REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 101 OF 2014

DAVID MANGONDI SENEMA &YUNEKA MORAA NELSON(Suing as the Legal

representatives of the estate of NELSON SIRI SENEMA (deceased)....APPELLANT

VERSUS

JOSEPH SABOO.....1ST RESPONDENT

OBARA SABOO.....2ND RESPONDENT

(An appeal arising from judgment and decree of Hon. B.O. Ochieng – Senior Principal Magistrate in Kilgoris P.M.C.C 24 of 2012 and delivered on 12.08.2014)

JUDGMENT

1. The Appellant, as administrator of the estate of the deceased, filed the suit against the respondent seeking compensation as a result of a road traffic accident which occurred on 27th November 2011 along the Kisii-Kilgoris road, at a bridge near Nyumba Tano area in PMCC 24 of 2012.The appellant averred that the deceased was a fare paying passenger in motor vehicle registration mark KBK 317Z *('matatu'*) when the driver or agent of the respondents recklessly drove the matatu and caused the same to submerge and or fall into the river thereby occasioning his fatal injuries. The deceased left behind his dependants who suffered loss and damages as a result of his death. The appellant claimed damages from the respondent under the Law Reform Act (Chapter 26 of the Laws of Kenya) and Fatal Accidents Act (Chapter 32 of the Laws of Kenya).

2. In their statement of defence dated 22nd August 2012, the respondents denied that they were the registered proprietors of motor vehicle KBK 317Z and denied the occurrence of the accident on 27th November 2011 as alleged by the Appellant. In the alternative, the Respondents averred that if any accident occurred then it was contributed by negligence of the plaintiff and an act of God. It also averred that the appellant's suit was bad in law and incurably defective.

3. The matter was set down for hearing on 28th November 2012. After hearing the respective cases by the parties, the trial Magistrate reached the conclusion that an accident occurred on 27th November 2011 and found that the driver of the matatu was 50% liable. The other 50% liability was attributed to an Act of God. The trial magistrate awarded general damages of Kshs 350,000/- and special damages of Kshs 54,000/-.

4. Aggrieved by the decision of the trial court, the appellant has filed the present appeal in which they raises the following grounds in their Memorandum of Appeal dated 10th September 2014:

> 1. That the trial magistrate erred in law and in fact in holding the Act of God 50% liable contrary to the evidence tendered by the witnesses.
>
> 2. That the trial magistrate erred in law and fact in failing to hold the Respondent 100% liable for the accident.
>
> 3. That the learned trial magistrate erred in law and fact in assessing the monthly income of the deceased to be Kshs. 5,000/- contrary to the evidence tendered by the Appellants.
>
> 4. That the learned trial magistrate erred in law and fact in awarding the estate of the deceased a sum of Kshs. 760,000/- for loss of dependency/lost that was inordinately low as to amount to an erroneous estimate of loss of damage.
>
> 5. That the learned magistrate erred in law and fact in failing to consider the appellant's evidence and submissions in his judgment.

6. That the learned trial magistrate's decision on liability albeit, is discretionary one was plainly wrong.

5. This court, as the first appellate court, has a duty to re-evaluate and re-assess the evidence adduced before the trial court, keeping in mind that it is the trial court that saw and heard the parties and giving allowance for that, to reach an independent conclusion as to whether to uphold the judgment (***see Selle v Associated Motor Boat Co. [1968] EA 123***).

6. David Senema, **Pw1**, recalled that on 27th November 2011 the deceased was involved in an accident while travelling in KBK 317 Z. The accident occurred as the driver lost control and the motor vehicle submerged into water. He produced letters of administration ad litem and receipts for the funeral expenses that were incurred. The deceased left behind a widow and four children and was working in Moco Auctioneers. He produced the deceased's letter of appointment together with cash vouchers from Moco Auctioneers as proof of salary payment. On cross examination he said the death certificate indicates that the deceased was a farmer.

7. Pw2, Solomon Lemayian Nkeiyua recalled that on 27th November 2011 he boarded Nisan KBK 317Z so as to travel back to Nyanguso. It had rained earlier. Before arriving at his destination, a passenger alighted at Nyumba Tano. He recalled that a few meters before the bridge, he heard children warning the driver of the swollen river at the bridge, he also heard some women in the front seat telling the driver to stop but the driver proceeded. The vehicle was swept down the bridge. The driver jumped off from the vehicle, he managed to get out through a window.

