REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CIVIL APPEAL NO. 53 OF 2019

KRECENCIA KEMUNTO GOCHI &

ELIJAH OSORO MOGERE [suing as Legal Representatives of

AMOS MOGENI OSORO (Deceased)].....APPELLANTS

=VRS=

ROBINSON NYAGAKA.....RESPONDENT

{Being an appeal against the Judgement of Hon. C. W. Waswa (Mr) – RM Nyamira

dated and delivered on the 30th day of September 2019 in the original Nyamira

Chief Magistrate's Court Civil Case No. 157 of 2018}

JUDGEMENT

On 26th September 2018 the appellants sued the respondent seeking compensation for fatal injuries sustained by Amos Mogeni Osoro, deceased, as a result of a motor accident which occurred along the Kisii – Nyamira Road on 6th July 2018. However, after hearing and considering evidence from both sides the trial court found the appellants did not prove the case on a balance of probabilities and dismissed it with costs to the respondent. Being aggrieved they preferred this appeal. The grounds of appeal are: -

> **"1. The Learned Trial Magistrate erred in fact and in law in holding and/or finding that the Appellant herein had not proved his case in a preponderance of probability, in the absence of any tangible and/or credible evidence at all to that effect.**
>
> **2. The learned Trial Magistrate misdirected himself in fact and law, when she failed to properly or at all evaluate and/or analyse the evidence on record cumulatively and/or exhaustively, thus the learned trial magistrate reached an erroneous conclusion insupportable by the evidence on record.**
>
> **3. That the learned trial magistrate misdirected himself in law by dismissing the appellant's case thus occasioning a miscarriage of justice.**
>
> **4. That the judgement and/or decision of the learned Trial Magistrate is contrary to the weight of the evidence on record."**

By the appeal, this court is urged to set aside the judgement of the lower court in its entirety, find in favour of the appellants on the issue of liability and award and assess the damages due to the appellants.

The Advocates for the parties preferred to canvass the appeal by way of written submissions. While conceding that the evidence adduced was **"divergent"** Counsel for the appellants faulted the trial Magistrate and submitted he used wrong principles in arriving at the decision. Counsel cited the following reasons for faulting the trial Magistrate: -

> **i. It is trite law that an eye witness is a person who gives direct evidence on how an event took place and therefore his/her testimony would have more probative value compared to that of a corroborative witness who can only but provide circumstantial or indirect evidence of the events surrounding the accident. Accordingly, the trial magistrate ought to have placed more weight to the testimony as tendered by Pw2 rather than relying heavily on the testimony of Dw1.**

ii. The defendant did not call his driver/agent/witness to testify during trial and rebut the testimony of the plaintiff who appears to be the only eye witness, and therefore the testimony as tendered by the plaintiff was not rebutted.

iii. Dw1's testimony with respect to the accident is <u>hearsay</u> and/or circumstantial as he clearly states that the he arrived at the scene of the accident after <u>30 minutes.</u> As such, he did not witness the accident (See page 16 of the Record of Appeal).

iv. Whilst the investigating officer states that the motor cycle was to blame for the accident. During cross examination, he contradicts himself by stating that the matter is still pending in court and that the court will determine who to blame (See pages 16 & 17 of the record of appeal). In addition, the police abstract produced as PEX 1 indicates that the matter is still pending under investigations (See the police abstract at page 41 of the Record of Appeal. Besides, Pw1 confirms that Dw1 had since been transferred to Kondele Police Station (which he confirms in his evidence in chief) and as at the time he was testifying the matter was still pending under investigations. Therefore, it is ridiculous when Dw1 states in his evidence in chief as follows: "… A file was opened. Taken to ODPP and it was brought to court. It's for hearing on 18/08/19. [See page 16 of the Record of Appeal]" The logical questions to be considered by the trial court while writing its judgement would be: Who was charged for the accident, yet the alleged perpetrator of the offence is deceased? What is the file case file number in court? what is the nature of the charge? Why is the hearing scheduled on the 18/08/2019, the day being Sunday! Your ladyship, from the above analysis, it is clear that the Dw1's testimony is spurious, porous and full of falsehood and ought not to have been considered at all by the trial court.

v. In the absence of sketch plans to illustrate the point of impact and position of the suit motor vehicle and motor cycle, motor vehicle inspection report, corroborating witnesses and documentation to support the evidence as tendered by Dw1, the testimony of Dw1 has little probative value as compared to that as adduced by Pw2.

Counsel urged this court to find the respondent wholly liable for the accident or apportion liability in the ratio of 50:50%. To buttress his argument Counsel relied on the cases of **Commercial Transporters Limited v Registered Trustees of the Catholic Archdiocese of Mombasa [2015] eKLR, Postal Corporation of Kenya & another v Dickens Munayi [2014] eKLR, Matunda Fruits Bus Services Ltd v Moses Wangila Wangila & another [2018] eKLR, Hussein Omar Farah v Lento Agencies [2006] eKLR** and **Eliud Papoi v Jidneshkumar Rameshabel Patel & another [2017] eKLR**. In regard to the quantum of damages, Counsel proposed an award of Kshs. 6,187,184/= for loss of dependancy calculated as follows – Kshs. 33, x 23 x 12 x 2/3; Kshs. 100,000/= for pain and suffering; Kshs. 100,000/= for loss of expectation of life; Kshs. 115,000/= as special damages and Kshs. 100,000/= for funeral expenses. Counsel also urged this court to award the appellants costs in the lower court and in this appeal.

