



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

CIVIL APPEAL NO. 61 OF 2016

CIVIL APPEAL NO. 59 OF 2016.

KENNEDY OKONGO OGANDA & ANOTHER.....APPELLANT

VERSUS.

HAMISI MISA MALOBA (*Suing as the personal*

representative and Administrator of the Estate of

HASSAN LUKA HAMISI [Deceased]).....RESPONDENT

CONSOLIDATED WITH

BUNGOMA HIGH COURT CIVIL APPEAL NO. 61 OF 2016

HAMISI MISA MALOBA (*Suing as the Personal*

Representative and Administrator of the Estate of

HASSAN LUKA HAMISI (Deceased).....APPELLANT

VERSUS

KENNEDY OKONGO OGANDA & ANOTHER.....RESPONDENT

[An appeal from Judgment and decree in original Bungoma

CMCC 154/2015 delivered on 18th November, 2016 by Hon. J. King'ori - CM]

J U D G M E N T

The 1st appellant Kennedy Okongo Oganda in the appeal was the defendant in CMCC 154/2015. The 2nd appellant Hamisi Musa Maloba (Suing as a Legal representative of the Estate of Hassan Luka Hamisi (deceased) was the plaintiff. Judgment was entered for plaintiff and defendant in the suit were dissatisfied with the Judgment. Kennedy Okongo filed appeal against Hamisi in Bungoma C.A. No. 59/2016, Hamisi filed appeal against Okongo in Bungoma C.A. 61/2016. By order of this court both appeals were consolidated and Bungoma HCA 59/2016 became the operating file.

Briefly the evidence before he magistrate court was that Kennedy Okongo was the owner and driver of Motor vehicle Reg. No. KAW 937 Toyota. On 25.12.2014 he was driving his Motor vehicle from Kisumu to Bungoma. On reaching Musikoma he saw a motorcycle that was coming from the opposite direction. The motorcycle hit a speed bump lost control and hit his motor vehicle on the drivers side. He reported the accident to police who conducted investigation. He was charged in Bungoma Traffic Case No. 1422/2015 with offence of causing death by dangerous driving when matte was still pending hearing. He blamed the accident on the rider of the Motor cycle and the 2 pillion passenger, the rider for over-speeding and the pillion passenger for allowing to be carried when they were more than required and for not wearing a helmet.

As a result of the accident and one Luka Hamisi sustained fatal injuries. Hamisi Musa Maloba the administrator of the estate of Luka Hamisi therefore filed CC 154/2014 seeking general damages, under the Law Reform Act and Fatal Accident Act.

The Pw3 Christopher Moi Muhati, the rider of the motorcycle Reg. No. KMCV 446B testified that on material day he was carrying 2 pillion passengers, being the deceased in this case Hassan Luka Hamisi and his father who also died (Not subject to this suit). He was riding on the left side of the road when facing Mumias on reaching at Bamers he saw an on-coming vehicle which on reaching them came to their side of the road and hit them. The vehicle rested on the left side of the road in a ditch. He denied that he hit bumps and lost control.

Pw1 PC. Benard Tanui attached to Bungoma Traffic Base produced the Investigation Traffic file in respect of the accident. From the Investigation and sketch plan the accident occurred on right side of road when facing Bungoma direction. The Motor cyclist was supposed to be on that lane. It is the Motor vehicle which left its left side which was its proper lane and hit the motor cyclist who was lawfully on his proper lane.

