REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL APPEAL NO. 48 OF 2019

1. GILANIS SUPERMARKETS LTD.....1ST APPELLANT

2. GEOFFREY NJENGA NJOROGE.....2ND APPELLANT

VERSUS

NYAGAKA TOM ATENGA [Suing as Legal Representative of the

Estate of PENUEL NYAGAKA ONCHOMBA (Deceased)].....RESPONDENT

{Being an appeal against the Judgement of Hon. S. K. Arome – SRM – Keroka dated and delivered on the 28th day of August 2019 in the original Keroka Principal Magistrate's Court Civil Case No. 251 of 2017}

JUDGEMENT

By way of the Memorandum of Appeal dated 9th September 2019 the appellant herein seeks to set aside the lower court's judgement on liability and assessment of damages on the following grounds: -

> **"1. THAT the Learned Trial Magistrate erred in law and fact by holding the appellant 70% liable or at all, contrary to the weight of the evidence on record.**
>
> **2. THAT the Learned Trial Magistrate erred in law and facts by awarding general damages which were manifestly excessive or at all, thereby occasioning miscarriage of justice.**
>
> **3. THAT the Learned Trial Magistrate erred in law and facts in applying the wrong principles of law thus arriving in a wrong decision in awarding damages.**
>
> **4. THAT the Learned Trial Magistrate erred in law and fact in diverting from the facts in pleadings and evidence on record even though there was a serious variance.**
>
> **5. THAT the Learned Trial Magistrate acted in error when he failed to properly evaluate evidence on record thus reaching erroneous decision.**
>
> **6. THAT the Learned Trial Magistrate erred in law and fact in failing to appreciate the authorities supplied by the appellant thus arriving on a wrong decision."**

The background of the case is that the respondent sued the appellant for special and general damages for fatal injuries sustained by Penuel Nyagaka Onchomba (deceased) who was allegedly hit by motor vehicle KBM 217V along the Keroka – Masimba Road on 20th November 2017. Following the hearing in which the respondent called three witnesses but the appellant did not adduce any evidence the trial Magistrate found the appellant largely to blame for the accident and entered judgement on liability in favour of the respondent in the ratio 70:30%. He then proceeded to award the respondent damages in the sum of Kshs. 2,504,462/= and awarded him interest thereon from the date of judgement and the costs of the suit.

The appeal was canvassed by way of written submissions. Learned Counsel for the appellants submitted that the respondent's case was not proved on a balance of probabilities as there was variance between the pleadings and the evidence on record and that the finding on liability was therefore made against the weight of evidence. He submitted that the trial Magistrate should have instead dismissed the suit with costs. Counsel also faulted the trial Magistrate for not considering the precedents cited in favour of the appellant. On the assessment of damages Counsel for the appellant submitted that an award of Kshs. 620,000/= general damages and Kshs. 121,000/= special damages would have been fair and reasonable considering that the deceased was single and unemployed.

On his part, Counsel for the respondent submitted that the respondent tendered substantial oral and documentary evidence before the trial court which was not rebutted or controverted by the appellant. Counsel submitted that the omission by the appellant not to adduce evidence rendered the defence unsubstantiated and left the respondent's case unchallenged. Counsel cited several cases to buttress this argument. Counsel urged this court to maintain the apportionment of liability by the trial court. Counsel also urged this court to find that the awards made under the different heads of damages were based on sound reasoning and they ought not to be disturbed. On special damages Counsel submitted that receipts totalling to Kshs. 152,0050/= were produced to prove the same. He urged this court to find the appeal lacks merit and dismiss it with costs to the respondent.

As the first appellate court I have to consider and re-evaluate the evidence in the lower court so as to arrive at my own independent conclusion while keeping in mind that I did not see or hear the witnesses who testified – (**see Selle v Associated Motor Boat Company Limited [1968] EA 123).**

