



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 54 OF 2017

CORAM: D.S. MAJANJA J.

BETWEEN

REBECAH EVERLINE ARIRI APPELLANT

AND

MARY GWARO &

AMBROSE MARITA suing as the legal representatives of

JAMES OBWAYA NYAEGA (Deceased) RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. C. Ateya, RM dated 20th February 2017 at the Senior Resident Magistrates Court at Ogembo in Civil Case No. 20 of 2015)

JUDGMENT

1. The case against the appellant in the subordinate court was that on 13th August 2014, the deceased was walking off the verge of the Kisii - Kilgoris road when the appellant drove motor vehicle registration number KBN 755Z, negligently causing it to veer off the road and knock the deceased who sustained fatal injuries. As a result of his death, the respondents claimed damages from the appellant under the **Law Reform Act (Chapter 26 of the Laws of Kenya)** and **Fatal Accidents Act (Chapter 32 of the Laws of Kenya)**. The trial magistrate apportioned liability at 90:10 against the appellant and made the following award of damages:

Pain and Suffering	Kshs.	50,000/-
Loss of expectation of life	Kshs.	100,000/-
Loss of Dependency	Kshs.	560,000/-
Less 10% contribution	(Kshs.	71,025/-)
Special Damages	Kshs.	50,500/-
TOTAL	Kshs.	689,475/-

2. The appeal, whose grounds are contained in the memorandum of appeal dated 30th June 2017, is against the finding on liability and quantum. I will deal with the issue of liability first. The appellant contended that the trial magistrate erred in law and in fact in holding the appellant liable at 90% whereas the evidence on record did not disclose any evidence of negligence or breach of duty of care on the part of the appellant and neither was the same proved at all. The respondent countered that the claim was proved by PW 1, who was the eyewitness, and that the trial magistrate apportioned liability according to the evidence.

3. In dealing with the issue of liability, this court, as the first appellate court, has a duty to re-evaluate and re-assess the evidence adduced before the trial court, keeping in mind that it is the trial court that saw and heard the parties and giving allowance for that, to reach an independent conclusion as to whether to uphold the judgment (see **Selle v Associated Motor Boat Co. [1968] EA 123**).

4. The respondent pleaded that the deceased was walking off the verge of the road and the appellant failed to control the vehicle to the extent that it veered off the road and knocked down the deceased. In her defence, the appellant alleged that the deceased attempted to cross the road

in a non-designated area and therefore failed to have regard to his own safety and that the accident was wholly or substantially caused by his own negligence.

5. Ambrose Marita (PW 1) testified that on the material day, he was walking with his father along the right side of the Kisii-Kilgoris road towards Kilgoris. He saw the appellant's vehicle which came towards them on the right side, passed him and then hit the deceased. He further testified that the vehicle was moving in a zig-zag manner. In cross-examination, he denied that the deceased was crossing the road or that he was drunk.

6. The appellant (DW 1) testified that as she was driving, she saw the deceased, about 100 metres away, staggering onto the road but because of the proximity, she tried to hoot and or apply brakes, but she hit the deceased. She stated that the point of impact was in the middle of the road on the yellow line. She told that the court that the headlight, bumper and windscreen were damaged. Because of the gathering crowd, she drove to Ogembo Police Station. In cross-examination, DW 1 stated that she was going downhill at a speed of 60kph and the road was clear and straight and that there were guard rails on both sides of the road. She explained that after the collision, the deceased landed on the guard rails and that is what killed him.

7. Since the parties did not dispute the collision, the only issue for determination is the apportionment of liability. Although the trial magistrate came to the conclusion that the appellant bore 90% of the blame, she did not explain how she came to this conclusion. On my part and having analysed the evidence, I find that both versions of the events as explained by the parties are equally true. It is possible that while the deceased was walking, the appellant's vehicle hit him. It is also possible that the deceased was crossing the road when he was hit. Since there were guard rails, DW 1 would have hit the rails but she did not, raising the possibility that the deceased was crossing the road when he was hit, when DW 1 failed to control the vehicle as she was driving too fast. In these circumstances I would apportion liability equally between the parties.

8. I now turn to the issue of quantum of damages. The appellant's case was that the claim for loss of dependency under the *Fatal Accidents Act* was not proved. According to the plaint, the deceased was aged 52 years old at the time of his death and was employed as a plant operator/engineer earning Kshs. 40,000/p per month.

9. PW 1 testified that the deceased was working with the Ministry of Road and Public Transport. He produced a letter of promotion dated 16th May 2007 which showed that as at the date of the letter the deceased was earning Kshs. 8,754/- which would be subject to annual increments. He also produced a condolence message read at the deceased's funeral by Regional Mechanical Engineer confirming that he was a civil servant and had worked in the Ministry up to the time of his death.

10. The respondents' evidence was uncontested and so was the fact that the deceased had a wife and 3 sons who were all going to school. The trial magistrate used the salary shown in the letter of appointment as the multiplicand and since the deceased was supporting a family, she applied a dependency ratio of 2/3. Since, the deceased was still working at the time of his death, he would have earned a larger salary than that shown in the letter of appointment since he was entitled to annual increments and promotions. As the respondents did not prove the actual salary at the time of death, there was no error in the trial magistrate adopting the salary shown in the letter produced. As the deceased had two school going children whom he supported in addition to his wife, I do not find any error in adopting a dependency ration of 2/3.

11. As regards the multiplier, the trial magistrate awarded 8 years assuming the deceased would work until 60 years. In *Board of Governors of Kangubiri Girls High School & Another v Jane Wanjiku Muriithi & Another NYR CA Civil Appeal No. 35 of 2014 [2014] eKLR*, the Court of Appeal held that the choice of multiplier is a matter of the court's discretion which must be exercised judiciously. In determining the multiplier to be adopted, the court may consider the nature of employment of the deceased and the fixed retirement age, the period of expected dependency, the conditions of life if the deceased could have lived, keeping in mind that the standard of life and the life expectancy in Kenya has reduced over the years due to factors such as poverty, impact of HIV and the risk of road traffic accidents. It follows therefore the trial magistrate erred in awarding the respondent the full term of 8 years without taking to account the imponderables I have alluded. I would grant a multiplier of 6 years.

12. For an appellate court to interfere with an award of damages, it must be shown that the trial court, in awarding damages, took into consideration an irrelevant fact or failed to consider a relevant fact or that 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 *Butt v Khan [1981] KLR 349*). **Applying this principle to the case at hand, I interfere only with the multiplier.**

13. In light of the finding I have made on both liability and quantum, I allow the appeal, set aside the judgment of the subordinate court and substitute it with the following award:

Pain and Suffering	Kshs.	50,000/-
Loss of expectation of life	Kshs.	100,000/-
Loss of Dependency		
(Kshs. 8,754 X 2/3 X 6 X 12)	Kshs. ...	420,192/-
Special Damages	Kshs.	50,500/-
Less 50%		
TOTAL	Kshs.	310,346/-

14. The appellant shall pay costs assessed at Kshs. 20,000/-. The amount awarded shall accrue interest at court rates from the date of judgment.

DATED and DELIVERED at KISII this 2nd day of August 2018.

D.S. MAJANJA

JUDGE

Ms Gogi instructed by Masire and Mogusu Advocates for the appellant.

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