The learned trial magistrate upon considering this evidence, found that the Kennedy Okongo Oganda was negligent and therefore liable at 100%. Kennedy Okongo Oganda dissatisfied with the finding on liability filed Bungoma C.A. 59/2016 against Hamisi Musa Maloba setting out the following grounds:

- 1. The learned trial magistrate erred in law and fact in failing to appreciate the reasonable and sufficient evidence tendered before him and finding the appellant 100% liable.**
- 2. The learned trial magistrate erred in law and fact in failing to consider the evidence adduced by the Appellant/Defendant.**
- 3. The learned trial magistrate erred in law and fact in failing to find that the finding by the traffic police was only an opinion of the police and the same was not binding to the court in evidence as the police officer was not at the scene at the time of the accident.**
- 4. The learned trial magistrate erred in law and fact in finding the Defendant/Appellant 100% liable for causing the accident and in failing to apportion liability between the plaintiff and the defendant.**
- 5. The learned trial magistrate erred in law and fact in finding that the evidence of the Appellant did not prove the required standards the particulars of negligence pleaded at paragraph 4 of the Defence and in spite of the Appellant having pleaded particulars of contributory negligence deceased.**

The learned trial magistrate having found Kennedy Okongo Oganda (The defendant) liable at 100% entered judgment on quantum for the plaintiff for Hamisi Maloba (appellant in Civil Appeal 61 of 2016).

- (a) Loss of years Kshs.500,000/=
- (b) Pain and suffering Kshs.100,000/=
- (c) Loss of expect of Life Kshs.150,000/=

Total Kshs.660,000/=

- (d) Costs of suit
- (e) Interest on the award and costs at Court rate.

Hamisi was dissatisfied with this quantum of damages and filed appeal No. 61/2016 on the following grounds of Appeal.

- i) The learned trial magistrate erred in law and in fact by making no award on special damages which finding was against the evidence tendered by the appellant.
- ii) The trial magistrate erred in law and fact by awarding the appellant (Hamisi Musa Maloba) Ksh.500,000/- as lost years which amount was inordinately low.

By consent the appeals were consolidated and Hamisi Musa Maboba (the plaintiff in lower court) was adopted as 1st plaintiff and Kennedy Okongo Oganda (the defendant in the lower court) as the 2nd appellant. The appeal was canvassed by way of written submission.

Mr. Mukisu for the 1st appellant (Hamisi Musa) submitted that the trial court, visited the scene, traffic investigation file was produced and a sketch map showing the point of impact was tendered which showed the impact was on the lane of the motorcyclist as evidenced by presence of broken glass and blood stains. He submitted that from this evidence the trial magistrate properly found the 2nd appellant 100% liable. On quantum he submitted that the trial court failed to award special damages of Kshs.48,500/= while was pleaded in paragraph 6 of the plaint and receipt produced as Exh. 3B, 4,5,7. He further submitted that the quantum of Kshs.500,000/= general damages awarded was so inordinately low and that an award of Kshs.30,000/= would be adequate.

Mr. Mose for the 2nd appellant Kennedy Okongo submitted that the trial magistrate in finding on liability relied on Secondary evidence when Primary evidence was available. He faulted the trial court on relying on fact that the 2nd appellant had been charged with a traffic offence. He submitted that the 2nd appellant had pleaded contribution by 1st appellant but same was overlooked.

On quantum counsel submits that counsel for 2nd appellant submits that while evidence was adduced that deceased had been admitted to Chwele Medical Training Centre, there was no evidence that he had enrolled or that he had attended the training for one semester. He submitted that the court resisted the temptation to speculate the earning and that the award of Kshs.500,000/= for lost years was proper.

On the special damages of Kshs.48,000/= not awarded, counsel submits this was an error and the court should correct the same. From the grounds of appeal and submission by Counsel for the parties, the issues for determination in this appeal are;

1. Was the finding in liability against the 2nd appellant at 100% proper?

2. Is the quantum of damages awarded to 1st appellant too low?

This is a first appeal In the case of *Sielle Vs Associated Motor Boat Company Ltd [1968] EA 123* by Sir Clement De Lestang, it was held 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 of the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.*”**

On liability the learned trial magistrate stated;

