



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: D.S. MAJANJA J.

CIVIL APPEAL NO. 71 OF 2018

BETWEEN

JOASH GITANGE.....APPELLANT

AND

REBECCA KEMUNTO GIKENYI & MIRIAM

ORARE suing as legal representative of FRANKLINE

NYAMORA ORARE (DECEASED).....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon.M.M. Nafula, SRM

dated 15th August 2018 at the Magistrates Court at Ogembo

in Civil Case No. 174 of 2013)

JUDGMENT

1. The appellant is dissatisfied with the judgment of the subordinate court finding him fully liable and awarding the respondents Kshs. 2,690,000/- as damages under the *Fatal Accidents Act (Chapter 32 of the Laws of Kenya)* and the *Law Reform Act (Chapter 26 of the Laws of Kenya)* made up as follows

Pain and Suffering Kshs. 50,000/-

Loss of expectation of life Kshs. 50,000/-.

Loss of Dependency Kshs. 2,400,000/-

Funeral Expenses Kshs. 70,000/-

Special Damages Kshs. 20,000/-

2. There was no dispute that the deceased was fatally injured in an accident that took place on 27th May 2013 at Keera area along the Nyacheki – Keroka road involving the appellant's motor vehicle number KBQ 398H and the deceased who was riding motor cycle registration number KMCR 151 P.

3. At the hearing the respondents called two witnesses. PC Alfred Komen (PW 1) confirmed that the accident took place and the particulars of the motor vehicle and motor cycle. He told the court that the matter was still under investigation and the subject of an inquest. The deceased's wife, Rebeccah Kemunto (PW 2) testified that she went to the scene after hearing screams and found that the deceased, who was the rider, had already passed away. The appellant (DW 1) testified that one the material day, he was driving when he saw an oncoming motorbike being driven at a high speed. He tried to veer off the road by the knocked the motor cycle. He stated that he was driving at about 50kph and that the motor cycle hit his car on the right side. In cross-examination he stated that he tried to avoid the accident but the knocked

the motorbike. He also stated that the accident occurred on a bridge.

4. The trial magistrate found the appellant fully liable. The trial magistrate held as follows:

[DW 1] further testified that the accident on a bridge and therefore there was no way that he could have turned on the opposite direction to avoid the accident in as much as the motorcyclist may have been cycling at a very speed, but was on his side. I find the defendant to be 100% liable towards the occurrence of the said accident.

5. Counsel for the appellant, complained that respondents had not proved the case as PW 1 and PW 2 did not witness the accident. He pointed out that DW 1 explained clearly what took place and his evidence showed that he was not to blame for the accident. Counsel added in the unlikely event that there was evidence of liability on the appellant's part, then the court ought to have apportioned liability.

6. Counsel for the respondents, supported the trial court decision on the ground that the DW 1 admitted that he caused the collision and that there was sufficient evidence to find him fully liable.

7. I confess that I do not understand the reasoning of the trial magistrate, which I have set out above, in holding the appellant fully liable but I am required to re-evaluate the evidence and come to my own conclusion bearing in mind that I neither heard or saw the witnesses testify (see **Selle v Associated Motor Boat Co. [1968] EA 123** and **Kiruga v Kiruga & Another [1988] KLR 348**). I find that is a case where there was a collision by the motor vehicle coming from one side and the motorcycle coming from the other side. The accident took place at a bridge which mean both parties ought to have been careful. We cannot tell what the deceased did but the evidence of DW 1 is that he saw the motorbike coming at a high speed but he veered off the road to try and avoid. In my view this is a case where both parties are to blame. The appellant may have been driving too fast to control the vehicle. I also accept the appellant's testimony, as the only eye witness, that the motorcycle rider was riding too fast to see the oncoming vehicle. I would therefore apportion liability at 60:40 against the respondents.

8. As regards damages, this court is guided by the well-worn principle articulated by the Court of Appeal in **Kemfro Africa Ltd t/a Meru Express & Another v A.M. Lubia & Another (No.2) [1987] KLR 30** that:

[T]he principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial judge were held by the former court of Eastern Africa to be that it must be satisfied that either the judge in assessing damages took into account a relevant or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly.

9. The thrust of the appellant's complaint is that the award was excessive in the circumstances particularly given that there was no evidence to support the conclusions reached by the trial magistrate. Counsel for the respondents supported the decision by the trial magistrate and urged that it was supported by the evidence and cases cited.

