



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL APPEAL CASE NO. 113 OF 2010**

**REHEMA NDUKU KIMINDU & ANOTHER**

**(Suing as the legal representatives and Administrators**

**of the Late JOSEPH KIMINDU KIITI).....APPELLANTS**

**VERSUS**

**LOCHAB BROTHERS LTD.....RESPONDENT**

***(Being an Appeal from the Judgment and Decree of the Machakos CMCCC NO. 725 OF 2009 delivered on 23<sup>rd</sup> July 2010 by Mr. S.M. Mungai, Principal Magistrate)***

**JUDGMENT**

**INTRODUCTION**

1. This is an Appeal from Judgment in a personal injury suit herein filed in the trial Court by a Plaintiff dated 22<sup>nd</sup> day of May 2009 in which it pleads the cause of action in paragraph 4 as follows:

*i. "On or about 28/2/2009 the deceased, JOSEPH KIMINDU KIITI, was lawfully cycling along Nairobi – Mombasa road at Makindu when the Defendant's Motor Vehicle Registration Number KAV 834R lost control, left the road and hit the deceased fatally injuring him. The Plaintiff's aver that the accident occurred due to negligence of the Defendant's driver and/or agent and/or servant and or employee in driving, managing and/or controlling the said motor vehicle registration number KAV 834R. As a result of the aforesaid death the estate of the deceased has suffered loss and damages for which it holds the defendant wholly liable."*

2. The Respondent herein (Defendant then) filed its defence on 6/7/2009 at the trial Court denying the contents of the Plaintiff and putting the Appellant herein (Plaintiff then) to strict proof. They alleged that the said accident was wholly caused by the negligence, carelessness and recklessness on the part of the deceased in that the deceased rode/cycled a bicycle so carelessly and negligently that he lost control thereof and hit the Defendant's stationary Motor Vehicle's cabin and fell backwards thereby injuring the back of his head.

**HEARING IN TRIAL COURT**

3. PW1 testified that she is the wife of the deceased who left behind five dependents, four being school going minors. She testified that she was not at the scene at the time of accident but she produced a search for the motor vehicle KAV 834P and the payment its receipt as exhibits 1A and 1B, respectively. She testified that her husband worked as a casual at Autospring Manufaa Ltd. earning Ksh.8700 and would send home Ksh.6000 and that they used Ksh.30,000 for the funeral. She produced death certificate as exhibit 2 and four clinic cards as exhibit 3. She also produced the police abstract as exhibit 4b and the Grant of Letters of Administration exhibit 5.

4. PW2 who was a neighbor to PW1 testified that he witnessed the accident at around 8.00pm as the deceased cycled his bicycle on the left side heading to Nairobi and he was fifty meters away from the scene of accident. He testified that motor vehicle KAV 834R left its lane and caused the accident and the police never called him to record a statement. He confirmed that the deceased died at the scene and that he was thrown about 10 meters from the right side front of the lorry and that the police found him at the scene.

5. DW1 testified that he was driving to Mombasa from Eldoret that at Makindu when going to a parking as he stopped to branch a cyclist came from behind the other vehicle and hit his motor vehicle on the right side and the headlight lens got broken. The Red Cross called the police. He was driving between 30 – 40 Kilometers per hour as he was planning to branch to the parking. The police did not blame him for the accident.

**PLAINTIFF'S SUBMISSIONS**

6. The Plaintiff submitted that their claim against the Defendant was for general damages under the Law Reform Act and Fatal Accidents Act and listed the issues to be determined as follows:

- a. Whether an accident involving the deceased and Motor Vehicle KAV 834R happened on 28/2/2000.
- b. Who owned the Motor Vehicle KAV 834R at the time?
- c. Who was to blame for the occurrence of the accident?
- d. Whether the accident was the cause of the deceased death and if his estate has suffered loss and damages as a result of (quantum of damages)
- e. Who is to bear the costs of the suit and interests?

7. On loss expectation of life they cited **Floice Adema Onam v. Kezia Muthoni Ngure & 2 Others**, Mombasa HCCC. NO. 301 of 2002 where estate of deceased was awarded Ksh.100,000 in 2005 and Ludega Atieno Amimo (Suing as an Administrator and personal representative of **Francis A. Okelo, deceased**) v. **Akamba Public Road Services Ltd & 2 Others**, Kisumu HCC. NO. 173 of 2001 where a similar amount of Ksh.100,000 in 2005 and they submitted that due to inflation an award of Ksh.150,000 would suffice on loss of expectation of life.

