



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CIVIL APPEAL NO.8 OF 2018

ISAAC NJENGA KAMAU.....1ST APPELLANT

JOKITA WANGA WASIBALA.....2ND APPELLANT

VERSUS.

WYCLIFFE WANYAMA JUMA(suing as the widower and legal representative of the
estate of EMILY NALIKA JUMA(DCD).....1ST RESPONDENT

ALICE NJERI KAMAU.....2ND RESPONDENT

JOHN KAMAU.....3RD RESPONDENT

(An appeal from the judgment and decree in original Bungoma PMCC No.393 of 2016 delivered on 5.2.2018 by Principal Magistrate S.O Mogute)

JUDGEMENT.

By way of plaint dated 15th July 2016, the respondents sued the appellants for orders for general damages under the Fatal Accident Act and Law Reform Act and special damages arising from road traffic accident that occurred on or about 5.8.2014 along Bungoma-Webuye road when the deceased and her son were pillion passenger and cyclist respectively.

The defendant who was driving motor-vehicle registration number KAP 245G attached to Trailer registration No.ZA 4144 lost control of the same and veered off the road to where the deceased and her son were and knocked them down. The deceased succumbed to injuries hence her Estate suffered loss and damage and thus held the defendants jointly liable.

The particulars of negligence on part of the defendants were set out in paragraph 7 of the plaint as follows;

- a. Permitting defective motor vehicles to be driven on the said road
- b. Failure to service the said motor vehicles
- c. Failure to train the 4th defendant contrary to the traffic rules
- d. Overworking the 4th defendant contrary to traffic rules
- e. Permitting untrained person to drive suit motor vehicle.
- f. 4th defendant carelessly driving along the said road
- g. 4th defendant driving while under influence of alcohol
- h. 4th defendant over speeding at a restricted area and failing to hoot so as to warn the plaintiff.

The 3rd and 4th Defendants/Respondents entered appearance and subsequently filed their statement of defence dated 14th June 1999 denying the Plaintiff's claim and setting out particulars of negligence on part of the deceased pillion passenger under paragraph 6 of statement of defence as follows;

- i. Travelling on the said bicycle knowing too well that the said cyclist has not mastered the art of cycling.**
- ii. Exposing herself to risk of injury and damage.**
- iii. Failing to hold the bicycle properly when travelling on the said bicycle.**
- iv. Being intoxicated while riding and jumping of the bicycle without taking care of own safety.**
- v. Allowing herself to be ferried on a bicycle which was defective.**

The particulars of negligence on part of the cyclist were set out as follows;

- i. Being careless and carefree in the manner of cycling**
- ii. Cycling when he has not mastered the art of cycling**
- iii. Failing to keep proper lookout and suddenly without warning entering into a junction**
- iv. Obstruction other road users and cycling in a zig zag manner**
- v. Failing to hide warning given by the driver of the suit motor vehicle**

The matter went to full hearing and Pw1, Wycliffe Juma Wanyama, the husband of the deceased testified that he knew the deceased Emily Naliaka. He stated that he died on 5.8.2014 and produced death certificate Ex.2. He testified that he was also issued with a grant and they have 7 children and produced document to prove the same as EX.4. He further produced police abstract and a post mortem report. He testified deceased was a business woman and used to sell vegetables and fish getting monthly income of Kshs.5000/=.

He testified on funeral expenses that he paid kshs.10,000/= for coffin, mortuary expenses of Kshs.2700/=, Kshs.3000/= for advertisement, food for Kshs.6000/=. He testified that before his wife passed on she was in good health.

Pw2, Isaac Wanyama testified that he is the son of deceased. He testified that he was with the deceased on the fateful date. He recalled that he was cycling the bicycle to the left side of the road facing Mabanga when a tractor appeared from Bungoma at a high speed.

He testified that at the junction to Nzoia they were hit by a tractor that did not stop to give way for them to pass. He testified that he sustained injuries while his mother passed on while been taken to the hospital. He testified that his mother was a business lady and he blamed the driver of the suit motor vehicle for the accident.

Pw3 CPL Jane No.75251 testified that she has a police file No. A.R Fatal Court file No. 1006/2015. She testified that the accident occurred at Bukembe and CPL Cheruiyot investigated the accident. She testified that motor vehicle registration number KAP 245G was involved in an accident with pedal cyclist who was carrying a pillion passenger and the passenger died on the spot.

She testified that the driver of the tractor was to be charged with the offence of causing death by dangerous driving. She produced a police abstract as Ex 7(a).

