REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CIVIL APPEAL NO.51 OF 2018

(Appeal Originating from Nyahururu CM's Court CM.223 of 2008 *by: Hon. A.B. Mong'are S.R.M.)*

SAMUEL NJOROGE NJOGU.....APPELLANT

- V E R S U S –

PHYLIS MUTHONI MUTURI.....RESPONDENT

J U D G M E N T

The appellant, ***Samuel Njoroge Njogu,*** is aggrieved by the judgment of ***Hon. A. B. Mongare*** delivered on 04/10/2011 in ***Nyahururu PMCC 223/2008,*** in which the respondent was awarded a total of Kshs.180,000/- in general and special damages. The suit was filed by ***Phylis Muthoni Muturi*** as legal representative of the estate of ***Solomon Muturi,*** her son who was fatally injured in a road traffic accident which occurred on 26/03/2006 along Nyahururu – Rumuruti Road whereby the deceased's bicycle collided with motor vehicle KSC 535 which was being driven by the appellant.

In the plaint that was filed by the respondent on 31/11/2008, the respondent blamed the appellant for the occurrence of the accident in that he, inter alia, drove at an excessive speed, drove without due care and attention, failed to apply brakes, stop or slow down, swerve or manage and in any way control motor vehicle KSC 535; that as a result, the deceased was fatally injured. The respondent sought damages under ***the Fatal Accidents Act and the Law Reform Act.***

The appellant filed a defence on 13/01/2010 denying the occurrence of the accident and all the particulars of negligence attributed to him. In the alternative, he pleaded that if any accident occurred, it was attributable to the negligence of the deceased for inter alia, failing to have regard for his own safety, cycling without due care and attention, cycling in the path of the motor vehicle, failing to heed the warning of the appellant etc. It was also alleged that the suit is incompetent bad in law and does not disclose a cause of action known in law.

The appellant filed this appeal and has cited the following grounds in the memorandum of appeal filed in court on 31/08/2013;

1. That the learned Magistrate erred in law and fact in finding that the plaintiff/respondent had proved her case as required;

2. That the learned trial Magistrate erred in law and fact in finding the defendant/appellant 50% liable contrary to the evidence on record;

3. That the learned Magistrate erred in law and fact in disregarding the evidence of police who stated that no charges had been preferred against the appellant and that the deceased was wholly to blame for the occurrence of the accident;

4. That the learned trial Magistrate erred in of law and fact in disregarding the fact that the respondent did not call an eye witness to testify;

5. That the learned Magistrate was in error of law and fact in failing to find that the respondent was wholly to blame for the accident;

6. That the learned Magistrate's findings of fact and law in awarding the Respondent a sum of Kshs.10,000/- for pain and suffering, Kshs.10,000/- special damages, Kshs.100,000/- for loss of expectation of life and Kshs.240,000/- for loss of dependency against the principle of law and/or yet the same is not payable in addition;

7. That the learned trial Magistrate erred in law and fact in awarding special damages of Kshs.10,000/- and yet the same was not pleaded and proved;

8. That the learned Magistrate assessment on general damages for loss of dependency was excessive and unreasonable in the circumstances;

9. That the learned trial Magistrate erred in law and in fact in disregarding the appellant's submissions;

10. That the learned Magistrate erred in law and fact in taking into account irrelevant or extraneous issues in assessing damages;

11. That the learned Magistrate's findings were wrong in law and fact or otherwise the learned Magistrate misdirected herself on matters of law and fact with resultant injustice.

Submissions:

The appellant's Counsel filed submissions which were highlighted. Grounds 1 – 5 where it was argued together where it was submitted that the court found liability at 50% because PW1 did not witness the accident and could not tell how it happened; that PW2, the deceased's twin arrived at the scene after the accident and could not tell how it happened; that PW2 did not even find the body at the scene; that PW3, a police officer stated that the appellant was never charged because the deceased was wholly to blame for the accident because he was hit while on the appellants lane; that the driver tried to avoid the accident but the deceased also swerved; that the appellant was a careful driver and did all he could to avoid the accident; that the respondent therefore did not prove her case on a balance of probabilities; that the court having found that PW2 lied to the court and that the appellant was not charged because he was not at fault, the court should have dismissed the suit. Counsel relied on the decision of ***Anderson Kenga Bulushi vs San Rathod Automobile (2005) eKLR.***

As regards ground 6 – 10, Ms. Chelangat, the appellant's Counsel submitted that the award of Kshs.10,000/- for special damages was baseless because special damages must not only be pleaded but should be strictly proved and that though Kshs.12,900/- was pleaded, there was no proof thereof and that the court acknowledged as much. Counsel relied on ***Section 107 of the Evidence Act*** which provides that he who alleges has the burden of proving; Counsel further submitted that the award of damages that was without basis and there was no proof of earnings or dependency. For that submission, Counsel relied on ***Nyamwate & Others vs United Millers Ltd & 2 Others Kisumu HCCC 153 and 154 of 2014*** where the court held that income had to be proved before an award of dependency.

