REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 21 OF 2018

CLEMENT OCHIENG.....APPELLANT

VERSUS

RUTH ATIENO OMBOGO.....1ST RESPONDENT

(suing as the personal representative and Administrator of the estate of

NOLISE OTIENO Mwalo – *Deceased)*

ROBERT GITAI.....2ND RESPONDENT

[Being an appeal arising from the Judgment and Decree of the Trial Court dated 6th March, 2018

by Hon. Mr, Yalwala SRM in the original KISUMU CMCC NO. 135 OF 2018*]*

JUDGMENT

The learned trial magistrate held the Defendants equally liable for the accident which resulted in the death of **NOLISE OTIENO MWALO**.

1. The trial court held as follows;

> **"I have considered the circumstances under which the accident occurred as such. First, both drivers for the said vehicles had been careless in their driving as they approached the scene, as they engaged in dangerous game of competing for picking up passengers, thereby throwing caution to the wind. In so doing, they had no regard for the safety of the passengers they already had in their vehicles or other road users such as the deceased pedestrian.**
>
> **As a result of that dangerous competition and carefree driving, the driver of the vehicle registration KAU 908T carelessly overtook motor vehicle registration No. KAW 847J and swerved back to the left, next to the stage, in order to beat the driver of motor vehicle registration No. KAW 847J in picking up the deceased pedestrian, who was at the stage.**
>
> **Not to be outdone, the driver of motor vehicle registration No. KAW 847J, instead of slowing down to let the driver of motor vehicle registration No. KAU 908T overtake and return to the left lane safely, continued to drive at high *speed in competition."***

2. The vehicle KAW 847J is said to have rammed the other vehicle from the rear, causing it to lose control, and to knock down the deceased.

3. It is in the said circumstances that the trial court found the Defendants equally to blame for the accident.

4. The trial court then awarded compensation as follows;

> **1. Special Damages - Kshs 17,500.00**
>
> **2. Loss of Expectation of Life - Kshs 100,000.00**

3. Loss of Dependency - Kshs 3,000,000.00

4. Pain and Suffering - Kshs 30,000.00

T O T A L Kshs 3,147,500.00

5. The Plaintiff was also awarded Interest on the compensation, at Court rates, together with the costs of the suit.

6. The 1st Defendant, **CLEMENT OCHIENG**, was dissatisfied with the judgment, and he lodged an appeal to the High Court.

7. This judgment is in relation to the said appeal, in which the Appellant raised the following 3 Grounds of Appeal;

"1. THAT the learned magistrate erred in law by apportioning liability at 50:50 in light of the evidence tendered at the *trial.*

2. THAT the learned magistrate erred in assessing the damages at Kshs 3,147,500, which is excessively high in the circumstances.

3. THAT the judgment and decree is against the weight of the evidence."

8. When canvassing the appeal, the Appellant submitted that the evidence on record proved that the accident was wholly attributable to the carelessness of the driver of the 2nd Defendant, who is the 2nd Respondent in this appeal.

9. Although the vehicles were involved in the accident which resulted in the death of the pedestrian, the Appellant submitted that that ought not to be the basis for apportioning liability equally to the drivers of the 2 vehicles.

10. I was reminded that even when the drivers of the vehicles involved in the accident bore some fault, it may be possible to distinguish a remote fault from the direct fault which caused the accident.

11. In this case, the Appellant said that the deceased, who was waiting to board a public service vehicle, did wave down his vehicle, as that was the first vehicle to get to *"the stage"* where the deceased was waiting.

12. Notwithstanding that situation, the 2nd Respondent's driver is said to have rammed the Appellant's vehicle from the rear, causing it to collide with the deceased.

13. Therefore, the Appellant submitted that it was the driver of the 2nd Respondent who was 100% liable for the accident.

14. In response to the appeal, the 1st Respondent, (who was the Plaintiff during the trial), pointed out that the Appellant never got his driver to testify at the trial. In the absence of the said driver, the 1st Respondent submitted that there was no evidence that could have demonstrated how or why the driver failed to keep a safe distance, which could have enabled him to avoid hitting the 2nd Defendant's vehicle.

15. On the issue of Quantum of the Compensation awarded, the Appellant urged this court to reduce the award for Pain & Suffering from Kshs 30,000/= to Kshs 10,000/=, as the former was inordinately high.

16. And in respect to the multiplier applied by the trial court, the Appellant submitted that instead of 25 years, it ought to have been 15 years. He submitted that the uncertainties and contingencies of life should reduce the number of years when the deceased could have been in employment.