8. Sgt Jacob Mwaadi (**Pw3**) gave evidence that he is a base commander based at Kilgoris Police Station. He testified that there was an accident reported on 27th November 2011 involving motor vehicle KBK 317Z Toyota Matatu. He conducted the investigations and recorded statements from the surviving witnesses. On the date of the accident it had rained heavily and there was raging water passing over the bridge. Some passengers told the driver to stop driving as they approached the bridge but he continued nonetheless. He gave evidence that when the vehicle was swept into the swollen river, the driver jumped off leaving the vehicle unattended. Ten passengers died he indicated their names as the police file, the deceased being one of them.

9. Pw4 Yuneka Moraa Nelson Sinema is the widow of the deceased. She testified that on 27th November 2011 her husband died from a road accident. They had four children. The deceased earned Kshs 12,500/- from Moco Auctioneers and from the amount he would send her Kshs. 10,000/-. Kennedy Moruli Mokua (**Pw5**) testified that he was an auctioneer trading as Moco Auctioneers. That he employed the deceased as a clerk and would pay him Kshs 12,500/- as evidenced by the petty cash vouchers produced in court.

10. John Obat Mose (**Dw1**) recalled that on 27th November 2011 he was at work driving a lorry KBK 317Z. It was raining. Upon arriving at a Nyumba Tano, he recalled seeing a bridge right ahead. There was a Station Wagon in front of the matatu. He heard a loud bang, followed by water suddenly rushing over the bridge which dragged the matatu and effort to control it were futile. Joseph Leparakuo Kaleke (**Dw2**) recalled that on 27th November 2011 at 5:00 p.m. he was driving a Station Wagon KAR 026D along Kilgoris Nyaguso road. He overtook a Nissan Matatu and proceeded to cross the bridge without any hindrances. He later learnt that there was an accident.

11. When the appeal came up for hearing parties agreed that it should proceed by way of written submissions. The Appellants submitted that on the material day as the matatu approached the bridge some children warned the driver of the swollen river, similarly the passengers in the front seat of the matatu told him not to cross the bridge. They argued that a reasonable person and in this case an experienced driver would have foreseen that it was not safe crossing the bridge under the circumstances. They relied on the case of ***Nakuru HCCA No. 159 of 2008 Timsales (K) Limited v Grace Bosibo*****ri** to support their argument that the accident was not due to an Act of God. In the said case Justice Wendoh cited with approval the holding in **Ryde vs Bushell & another (1967)** where the East African Court of Appeal held that, **"Nothing can be said to be an act of God unless it is proved by the person setting up the pleas to be due exclusively to natural causes of so extraordinary a nature that it could not be reasonably have been foreseen and the results of which occurrence could not have been avoided by any action which should reasonably have been taken by the person who seeks to avoid liability by reason of the occurrence."**. It was their case that the respondent was 100% liable for causing the accident. They also submitted that the appellant tendered evidence of the deceased's employment letter and payment vouchers, in addition called Pw5 who testified that he had employed the deceased and was paying him a monthly salary of Kshs. 12,500/-.

12. The Respondents submitted that the accident was solely caused by an Act of God after water from the river suddenly flooded the bridge causing the driver to lose control of the matatu. The respondent relied on the case of ***Ryde vs. Bushell & Another (supra)*****.** It was also their submissions that the trial magistrate clearly considered both parties' written submissions and legal authorities. On damages it was submitted that the sum of Kshs. 760,000/- was sufficient in the circumstances and that the appeal should be dismissed.

13. The appeal before this court is purely on liability and damages. I now turn to the issue of liability. It was not in dispute that the accident took place on the stated date, time and place. It is trite law that he who alleges the existence of a fact must prove it. The appellant had the burden to prove that the accident was due to negligence of the respondent. In their plaint, the applicants relied on the doctrine of *res ipsa loquitur* to establish the respondents' negligence. In ***Winfield and Jolowicz on Tort (11th Edition, S & M, 1979) at page 99*** the doctrine of *res ipsa loquitur* has been explained as follows;

> In order to discharge the burden of proof placed upon him, it is usually necessary for the plaintiff to prove specific acts or omissions on the part of the defendant which qualify as negligent conduct. Sometimes, however, the circumstances are such that the court will be prepared to draw an inference of negligence against the defendant without hearing detailed evidence of what he did or did not do.

