



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CIVIL APPEAL NO. 17 OF 2015

SANGANYI TEA FACTORY LIMITED.....APPELLANT

VERSUS

NORAH NYABOKE ATEI & SYLVESTER DEBA ONDARI

{Suing as Legal reps of FELIX BOSIRE (Deceased)}.....RESPONDENTS

{Being an appeal against the Judgement of Hon. J. Njoroge – CM Nyamira

dated and delivered on the 5th day of March 2014 in the original Nyamira

Chief Magistrate’s Court Civil Case No. 46 f 2013}

JUDGEMENT

By their plaint filed in the lower court on 29th January 2013 the respondents sued the appellant for compensation for fatal injuries sustained by Felix Bosire, deceased, following a collision between a lorry KAY 921A and a motor cycle whose rider was the deceased. The collision was said to have occurred on 5th June 2012 along the Nyamusi – Ekerenyo Murram Road. Both parties blamed each other for the accident with the appellant stating that its lorry was parked off the road at a tea buying center when the motor cycle which was being driven negligently by the deceased crashed into it and the respondents blaming the accident on the negligence of the driver of the lorry. However, after considering and analysing evidence from both sides, the trial Magistrate found the driver of the lorry and the deceased were both to blame for the accident and apportioned liability in the ratio 70:30% in favour of the respondents. He then awarded the respondents damages as follows: -

- Pain & suffering – Kshs. 20,000/=
 - Loss of expectation of life – Kshs. 100,000/=
 - Loss of dependency – Kshs. 600,000/=
 - Special damages – Kshs. 56,900/=
- Total – **Kshs. 776,900**
- Less 30% - Kshs. 223,070
- Total – **Kshs. 543,830/=**
- Interest and costs.

It is the appellant’s contention that liability was not proved on a balance of probabilities. Counsel drew this court’s attention to the testimony of PC James Gitonga who blamed the accident on the driver of the motor cycle and to Pw2’s evidence that the vehicle was stationary and was parked off the road. Counsel submitted that there was also evidence that at the point where the accident occurred the road was straight and the driver of the motor cycle had a clear view of the appellant’s vehicle. Counsel further contended that the respondents did not adduce evidence that the appellant’s driver was charged with causing obstruction. Citing the case of **Kiema Muthuku v Kenya Cargo Handling Services Limited [1991] 2 KAR**, Counsel urged this court to agree with the appellant that there is yet no liability without fault in our legal system and allow this appeal.

On the quantum of damages, Counsel submitted that the sum awarded for pain and suffering was excessive as the deceased died the same day and Kshs. 10,000/= is the conventional award made by courts under this head.

For loss of expectation of life, Counsel proposed an award of Kshs. 100,000/= being the conventional award under this head.

Counsel submitted that the court should also have made an award for lost years calculated as follows: - $3000 \times \frac{1}{3} \times 10 \times 12 =$ Kshs. 180,000/=. He submitted that the award should then have been deducted from the award made for loss of dependency under the Fatal Accidents Act.

In regard to loss of dependency, Counsel submitted that it was clear that the deceased did not have a secondary education and only helped in the farm at home. Counsel submitted that it was not proved that he had completed the driving course let alone that he had undertaken it and hence a multiplier of Kshs. 3000/= would have sufficed. Counsel however agreed with a dependency ratio of 1/3 but in the end urged that as income was not proved then the claim should have been dismissed altogether. Counsel relied on the case of **Samuel Mukunya Kamunge v John Mwangi Nyeri HCCA No. 34 of 2002**.

On special damages, Counsel submitted that the only sum proved was Kshs. 6,900/= which is what the trial court should have awarded. Counsel submitted that the damages that should have been awarded to the respondents should have been as follows: -

A. Under the Law Reform Act

- (i) Pain & suffering – Kshs. 10,000/=
- (ii) Loss of expectation of life – Kshs. 100,000/=
- (iii) Lost years – Kshs. 180,000/=

B. Under the Fatal Accidents Act

- (i) Loss of dependency – Kshs. Nil
- (ii) Special damages – Kshs. 6,900/=

Total – Kshs. 296,900/=

Counsel for the appellant however argued that as the respondents did not prove liability against the appellant this appeal should be allowed and the damages set aside with costs to the appellant.