8. Under lost years/loss of dependency they submitted that the deceased salary was not disputed and invoked provisions of the Regulation of Wages (Agriculture Industry) (Amendment) Order 2005 which provides minimum wage of Ksh.8,000 and applied a multiplicand of  $\frac{2}{3}$  since he had dependant children and retirement age of 60 years thus a total of 1,280,000 i.e

a.  $\frac{2}{3} \times 8000 \times 20 \times 12 = \text{Ksh.}1,280,00$

b. They relied on the case of **Floice Adema Onam v. Kezia Muthoni Ngure & 2 Others** Mombasa HCCC. No. 301 of 2002 where the deceased was aged 50 years at the time of his death and the Honourable Court adopted a multiplier of 15 years.

9. On pain and suffering they submitted the deceased died on the day of accident and cited **Mourice Odiwour Ogada (Suing as a personal representative of Jane Dorothy Onyungo) v. John Juma Obunga & Another**, Kisumu HCC. No. 375 of 1999 where the deceased died later in the day in hospital and her estate was awarded general damages of Ksh.100,000 for pain and suffering in 2006 and urged the Court to hold the same.

10. They finally submitted that special damages of Ksh.30,000 was proved by receipts and that the Plaintiff is liable to pay Plaintiffs cost plus interest. The Defendant did not file any submission at the trial Court.

#### **JUDGMENT OF TRIAL COURT**

11. The trial Magistrate stated as follows in his judgment:

*“I therefore do not hesitate to find that the Plaintiff’s have [not] proved their case on liability against the defendant and I dismiss the case with costs. I am therefore under an obligation to proceed and pronounce the damages which I would have awarded had they succeeded in prosecuting their claim”*

12. The trial magistrate made a decision on quantum of damages as follows:

<i>Special damages</i>	<i>700</i>	
<i>Pain and suffering</i>	<i>30,000</i>	
<i>Loss of expectation of life</i>	<i>120,000</i>	
<i>Loss of earning</i>	<i><u>480,000</u></i>	
		<i>630,000</i>
<i>Less damages under Law Reform Act</i>	<i><u>150,000</u></i>	
		<i><u>480,700</u></i>

#### **MEMORANDUM OF APPEAL**

13. The appellant filed a memorandum of appeal on 6 Aug 2010 on six grounds and prayed that

a) *The judgment and decree of the honourable trial magistrate on liability made on 27<sup>th</sup> July 2010 be set aside and judgment on the same entered at 100% against the respondent and assessment of damages be upheld as quantified by the trial court.*

### **APPELLANT'S SUBMISSION ON APPEAL**

14. The Appellant submitted that the magistrate failed to uphold the Plaintiffs eye witness evidence by PW2 which was consistent with the pleading and that it was erroneous for the magistrates to hold otherwise.

### **RESPONDENT'S SUBMISSION**

15. The Respondent cited the case of **Hahn v. Sign C.A** No. 40/83 (1985) KLR at page 716-725 for the proposition that an appellate court should not differ from the trial court findings of facts unless it is demonstrated that the trial court misapprehended the evidence and arrived at the wrong conclusion. They thus submitted that the appeal has no merits and dismiss this appeal with costs.

### **DETERMINATION**

#### ***Analysis of Evidence***

16. This being the first court of appeal it has the power to re-evaluate the facts of the case to reach its own conclusion before deciding whether the trial court's decision is to be upheld. See **Peters v. Sunday Post** (1958) E.A. 424 and **Selle & Anor. v. Associated Motor Boat Co. Ltd. & Ors.** (1968) E.A 123.

17. It is not in dispute that there was an accident that occurred on or about 28/2/2004 and led to the death of Joseph Kimindu Kiiti. The subject of this Appeal is also not in dispute as the dispute between the parties was only on liability. The magistrate's calculation on quantum is not disputed and both parties agree to the figure of Ksh.480,700/-.

18. The Appellant widow of the deceased herein called one witness who corroborated her testimony as she was not at the scene. It should be noted that the only eye witness PW2 was not involved in the investigations by police and he did not write even a statement at the police station, and the Defence was represented by the driver. The only testimony on the cause of the accident is that of alleged eye-witnesses PW2 for the plaintiff and DW1 for the defence as it was only the two who were at the scene at the time of the accident. There was no evidence produced in court by the police as to the description of the accident scene or even a sketch map of the accident scene and point of impact as would assist the court in reaching a decision on who contributed to what extent to the accident. The police abstract indicated that the matter is still pending under investigation and there was no judicial determination of any criminal liability on the part of the parties to the accident.

