



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CIVIL APPEAL NO. 127 OF 2018

BETWEEN

PENINA AKINYI WANDIAN.....APPELLANT

AND

ERICK OLOO WAGA(suing as personal representatives of the estate of

***George Odhiambo Waga*)RESPONDENT**

Consolidate with

CIVIL APPEAL NO. 129 OF 2018

ERICK OLOO WAGA (suing as personal representatives of the estate of

***George Odhiambo Waga*)..... APPELLANT**

AND

PENINA AKINYI WANDIAN.....RESPONDENT

(Being an Appeal from the Judgment and Decree in Kisumu CMCC No. 308 of 2016 by Hon. M.Agutu(SRM) on 30th November, 2018)

JUDGMENT

1. **ERICK OLOO WAGA (Erick)** suing as personal representatives of the estate of **George Odhiambo Waga (Deceased)** sued **PENINA AKINYI WANDIAN (Penina)** in the lower court claiming damages for fatal injuries suffered by his son on 30th May, 2015 when he was knocked down by Appellant's motor vehicle KCB 136G while lawfully walking along Busia-Kisumu Road at Ojola area allegedly due to the negligence of the Appellant, her driver, agent and or servant.

2. The Appellant in her statement of Defence denied the claim and blamed deceased for the accident.

3. After hearing both parties, the learned trial magistrate in a judgment dated **30th November, 2018** apportioned liability at 70% against the deceased and 30% against **Penina** and awarded damages in the sum of Kshs. 600,898/- after contribution.

The Appeal

4. **Penina** being dissatisfied with the lower court's decision preferred this appeal and on 14th December, 2018 filed the Memorandum of Appeal dated 14th December, 2018 which sets out 7 grounds of appeal which I have summarized into 2 grounds that:

- 1) **The finding apportioning liability to her was unsound and unsupported by evidence**
- 2) **The assessment on quantum on the basis of a minimum wage of unspecified worker was erroneous**

5. **On the other hand, *Erick*** being dissatisfied with the lower court's decision also preferred an appeal and on 22nd March, 2019 filed the Memorandum of Appeal dated 19th December, 2018 which sets out one ground challenging the apportionment of liability against the deceased.

Analysis and Determination

6. This being the first appellate court, its duty is to re-evaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. (See **Selle & Another v Associated Motor Boat Co. Ltd & Another (1968) EA 123.**)

7. I have considered the entire record of appeal and considered the submissions of counsels for both parties. I note that the appeals revolve around the question of both liability and quantum.

a. Liability

8. From the evidence on record, it is apparent that the deceased was crossing the road when the accident occurred. The learned trial magistrate found the deceased mainly to blame for crossing the road when it was not safe to do so and also found that the driver of the accident motor vehicle having seen the deceased before the accident occurred had also had a duty to exercise due care and attention.

9. From the foregoing, I find that the analysis by the trial magistrate on liability and the verdict thereof was well founded and I decline to interfere with that finding.

b. Loss of dependency

10. The extent to which an appellate court may interfere with an award of damages is well settled. It must be shown that the trial court in awarding of the damages took into consideration an irrelevant fact or the sum awarded is inordinately low or too high that it must be a wholly erroneous estimate of the damage, or it should be established that a wrong principle of law was applied (See **Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v A.M. Lubia and Olive Lubia (1985) 1KAR**) and **Denshire Muteti Wambua V Kenya Power & Lighting Co. Ltd, Civil Appeal No. 60 of 2004.**)

11. The evidence on record reveals that deceased's occupation was not proved. I totally agree with ***Penina's*** advocate's submissions that the court ought to have applied the wages of a general worker which was Kshs. 5,844.20 deceased and not Kshs. 11,831.20 adopted by the trial court.

DISPOSITION

12. In view of the finding I have made, ***Erick's*** appeal fails and is dismissed. ***Penina's*** appeal succeeds on the issue of multiplicand of Kshs. 11,831.20 which I substitute with Kshs. 5,844.20. Each party shall bear its own costs of the appeal.

DATED, DELIVERED AND SIGNED THIS 30th DAY OF January 2020

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Amondi/Okodoi

For Appellants - Ms Barasa

For Respondents - Mr Mweisigwa hb for Ms.Okumu