



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 16 OF 2015

HENRY SHIKHONGA WAMUKOYA (Suing as the

Administrator/legal representative of the estate

of ELPHAS WAKHULE WAMUKOYA (Deceased).....APPELLANT

VERSUS

MAKOKHA SYLVESTER.....RESPONDENT

JUDGMENT

The appellant had sued the respondent at the lower court in his capacity as the legal representative of the estate of his late brother Elphas Wakhule Wamukoya (herein referred to as the deceased) after the deceased was fatally knocked down by a tractor/trailer registration No. KBF 405N - ZD1033 belonging to the respondent while the deceased was riding a motor cycle registration No. KMCR 175 P along Mumias Musanda road. The appellant blamed the driver of the respondent's motor vehicle for driving the vehicle carelessly and/or recklessly thereby causing the accident that occasioned the death of the deceased. The respondent denied the claim. After a full trial the trial court entered judgment for the respondent against the appellant as follows:-

Liability - 50:50

General damages for pain and suffering - Ksh. 100,000/=

Damages under Fatal Accidents Act - Ksh. 2,579,200/=

Special damages - Ksh. 37,130/=

T O T A L - Ksh. 2,716,330/=

Less 50% - Ksh. 1,358,165/=

Plus one half ($\frac{1}{2}$) of the costs of the suit.

2. The appellant was aggrieved by the said judgment and filed this appeal. The grounds of appeal are that:-

a) The learned magistrate erred in law and fact by apportioning liability in the ratio of 50%:50% with total disregard of the corroborated evidence adduced by the appellant

b) The learned magistrate erred in fact and in law in failing to render any judgment/decision on the applicability of the Law Reform Act to the appellant's case

c) The learned trial magistrate erred in fact and in law in failing to determine the pertinent issues from the evidence adduced on a balance of probabilities as opposed to a beyond reasonable doubt basis

d) The learned trial magistrate erred in fact and in law on the award of special damages by failing to appreciate the evidence on record and the appellants written submissions.

e) The learned magistrate erred in fact and in law in failing to award interest to the appellant.

3. The appeal was opposed by the respondent vide the written submissions of his advocates, **Kibichiy & Company Advocates**.

The Evidence on Liability

4. The appeal is on both liability and quantum. On liability the respondent testified as PW1 and called four witnesses – the employer to the deceased PW2, an eye witness to the accident PW3 and a police officer who produced the police abstract PW4. It was the evidence of the respondent that he did not witness the accident. That he received the report about the accident and went to the scene. He did not find the accident motor vehicle at the scene.

5. The eye witness PW3 testified that he and the deceased were employed by PW2 as motorcycle riders. That on 3rd September, 2011 at 7 p.m. they were riding their respective motor cycles heading towards Muhuru area. That he was riding about 7 metres behind the deceased. That the road was rough and narrow. They met with a tractor coming from the opposite direction. It was carrying sugar cane. The tractor lost control and moved to their side. It hit the deceased who fell on the side of the road towards Muhuru. He was taken to St. Mary's Hospital. He died on the following day. The witness blamed the driver of the tractor for occasioning the accident.

6. Apart from producing the police abstract the police officer did not give any relevant evidence as to how the accident occurred.

7. The defence called one witness – the driver of the motor vehicle, DW1. His evidence was that on the material day at 7 p.m. he was driving the tractor towards Mumias town. He was carrying sugarcane. On the way he saw two motorcycles approaching from ahead. He was keeping to his left side of the road. The headlights to his motor vehicle were on. He was ascending a slope while the motor cycles were ascending. He was at a slow speed as the tractor was loaded. The motor cycles were going at a high speed. He hooted to them. He by-passed with the motor cyclist who was ahead. When by-passing with the one who was behind the cyclist hit his tractor at the back. He did not stop for fear of being attacked by members of the public. He went to Imanga Police Base and reported. He went back with policemen to the scene. They found the motorcycle there but the victim had been taken away. The police took measurements. The tractor was taken for inspection. It was then released to him. He was not charged with any offence. He denied in cross-examination that his vehicle lost control thereby occasioning the accident.