The appeal was vehemently opposed. Counsel for the respondents submitted that negligence was deduced from the testimony of the witnesses for the appellant (Dw1 & Dw2) and that there was no evidence to show that the deceased contributed to the accident. Counsel urged this court not to interfere with the trial Magistrate's findings of fact as the same was based on evidence. Counsel also urged this court not to interfere with the quantum of damages and submitted that the same cannot be said to be manifestly high. Counsel contended that in any event the dependency ratio adopted by the trial court was too low compared to that of $\frac{1}{2}$ adopted in the case of **Alice O. Alukwe v Akamba Public Road Services Ltd & others [2013] eKLR**. Counsel urged this court to dismiss this appeal with costs to the respondents.

An appeal is in the nature of a retrial and as was held in the case of **Selle v Associated Motor Board Company Ltd [1968] EA 123**, this court has a duty to reconsider and analyse the evidence in the court below so as to arrive at its own independent conclusion bearing in mind that it did not see or hear the witnesses who testified. In the court below, evidence was led that the accident occurred when the motor cycle knocked the appellant's motor vehicle. According to the respondents, the motor vehicle entered into the road without checking and although the deceased tried to swerve, he could not avoid the collision.

Dw1, the driver of the lorry who knew better how the accident occurred testified that the lorry was at a tea buying centre and he was outside supervising the loading when he heard a bang. He contended that the vehicle was off the road. However, Dw2 (Jeremiah Nyanduko) disclosed during cross examination that the vehicle was in the middle of the road. That would explain why as narrated by Dw2 the motor cycle landed in the middle of the road. This is clear proof that the driver of the motor vehicle was negligent and the fact that he was not charged with obstruction is immaterial. It also transpired at the hearing that the deceased did not have a licence and my finding therefore is that the trial court did not err in finding him guilty of contributory negligence. I am satisfied that the finding of liability and the ratio of contribution thereof was based on evidence and I find no reason to interfere.

On the quantum of damages, the principles which should guide this court are settled – see **Kemfro Africa Ltd v A M Lubia & another [1982-88] 1 KAR**. A court can only interfere with the trial court's award of damages where it is satisfied that the trial court took into account an irrelevant factor or left out a relevant factor or the award was too high or too low as to amount to an erroneous estimate or that the assessment was not based on evidence. In this appeal I note firstly that the respondent's claim was brought under the Law Reform Act as well as the Fatal Accidents Act. The trial court was therefore correct in awarding damages under the heads it did and indeed those were the submissions of Counsel before that court. The awards under the Law Reform Act are conventional awards and the court did not misdirect itself in any manner. The awards were neither inordinately high nor inordinately low. It is clear from the record that the deceased did not die instantly but that he was rushed to hospital. The deceased was therefore entitled to damages for pain and suffering in addition to those for loss of expectation of life – see **Kemfro Africa Limited t/a "Meru Express Services (1996)" & another v Lubia & another (No 2) [1987] KLR 30**. Additionally, in assessing damages, the courts must also take into account the passage of time and so Kshs. 20,000/= for pain and suffering and Kshs. 100,000/= for loss of expectation of life are reasonable.

Damages for loss of dependancy are awarded under the **Fatal Accidents Act** and ever since the decision of the Court of Appeal in the case of **Hassan v Nathan Mwangi Kamau Transporters & 5 others [1986] KLR 457**, it has been an accepted practise to award damages under this head even for young children whose prospects in life are unknown the reason being that they would have been expected to help their parents once they grew up. The only rider is that when this is done then a global amount is awarded. In this case, although Pw2 described the deceased as a child, he was eighteen years old and had started to take interest in the boda boda business. She stated that he was training at HETZ Driving Technical and would have become a driver earning Kshs. 15,000/= per month. She did not however tender proof of his having gone to the school (I could not find the mock test paper allegedly produced at the trial as Exhibit 9). Nonetheless, it is my finding that his mother still expected that he would have fended for her as he had come of age. It is also my finding that the damages awarded under that head were not inordinately high as to warrant this court to interfere with the same. Even were the court to award a global sum, the sum of Kshs. 600,000/= would have been reasonable.

Accordingly, I find no merit in this appeal save to state that the net sum awarded under the Fatal Accidents Act shall be to the benefit of the deceased's mother only. The appeal is otherwise dismissed with costs to the respondents. It is so ordered.

Signed, dated and delivered in Nyamira this 19th day of December 2019.

E. N. MAINA

JUDGE