Mrs. Wamithi the respondent's Counsel also filed submissions in opposition. It was counsel's submission that three witnesses testified for the respondent while the appellant did not call any evidence to support their case; that the respondent's evidence was not rebutted; that the particulars of negligence attributed to the respondent remained mere allegations. Counsel relied on the decision of ***Autar Singh Bahra & Another vs Raju Govindji HC.548/1998*** which was cited in ***Motex Knitwear Mills Ltd Milimani HCC.834/2002.*** It was Counsel's submission that mere cross – examination of the respondent's witness did not amount to giving evidence. Counsel also relied on the decision of ***Kimaru J. – in William Kabogo Gitau vs George Thuo & 2 others (2010) KLR*** where the court held that where a party establishes his case to a 51% as opposed to 49%, he is said to have established his case on a balance of probabilities. Mrs. Wamithi further argued that the appellant was the only eye witness to the accident and was best placed to explain how the accident occurred but chose to keep quiet. It means that the respondent's evidence remained unchallenged. It was also submitted that since the respondent had pleaded the doctrine of ***res ipsa loquitor*** the burden of proof shifted to the appellant to disprove the particulars of negligence attributed to him. For that proposition, Counsel relied on ***Esther Nduta Mwangi & Another vs Hussein Dairy Transporters Ltd Machakos HCCC.46 of 2017*** and ***Joseph Kahinda Maina vs Evans Kamau Mwaura & 2 Others (2014) eKLR.***

Counsel in supporting the apportionment of liability cited the case of ***Alfarus Muli vs Lucy M. Lavuta & Another (1997) eKLR*** where the court approved the apportionment of liability as an exercise of the court's discretion based on the evidence.

In reply to grounds 6 – 11, the Counsel argued that the appellant has to demonstrate that the award of damages was a wrong exercise of the court's discretion, that the award was too high or too low.

Counsel cited the decisions of ***Zablon W. Mariga vs Morris Wambua Musila C.App.No. 60 of 1982*** and ***Butler vrs Butler (1984) eKLR,*** Counsel submitted that under the ***Law Reform Act*** damages are awarded for the benefit of a deceased's estate while under the ***Fatal Accidents Act,*** damages are awarded for loss of dependency. Counsel cited the case of ***Jeremiah Njuguna & Another vs Anagleta J. Yator & Edel J. Biwott (suing as the administrator of the estate of the late Paul Kiplagat (2016) eKLR.*** Counsel argued that the damages awarded on all the heads were deserved; that even if there was no documentary evidence to support earnings by the deceased, the court would adopt the minimum statutory prevailing wages. That is what the court did in ***Francis Karani & Another vs Thomas Ndaya Obayo CA.C.App.No. 167 of 2002.***

Analysis and determination:

It is the duty of this court, on a first appeal, to examine, analyze and re-assess all the evidence tendered in the trial court afresh and reach its own conclusions but always bear in mind that this court neither saw nor heard the witnesses testify, something that the trial court had the benefit of. I am guided by ***Selle vs Associated Motor Boat Co. (1968) EA 123 and Kiragu vs Kiragu & Another (1988) EA 348,*** the court held;

"An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidences generally."

The respondent called 3 witnesses. ***PW1 Phylis Muthoni*** learned from ***Charles Nderitu,*** that her son Solomon (the deceased) had been hit by a motor vehicle on his way from Rumuruti going towards Nyahururu. PW1 did not know how the accident occurred.

PW2 Charles Nderitu testified that on 26/03/2006, he received information that his brother Solomon had been hit by a motor vehicle and taken to hospital. He later saw the body during post mortem. According to PW2, the appellant was avoiding a pothole when he hit the deceased; that the deceased was coming from Rumuruti going towards Nyahururu and the driver swerved to avoid a pothole; that the vehicle landed on the side as one faces Rumuriti. He did not get the deceased brother at the scene but the bicycle was on the motor vehicle's lane. He admitted that the Cpl. Mugambi demanded that an inquest be done but none was done. He said that the investigation officer recorded statements of the appellant, his wife and one Benson Ngima Kiora who was a passenger on the bicycle. PW3 said that it is the investigation officer who indicated that the deceased was to blame for the accident.