17. In answer to the submissions on quantum, the Respondents reasoned that the learned trial magistrate had given a fine, well thought-out and well-reasoned judgment, and there was absolutely no proper basis upon which this court could disturb the compensation awarded.

18. Being the first appellate court, I am obliged to re-evaluate all the evidence on record, and to draw my own conclusions. Whilst undertaking the process of the said re-evaluation of the evidence, I am required to bear in mind the fact that I did not have the benefit of seeing any of the witnesses when they were testifying.

19. Therefore, where the decision of the trial court is hinged upon the demeanour of a witness, I have to respect that decision unless there is a good reason to justify a conclusion that was inconsistent with it.

20. The first notable consideration is that the 2nd Defendant, **ROBERT GITAU** did not either Enter Appearance or file a Defence. Consequently, on 15th September 2014, an interlocutory judgment was entered against him, as prayed in the Plaint, pending formal proof.

21. At paragraph 4 of the Plaint it was stated that the 2nd Defendant was the registered owner of the motor vehicle registration KAU 908T.

22. At paragraph 5 of the Plaint it was stated that the vehicles belonging to the Defendants were driven and managed so dangerously, carelessly or recklessly that;

"…… the same violently rammed into each other and thereby violently knocked down the deceased hence occasioning the deceased fatal injuries …

23. The particulars of negligence which were attributed to the 2nd Defendant were that he drove too fast in the circumstances; failed to notice the presence of an oncoming vehicle in time so as to avoid the collision of the 2 vehicles; and deliberately and consciously drove into the side of the vehicle registration KAW 847J.

Cause of the Accident

24. PW2, PC SIRENGO NANYONYI, was a police officer attached to Traffic Duties. However, he was not involved in the investigations giving rise to this case.

25. He produced in evidence the police file.

26. He said that according to the records, it was **TOBIAS ODHIAMBO**, who caused the accident. The said Thomas Odhiambo was the driver of the vehicle registration KAW 847J.

27. However, during cross-examination **PW2** said that although Thomas Odhiambo was charged, he was acquitted for lack of evidence.

28. Notwithstanding the acquittal, **PW2** insisted that it was Thomas Odhiambo who was to blame for the accident.

29. PW3, Leonard Nechesa Simiyu, was a businessman based in Kendu Bay.

30. On the material day, he was a passenger in a matatu belonging to Lacoon Investment.

31. Exhibit 1 shows that the vehicle registration KAW 847J belonged to Lacoon Investment.

32. It was the evidence of **PW3** that the vehicle he was travelling in, was waved-down by the deceased, and that the driver made an indication that he would stop. This is what **PW3** said;

"The driver indicated. Another vehicle came from behind and hit our own vehicle.

Our vehicle was pushed to hit the person who was off the road.

I was seated behind the door and I saw everything."

33. He concluded his testimony by saying that it was the driver of the vehicle which hit them from behind, who was to blame for the accident.

34. I noted that that version of events was not challenged during cross-examination.

35. DW1, Stephen Otieno Nyambwiri, was a conductor in the vehicle registration KAW 847J. On the material day, that vehicle was being driven by Tobias.

36. DW1 informed the trial court that Tobias was deceased: and that explains the inability of Tobias to testify.

37. DW1 said that charges were preferred against Robert Lutan, for the offence of Causing Death by Dangerous Driving; but he did not indicate whether or not Robert was acquitted.

38. However, **DW1** said that the charges preferred against Tobias ended in an acquittal.

39. According to **DW1**, Robert was the driver of the vehicle registration KAU 908T.

40. During cross-examination, **DW1** said;

"I witnessed the accident. We were to pick a passenger. We were competing to pick the passenger. The vehicle that overtook us, hit the person."

41. As **DW1** was the conductor in the vehicle KAW 847J, his evidence implied that it was the vehicle KAU 908T which hit the deceased.

42. DW2, Silwa Nduyonga, was a Private Investigator. He said that;

"Motor vehicle registration KAW 847J was in front initially.

…….

Then KAU 908T overtook it at high speed and swerved back to the left and then applied brakes, and as a result KAW 847J hit it from behind."

43. As far as the private investigator was concerned, it was the driver of KAU 908T who caused the accident.

44. Upon my consideration of the evidence on record, I find that whilst **PW3**, (an alleged eye-witness) said that the vehicle which hit the deceased was KAW 847J, **DW2** testified that it was KAU 908T which hit the deceased.

45. What appears constant is that one of the 2 vehicles hit the other from behind, causing the vehicle in front to hit the deceased.

