



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT KISII

CORAM: A.K NDUNG'U J.

CIVIL APPEAL NO. 64 OF 2018

CALEB OMARA KAISO.....APPELLANT

VERSUS

WILLIAM MACHUKI NYAMOIRO &

ASKA KWAMBOKA MACHUKI (Suing

as legal representatives of the estate of

MOSES ZAPHANIAH MACHUKI (Deceased).....RESPONDENTS

(Being an appeal from the judgment and decree delivered by Hon. S.K. Onjoro (SRM) dated 17th day of August 2018 in CMCC No. 288 of 2015 Kisii)

JUDGEMENT

1. The appellant contests the judgment of the subordinate court in which he was found wholly liable. He is also aggrieved by the award of damages made to the respondents following the death of the deceased.
2. It is common ground that on 3rd January 2015, the deceased was walking along the Kisii- Nyamira road in Jogoo area when he was hit by motor vehicle registration number KBJ 836 K belonging to the appellant. The respondents' case was that the appellant's driver negligently controlled the vehicle and caused it to hit the deceased. They contended that the appellant's driver was driving the vehicle too fast and failed to keep a proper look out for other road users and therefore caused the accident.
3. In his statement of defence, the appellant blamed the deceased for the accident and stated that he had caused it by his own negligence. That he was walking without paying any attention for other road users and failed to take precautions to avoid the accident. He also claimed that the defendant was walking along the road under the influence of illicit drugs and other intoxicating substances.
4. Regarding the issue of liability, Aska Kwamboka (PW 1) the deceased's widow, testified that she was at home when she received a call from her father in law, William Machuki, that her husband had been involved in an accident and died on the spot. PC Caleb Osodo (PW 2) produced a police abstract relating to the accident which had occurred on the material day at about 2:00 p.m. along Kisii –Nyamira road at Jogoo area. He stated that the accident had involved the deceased and the respondent's motor vehicle which was being driven by one Stephen Kaisi. He testified that the driver had been blamed for the accident and that he had fled from the scene hence the indication in the abstract that the matter was pending under investigation. He also admitted on cross examination that he was not the investigating officer.
5. The appellant adopted his written statement as his evidence in the matter. In it, he stated that he was lawfully driving his vehicle towards Nyamira from Kisii town on 8th January 2014, when the deceased, who appeared drunk suddenly dashed onto the road and collided with the vehicle he was driving. He told the court that he had applied brakes but since the distance was too short and he was unable to avoid colliding with the pedestrian. He also stated that after the police inspected his vehicle and blamed the pedestrian for the accident. He asserted that he was driving at not more than 40 kph and was therefore not liable for the accident.
6. Based on the evidence, the trial court found the appellant wholly liable for the accident. The appellant's counsel argues that the trial court shifted the burden of proof to the appellant contrary to the norm. He submits that liability should have been apportioned equally, since the evidence showed that the deceased was drunk and had dashed on to the road in front of the vehicle which was being driven by the appellant at a moderate speed. Conversely, the respondents' counsel supported the decision of the trial magistrate. He submitted that the evidence of the appellant did not rebut the respondents' case and should be disregarded.

7. Since this is a first appeal, I am mindful of the principle that the first appellate court is required to reconsider the evidence, evaluate it and draw its own conclusions making an allowance for the fact that it neither heard nor saw the witnesses testify (see **Selle v Associated Motor Boat Company Ltd [1968] E.A. 123, 126**).

8. There was no independent eye witness of the accident which led to the loss of the deceased's life. On the one hand the appellant testified that he was driving at a reasonable speed when the deceased who appeared intoxicated suddenly dashed onto the road and he was unable to avoid the accident. On the other hand PW 2, who testified in support of the respondents' case, stated that it was in fact not the appellant that was driving the vehicle at the material time but one Stephen Kaisa who fled the scene after the accident. Contrary to the appellant's claim that the police had blamed the deceased for the accident, PW 2 put the blame on the driver. PW 2 was not the investigating officer and also stated that he did not have the police file in court. It is therefore unclear why he testified that someone other than the appellant was driving the vehicle. There was also no backing for the respondents' case that the appellant was driving too fast at the time of the accident nor was there any evidence to support the appellant's contention that the deceased was drunk when the accident occurred.

9. It is not in dispute that the appellant hit the deceased. As the circumstances under which the deceased was hit are unclear, I apportion liability equally. I am guided by the decision of the Court of Appeal in **Hussein Omar Farah v Lento Agencies Civil Appeal 34 of 2005 [2006] eKLR** where the court held;

“In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.”

10. On the issue of damages, the appellants contested the trial court's award for loss of dependency under the **Fatal Accidents Act** on the ground that the income and the dependency could not be established from the evidence. It was argued that the trial court should have applied a nominal figure of Kshs. 2,000/= since the deceased's monthly income was not proved. The appellant also proposed a multiplier of 15 years as opposed to the 20 years adopted by the trial court. The appellants were also aggrieved with the trial court's assessment of pain and suffering which he contended was excessive given that the deceased had died shortly after the accident.

