



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CIVIL APPEAL NO. 34 OF 2019

BETWEEN

JACKSON ONUNGA.....APPELLANT

AND

JMO suing as the administrator and personal representatives of the estate of

BAO).....RESPONDENT

(Being an Appeal from the Judgment and Decree in Kisumu CMCC No. 243 of 2017 by Hon. M.Agutu (SRM) on 18th December, 2018)

JUDGMENT

1. **JMO suing as the administrator and personal representatives of the estate of BAO) (Respondent)** sued **JACKSON ONUNGA (Appellant)** in the lower court claiming damages for fatal injuries suffered by his daughter **BAO (Deceased)** on 12.03.16 when Appellant's motor vehicle KCA 497Y knocked her down while she was lawfully cycling along Kona –Mbaya –Raggia Road allegedly due to the negligence of the Appellant.

2. The Defendants/Appellants in his statement of Defence denied the claim and blamed deceased for the accident.

3. The learned trial magistrate apportioned liability at 80:20% in favor of Respondent against the Appellant and in a judgment dated **18th December, 2018**, awarded damages in the sum of Kshs. 942,004/- after deducting 20% contributory negligence.

The Appeal

4. The Appellant being dissatisfied with the lower court's decision preferred this appeal and on 19.03.19 filed the Memorandum of Appeal dated 19.03.19 which sets out 5 grounds of appeal that:

1) The sum of Kshs. 317,505/- is manifestly excessive

2) The sum of Kshs. 700,000/- in respect of loss of dependency is speculative

3) The deceased was greatly at fault

4) The court conferred damages under the Law Reform Act and the Fatal Accidents Act

5) The court relied on documents that were not produced and ignored the Appellant's submissions

6) The Learned trial Magistrate erred in awarding damages both under the Law Reform Act and Fatal Accidents Act

SUBMISSIONS BY THE PARTIES

5. This appeal was argued by way of written submissions. In further exposition of the appeal, both parties cited various authorities.

Appellant's submissions

6. On liability, Appellant maintained that the deceased was negligent and submitted in the alternative that the evidence and the condition of the road did not disclose who was to blame and that liability ought to have been in the least apportioned equally. In support of this assertion, the Appellant place reliance on section 107 (1) of the Evidence Act and **Statpack Industries v James Mbithi Munyao [2005] eKLR** where the court held that “**Not every injury is necessarily a result of someone's negligence. An injury per se is not sufficient to hold someone liable for the same**”.

7. On loss of dependency and loss of expectation of life, the Appellants submitted that was highly estimated and awarded without any guiding principles.

8. Appellants further fault the trial court for awarding damages on the basis of receipts that did not comply with the Stamp Duty Act.

Respondent's submissions

9. It was submitted for the Respondents that liability was properly apportioned after the trial court found that the Appellant's driver moved onto the path of the deceased.

10. Concerning special damages, it was submitted that the same were specifically pleaded and awarded as proved. It was additionally submitted that the global sum for loss of dependency and loss of expectation of life was properly awarded for the 15-year-old deceased and in support thereof reliance was placed on **Hellen Waruguru Waweru (Suing as the Legal Representative of Peter Waweru Menja (Deceased vs. Kiarie Shoe Stores Limited [2015] eKLR, Chen Wembo & 2 Others Vs IKK & Another (suing as the legal representatives and administrators of the estate of CRK (deceased) (2017) eKLR and Oshivji Kuvenji & Another V James Mohamed Ongenge (Suing as a Representative of the Estate of Samuel Ongenge) [2012] eKLR.**

Analysis and Determination

11. 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.**

12. 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.**

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

a). Liability

14. PW3 in his testimony stated that the deceased was cycling from the opposite direction with the accident motor vehicle. He stated that the accident motor vehicle was avoiding a bump when it crushed on the deceased. The investigating officer arrived at the scene log after the deceased and the vehicle had been removed from the scene and could not tell how the accident occurred. The driver of the accident motor vehicle conceded that he was driving from the opposite direction that the deceased was cycling. He stated that both were in the process of going over a bump when the deceased fell and was run over by the accident motor vehicle.

15. The trial magistrate considered that the deceased had fallen on her lawful lane and on that basis found that the driver of the motor vehicle had moved to the deceased's lane and apportioned liability at 80:20% in favor of Respondent against the Appellant. I have considered the analysis by the trial magistrate and I find that the verdict on liability was well founded and I decline to interfere with that finding.

b. Loss of Dependency

16. In **Chen Wembo & 2 Others Vs IKK & Another (suing as the legal representatives and administrators of the estate of CRK (deceased) (2017) eKLR** which the trial magistrate relied upon, the court awarded a global award of Kshs 600,000/- for loss of dependency for a 12-year-old. The deceased died at the age of 15 years. There was no evidence on the abilities and future prospects of the minor on which the court could use as a basis for calculating the damages. I am not convinced that the award of Kshs. 700,000/- under this heading was an erroneous estimate of the damage or was based on a wrong principle of law was applied.

c. Award under the Fatal Accidents Act and Law Reform Act

17. In **Hellen Waruguru Waweru (Suing as the Legal Representative of Peter Waweru Menja (Deceased vs. Kiarie Shoe Stores Limited [2015] eKLR,** the Court of Appeal (Waki, Nambuye and Kiage JJA) stated 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

are the same, and consequently the claim for lost years and dependency will go to the same person. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation life as these are only awarded under the Law Reform Act, hence the issue of duplication does not arise.

18. In the case of David Kahuruka Gitau & Another V Nancy Ann Wathithi Gitau & Another [2016] eKLR, Mativo J, had this to say about Section 15(5) of the Law Reform (Miscellaneous Provisions) 1934 Act and Section 2(5) of the Law Reform Act

“I am fully aware of numerous authorities where damages have been deducted to avoid double compensation but little has been stated about the true meaning and interpretation of Section 2 (5) of the Law Reform Act. My natural and logical interpretation and understanding of Section 2 (5) of the Law Reform Act cited above is that the right conferred for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on dependents by the Fatal Accidents Act.”

19. The judge cited in Richard Omeyo Omino vs Christine A. Onyango Kisumu Civil Appeal No. 61 of 2007 with approval, where **Karanja J** in discussing the provisions of Section 2 (5) of the Law Reform Act stated: -

"The Law Reform Act Section 2 (5) provides that the rights conferred by or under the benefit for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependents 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.

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". This 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 Accidents Act the trial judge bore in mind or considered what he had awarded under the Law Reform Act for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction."

20. I fully associate myself with the findings in the above cited cases and therefore find that the trial magistrate appropriately awarded damages both under the Fatal Accidents Act and Law Reform Act.

DISPOSITION

21. In view of the finding I have made, the appeal is found to have no merit and it is dismissed with costs to the Respondent.

DATED, DELIVERED AND SIGNED THIS 28th