that he had heard the rider tell PW1 that the appellant had given him the motor cycle to go and collect milk. He stated that he had not recorded in his statement that that he heard the rider say he had been sent by the appellant.

8. In re- examination, he stated that although he could not remember what he had recorded in his statement, he had heard the rider inform PW1 that the motor cycle was owned by the appellant.

9. The appellant robustly denied the claim through his statement of defence dated 20/12/2017 and prayed for the respondent's suit to be dismissed.

10. In his defence, **DW1, Julius Muriungi Nkobitu** and the appellant herein, testified that on the material day, he woke up in the morning and went to his hotel using his motor cycle. He parked the said motor cycle in front of his hotel, went inside to make some arrangements, put the motor cycle's keys on the counter and then left for church soon thereafter. At about 2.00 pm, he received a call from PW1 and Gikundi informing him that one of his workers fell with a motorcycle in a ditch and was taken to Meru General Hospital. On his way to the hospital, he saw his motor cycle very far in a ditch. PW1 was the one who had taken the rider and the victim to the hospital. When he arrived at the hospital, PW1 told him that the victim had succumbed to the injuries while the rider was in the ward. The rider, namely Reuben Gitonga, whom he had known for about 2 weeks, was his employee in the hotel. The motor cycle was for his own use and the said Reuben had taken the keys to it without his permission. The motor cycle was in a ditch far from the hotel and PW1 took the deceased and the rider to the hospital because he knew them well. He also adopted his witness statement recorded on 20/12/2017 as his evidence.

11. During cross examination, he confirmed that the appellant owned the subject motor cycle as well as the hotel. Although Reuben was his employee, he did not have any document to show that he had worked for him for 2 weeks only. He stated that he did not see the rider and the deceased board the motor cycle. He was called by Gikundi, PW1's son, who informed him of the accident. He did not go with the motor cycle to church because it was not insured. He concluded that he lived where the hotel was.

12. During re-examination, he stated that he recorded in his statement that he was in church when the accident occurred.

13. **DW2 Geoffrey Muriuki Ntangi**, adopted his statement recorded on 20/12/2017 as his evidence in chief. He testified that he was with DW1 at Africa Pentecost, when DW1 received a call from PW1 that his motor cycle had been involved in an accident. DW1 was shocked how the motor cycle had been involved in the accident, yet he had not given it to anyone. Although he accompanied DW1 to the hospital, he did not go to the wards.

14. During cross examination, he maintained that he was with DW1 in church when the accident allegedly happened and that he was not present when the accident occurred.

15. After trial, the trial court found that the respondent had proved his case on a balance of probabilities and entered judgement in his favour against the appellant as follows:

a) Pain and suffering Ksh.10,000

b) Loss of expectation of life Ksh.100,000

c) Loss of dependency Ksh.1,315,646.30

d) Special damages Ksh.30,000

Total award **Ksh.1,455,646.30**

16. Aggrieved by the said decision, the appellant filed his Memorandum of Appeal on 15/12/2020 listing 8 grounds of appeal. The appellant faulted the trial court for holding that he was 100% liable in negligence when no evidence was tendered to proof the same, yet the deceased had wholly or substantially contributed to the occurrence of the accident. He faulted the trial court for awarding Ksh. 100,000 for loss of expectation of life. He faulted the trial court for awarding Ksh. 1,315,646.30 for loss of dependency when the same had not been established through cogent and credible evidence. He faulted the trial court for finding him liable whereas the respondent had not proved his case against him on a balance of probabilities. He faulted the trial court for awarding the respondent an inordinately high amount of damages, thereby arriving at a judgement that was wholly against the weight of the evidence and law.

Submissions

17. The parties filed their submissions in respect to the appeal on 30/9/2021 and 1/11/2021 respectively. The appellant submitted that since it had been established that he was not the rider of the subject motor cycle at the time of the accident, the trial court misdirected itself in holding him 100% liable. He faulted the trial court for holding that the respondent had proved his case against him on a balance of probabilities, yet no negligence was proved on his part, because the record showed that Reuben was the rider of the subject motor cycle at the material time. He submitted that the witnesses of the respondent's departure from their pleadings supported the appellant's defence. He faulted the trial court for incorrectly applying the doctrine of vicarious liability, yet the alleged rider was never joined to these proceedings.

18. He submitted that the respondent did not adduce any evidence to prove that the deceased had a wife and a son and whether he supported them. He faulted the trial court for adopting a dependency ratio of $^{2}/_{3}$ yet there was no evidence that the deceased supported the alleged

dependants. According to him, the trial court ought to have adopted the usual dependency ratio of $^{1}/_{3}$, but since the respondent did not proof his case in the trial court, the award was flawed ab initio. He urged the court to re- evaluate the evidence on record and allow the appeal with costs.

19. On his part, the respondent submitted that since the appellant did not take out 3rd party proceedings against his employee, Reuben, the trial court was just and squarely right in finding the appellant vicariously liable and apportioning 100% liability in his favour. In reminding the court of its duty as a first appellate court, he submitted that he did not see any justification for this court's interference with the trial court's finding on liability, as the appellant did not rebut the same. On the issue of dependency, he submitted that the appellant did not challenge PW1's testimony that the deceased supported his wife and child. Moreover, the mere fact that there existed a child is sufficient proof that a woman existed. In beseeching the court to maintain the dependency ratio of $^{2}/_{3}$, he cited **Crown Bus Services Ltd & 2 others v Jamilla Nyongesa & Amida Nyongesa (Legal Representatives of Alvin Nanjala (Deceased) 2020) eKLR**, where the court accepted the dependency ratio of $^{2}/_{3}$ for unmarried woman with a child and mother to support. He concluded that the appeal ought to be dismissed with costs.