11. The respondents' counsel submitted that the award for pain and suffering and for loss of expectation of life were reasonable. On loss of dependency, it was submitted that since there was no proof of income, the trial court was right in applying the minimum wage at the time which was Kshs. 10,954/=. The multiplier of 20 years for the deceased who had died aged 38 was said to be reasonable. For the dependency ratio, counsel submitted that the trial court ought to have applied 2/3.

12. In the plaint, the respondents pleaded that the deceased was aged 38 years and was at the time of his demise, a businessman earning approximately Kshs. 25,000/= per month. They claimed that he supported his widow, two sons aged 14 years and 9 years and a daughter aged 12 years.

13. PW 1 reiterated that the deceased was aged 38 years and stated that he earned Kshs. 25,000/= each month from farming. She testified that he worked as a small scale businessman and sometimes worked as a builder in casual employment. She also stated that they had 3 school going children whom he provided for. She produced letters of administration ad litem issued to her and William Machuki, a certificate of death, a post mortem report and a letter from the chief to support her case.

14. An appellate court will not ordinarily interfere with the findings of a trial court on an award of damages unless it can be shown that the court proceeded on wrong principles, or misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low (see **Butt v Khan [1981] KLR 349**).

15. The decision of the Court of Appeal in **Jacob Ayiga Maruja & Another v Simeane Obayo, Civil Appeal No. 107 of 2002 (2005) eKLR** answers the appellant's argument that the respondent was not entitled to an award for loss of dependency because she did not produce documentary proof of his earnings. In that case the Court held as follows;

“We do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving earning is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things.”

16. It would be unjust to demand records from the respondent since the deceased is said to have earned his sustenance from farming and casual work. The respondents proposed that the trial court apply the minimum wage of Kshs. 10,945/= provided by the Labour Institutions Act (No. 12 of 2007) which the court did. No proposition was made by the appellant under this head before the trial court.

17. The **Regulation of Wages (General) (Amendment) Order 2015**, which was applied by the trial court, was deemed to have come into operation on 1st May 2015. The deceased died on 1st January 2015 and it was therefore erroneous for the trial court to adopting the minimum wage provided in that legal notice. The **Regulation of Wages (General) (Amendment) Order 2013** where applicable in the case of the deceased which provides the minimum wage as Kshs. 9,024.15/=.

18. The respondent proposed a multiplier of 20 years before the trial court. The cases cited by the respondent were not helpful on this issue. In the case of **Irene W Kagundu & Another v W. K. Tilley (Muthaiga) Ltd & Another [2018]eKLR** the deceased died aged 49 whereas the deceased in the case of **Abdi Kadir Mohammed & another v John Wakaba Mwangi [2009]eKLR**, died aged 12 years.

19. In **Paul Ouma v Rosemary Atieno Onyango & another (Suing as the Legal Representative in the Estate of Joseph Onyango Amollo**

(Deceased) [2018] eKLR the court upheld a multiplier of 20 years where a watchman had died aged 38 years. In *Stella Nasimiyu Wangila & another v Raphael Oduro Wanyamah [2016] eKLR* the court found a multiplier of 15 years reasonable for the deceased who died aged 38 years. I therefore find the multiplier adopted by the trial court reasonable.

20. There was proof that the deceased had a wife and three school going children at the time of his demise. I will uphold the dependency ratio of 1/3 adopted by the trial court.

21. For the reasons given, I set aside the trial court's award for loss of dependency under the Fatal Accidents Act and substitute it with the following award;

9,024.15 X 20 X 12 X 1/3 = Kshs. 721,932/=

22. The appellant also contends that the award of damages for pain and suffering were excessive. The court appears to have been influenced by the case of *Irene W Kagundu (supra)* where the court awarded Kshs. 70,000/= for pain and suffering where the deceased had died on the same day. In the case of *Francis Wainaina Kirungu (suing as personal representative of the estate of John Karanja Wainaina) v Elijah Oketch Adallah Civil Suit No. 191 of 2013 [2015]eKLR* the court in 2015 awarded Kshs. 50,000/= for pain and suffering where the deceased had died soon after the accident. In my view the trial court properly exercised its discretion in making the award of Kshs. 50,000/= which I uphold. I also uphold the award of Kshs. 100,000/= for loss of expectation of life and similarly find no reason to interfere with the trial court's finding on special damages. I uphold it as is.

23. In conclusion, I set aside the trial court's finding on liability and substitute it with liability at 50:50. I also allow the appeal to the extent that I set aside the award of Kshs. 1,046,320 as damages under the **Fatal Accidents Act** and substitute it with judgment for Kshs. 721,932/=. In addition, the appellants shall be entitled to the award under the **Law Reform Act** being Kshs. 50,000/- for pain and suffering and Kshs. 100,000/- for loss of expectation of life.

24. For avoidance of doubt there shall be judgment for the appellants against the respondent as follows:

a) Fatal Accidents Act	Kshs. 721,932
b) Pain and suffering	Kshs. 50,000
c) Loss of expectation of life	Kshs. 100,000
d) Special Damages	Kshs. 20,000
	Kshs. 891,932
Less 50%	
TOTAL	Kshs 445,966

25. The respondents shall bear the costs of this appeal.

Dated, Signed and Delivered at Kisii this 26th day of February 2020.

A. K. NDUNG'U

JUDGE