Findings on Liability

8. The learned trial magistrate held that the police officer PW4 did not give any relevant evidence on how the accident occurred. The magistrate held that no sketch plan was produced to show the possible point of impact. That the inspection reports for both the tractor/trailer and the motorcycle were not produced. That it was not possible to state where the damages on the tractor/trailer and the motor cycle were. That all the evidence amounted to the word of the respondent against that of the appellant. That there was no basis for holding the respondent wholly to blame for the accident. He thus apportioned liability in the ratio of 50:50.

Submissions on Liability

9. The advocates for the appellant, **Abok Odhiambo & Co. Advocates**, submitted that the trial magistrate erred in shifting the burden of proof to the appellant. That the evidence of PW3 demonstrated negligence on the part of the respondent's driver. That the burden of proof was on the respondent to adduce evidence to disapprove the evidence of PW3. That the respondent failed to produce the motor vehicle's inspection report to show whether the tractor was in a good state. That he failed to call the police officers who visited the scene to corroborate the evidence of his driver. That the respondent's driver disturbed the scene by failing to stop after the accident. That apart from the evidence of PW3, the appellant also relied on the doctrine of *res ipsa loquitur*. The advocates also relied on the provisions of Sections 109 and 112 of the Evidence Act to hold that the burden of proof was on the respondent to produce the motor vehicle's inspection report.

10. The advocates for the respondent on their part submitted that the burden of proof was on the appellant to prove their case on a balance of probabilities. That the appellant failed to produce the sketch plans or photographs to show how the accident occurred and the extent of the damage. That the police abstract that was produced indicated that the matter was pending investigations. No one was charged with causing the accident. That since there was no concrete evidence tendered the trial magistrate was right in apportioning liability on the ratio of 50:50.

Determination on Liability

11. This is a first appeal. It is the duty of a first appellate court to consider and evaluate the evidence adduced at the lower court and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make an allowance in that respect – See **Selle & Another –Vs- Associated Motor Boat Co. Limited & Others (1968) EA 123**.

12. The question is whether the learned trial magistrate erred in finding the appellant 50% liable for the accident. Both the appellant and the respondent gave different versions as to how the accident occurred with the appellant saying that it is the tractor that lost control and veered into the motor cycle's side and caused the accident while the respondent stated that it is the motor cycle rider who left his side of the road and hit the tractor at the rear as they by-passed. None of the parties produced evidence to support their side of the story. It was contended that policemen visited the scene and most likely drew a sketch plan. The motor vehicle was examined but no inspection report was produced. The appellant contends that it is the respondent who had the burden of proof to produce that kind of evidence while the respondent says that the burden was on the appellant.

13. The appellant had pleaded in his plaint that the respondent's driver "carelessly, negligently, and/or recklessly drove, managed and/or controlled motor vehicle registration number KBF 405N - ZD1033 that he caused the same to knock the plaintiff down and therefore causing an accident" The particulars of negligence were then stated. The appellant also pleaded that they would rely on the doctrine of *res ipsa loquitur*.

14. The respondent on his part denied the assertions made by the appellant. They pleaded in the alternative that the accident was solely and

or substantially occasioned by the deceased. Particulars of negligence were then stated among them being “losing control of the bicycle (meant motor cycle) and crashing into the defendant’s vehicle.” The respondent also pleaded to invoke the principle of *res ipsa loquitur* to prove negligence on the part of the appellant.

15. The question then is as to who had the burden of proof to prove how the accident occurred. The standard of proof in civil cases is on a balance of probabilities. Section 107 of the Evidence Act provides that:-

“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.”

16. Section 108 of the said Act provides that:-

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

17. In the case of **Mohammed Iqbal & 2 others –Vs- Agnes Mbayaki Shikami [2016] eKLR, Sitati J** held that:-

“The appeal herein raises the twin issues of liability and quantum. Before making my findings, this court is aware of the principle that proof in civil cases is on a balance of probabilities and that parties are always bound by their pleadings. See the case of Karugi & Another – vs- Kabiya & 3 others (1987) KLR 347 wherein the Court of Appeal stated that the burden was always on the plaintiff to prove his case on a balance of probabilities and that such burden was not lessened even if the case was heard by way of formal proof.”