On defence hearing 4th Defendant Dw1, Jokita Wanga Wasibaka testified that he recorded a statement dated 16.7.19 and asked the court to adopt it. The 4th Defendant in his statement briefly stated that he recalled the said accident occurred along Webuye-Bungoma road. He stated that he was carrying 6 tonnes of sugarcane and he was with his turn boy Mr. Makoha. He stated that he joined Bukembe Road and there was a pedal cyclist riding behind him and also there was a motor cyclist carrying female pillion passenger, he stated that the cyclist was on his side but riding from opposite direction.

He stated that the pedal cyclist tried to avoid colliding with the motor cyclist and he swerved to the right and bumped onto the left rear tyre of his tractor. He stated that the pillion passenger fell down on the left and cyclist thrown across the road. He stated that he reported he accident at Nzoia Sugar Company Police. He stated that he blamed the pedal cyclist from accident and he hit the tyre of his tractor. He testified that his tractor was inspected and inspection report produced as DMF-1 and copy of his ID as DEX2.

After close of hearing the plaintiff filed their written submissions on liability and quantum and after consideration the trial magistrate entered judgement to the plaintiff against defendants and found defendants 100% liable and awarded the plaintiff general damages of **Kshs.1,063,625/=**.

The appellant been dissatisfied with both the judgement and ruling he then filed this appeal on the following grounds:

- i. That the learned trial magistrate erred in law and fact by holding that the 1st respondent had proved their case on a**

balance of probabilities.

ii. That learned magistrate erred in law and fact in finding the appellants 100% liable and applying the wrong principles in assessment of damages

iii. That the learned trial magistrate erred in law and fact in assessing damages for loss of consortium at Kshs.200,000/= which was manifestly excessive

iv. That the learned trial magistrate erred in law in adopting a dependency ratio of 2/3rd which was wholly inappropriate

v. That the learned trial magistrate erred in law and in fact in failing to evaluate the evidence in totality

vi. That the learned trial magistrate erred in law and in fact in awarding damages under the Law Reform Act and the Fatal Accidents Act.

By consent of the parties and court directions, this appeal was canvassed by way of written submissions. Mr. Onyinkwa for appellants. He submitted that on liability that the allegation that tractor was over speeding is unfounded and that evidence of Pw2 that cyclist saw the appellants tractor about 5 meters from accident scene.

He submitted that it is evidence that the place was a shopping center and T-Junction but what did the cyclist do to avoid the accident. He submitted and urged this court to apportion liability against the respondents on a 50%:50% basis.

He submitted that the damages awarded were excessive in nature. He submitted that adopting a dependency ratio of 2/3rd was inappropriate and had no basis and that the 1st respondent did not state that he entirely depended on the deceased therefore the dependency ratio of 2/3rd was on higher side and a dependency ratio of 1/3rd was reasonable in the circumstance.

He submitted that award of Kshs.200,000/= was excessive since the 1st respondent testified that he was married to the deceased and they had seven children and that he had not remarried and had no intention of doing so. He submitted that an award of Kshs.100,000/= for loss of consortium is sufficient relying on *Alex Otieno & Another Vs. Hayer Bishan Singh & Sons Limited (2016)e KLR*

He submitted that awarding of damages under both heads of Law Reform Act and Fatal Accident Act was an error. He submitted that in the instant case the beneficiaries of the deceased estate are same both under Law Reform Act and the Fatal Accident Act and therefore the trial should have taken into account the said fact and not award damages under the Law Reform Act. He submitted that the appellants pray that the appeal be allowed and award be reassessed.

Mr. Onchiri for the respondent submitted on liability that Dw1 confirmed that he was expected to indicate that he was turning to Nzoia and that Dw2 confirmed that the same and that the trial court in holding appellants 100% liable for the accident it compared statements by both Dw1 and Dw2.

He submitted on whether the award in damages was excessive under various heads, on award of loss of expectation at Kshs.100,000/=, he submitted that he trial court went ahead to less the same from the total award to avoid double compensation.

He submitted on loss of dependency that the deceased had 7 children who depended on her income therefore dependency ratio of 2/3 was appropriate and should be upheld relying on the case law in *William Kinyanjui and Another Versus Benard M. Wanjala and Anoter civil appeal number 98 of 2010*. He submitted that award on loss of consortium was not inordinately high and the award should be upheld by this court. This being a first appeal, this court is obliged to reevaluate and reexamine the evidence before the lower court and arrive at its own independent conclusion. This is the principle of law that was well settled in the case of *Selle V Associated Motor Boat Company Ltd [1968] EA 123* where Sir Clement De le Stang stated that:

“ This court must consider the evidence, evaluate itself and draw its own conclusion though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect .

However, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Sarif V Ali Mohammed Solan [1955] 22 EACA 270).

I have carefully considered the evidence adduced and as analyzed by the trial court in the judgment. I have also considered the submissions made before this court by the appellant and the respondent taking into account all the decisions relied on. In my view, the issues for determination in this appeal is whether the liability was properly assessed and whether the quantum of damages awarded by trial court properly awarded.