There was no eye witness to the accident that resulted in the death of Solomon. PW3 produced the police file on behalf of the investigating officer. PW3 said that the investigating officer relied on the statements of the appellant (driver) and his wife in arriving at the conclusion that the deceased was to blame for the accident. Incidentally there was also a recorded statement of one ***Benson Ngima Kiora*** who was a passenger of the deceased. According to that statement, the cyclist was on the right side of the road. The abstract in the file indicated that a person was to be charged with causing death by dangerous driving though the appellant was never charged. There was no recommendation made in the police abstract form. Though PW3 insisted that the deceased was to blame for the accident, in cross examination, he said that the investigating officer Cpl. Mugambi had recommended that an inquest be done. In my view, that recommendation means that it was not clear who was to blame for the accident. No doubt an accident occurred. The law is that he who alleges must prove (see ***Section 107 Evidence Act).*** Several allegations of negligence were attributed to the appellant the driver of the vehicle, who was not alone at the time of the accident but with his wife in the car. However, he chose not to say anything in his defence. The dead tell no tales, and therefore the deceased could not tell what transpired on that day. Accidents do not just happen. Somebody must have been careless.

In this case, the respondent pleaded the doctrine of ***Res ipsa Loquitor,*** meaning that the facts speak for themselves. In considering the said doctrine in ***Esther Nduta Mwangi & Another supra,*** Lenaola J. as he then was held as follows;

> **"Although the defendant denied the accident but pleaded in the alternative that the accident was as a result of negligence on the part of the deceased, the defendant chose to call no evidence whatsoever and that being the case, the particulars of negligence on the part of the deceased were not proved and are mere allegations..... The plaintiff, on the other hand pleaded the doctrine of res ipsa loquitor and produced documents including police abstract showing the date and place of the accident although no eye witness to the accident was called. However, since the doctrine of res ipsa loquitor was pleaded, the burden of proof was shifted to the defendant to prove the particulars of negligence attributed to him."**

The above case was relied upon by J. Odunga – ***Joseph Kahinda Maina (Supra).***

Having considered the above authority, I am persuaded to find that the appellant failed to discharge the burden that shifted on him to prove that he was not negligent. The court therefore properly exercised its discretion in apportioning liability at 50% against both the respondent and appellant, bearing in mind that nobody witnessed the accident.

In the case of ***Alfarus Muli (supra) Justice of Appeal R.O. Kwach, RSC Omolo and G.S Pall*** held as follows;

> **"The apportionment of liability is an exercise of judicial discretion based on the evidence before a Judge... Vehicles when properly driven on the road do not run into each other and from the fact of collision drove, a finding would be perfectly cited to infer negligence on the part of one or the other driver or on the part of both of them. For this court to disturb a finding of negligence by the superior court, it would have been shown that there was absolutely no evidence or that the evidence which as there, could not possibly support such a finding... The same consideration must apply in respect of the apportionment of liability."**

I am in agreement with the trial Magistrate's finding that the circumstances of this case called for an apportionment of liability at 50% and I hereby uphold that finding.

Whether the court can interfere with the award of damages:

The law is settled, that the appellate court will not interfere with an award of damages because it is an exercise of the trial court's discretion. The High Court can only interfere with an award of damages if the award is inordinately high or low or it amounts to an erroneous estimate or that the court considered irrelevant matters and failed to consider relevant matters.

In ***Zablon W. Mariga (supra)*** the court said;

> **"The assessment of damages is more like an exercise of discretion by the trial Judge and an appellate court should be slow to reverse the trial Judge unless he has either acted on wrong principles or awarded so excessive or so little damages that no reasonable court would; or he has taken into consideration matters he ought not to have considered or not taken into consideration matters he ought to have considered and in the result arrived at a wrong decision."**

See also ***Kemfro Africa Ltd t/a Meru Express Service & Another vs A.M Lubia and Olive Lubia (1982 – 1988) 1 KAR 727.***

The first complaint by the appellant is that the court should not have awarded damages under the ***Fatal Accidents Act & Law Reform Act.*** Damages under the ***Law Reform Act*** are awarded for the benefit of the deceased's estate while those under the ***Fatal Accidents Act*** are awarded to the deceased's dependants as compensation for loss of dependency. Such an issue was considered in ***Jeremiah Njuguna case*** by J. Githua where she stated;

> **"I wish to start by addressing the submissions made by the appellant that the trial magistrate ought not to have awarded**

damages under both the Law Reform Act and the Fatal Accidents Act as this amounted to double compensation. It is important to note that damages under the Law Reform Act are awarded for the benefit of the Estate of a deceased person while those under the Fatal Accidents Act are awarded to the deceased's dependants to compensate them for loss of their dependency.