18. In the case of **Mary Njeri Murigi –Vs- Peter Macharia & Another [2016] eKLR, Aburili J** held that:

“Apportionment of liability in my view would only be plausible if there was some material evidence to show how the deceased would have contributed to the occurrence of the accident.”

19. The evidence for the appellant was that the respondent was the one liable for occasioning the accident. The respondent on the other hand adduced evidence that it is the appellant who was liable for occasioning the accident. The appellant’s witness stated that the road on which the accident took place was narrow. There was no dispute that the deceased fell on the left side of the road after the accident. The appellant’s evidence was that he fell there after being hit by the appellant’s vehicle which had lost control. The respondent on the other hand stated that the deceased hit his vehicle at the back as they by-passed.

20. PW3 stated that he was closely riding behind the deceased at a distance of 7 metres. If it is true that the driver of the trailer had lost control he would most likely have crashed into the two cyclists considering that the trailer was heavily loaded with sugar cane.

21. Section 112 of the Evidence Act provides that:-

“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

22. The appellant was aware of the police investigations. He was therefore in a position to produce the sketch plan and motor vehicle inspection report. He cannot say that it is only the respondent who had special knowledge of the said documents. Both parties had knowledge of the documents. They are equally to blame for failing to produce the documents in court. The end result is that there was no credible evidence to support the evidence of the appellant that the accident occurred on the left side of the road because the tractor lost control. There was no credible evidence either to prove that it is the deceased who hit the tractor at the back as the motor cyclist and the tractor by-passed. Considering the fact that the road was narrow and that the accident took place at night time it was difficult to determine who between the two was to blame for the accident. The accident could have occurred either way as contended by the respective parties.

23. In the Court of Appeal decision in **Hussein Omar Farah –Vs- Lento Agencies (2006) eKLR**, cited in **Commercial Transporters Ltd – Vs- Registered Trustees of the Catholic Diocese of Mombasa (2015) eKLR**, it was held that where two motor vehicles collide and it is not possible to determine as to who between the drivers was at fault, both drivers should be held equally to blame for the accident. In this case it was not possible from the evidence adduced in court to determine how the accident occurred. The trial court was right in apportioning liability between the motor cyclist and the tractor driver. I therefore confirm liability at 50:50.

Quantum

24. Assessment of damages is a discretion of the trial court and an appellate court will interfere with the exercise of that discretion if the court took into account an irrelevant fact or left out of account a relevant fact or the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages – see **Kemfro Africa t/a Meru Express & Another Vs A.M. Lubia & Another (1982-1988) KAR 727** and **Butt Vs Khan (1977) KAR 1**.

25. The appeal was on the award on loss of expectation of life under the Fatal Accidents, the award of special damages and failure by the trial

court to award interest.

26. The respondent testified that the deceased was a boda boda rider. That he was employed by PW2 who was paying him Ksh. 400/= per day. That the deceased died at the age of 29. He had a wife and two children. The respondent produced baptismal cards for the two children. PW2 confirmed that both the deceased and PW3 were his employees. He said that the deceased was not working on Sundays.

27. The trial magistrate awarded Ksh. 100,000/= for pain and suffering under the Law Reform Act. He declined to award damages for loss of expectation of life as he reasoned that these would be catered for under the Fatal Accidents Act.

28. Under the Fatal Accidents Act the magistrate found that the deceased's earnings at Ksh. 400/= per day amounted to Ksh. 10,400/= per month. He reasoned that the retirement age was 60 years. He adopted a multiplier of 31 years and calculated damages for loss of dependency as follows:-

$$10,400 \times 12 \times 31 \times \frac{2}{3} = 2,579,200$$

29. The advocates for the appellants faulted the trial court for failing to make an award under the Law Reform Act for loss of expectation of life. They cited the judgment of this court in **Kenya Catholic Seminary Commission & Another –Vs- Musa Omumia Rakama (suing as administrator and legal representative of the estate of Everline Onyang Ogada (2018) eKLR** where the court cited the decision in the case of **Kemfro Africa Limited t/a Meru Express Services (1976) & another –Vs- Lubia & Another (1987) KLR 30** that:-

“6. An award under the Law Reform Act is not one of the benefits excluded from being taken into account when assessing damages under the Fatal Accidents Act; it appears the legislation intended that it should be considered.