On issue one of liability it is not in dispute that accident occurred, the issue that arise for determination is whether liability was properly apportioned at 100% liability to the defendants/appellant. To determine this issue, it is imperative to look at how the accident occurred. It is the testimony of PW2 that he is the son of the deceased and that he was with the deceased on the fateful date. He recalled that he was cycling the bicycle to the left side of the road facing Mabanga when a tractor appeared from Bungoma at a high speed.

He testified that at the junction to Nzoia they were hit by a tractor that did not stop to give way for them to pass.

The Defendants did not tender any evidence to rebut the Plaintiff's claim or confirm contributory negligence by plaintiff as they alleged in their pleadings. In absence of such evidence I find that the defendants were properly held 100% liable for the said accident. **Liability remains as per trial court at 100%.**

In respect to second issue on the quantum of damages awarded. The Court of Appeal in **Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55** set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

“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.”

In the instant case the appellants submitted that the awards on loss of dependency and loss of consortium were excessive in nature and therefore the same should be reassessed. He also submitted that the trial court erred in awarding of damages under both heads of Law Reform Act and Fatal Accident Act. He submitted that in the instant case the beneficiaries of the deceased estate are same both under Law Reform Act and the Fatal Accident Act and therefore the trial should have taken into account the said fact and not award damages under the Law Reform Act. The 1st respondent on the other hand submitted that the damages awarded under said heads were properly assessed by the trial court. To determine issue at hand it is imperative to analyze award under the two heads appealed against.

Loss of dependency

It is evidence on record that the deceased died at the age of 38 years as shown on death certificate. No evidence was tendered to prove her earning during her lifetime. Evidence was adduced that she made Kshs.5000/= per month from her business and the trial adopted sum of Kshs.5000/= as a multiplicand and multiplier of 18 years. The trial court adopted dependency ratio of 2/3. In calculating the loss of dependency, the same was worked out by the trial court as follows;

$5000 \times 18 \times \frac{2}{3} = \text{Kshs.720,000/=}$.

In the circumstances of this case the multiplier of 18 years was adopted by the trial court. It is not in dispute that the deceased was 38 years at the time of death. The appellants contend that a multiplier of 18 years is too high. Guided by the comparable authorities cited by the trial court, I am of the view that the multiplier adopted was within an acceptable range. On dependency; it is not denied that the deceased was a family woman with husband and 7 children who depended on her. It is therefore conventional for the court to apply the ratio of 2/3 as part of income deceased was using to maintain her family. In my view therefore that the learned Magistrate adopted a multiplicand based on earning of the deceased and the same was properly assessed by the trial court.

Loss of consortium

It is not in dispute that the plaintiff was deceased's husband. He lost consortium as a result of the death of his wife. Based on evidence on record an award of Kshs.200,000/= was sufficient in the circumstance of this case. The special damages of Kshs.23,625/= were not contested and therefore remains the same. On the issues whether claim under Law reform Act should be deducted from the award, my view is that, the requirement in the Law Reform Act is to "take into account" and does not make it mandatory to deduct any sums awarded to the estate of a deceased from damages awarded for lost dependency.

This view is buttressed by Justice Mabeya in **Peres Wambui Kinuthia and another –Vs- S.S. Mehta & Sons Limited, Nairobi Civil Appeal No. 568 of 2010 (UR)** where he held that:

"In the case of Kemfro Africa t/a Meru Express Services (1976) & Anor –vs- Lubia & Anor (No 2) (1987) KLR 30 the Court of Appeal was categorical that the words "to be taken into account" and "to be deducted" are two different things.

That the words used in Section 4(2) of the Fatal Accidents Act are "taken into account." That the Section says what should be taken into account and not necessarily deducted.

That it is sufficient if the judgment of the trial court shows that in reaching the figure awarded under the Fatal Accidents Act, the trial court bears in mind or considers what has been awarded under the Law Reform Act for the non-pecuniary loss. There is absolutely no requirement in law or otherwise for the court to engage in a mathematical deduction"

In the instant case the trial court took into account the award made under Law Reform Act when assessing damages under the Fatal Accident Act therefore total award was Kshs.1,063,626/= less award under Law Reform Act Kshs.100,000/= balance of Kshs.963,626/=. I hereby find that the same was properly assessed. The special damages of Kshs.23,625/= were not contested and therefore remains the same.

In the circumstance, I find no reason to interfere with the award and therefore I uphold the award by the trial magistrate. The upshot of the foregoing is that we find that the appeal lacks merit and is hereby dismissed with costs.

Dated and Delivered at BUNGOMA this 27th day of February, 2020.

S.N. RIECHI

JUDGE