46. Regardless of whichever vehicle actually hit the deceased, I am satisfied that the 2 drivers were competing, with the intention of picking up the deceased.

47. One vehicle overtook the other and then immediately turned back left, so as to pick up the passenger.

48. The other vehicle hit that vehicle, (which had just overtaken it), causing it to hit the passenger.

49. In the circumstances, I do agree with the conclusion arrived at by the learned trial magistrate, that;

"…….. it is the combined effect of carelessness of the drivers of both vehicles that caused the accident ……."

50. Therefore, I find no merit on the appeal on the issue of liability.

Quantum of Damages

51. In respect to Pain & Suffering the trial court awarded Kshs 30,000/=.

52. The deceased died on the spot. The learned magistrate noted that, in the circumstances,

"……. the deceased died right on the spot and hence endured minimal pain and suffering, if any."

53. Nonetheless, the trial court awarded Kshs. 30,000/= based on the case of **SOSPETER NDUNGU KAMUA V CHARLES MAGETO & ANOTHER HCCC NO. 404 OF 1998**, in which the deceased died on the same day.

54. I hold the view that when a person dies soon after an accident, he would most probably have suffered less pain, compared to someone who died hours after sustaining injuries.

55. I find that the trial court had no reason to warrant the award of Kshs 30,000/= in this case, wherein the deceased died on the spot.

56. I set aside that award and substitute it with an award of Kshs 10,000/=.

57. On the issue of the multiplier, the trial court used 25, whilst the Appellant urges the court to reduce it to 15.

58. The deceased was 33 years old at the time he died. The learned trial magistrate expressed himself thus;

"At his age of 33 years, the deceased *would, barring any other eventually, have been actively involved in providing for his family for up to about 25 more years."*

59. Before the trial court, the Appellant did not make any submissions on the question of the applicable multiplier. As far as the Appellant was concerned;

"The Plaintiff is therefore not entitled to damages in this case ……."

60. On the other hand, the Plaintiff asked the trial court to use a multiplier of 27.

61. In seeking a reduction of the multiplier to 15, the Appellant submitted that the deceased was not guaranteed employment, and that the uncertainties and contingencies of life reduce the active years.

62. In the case of **PATEL & ANOTHER Vs P.F. HAYES & OTHERS [1957] E.A. 748**, at page 749, the Court of Appeal said;

"The multiplier will bear a relation to the expectation of the earning life of the deceased and the expectation of life and

dependency of the widow and children."

63. If a multiplier of 15 was applied, that would imply that the expectation of the earning life of the deceased would be that he would not earn beyond the age of 48.

64. In the case of **IBRAHIM ADAM MIRE Vs PATEL SHAILESH KESHAVLA HCCC NO. 99 OF 2004**, wherein the deceased was 44, a multiplier of 14 was used.

65. In the case **JAMES GAKINYA KARIENYE Vs PERMINUS KARIUKI GITHIINJI HCCC NO. 91 OF 2014**, Aburili J. held as follows;

> **"It has also been submitted by thedefendant that the deceased would retire at 55 and that there was no guarantee that he would remain in active employment in the private sector.**
>
> **It is true that there are indeed many imponderables of life and life itself is a mystery of existence. However, it is not in the province of this court to determine or explore those imponderables.**
>
> **The duty of this court is to apply the generally known period about which an employee in the deceased's occupation, of an accountant, would be in active work and retire."**

66. In that case, the deceased was 28 years old; and the learned Judge awarded a multiplier of 25.

67. In arriving at the multiplier, the trial Judge said;

> **"There is no evidence of the vicissitudes of life or other imponderables or illness which would have shortened the deceased's working life to only 15 years and retire from work.**

68. In the same vein, I find no evidence to suggest that the deceased in this case would only have worked for another 15 years.

69. Indeed, a look at the authority cited by the Appellant reveals the following useful words from the learned Judge;

> **"In the government employment, the deceased would have retired at age 60 years. In accordance with employment laws, and there was no other evidence to challenge this legal retirement age, and the plaintiff did not state otherwise. I would therefore take 60 years to be the common retirement age."**

70. Thus, even applying the very authority which was cited by the Appellant, I find that the trial court did not make any error when it applied a multiplier of 25.

71. In the result, the appeal fails, save only in relation to the quantum of damages in respect of Pain & Suffering.

72. The Appellant will pay to the 1st Respondent, the costs of the appeal.

DATED, SIGNED and **DELIVERED** at **KISUMU** This **29th** day of **April** 2020

FRED A. OCHIENG

JUDGE