7. The Law Reform Act (Cap 26) section 2 (5) provides that the rights conferred by or for the benefit for the estates of deceased persons shall be in addition to and not in derogation of any of the rights conferred on the dependants of the deceased persons by the Fatal Accidents Act. This therefore means that a party entitled to sue under the Fatal Accidents Act still has the right to sue under the Law Reform Act in respect of the same death.

8. The words ‘to be taken into account’ and ‘to be deducted’ are two different things. The words in section 4 (2) of the Fatal Accidents Act are ‘taken into account’. The section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the Fatal Accident Act, the trial judge bore in mind or considered what he had awarded under the Law Reform Act for non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction.

In view of this authority there is no requirement to deduct the award made under Law Reform Act from the award made under the Fatal Accidents Act. I have taken into account the award made under the Law Reform Act when making the award under the Fatal Accidents Act.”

The advocates urged the court to award Ksh. 200,000/= for loss of expectation of life.

30. The advocates for the respondent submitted that it is trite law that the appellant was only entitled to general damages for pain and suffering under the Law Reform Act and that he was not entitled to damages for loss of expectation of life as he was awarded for lost years under the Fatal Accidents Act as well as under the Law Reform Act as this would lead to a double compensation. That the trial court did not err by not making any award for loss of expectation of life.

31. Section 2 (5) of the Law Reform Act Cap 26 (Laws of Kenya) provides that the rights conferred for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Fatal Accidents Act.

32. This question of double taxation under the Law Reform Act and Fatal Accidents Act was addressed by the Court of Appeal in **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) –Vs- Kiarie Shoe Stores Limited NYR CA Civil Appeal No. 22 of 2014 [2015] eKLR** where the court held that:-

“This court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the Law Reform Act and dependants under the Fatal Accidents Act are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the Law Reform Act, hence the issue of duplication does not arise.”

33. In face of clear provisions of the law and the above authority and what was stated by the court in **Kemfro Africa Limited t/a Meru Express Services 1976 & Another –Vs- Lubia & Another** as cited above, the family of the deceased herein was entitled to be awarded damages for loss of expectation of life.

34. At the lower court the advocates for the appellant cited the case of **David Wekesa Situma –Vs- Lochab Brothers Limited, Bungoma Civil Case No. 68 of 2003** where Sergon J. awarded Ksh. 100,000/= for loss of expectation of life in the year 2008. They also cited other authorities where sums ranging from Ksh. 80,000 – 150,000/= were made. The advocates for the respondent had submitted in support of an award of Ksh. 70,000/=. They had cited authorities for awards made between 1990 and 2013 where sums ranging between Ksh. 60,000/- to 150,000/= were made. In my own assessment of the trend in recent years courts have been making a conventional awards of Ksh. 100,000/=

under this heading. However since the appellant was awarded Ksh. 100,000/= for pain and suffering, I am of the view that the award for loss of expectation of life should be placed at the minimum. The awards under the Law Reform Act should be placed at the minimum as was held by Emukule (as he then was) in **Benedeta Wanjiku Kimani –Vs- Changwony Cheboi & Another (2013)** where he stated that:-

“...These awards are therefore capped to a minimum, so that the estate does not benefit twice from the same death – under the Fatal Accidents Act and the Law Reform Act. Hence the greatest benefit is under the loss of dependency under the Fatal Accidents Act as already calculated above...”

I award Ksh. 50,000/= for loss of expectation of life.

Special damages

35. It is trite law that special damages must not only be specifically pleaded but must be strictly proved. See **Hahn –Vs- Singh, Civil Appeal No. 42 of 1983 (1985) KLR 716**. The appellant pleaded special damages to the sum of Ksh. 89,000/=. He testified that Ksh. 25,000/= was paid for obtaining of limited grant and Ksh. 3,000/= for demand letter. Receipts were produced in proof of these two items. The appellant said that they spent Ksh. 60,000/= in funeral expenses and produced a bundle of receipts in proof of the same. The trial court awarded Ksh. 37,130/= in special damages. It did not list what it approved to have been proved. The advocate for the appellant submitted that Ksh. 50,000/= had been proved. The advocate for the respondent submitted that the sum proved was as awarded by the trial court.