19. On the testimony of PW2 plaintiff's eye witness, it is improbable that the deceased who was cycling on the pedestrian land off the road could have fallen on the tarmac road about 10 metres ahead of the right side of the vehicle on the left lane and his bicycle which was hit on the front tyre thrown off the road on the left, after he had been hit by the lorry which had allegedly left its left land to branch off to the right with the right side of the front of the lorry knocking the deceased. Had the accident happened in the manner testified by the PW2, the deceased should have been thrown further off road, or crushed under the lorry, and not thrown ahead of the lorry on its right side. The evidence of the defence witness is on a balance of probability more probable than that of the PW2. I would find that the plaintiff did not prove the case of negligence against the defendant to warrant the determination of liability on the defence to any extent.

#### ***Whether to interfere with trial court's finding on the facts***

20. An appellate court is only entitled to interfere with the finding of fact by a trial court where as held in **Selle v. Associated Motor Boat Co. Ltd.** (1968) E.A 123, "*it appears either that [the trial court] failed to take into account of particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally.*"

21. The trial magistrate found the plaintiff's witness PW2 to be uncredit-worthy and held as follows:

*"The evidence of Ngei (PW2) seems to raise more questions than it answers. He contended that the deceased was knocked by a lorry which came from Nairobi direction where the deceased was heading. His evidence was that the deceased was riding off the road on the pedestrian lane on he left meaning he was opposite the lorry. His attempt to explain how the deceased ended up on the road after being knocked is more baffling than convincing. If the lorry crossed to the right lane before reaching the pedestrian lane where the deceased was then logically it would have knocked him and threw him off the road not back to the road. Had the lorry come from the right lane as suggested by the witness there is no reason it did not run over him and his bicycle.*

*The explanation by the defence witness Waweru (DW1) how the accident occurred is more plausible and makes sense compared to the confusing version presented by Ngei (PW2). During cross-examination Ngei (PW2) disclosed that he had not even realized it was the deceased who was riding ahead of him. If the deceased was fifty metres ahead and it was around 8.00pm and dark the witness could not have been in a position to see the accident occurring. His revelation he knew it was the deceased after the accident seriously suggests that he had not seen how the accident occurred, he is not a credible witness."*

22. As guided by the Court of Appeal in **Hahn v. Singh**, supra -

*"Where there is a conflict of primary witnesses and where the credibility of witnesses is crucial, the appellate court will hardly interfere with a conclusion made by the trial judge after weighing the credibility of the witnesses."*

See *Watt v. Thomas* (1947) AC 484 and *Whitehouse v. Jordan* (1981) WLR 246, cited in *Hahn*.

**Conclusion**

23. Having reviewed the evidence before the court I do not find any evidence which would lead to a different conclusion than that the plaintiff's witness had fabricated his testimony to fit the billing of the deceased as an innocent cyclist knocked down by a negligent truck driver pleaded in the Plaint. I am, consequently, not able to reach a conclusion different from that taken by the trial court, and I, therefore, have no basis to interfere with the finding of fact by the trial court.

24. As for quantum, no party has disputed the calculations as stated by the trial magistrate, and the same is upheld. It is, however, not without sympathy that the Court rules that, for the reasons given, it is unable to find liability against the Respondent, and the appeal shall, therefore, be dismissed.

**ORDERS**

25. Accordingly, the Court makes the following orders:

1. The appeal from the determination of the trial court is dismissed.
2. The Judgment and Decree of the trial court on liability of 27<sup>th</sup> July 2010 is affirmed. The assessment of quantum of damages at Ksh.480,700/= is upheld.
3. Each party shall bear the Costs in the trial court and in the Appeal.

*Order accordingly.*

**EDWARD M. MURIITHI**

**JUDGE**

**DATED AND DELIVERED THIS 23<sup>RD</sup> DAY OF JANUARY 2019.**

**G.V. ODUNGA**

**JUDGE**

**Appearances:-**

M/S B.M. Nzai & Co. Advocates for the Appellants.

M/S Gitonga Kamiti, Kairaria & Co. Advocates for the Respondents.