Analysis and determination

20. This being a first appeal, this court is enjoined to revisit the evidence that was before the trial court afresh, analyze it, evaluate it and arrive at its own independent findings and conclusions, but always bearing in mind that the trial court had the benefit of seeing the witnesses, hearing them and observing their demeanour and give allowance for that. See ***Selle v Associated Motor Boat Co. & others [1968] E.A. 123.***

21. The issues for determination are whether the trial court erred in apportioning liability at 100% against the appellant, and whether the sums awarded for loss of expectation of life and loss of dependency were inordinately high.

22. PW2, an eye witness, testified that him and the deceased were off the road walking, moved further into the bush but the motor cycle which was being ridden at a high speed and was unable to be control by the rider moved even deeper into the bush hit the deceased and threw him into a nearby ditch. That evidence was not subjected to any cross examination. Indeed, the appellant buttressed PW2's testimony when he stated that, **"I then proceeded to the Hospital but on my way I saw my motor cycle in a ditch very far but after looking at it, I proceeded to Meru."**

23. In ***William Kabogo Gitau v George Thuo & 2 Others [2010] 1 KLE 526*** the court stated that:

> **"In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely that not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."**

24. In my candid view, the respondent proved on a balance of probabilities that the appellant was wholly to blame for the accident. PW2 clearly illustrated that the deceased did not in any way contribute to the occurrence of the accident, as he was not anywhere close to the road. It was conceded by DW1 that he was the owner of the subject motor cycle and the rider at the material time was his employee. Further, the information contained in the police abstract which was produced as exhibit vividly demonstrated that the subject motor cycle belonged to the appellant. I therefore concur with the finding of the trial court that the appellant was 100% liable.

25. On whether the sums awarded for loss of expectation of life and loss of dependency were excessive, the principles under which the court can interfere with the findings of fact by the trial court on quantum were laid out in ***Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5,*** where it was held 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."**

26. PW1 testified that the deceased had a wife and a son, but the wife had since remarried. Dependency is a matter of fact and must be proved by evidence as was held in ***Abdalla Rubeya Hemed v Kayuma Mvurya & Another [2017] eKLR*** **as follows:-**

> **"Dependency is always a matter of fact to be proved by evidence. It is not that the deceased earned a sum and therefore must have devoted a portion or part of it to his dependence. Rather the claimant must give some evidence to show that he was dependent upon the deceased and to what extent**."

27. Similarly in ***Rahab Wanjiru Nderitu v Daniel Muteti & 4 Others [2016] eKLR*** the court held that:-

> **"The plaintiff must prove dependency. If a wife, she must prove marriage to the deceased either by customary marriage or by production of marriage certificate or by any other acceptable manner, by a letter from the Chief confirming that the plaintiff is a wife of the deceased and that the children are children of the deceased in the absence of birth certificates or any other documents to confirm the same."**

28. PW1 failed to adduce documentation to prove that his alleged grandson was indeed a child to the deceased. He did not also lead evidence to show the whereabouts of the mother of the deceased at all. In the absence of such proof, I find that PW1 was the only dependant in line with the provisions of **Section (4) (1) of the Fatal Accidents Act** which stipulates as follows:- **"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: Provided that not more than one action shall lie for and in respect of the same subject matter of complaint, and that every such action shall be commenced within three years after the death of the deceased person."

29. It is not disputed that the deceased succumbed to injuries he sustained as a result of the appellant's negligence. It is also not disputed that he was aged 22 years at the time of his death and he was enjoying robust life. What is in dispute is the source of the livelihood of the deceased and how much he made thereon. PW1 testified during cross examination that, **"My son was 22 years. He had stopped schooling at standard 7. He was a boda boda rider at the time of his death. I have not produced any driving license to show my son was qualified to ride a motor cycle. I have not shown any documents to demonstrate how much he was earning because he was his own person running his business and living his life."**

30. Evidently, the deceased engaged in some profit earning activity to make ends meet, even though no receipts were produced. I associate myself with the sentiments made by the court in ***Jacob Ayiga Maruja & anor v Simeon Obayo (2005) eKLR*** the court observed that, the absence of proof of the deceased earnings in form of receipts cannot be construed to mean he was not working for gain.

31. Here, PW1 failed to demonstrate how much the deceased earned and the trial court properly adopted the multiplicand of Ksh.5,844.20, being the minimum wage because the earnings of the deceased had not been established with certainty.

32. PW1 equally failed to tangibly demonstrate whether the deceased supported him and what percentage of the deceased income was used in that support. I therefore find that a dependency ratio of $^1/_3$ would suffice in the circumstances. The award under loss of dependency would thus be **5,844.20×12×28×$^1/_3$ = 654,550.4**

33. I must state that assessment of damages, even for loss of dependency, together with the method adopted in that assessment is purely at the discretion of the trial court. The Court of Appeal in appreciating the trial court's discretion in assessment of damages in ***Catholic Diocese of Kisumu v Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55*** held as follows:

> **"It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."**

34. The award of Ksh.100,000 for loss of expectation of life, was in my view, based on precedent and inflation rates and therefore, justifiable in the circumstances.

35. The upshot from the foregoing facts is that the appeal partly succeeds.

DATED SIGNED AND DELIVERED THIS 26TH DAY OF NOVEMBER, 2021

PATRICK J.O OTIENO

JUDGE

IN PRESENCE OF

NO APPEARANCE FOR APPELLANT

NO APPEARANCE FOR RESPONDENT

PATRICK J.O OTIENO

JUDGE