The general damages awarded under the two legal regimes are therefore meant for different purposes but since in reality it happens that some administrators of Estates double up as heirs to the deceased, the courts have over time developed a practice of awarding only conventional sums under the Law Reform Act in order to avoid overcompensating the dependants for their loss.

Having said that, I find that the learned trial Magistrate did not err in awarding general damages under both the Law Reform Act and the Fatal Accidents Act. The respondents were entitled to seek and obtain damages under the two statutes since this is allowed by the law. Section 2(5) of the Law Reform Act clearly provides that the right conferred by or for the benefit of the Estate of a deceased person shall be in addition and not in derogation of the rights conferred on the dependants of a deceased person under the Fatal Accidents Act. The trial court was therefore correct in awarding general damages under the two statutes."

I am in agreement with the finding in the above cited case that the respondent was entitled to damages under both heads.

Whether the damages were excessive:

The evidence on record is that the deceased died on the spot. The court awarded a minimal amount for pain and suffering being Kshs.10,000/-. The court can not interfere with the minimal figure.

On loss of expectation to life under the ***Law Reform Act,*** an award of Kshs.100,000/- was made. That award was modest and the court finds no good reason to interfere. Counsel referred this court to the case of ***Hyder Nthenya Musili & Another vs China Wu Yi Ltd & Another (2017) eKLR*** where J. Nyamweya said;

"The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award of loss of expectation of life is Kshs.100,000/- while for pain and suffering, the awards range from Kshs.10,000/- to Kshs.100,000/- with higher damages being awarded if the pain and suffering was prolonged before death."

The above position represents the law, and the court will not interfere with the said awards.

An award of Kshs.240,000/- was made for loss of dependency. PW1 told the court that the deceased was a farmer. He did not have a formal employment nor was he a large scale farmer to produce records of his income from farming. Ones earnings are not necessarily proved by production of documents like bank accounts statements. PW1 said that the deceased was 41 years, unmarried and used to support her with about Kshs.2,000/- per month. There is no reason to doubt PW1 that her son used to support her financially. The deceased must have done something for a living. Where there is no evidence to prove what the deceased earned, the court's have generally applied the prevailing minimum wage. This was addressed in the case of ***Francis Karani & Another vs Thomas Ndaya Obayo CA 167/2002*** where the Court of Appeal said;

"We do not subscribe to the view that the only way to prove the profession of a person must be the production of certificates and that the only way of proving earnings 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."

The deceased was 41 years old. The court was of the view that he might have continued working on the farm for the next 20 years. Many people will farm for a long period beyond even retirement. I think that 20 years was a good estimate. The court estimated the minimum wage to be Kshs.3,000/- which I believe was a fair estimate. The ratio of dependency of 1/3 is also fair because the deceased did not spent all his earnings on his mother. Dependency would therefore be calculated as follows 1/3 x 3,000 x 20years x 12 = 240,000/-. I uphold that award

Whether special damages were proved:

The law is clear, that special damages have to be specifically pleaded and strictly proved. In this case, though pleaded, the special damages were not proved and the award of Kshs.10,000/- as special damages was an error and I hereby set aside the said award of Kshs.10,000/-.

In the end, I uphold all the court findings on liability, damages on pain and suffering, loss of expectation to life and loss of dependency.

Pain and suffering	Kshs.10,000/-
Loss of expectation to life	Kshs.100,000/-
Loss of dependency	Kshs.240,000/-

Total Kshs.350,000/-

Less the contribution of 50% -Kshs.175,000

Kshs.175,000/-

The appeal succeeds in part. The respondent will have judgment against the appellant for Kshs.175,000/-.

The appellant will bear ¾ of the costs of appeal and all the costs in the lower court. It is so ordered.

Signed and **Dated** at **NYAHURURU** this ***28th*** day of ***May, 2020***.

.....

R.P.V. Wendoh

JUDGE

PRESENT

Mrs. Wamithi for the respondent

Eric – Court Assistant