***“On the issue of liability, the motorcyclist Pw3 testified that he was riding from Bungoma on the left side of the road with 2 pillion passengers when motor vehicle KAW 937T left its lane, lost control and came to his land and hit his motorcycle. It is his evidence that if the motor vehicle had not left its lane, the accident would not have occurred. The evidence by Pw3 is firmly and convincingly backed by the evidence presented by Pw1 the traffic police officer. It is quite so clear from the sketches in the police file Pexh.1 that the motor vehicle Reg. No. KAW 937T, left its lane and hit the motorcycle in its rightful lane. The debris on the road, the blood stains, the skid marks associated with the motor vehicle right to its final resting position indicate in no uncertain terms that the Defendant was to wholly blame for the accident. I reject the defence that the cyclist left his land and hit the motor vehicle. That the motorcyclist was not insured or that he had an excess passenger does not relate in any way to his liability. If the defendant did not veer from his lane, no accident would have occurred. The accident occurred well inside the rightful lane of the motorcyclist. It is not unclear where the blame lies. The question of apportionment of liability does not arise. I find for the plaintiff at 100% on liability. I have looked at the authorities cited by the defendant on liability and apportionment of liability but I do not find Morrison Mbuthia Maina & Another -Vs- Jane Wanjiku Mwangi & Another 206 eKLR, A.O. Bayusuf & Sons Limited -Vs- Samuel Njoroge Kamau NKU HCCA 274/04 and Jimnah Munene Macharia -Vs- John Kamau Erera NBI HCA 218/98 applicable to the fact of this case.*”**

The evidence of the driver of the motor vehicle and the rider of the motorcycle has been reproduced above. It clearly shows that the accident occurred on the rightful lane of the Motor cyclist. It is the vehicle which swerved from its lane to the lane where the motorcyclist was where the motor cyclist a party who desires that the defendant to bear contribution he must prove acts of negligence committed by the defendant. It is not enough to say we were involved in an accident and therefore we should bear contribution. From the evidence, the 2nd appellant was clearly negligent and caused the accident. I am satisfied that the finding on liability by the trial court was premised on evidence proved. I therefore dismiss the 2nd appellants Kennedy Okongo Oganda appeal with costs.

On quantum which is subject of the appeal by 1st appellant, Hamisi Musa Maloba; the principles upon which an appellate court can interfere with quantum of damages are now settled; in *Butt Vs Khan*, Civil Appeal No. 40 of 1997 the court stated: -

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. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was wither inordinately high or low.”

The trial magistrate in assessing damages the quantum for lost years, he adopted the global approach, and awarded Kshs.500,000/=. The lumpsum approach and the multiplier - multiplicand approach are both methods of assessing damages. While multiplier approach is appropriate where the deceased was working, and income known or could be ascertained, it becomes speculative where the deceased was a child or a student as in this case. The trial court rightly in my view adopted the lumpsum approach.

The deceased was 19 years old and had been admitted to join Chwele Medical Training Centre. While assessment of damages is at the discretion of the trial court, court should be guided by facts including the principle that similar injuries should have similar or closely similar awards. In this case the authorities cited provided a good guide for assessment. I find that had the trial court taken into account the similar awards in other cases, he would have found that the award of Kshs.500,000/= under this head of lost was low for these reason I set aside the award of Kshs.500,000/= for lost years and substitute thereof the sum of Kshs.1,000,000/=. I also award special damages of Kshs.48,000/= in the result I enter Judgment for applicant against the Respondent for;

1. Under Law Reform Act:

(a) Loss of Expectation of Life Kshs.150,000/=

(b) Pain and Suffering Kshs.10,000/=

2. Under Fatal Accident Act:

(a) Lost years Kshs.1,000,000/=

Total Kshs.1,160,000/=

Less lost years Kshs.150,000/=

3. Special damages Kshs.48,000/=

Total Kshs.1,058,000/=

The appellant will have costs of this appeal.

Dated and Delivered at Bungoma this 29th day of May, 2020.

.....

S.N.RIECHI

JUDGE