The respondent who is the father of the deceased gave evidence as Pw2 and it is clear from his testimony that he did not witness the accident. He however called PC Julius Gisemba (Pw1) and David Omato Mokobi (Pw3) whose evidence points to negligence on the part of the driver of the appellants' motor vehicle. PC Julus Gisemba testified that at the material time he was performing traffic duties at Keroka Police Station and was among the officers who visited the scene when the accident was reported to the station. He stated that the accident occurred when the lorry which was descending a hill lost control and veered off the road and knocked down four people who were on the side of the road. They were rushed to hospital but three of them died and only one survived. He stated that although the driver was charged with causing the death of the three victims by dangerous driving he was acquitted as the prosecution did not prove its case beyond reasonable doubt. David Omato Mokobi (Pw3) was the only victim who survived. He testified that he had gone to buy airtime at a kiosk opposite Gucha Hospital when he was suddenly hit by a vehicle that was coming from Masimba direction. He stated that the vehicle veered off the road and hit four of them as they stood outside the kiosk. According to him it seemed the driver hit them intentionally. He blamed the driver of the vehicle for veering off the road. The appellants did not adduce evidence and so they did not rebut or controvert the evidence of these two witnesses. As was held by the Court of Appeal in the case of **John Wainaina Kagwe v Hussein Dairy Limited [2013] eKLR** the averments in the defence remained mere allegations. The deceased together with the other victims were off the road and it is the lorry that veered off the road and found them. The fact that the eye witness testified that the deceased was walking and not sitting as averred in the plaint is in my view not a fatal contradiction. Also the fact that the driver of the vehicle was not found culpable in the traffic case does not absolve him from a claim for negligence and I am satisfied that it was proved on a balance of probabilities that he was negligent. In fact, had I heard the case in the first instance I would have found him wholly liable as there was no evidence to attribute negligence to the victims. However, there was no cross appeal on this issue and Counsel for the respondent having urged this court not to disturb the apportionment of liability at 70:30%. It shall remain as such.

On the appeal against the quantum of damages, this court is guided by the principle laid out in **Shabani v City Council of Nairobi [1985] KLR 516** 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 or it is based on some wrong legal principle or on a misapprehension of the evidence."**

In the case of **Ken Odondi & 2 others v James Okoth Omburah t/a Okoth Omburah & Company Advocates** C/Appeal Kisumu C/A No. 84 of 2009 cited with approval in **David Kahuruka Gitau & another v Nancy Ann Wathithi Gitau & another [2016] eKLR** the Court of Appeal stated: -

> **"We agree that this court will not ordinarily interfere with the findings of a trial judge on an award of damages merely because this court may take the view that had it tried the case it would have awrded higher or lower damages different from the award of the trial judge. To so interfere this court must be persuaded that the trial judge acted on wrong principles of law or that the award was so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled."**

Applying the above principles to this case I am not persuaded that there is any justification to disturb the trial Magistrate's assessment of damages under the Fatal Accidents Act. I am satisfied that the trial Magistrate applied the correct legal principles in arriving at the multiplier, multiplicand and dependancy ratio and arrived at an award for loss of dependancy which in my view is reasonable and consistent with past awards. Neither is the award inordinately high as to justify interference by this court. The award is affirmed.

The damages under the Law Reform Act are also based on precedent and the trial Magistrate cannot be faulted for those awards. On the special damages, however, the trial court should have awarded Kshs. 136,850/= which is what was proved out of the sum of Kshs. 150,050/= pleaded. The difference arose because whereas the respondent pleaded a sum of Kshs. 40,000/= for food he produced a receipt for Kshs. 32,300/=; Kshs. 15,000/= for mortuary fees but proved only Kshs. 6,500/=. The total award to the respondent ought therefore to have been Kshs. 2,488,992/= because I shall not disturb the deduction of the damages under the Law Reform Act as the respondent did not cross appeal. In view of the finding on liability, the total award should have been subjected to the ratio of liability but the trial Magistrate overlooked to do so. In the circumstances the final award of damages to the respondent having been subjected to the ratio of contribution by this court comes to **Kshs. 1,742,294/40cts**. The net award under the Fatal Accidents Act shall be distributed equally between the father and mother of the deceased only as awards under that Act are for the benefit of a parent, spouse and children but not siblings.

Unlike general damages which attract interest from the date of judgement (in this case date of judgement in the lower court), special damages attract interest from the date of filing suit and this case will not be exceptional and so the interest on the special damages shall be calculated from the date of filing suit. The appellant has succeeded partially in that the gross award has now been subjected to a 30% reduction and the order that commends itself to me on the issue of costs therefore is that each party shall bear his own costs. It is so ordered.

Signed, dated and delivered in Nyamira this 23rd day of April 2020.

E. N. MAINA

JUDGE

This judgement was delivered electronically in view of the Ministry of Health and the World Health Organization's guidelines on combating the Covid-19 pandemic, the Advocates for the parties having consented.