



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CIVIL APPEAL NO. 49 OF 2018

BETWEEN

JOHN SIMON ASHERS.....1ST APPELLANT

ROBERT NGILA.....2ND APPELLANT

AND

NELSON OKELLO ONJAO.....RESPONDENT

(suing as administrators and legal representatives of the estate of John Dianga Onjao)

(Being an Appeal from the Judgment and Decree in Maseno SRMCC No. 167 of 2009 by Hon. C.N.Oruo (RM) on 29th May, 2018)

JUDGMENT

1. **NELSON OKELLO ONJAO (Respondent) suing as administrators and legal representatives of the estate of John Dianga Onjao (Deceased)** filed suit in the lower court **JOHN SIMON ASHERS** and **ROBERT NGILA (Appellants)** seeking damages for fatal injuries suffered by his brother **John Dianga Onjao (Deceased)** on 19.03.2008 when 2nd Appellant's motor vehicle KAR 508U (**accident motor vehicle**) which was being driven negligently by 1st Appellant along Kisumu-Busia Road that it knocked down the deceased who was lawfully walking along that road.
2. The Defendants/Appellants in their statement of Defence denied the claim and blamed deceased for the accident.
3. The learned trial magistrate apportioned liability at 100% in favor of Respondent against the Appellants and in a judgment dated 29.05.18 awarded damages in the sum of Kshs. 772,500/-, costs of the suit and interest.

The Appeal

4. The Appellants being dissatisfied with the lower court's decision preferred this appeal and on 29.08.19 filed the Memorandum of Appeal dated 22.06.18 which sets out 9 grounds of appeal which I have summarized into 2 grounds that:

- 1) **The finding that Appellants were wholly liable was erroneous**
- 2) **The quantum on damages was inordinately high**

Analysis and Determination

5. This being the first appellate court, its duty is to re-evaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. (See **Selle & Another v Associated Motor Boat Co. Ltd & Another (1968) EA 123**).

6. The extent to which an appellate court may interfere with an award of damages is well settled. It must be shown that the trial court in awarding of the damages took into consideration an irrelevant fact or the sum awarded is inordinately low or too high that it must be a wholly erroneous estimate of the damage, or it should be established that a wrong principle of law was applied (See **Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v A.M. Lubia and Olive Lubia (1985) 1KAR**) and **Denshire Muteti Wambua V Kenya Power &**

Lighting Co. Ltd, Civil Appeal No. 60 of 2004).

7. I have considered the entire record of appeal and considered the submissions of counsels for both parties. I note that the appeal revolves around the question of both liability and quantum.

Liability

8. It is trite law that "whoever alleges must prove. **Section 107 of the Evidence Act, Chapter 80 Laws of Kenya** states as follows:

1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts, must prove that those facts exist.

2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person

9. Further **Section 109** in narrowing down to proof of particular facts stipulates:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

10. The foregoing provisions of the law were restated by the Court of Appeal in the case of **Kirugi & Another – Vs – Kabiya & 3 Others [1987] KLR 347** where it held thus:

“The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof.”

11. The police abstract tendered as PEXH. 1 is a critical document and in this case, it proved that indeed an accident involving the deceased and the accident motor vehicle was reported to the police.

12. It should however be remembered that a police abstract does not prove the manner in which an accident occurred and notwithstanding that the Respondent did not witness the occurrence of accident, he had a duty to discharge the burden to prove that Appellants were liable.

13. In the case at hand, it is indeed not possible to safely conclude who between the deceased and the 2nd Appellant was to blame for the accident.

14. In **Hussein Omar Farah v Lento Agencies [2006] eKLR**, the Court of Appeal faced with a similar situation as the one subsisting in this case held as follows:

“In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs, the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.”

15. Applying the same principle case to this case, I have come to the conclusion that the learned trial magistrate fell into error when he wholely relied on the entries on the police abstract, without corroborating evidence, to find that the Appellant's were wholly liable for the accident. Accordingly, I apportion liability at 50:50 % as between the Appellants jointly and severally on one hand and Respondent on the other hand.

16. Concerning quantum, the Respondent proposed Kshs. 100,000/- for pain and suffering; Kshs. 150,000/- for loss of expectation of life and a dependency ratio of 2/3 and placed reliance on **Maurice Odiwuor Ogada Vs John Juma Obungu & Another HCCC.NO. 375 of 1999** where Kshs. 200,000/- was awarded for a deceased that died a week after the accident. Appellants offered Kshs. 10,000/- and placed reliance on **Philomena Muthu Nzyoka (Suing as a Legal Representative of the Estate of the Late T K M) v Transpares Kenya Limited [2016] eKLR** where Kshs. 80,000/-was awarded for a deceased that died on the same date of the accident. The deceased died on the date of the accident and I find that Kshs. 80,000/- for pain and suffering is adequate compensation for pain and suffering.

17. For loss of expectation of life, the Respondent sought Kshs. 150,000/- and Appellants offered Kshs. 100,000/-. I find no reasonable cause to interfere with the sum of Kshs. 100,000/- awarded by the trial court.

18. In the absence of evidence of the deceased's earning, I find that in calculating loss of dependency, the trial court rightly applied the multiplicand of Kshs. 7,000/-which was the minimum wage for an unskilled worker and a multiplier of 10 years since the deceased died at the age of 45 years. The dependency ratio of 2/3 is normally applied in a case where the deceased has dependents such as the deceased in this case and I find that the same was correctly applied.

19. Accordingly, the appeal partially succeeds and the trial court's decision is set aside and substituted as follows:

1) Liability at 50:50 % as between the Appellants jointly and severally on one hand and the Respondent on the other hand

2) Pain and suffering Kshs. 80,000/-

3) The award for loss of expectation of life and loss of dependency remain as ordered by the trial court

4) Each party shall bear its own costs of this appeal but the Appellants will bear costs of the trial in the magistrate's court.

DATED AT KISUMU THIS.....29th.....DAY OF.....September.....2020

T. W. CHERERE

JUDGE

Court Assistants - **Amondi/Okodoi**

For the Appellants- **Mr. Otsyeno for E.K.Okinyi & Co. Advocates**

For the Respondent- **Mr. Ouma for Mourice Carlos Ouma & Co. Advocates**