36. Though some of the said receipts have faded the following receipts are clear:-

Grant	-	Ksh. 25,000/=
Demand letter	-	Ksh. 3,000/=
Mortuary charges	-	Ksh. 12,215/=
Mortuary charges	-	Ksh. 7,500/=
5Kg cooking fat	-	Ksh. 775/=
8 Kg sugar	-	Ksh. 1,440/=
Clothes	-	Ksh. 2,000/=
Coffin	-	Ksh. 15,000/=
Shopping	-	Ksh. 636/=
Bandage	-	Ksh. 65/=
Cotton wool	-	<u>Ksh. 120/=</u>
T O T A L	-	<u>Ksh. 67,751/=</u>

I find that the appellant specifically pleaded and proved special damages to the sum of Ksh. 67,751/=. The sum of Ksh. 37,130/= awarded by the learned trial magistrate was erroneous.

37. The upshot is that the appeal succeeds as follows:-

1. Liability - 50:50 against the respondent

2. General damages:

Under the Law Reform Act -

Pain and suffering - Ksh. 100,000/=

Loss of expectation of life - Ksh. 50,000/=

Damages under Fatal Accidents Act - - Ksh. 2,579,200/=

T o t a l - Ksh. 2,729,200/=

3. Special damages - Ksh. 67,751/=

Both awards are subject to 50% contribution by the deceased.

Interest

38. The Appellant submitted that the learned trial magistrate ought to have awarded interest as provided for by Section 26 of the Civil Procedure Act by computing the same from the date of the trial court's judgment.

39. In the case of **Jane Wanjiku Wambu –Vs- Anthony Kigamba Hato & 3 Others [2018] eKLR**, Joel Ngugi J held that:-

“Our superior courts have, over time, come up with several principles derived from this general rule in Section 26 of the Civil Procedure Act which have, over time acquired stable meanings. The following three principles in this regard seem relevant for the appeal at hand.

First, at all times a trial court has wide discretion to award and fix the rate of interests provided that the discretion must be used judiciously. Given this discretion, an appellate court is, therefore, enjoined to treat the original decision by a trial court with utmost respect and should refrain from interference with it unless it is satisfied that the lower court proceeded upon some erroneous principle or was plainly and obviously wrong. See New Tyres Enterprises Ltd v Kenya Alliance Insurance Company Ltd [1988] KLR 380.

Second, Under Section 26(1) of the Civil Procedure Act, the court has discretion to award and fix the rate of interests to cover two stages namely:

a. The period from the date the suit is filed to the date when the court gives its judgment; and

b. The period from the date of the judgment to the date of payment of the sum adjudged due or such earlier date as the court may, in its discretion fix.

30. Third, when it comes to the period before the filing of the suit, Section 26 of the Civil Procedure Act has no application. Instead, interest prior to the date of the suit is a matter of substantive law and is only claimable where under an agreement there is stipulation for the rate of interest (contractual rate of interest) or where there is no stipulation, but interest is allowed by mercantile usage (which must be pleaded and proved) or where there is statutory right to interest or where an agreement to pay interest can be implied from the course of dealing between the parties. See Gulamhussein v French Somaliland Shipping Company Limited [1959] EA 25; Highway Furniture Mart Limited – v- The Permanent Secretary & Another EALR (2006) 2 EA 94; Mulla – The Code of Civil Procedure (16th Ed.) Vol. 1 at p. 505.”

40. I find that the trial magistrate erred in failing to address his mind to the issue of interest. The appellant was entitled to an award of interest on the sum awarded. I award interest on general damages to accrue from the date of this judgment while interest on special damages shall accrue from the date of filing suit, until payment in full.

41. The respondent to meet half of the costs of the suit at the lower court and in this appeal.

Delivered, dated and signed in open court at Kakamega this 29th day of May, 2019.

J. NJAGI

JUDGE

In the presence of:

Mr. Abok for the Appellant

No appearance for the Respondent

Parties:

Appellant - absent

Respondent - absent

Court Assistant - George

30 days right of appeal.