Counsel for respondent vehemently opposed the appeal and submitted that the appellants did not prove their case in the court below and therefore the judgement of the trial court was just. Counsel submitted and discredited the evidence of the witness called by the appellants at the hearing and contended that the evidence of the defendant's witness confirmed that the deceased was to blame for the accident. Counsel argued that the appellants had a duty under Section 107 of the Evidence Act to prove their case and that burden could not shift to the respondent. Counsel submitted that the respondent's evidence on the occurrence of the accident was uncontroverted and unchallenged. He urged this court to dismiss this appeal with costs to the respondent.

As an appeal to the first appellate court is in the nature of a retrial I have a duty to reconsider and evaluate the evidence in the court below so as to arrive at my own independent conclusion while bearing in mind that I did not see or hear the witnesses.

There is no liability without fault **(see Kiema Mutuku v Kenya Cargo Hauling Services Ltd 1991** cited with approval in **East Produce (K) Limited v Christopher Astiado Osiro [2006] eKLR)** and so for the appellants to succeed they were required to prove on a balance of probabilities that the accident was caused by negligence on the part of the respondent.

The 1st appellant testified that she witnessed the accident. She blamed the collision on the driver of the respondent's vehicle saying that he drove into the path of the deceased's motor cycle. The respondent on the other hand called the investigating officer who testified based on what he perceived from a visit to the scene upon getting report of the accident. Between the two the appellants' witness would be considered a direct witness as opposed to the investigating officer who arrived at the scene after the accident. Be that as it may it is my finding that the 1st appellant's evidence that she witnessed the accident is doubtful. This accident occurred at night as the deceased was travelling from Kisii to Nyamira. The 1st appellant did not say what she was doing on the road at 7pm and did not allege that she was with the deceased. Therefore, one wonders about such a coincidence. Secondly, in cross examination she admitted that she could not clearly see what happened. More importantly however is that she was not telling the truth in view of what she and her co-appellant stated in their statement (paragraph 4) where they stated:-

"<u>That</u> we received the accident message from one of the eye witnesses who knew the deceased".

If in fact the 1st appellant witnessed the accident she would have said so in the statement but not said she was informed about it by a third party. I am not therefore persuaded that the 1st appellant gave a credible account of how the accident occurred. To the contrary I find her an unreliable and untrustworthy witness. Dw1 was the investigation officer. He went to the scene after receiving a report of the accident and his opinion was based on the position of the vehicles and other observations he made at the scene. Unlike in the cases cited by Counsel for the appellants the testimony of the investigating officer gave the court something upon which blameworthiness could be determined even though none of the drivers or an eye witness testified. I am persuaded that his evidence was credible given that he is an independent witness whose evidence was objective. Accordingly, I find that liability was not proved on a balance of probabilities.

The trial court and even this court is required to assess the damages it would have awarded had the appellants succeeded.

In the case of **John Wainaina Kagwe v Hussein Dairy Limited [2013] eKLR** the Court of Appeal citing the cases of **Selle v Associated Motor Boat Company Limited [1968] EA 23** and **Williamson Diamonds Ltd v Brown [1970] EA 1** stated: -

> **"……., We are satisfied that the learned judge grossly misdirected herself in failing to assess damages she would have been inclined to award the appellant in the event that he had succeeded. Such course of action is intended to assist the appellate court in the event that it disagrees with the trial court's findings on the issue of liability and overturns it, to have regard as to the trial court's perception of the damages payable since the appellate court has no chance or opportunity to observe and see the appellant testify as to be able to gauge his injuries and the appropriate damages awardable."**

Under the Law Reform Act damages are awarded for pain and suffering depending on the amount of pain the deceased endured before he died. The longer and hence more pain the higher the damages. In this case **the death was instantaneous and so Kshs. 20,000/=** would have sufficed. **For loss of expectation of life Kshs. 150,000/=** is the conventional amount and that is what I would have awarded.

Under the Fatal Accidents Act I agree with Counsel for the appellant on the multiplier and dependency ratio. However, it is clear from the payslips produced in evidence that the deceased's take home pay was Kshs. 11,166/= only. That was the amount that remained at his disposal to share with his wife and children. Accordingly, **damages under this head** would have been assessed as follows: -

11,166 x 23 x 12 x 2/3 = 2,054,544/=

In regard to special damages the appellants pleaded a sum of Kshs. 110,850/= but proved 115,000/= being 30,000/= for the coffin, 30,000/= legal fees for letters of administration ad litem and Kshs. 55,000/= for funeral expenses and so this court would have awarded the Kshs. 110,850/= pleaded.

As regards the proposal to award Kshs. 150,000/= funeral expenses that is misconceived as a party cannot be awarded more than that pleaded in the plaint and in this case only Kshs. 80,000/= was pleaded and was proved.

In the upshot I find no merit in this appeal and the same is dismissed with costs to the respondent. 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 in view of the Covid-19 pandemic, the Advocates for the parties having consented.