REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CIVIL APPEAL NO.2 OF 2018

SAMWEL ONGERA NYABUTI.....1ST APPELLANT

EZEKIEL GEKARA NYANSAGERIA.....2ND APPELLANT

VERSUS

GILBERT ODHIAMBO OKEYO &

MARTHA ACHIENG ODHIAMBO (suing as the

legal representatives of the estate

of **TOBIAS OJWANG ODHIAMBO (DECEASED).....RESPONDENTS**

(Being an appeal from the judgment of the Senior Principal Magistrate's court at Oyugis in civil case No.225 of 2016 delivered on 22.1.2018 – Hon. J. Wesonga, SRM)

JUDGMENT

[1] The appellants, **Samwel Ongera Nyabuti** and **Ezekiel Gekara Nyansageria**, preferred eight (8) grounds of appeal against the decision and judgment of the lower court at Oyugis in PMCC No.225 of 2016, in which the appellants were sued by the respondents, **Gilbert Odhiambo Okeyo** and **Martha Achieng Odhiambo**, for damages under the Law Reform and Fatal Accidents acts arising from a road accident which occurred along the Oyugis-Sondu Road at Kadada centre on 11th February 2016, involving the appellants' motor vehicle Reg. No. KBQ 941 J Isuzu Lorry/truck which swerved and/or veered off the road and knocked down the respondent's son, Tobias Ojwang Odhiambo (deceased), thereby causing him fatal injuries.

[2] The respondents attributed the occurrence of the accident to the appellant's negligence in the manner their vehicle was driven on the material date and prayed for damages against them. The appellants denied all the allegations made against them by the respondents and contended that if indeed the alleged accident occurred, then was wholly or partly contributed to by the negligence of the deceased and the respondents. The appellants therefore prayed for the dismissal of the respondent's claim.

[3] At the trial, oral testimony was received from the first respondent only i.e. Gilbert Okeyo Odhiambo (**PW3**). There was indication that the evidence received in a separate suit, PMCC No.222 of 2016, would apply to this case as the evidence of the respondents' witnesses No.1 and No.2 i.e. **PW1** and **PW2**.

However, there was no order of consolidation of this case with the said PMCC No.222 of 2016, yet several orders relating to this matter were not recorded in this file and instead, references to orders made in the other file were made herein.

[4] This was a very strange way of proceeding with this matter and the result was confusion and mix-up of documents in both files as was demonstrated at the hearing of the appeal preferred against the judgment of the trial court in PMCC No.222 of 2016. Incidentally, the appeal was heard by this court but was dismissed purely on technicality brought about by the confusion and mix-up referred to hereinabove.

[5] Be that as it may, the trial court rendered its judgment after the conclusion of the trial in this case and found that the appellants were fully liable at 100% for the occurrence of the accident and as such, the respondents were entitled to damages as prayed in the plaint. Accordingly, general damages for loss of expectation of life were assessed at Kshs.100,000/= and at Kshs.1 million for loss of dependency. There was also general damages for pain and suffering assessed at Kshs.20,000/= as well as special damages in the sum of Kshs.15, 950/=.

All in all, judgment was entered for the respondents against the appellant for the total sum of Kshs.1, 135,950/= together with costs and interest.

[6] This appeal is an expression of the appellants' dissatisfaction with that decision of the trial court. This court's role was therefore to reconsider the evidence adduced at the trial court and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses (See, **Selle –vs- Associated Motor Boat Co. [1968] EA 123**).

The hearing of the appeal was by way of written submissions.

In that regard, the appellants' submissions dated 9th October 2019, were filed on their behalf by **M/s Mose, Mose & Milimo Advocates** and those of the respondents dated 11th October 2019, were filed by **M/s Geoffrey O. Okoth & Co. Advocates**.

[7] Having given due consideration to the rival submissions in the light of the grounds of appeal and opposition thereto and also having re-visited the evidence availed at the trial by the respondents in the absence of the appellants' evidence which was not availed in support of their defence to the claim, it is this court's opinion that the occurrence of the accident was not substantially disputed nor was the appellants' ownership of the ill-fated vehicle at the material time of the accident.

[8] However, there was inadequate evidence from the respondents as to who, between the appellants' driver and the deceased was to blame for the accident.