10. I do not think the awards for loss of expectation of life and for pain and suffering made under the **Law Reform Act** are outside the scope of what is awarded in other cases. The courts usually make a conventional award for loss of expectation of life and I find that the award of Kshs. 50,000/- was not outside the bounds of reasonableness. In **Benham v Gambling [1941] AC 157**, the court explained that a moderate award for loss of expectation of life should be made as the award is not intended to compensate the estate for financial or pecuniary loss. The Court observed that:

In assessing damages for this purpose, the question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness, the test is not subjective and the right sum to award depends on an objective assessment of what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. Of course no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not for loss of future pecuniary prospects.

11. As regards the award for pain and suffering, the evidence was that the deceased died on the spot. I would reiterate what I stated in **Sukari Industries v Clyde Machimbo Jume HB HCCA No. 68 of 2015 [2016] eKLR** as follows:

On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased's estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs 10,000 to Kshs 100,000 over the last 20 years hence I cannot say that that the sum of Kshs 50,000 awarded under this head is unreasonable.

12. As regards the claim for loss of dependency under **Fatal Accidents Act**. According to the plaintiff, the deceased was aged 27 years when he died. He was earning Kshs. 15,000/- per month with which he supported his family comprising his widow, mother and two children aged 5 years and 6 months respectively. In her testimony, PW 2 testified that the deceased used to earn Kshs. 500/- per day from riding the motor cycle. In their submissions before the trial court, both parties urged the trial magistrate to apply the minimum wage in the absence of any evidence. The appellant urged Kshs. 3,000/- while the respondent urged Kshs. 12,000/- based on **Regulation of Wages (General) (Amendment) Order, 2017** ("the **Order**"). Since both parties are agreed that the minimum wage was applicable, the multiplicand under the **Order** based on the wages of a general labourer was Kshs. 12,000/- per month

13. The Court of Appeal in **Board of Governors of Kangubiri Girls High School & Another v Jane Wanjiku & Another NYR CA Civil Appeal No. 35 of 2014 [2014]eKLR** stated that, "The choice of a multiplier is a matter of the courts discretion which discretion has to be exercised judiciously with a reason." The multiplier is a function the age of the deceased, how long the dependants would rely on the deceased and other vagaries and vicissitudes of life. The deceased's last born was barely a year old which means she would probably finish

school at the age of 20 years. Before the trial court, the appellant suggested a multiplier of 27 to take into account the vagaries of life while the respondents proposed 25 years. I find the multiplier of 25 years reasonable given that it is was even less than what was proposed by the appellant.

14. The dependency ratio is a question of fact but in this case both parties submitted that the 2/3 dependency ratio was appropriate as the deceased had a wife and two very young children depending on him. The trial magistrate accepted this submission.

15. It is trite law that special damages must be pleaded and proved to the required standard (see *Kampala City Council v Nakaye* [1972] EA 446, *Siree Limited v Lake Turkana El Molo Lodges* [2002] 2 EA 521 and *Hahn v Singh* [1985] KLR 716). The respondent prayed for Kshs. 70,300/- as special damages made up as follows; Kshs. 200 for the police abstract, Kshs. 100 for the death certificate, Kshs. 50,000/- for funeral expenses, post mortem, coffin and related expenses and Kshs. 20,000 being fees for procuring letters of administration. She produced a receipt from her advocates for Kshs. 20,000/- to support the claim. As regards funeral expenses, I would only state what the Court of Appeal in *Jacob Ayiga Maruja & Another v Simeone Obayo CA Civil Appeal No. 167 of 2002 [2005] eKLR* where the plaintiff had been awarded Kshs. 60,000/- as funeral expenses as follows:

We agreed and the courts have always recognized that a reasonable award ought to be made in respect of reasonable and legitimate funeral expenses. But when such a large sum is claimed for such expenses then there ought to be proof of what the money was spent on. We however must not be understood to be laying down any law that in subsequent cases Kshs. 60,000/= must be given as reasonable funeral expenses. Those items are and must remain subject to proof in each and every case and the KShs. 60,000/= we have awarded herein apply strictly to the circumstances of this case.

16. For reasons I have set out, I do not find any reason to interfere with the award of damages by the trial court. I however allow the appeal to the extent that I set aside the judgment on liability and substitute it with an apportionment of liability on the basis that the deceased through the respondents shall bear 60% liability while the appellant shall bear 40%.

17. The appellant shall have costs of this appeal which I assess at Kshs. 40,000/- only.

SIGNED

D.S. MAJANJA

JUDGE

DATED and DELIVERED at KISII this 25th day of APRIL 2019.

R. E. OUGO

JUDGE

Mr Mose instructed by Mose, Mose and Millimo Advocates for the appellants.

Ms Kusa instructed by Khan and Associates Advocates for the respondents.