14. The Respondents' defence was that the accident was inevitable as it was occasioned by water suddenly rushing across the bridge. In ***Kago –Vs- Njenga Civil Appeal No. 1 of 1979***, the Court of Appeal held that

> **"For the defence to rebut the presumption of negligence arising from "***res ipsa loquitur***", it was for the Defendants to avoid liability by showing either that there <u>was no negligence on their part which contributed to the accident, or that there was a</u>**

probable cause of the accident that did not connote negligence on their part, or that the accident was due to circumstances not within their control(*See Msuri Muhhddin –Vs- Kassaby & Another [1960] EA 201).” Emphasis added.*

15. In **RYDE V BUSHELL & ANOTHER (1967) EA 817** the East African Court of Appeal held as follows:-

> “(i)The plea of Act of God is available to relieve a defendant from liability for damages suffered following the performance of part of his obligation and not merely to absolve the person from the performance of an obligation;
>
> (ii) Nothing can be said to be an act of God unless it is proved by the person setting up the plea to be due exclusively to natural causes of so extraordinary a nature that it could not reasonably have been foreseen and the results of which occurrence could not have been avoided by any action which should reasonably have been taken by the person who seeks to avoid liability by reason of the occurrence.”

16. Dw2 on cross examination gave evidence that there was water flowing across the bridge at the level of half a tyre. He also recalled that there were stationery vehicles on the other side of the bridge. Pw1 also gave evidence that there was a woman in the vehicle who asked Dw1 not to drive across the bridge but he did not heed her advice. The totality of the evidence points to the fact that the driver failed to pay due care and attention while driving as he allowed the matutu on to a bridge that had water across it. His own passengers warned him and the weather as described called for diligent driving. Dw2 was not there when the accident happened according to him he had passed.

17. After evaluating the evidence, I am satisfied that there is sufficient evidence on record which this court draws the inference that the accident was caused by the negligent actions of the driver. He was warned by his passengers and even persons he passed on the road, he saw what was ahead and should have taken all precaution not to approach the bridge. The driver subjected the lives of his passengers to danger and drove straight to the place he was warned not to. The finding of Act of God was inappropriate in this case. Floods do occur when it rains it is expected that a prudent driver must take all the necessary precaution whilst approaching a flooded area to take the next possible available route to reach his destination, or wait and not to approach raging water and expects to sail through without an incident. The appellant has thus proved his case on the balance of probabilities while the respondents have failed to discharge their burden which is to show that the accident was caused by no negligence on their part or circumstances not within their control.

18. The second limb of the appellants’ appeal was that the award of loss of dependency under the Fatal Accidents Act was inordinately low. The general principle upon which this Court, as an appellate court, will interfere with an award of damages was stated in ***Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5** as follows;

> *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 either inordinately high or low…*

19. In this case the trial court awarded Kshs 5,000/- being the minimum wage and adopted a multiplier of 19. In assessing damages under the Fatal Accident Act, the court has to consider the multiplicand, multiplier and dependency ratio. The choice of a multiplier is matter of the courts discretion which discretion has to be exercised judiciously with a reason (see ***Board of Governors of Kangubiri Girls High School & Another v Jane Wanjiku Court of Appeal at Nyeri, Civil Appeal No. 35 of 2014 eKLR***).In ***Wangai Thairu v H. Ezekiel Barngetuny and Another HCCC 1638 of 1988*** the court stated as follows:

> “The principles applicable to an assessment of damages under the Fatal Accident Act are too clear, the court must in the first instance find out the value of the annual dependency, such value is usually called the multiplicand. In determining the same the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure usually the court must bear in mind the expectation of the earning life of the deceased, the expectation of life and dependency of the dependents and the chances of life of the deceased and dependents. The sum thus arrived at must then be discounted to allow the legitimate consideration such as the fact that the award is being received in lump sum and would if wisely invested yield returns of an income nature.”