The respondents' evidence on record in the trial file was that of the first respondent (**PW3**). There was no consolidation of the file with any other file. Therefore, the evidence of PW1 and PW2 in the mentioned file No.222 of 2016, could not apply to this file.

[9] All that the first respondent confirmed was the occurrence of the accident on the material date and the death of the deceased as a result of the injuries suffered by him in the accident. He (first respondent – PW3) was not at the scene at the material time of the accident and could not therefore say who was to blame for the accident and to what extent as between the deceased and the driver of the vehicle.

The driver of the vehicle was not called to testify and disprove the allegations that he was wholly to blame for the accident or to prove that it was the deceased who was wholly or partly to blame for the accident. He also was not available to prove the alleged negligence of the respondents in the accident.

[10] Although the accident occurred and claimed the life of the respondents' son aged fourteen (14) years at the time, it was difficult in the absence of cogent evidence, to say who between the deceased and the driver of the vehicle was largely or partly to blame. In the circumstances, as suggested by the appellant herein, liability ought to have been and should be apportioned at the ratio of 50-50%. In that regard, the appeal with regard to liability succeeds.

[11] As to quantum of damages, there was sufficient evidence to show that the deceased was aged 14 years old at the time of the accident. That, he was a primary school pupil and was survived by his parents (i.e. the respondents) and siblings i.e. two sisters and one brother.

Being a pupil, and a child, he solely depended on his parents for his welfare and not vice-verse.

In the circumstances, there was no room to apply the multiplier approach in the assessment of damages under the Fatal Accidents Act. The best approach was the global figure approach considering that compensation for the untimely demise of the minor was inevitable and almost mandatory and that in African societies parents expect financial help from their children when they grow up. Indeed, children even after they get married continue to give financial support to their parents. This is a real truism which cannot be wished away.

[12] With regard to the multiplier approach, the court in **Marko Mwenda –vs- Bernard Mugambi & Another NBI HCCC No.2343 of 1993**, observed that:-

> **"The normal method of assessing damages for loss of dependency under the Fatal Accidents act is the so called multiplier approach. The court finds the annuals loss of dependency and applies it over a multiplier refreshing so many years purchase.**
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> **In finding the annual loss of dependency, the so called multiplicand, the court first ascertains the net income of the deceased and then finds as fact how much of it was available for the use of the dependents. In adopting a multiplier, the court has regard to such personal circumstances of both the deceased and the dependents as age, expectation of earning life expected length of dependency and the vicissitudes of life"**.

The court further observed that:-

> **"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 approach. It is plain that it is a useful and practical method where factors such as the age of the deceased, the ages of the dependents, the net income of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are known or are knowable without due speculation. Where that is not possible, to insist on the multiplier approach would be to sacrifice justice at the alter of methodology something a court of justice should never do"**.

It was therefore correct for the trial court herein to apply the global approach in the assessment of damages for loss of dependency under the Fatal Accidents Act. However, an award of Kshs.1 million under the head was rather excessive consideration being given to the age of the deceased at the time of his demise (i.e 14 years) and the vicissitudes of life.

In this court's opinion, a sum of Kshs.500,000/= under the head would be conventional and reasonable. Therefore, the amount of Kshs.1

million awarded by the trial court is hereby reduced downwards to Kshs.500,000/=.

[13] The award by the trial court of Kshs.100,000/= for loss of expectation of life and Kshs.20, 000/= for pain and suffering both under the Law Reform Act were reasonable and adequate and are hereby upheld.

The special damages of Kshs.15, 950/= were pleaded and duly proved by necessary documentary evidence.

All in all, this appeal succeeds in part to the extent that the judgment of the trial court is hereby set aside and substituted for a judgment in favour of the respondents against the appellants in the total sum of Kshs.635, 950/= made up of Kshs.100,000/= for loss of expectation of life, Kshs.20, 000/= for pain and suffering, Kshs.500,000/= loss of dependency and Kshs.15, 950/= special damages.

[14] With a deduction of 50% for the respondents' contributory negligence, they would be entitled to a net total of Kshs.317, 975/= from the appellants together with costs and interest. Each party shall bear their own costs of appeal. Ordered accordingly.

J.R. KARANJAH

JUDGE

26.11.2019

[Delivered and dated this 26th day of November, 2019]