20. It is trite law that he who alleges must prove (see section 107 of the Evidence Act). The appellant tendered evidence that the deceased was a clerk at Moco Auctioneers. Pw1 testified that the deceased was employed as a clerk earning Kshs 12,500/- at the time of his death. Pw1 produced cash vouchers issued to the deceased on account of his salary from Moco Auctioneers. He also produced an employment letter of the deceased as proof that the deceased was employed by said establishment. On the other hand the respondents pointed out that the death certificate of the deceased was proof that the deceased was a farmer. Pw4 on cross examination testified that her husband started working at Moco Auctioneers in 2011 which was contradictory to the fact that he was employed at said establishment in 2009. Although Pw5 testified that he was trading as Moco Auctioneers he did not produce a copy of the certificate of registration for his business. It was Pw5’s testimony that the deceased had been in probation for 4 years and he could not recall how he calculated his yearly increments as from 2009. He did not make any statutory deductions for the deceased while he was under his employment. The trial court came to the conclusion that the deceased was not employed by Moco Auctioneers observed as follows:

> **“The Plaintiff needed to do a better job on this. Though they called two witnesses it was very difficult to confirm if indeed he was employed as alleged. Better documents should have been produced and I expected the wife to give us a better corroboration.”**

21. I am constrained to agree with the findings of the trial magistrate as the appellant failed to prove on a balance of probability that the deceased was employed at Moco Auctioneers. The evidence from the witnesses called by the Plaintiff in regard to the employment of the deceased at Moco Auctioneers was shaky and did not meet the threshold of proof in civil cases. The Respondents argument that the deceased was a farmer was based on the occupation entered in the death certificate of the deceased. However Pw5 testified that he was not a farmer as was indicated in the death certificate.

22. I find that it was not clear what the occupation of the deceased was at the time of his death. I also note that evidence of proof of farming income was not tendered before court. The trial court should thus have awarded a global sum in the circumstance.In ***Mwanzia -Vs- Ngalali Mutua Kenya Bus Ltd*** and quoted in ***ALBERT ODAWA -VS- GICHUMU GITHENJI NKU HCCA NO.15 OF 2003 (2007), KLR*****,** Justice Ringera was of the following view;

> **"The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma.**
>
> **It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are known or are knowable without undue speculation; where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do."**

23. This reasoning was adopted in **Mary Khayesi Awalo & Another -Vs- Mwilu Malungu & Another Eld Hccc No. 19 Of 1997 [1999] Eklr** where Nambuye J., stated that:-

> **"As regards the income of the deceased there are no bank statements showing his earnings. Both counsels have made an estimate of the same using no figures. In the courts opinion that will be mere conjecture. It is better to opt for the principle of a lump sum award instead of estimating his income in the absence of proper accounting books."**

24. I have considered that a global award would be most appropriate in the circumstances. In ***Eston Mwirigi Ndege & another v Patrick Gitonga Mbaya [2018] eKLR*** Mabeya J. held that

> "In this case, the deceased was aged 31 years, a very young age, and was married with 2 kids. She was actively involved in dairy farming on family land. She was in the prime of her life and her estate must have undergone immense loss and anguish as a result of her death. Taking in totality all the circumstances of this case, I find and hold that a global sum of Kshs.1, 500,000/- would be adequate compensation for loss of dependency and I would award the same."

25. The undisputed evidence was that, at the time of his demise, the deceased was 31 years. The deceased had a wife and four children whom the deceased was taking care of. In conclusion the appeal is found to have merit and is hereby allowed on the following terms:

a. I find the Respondents 100% liable for the accident.

b. The award given by the trial court is also inordinately low, in this respect this court hereby set aside the judgment of the Learned Trial Magistrate dated 12th August 2014, by entering judgment in favor of the appellants against the respondents for the sum of Kshs 1,388,045/- made up as follows:

Pain and Suffering	Kshs. 10,000/-
Loss of expectation of life	Kshs.70, 000/-
Loss of Dependancy	Kshs. 1,200,000/-
Special damages	Kshs. 108,045/-
Total	**Kshs. 1,388,045/-**

c. I grant the appellant interest on the sum from the date of judgment and award costs of the appeal to the appellant.

Dated, Signed and Delivered at KISII this 28th day of February 2019.

R. E. OUGO

JUDGE

In the presence of;

Mr. Otara For the Appellant

Miss Angasa For the Respondent

Rael Court clerk