



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 607 OF 2016

FRED ONGERA OSINDI & ANOTHER

(SUING AS THE ADMINISTRATORS & ADMINISTRATIX TO THE ESTATE OF THE LATE

OSINDI NYANUMBA (DECEASED).....APPELLANTS

VERSUS

KAMWELE BILDAD ROGONCHO.....RESPONDENT

(The appeal arises out of the judgment of Hon. A.M. Obura (Mrs) Principal Magistrate delivered on 27.9.2016 in Nairobi CMCMM NO. 1262 OF 2015)

JUDGMENT

The appellants were the plaintiffs in the lower court against the defendant in an action based on a road traffic accident where the deceased was knocked down by motor vehicle registration No. KBB 849 R which was said to be registered and or owned by the respondent. They brought the suit as administrators of the deceased and blamed the accident on the negligence of the respondent claiming damages arising therefrom.

The respondent denied the appellants claim in the defence filed herein. After a full trial the lower court found the deceased and the respondent were both to blame for the accident and apportioned liability equally that is 50% against 50%. The court also awarded Kshs. 50,000/= for pain and suffering and Kshs. 100,000/= for loss of expectation of life.

On the heading of lost years the court awarded Kshs. 403,560/= after applying a multiplier of 15 years and using a net salary of Kshs. 3,363/=. An award of Kshs. 1,870/= was made in terms of special damages. The total sum awarded was Kshs. 555, 430/= which was subjected to 50% contributory negligence leaving a balance of Kshs. 277,715/=. The appellants were aggrieved by this judgment and lodged this appeal.

In the memorandum of appeal dated 27th September, 2016 and filed on 4th October, 2016 the appellants complained among other issues that the court erred in law and facts on the subject of multiplicand applicable and was mis-directed on the assessment of loss of dependency. The lower court was also faulted to applying a net salary of Kshs. 3,363 as the monthly income of the deceased.

In so doing the court was faulted for not considering the submissions made on behalf of the appellants on the income applicable in such a case which was Kshs. 14,226/=. The lower court was also faulted for not taking into account the authorities cited by the appellants.

Following directions given by the court the parties herein filed submissions which I have considered.

There was conflicting evidence as to the occurrence of the accident that claimed the life of the deceased. The evidence on record showed that the deceased was knocked down by a motor vehicle while in the company of P.W. 3. According to this witness both him and the deceased were walking on the pavement along Waiyaki way when he was knocked down by the motor vehicle. he died before the police arrived. He denied that the deceased was knocked down while crossing the road as alleged by the defence witness.

As correctly observed by the lower court, there was no sketch map of the scene despite of the fact that the police visited the scene. This could have helped the court to resolve the matter in a more credible manner. No efforts were made by either party to summon police from Parklands Police Station to aid the court in that regard.

According to P.W. 3 the point of impact was on the left side of the road while according to the defence it was in the middle of the road. As the first appellate court, it is my duty to evaluate the evidence adduced by the witnesses in the lower court and arrive at independent conclusions. This I have done.

What there is a word of P.W. 3 as against that of the defence witness. In the absence of any other independent witness there is no way the subject of liability can be resolved other than by what the lower court decided. That is to say both parties were equally to blame in the circumstances. The police accident abstract produced as exhibit 3 shows that the case was still pending under investigation and as at the time of hearing no progress had been made.

The deceased was employed as a driver with Aqua Mist Limited. His gross salary was Kshs. 15,348/=. The payslip produced as exhibit 6 contained several deductions amounting to a total of Kshs. 11,985/= leaving a net pay of Kshs. 3,363/=. This is the figure that was used by the lower court to calculate the rate of dependency. With respect that calculation was misdirection. The only deductible sum was in respect of statutory obligations which are PAYE and NHIF amounting to Kshs. 922/= leaving a net monthly salary of Kshs. 14, 226/=.

The deceased was survived by a wife, two sons and a mother. All these were adults. There is no evidence that his sons were dependants but one would expect that his wife and mother were direct dependants. In the circumstances I am persuaded to find that he used half of his income for the support of his wife and mother which amounts to Kshs. 7,113/=.

The deceased died at the age of 43. He was a driver by profession and in the absence of any evidence of retirement age it is reasonable to assume that he would have worked up to age 60 which means he had 27 years to work as such. However, there are unexpected events in life just like the accident that claimed his life.

In the circumstances, I am prepared to accept the proposed multiplier of 15 years proposed by the appellants. The loss of dependency therefore would work out to Kshs. 7,113 x 12 x 15 = Kshs. 1,280,340 which shall be subjected to 50% contributory negligence leaving a balance of Kshs. 640,170/=.

The award of Kshs. 50,000/= for pain and suffering is reasonable which shall also be subjected to 50% contributory negligence leaving a balance of Kshs. 25, 000/=. Special damages of Kshs. 1,870/= shall also be subjected to contributory negligence leaving a balance of Kshs. 935/=.

The award of loss of expectation of life of Kshs. 100,000/= was on the higher side. Conventional figures range from Kshs. 50,000/= to Kshs.150,000/=. In this case I make an award of Kshs. 60,000/= which however is deductible from the final figure. In the end this appeal this appeal succeeds by setting aside the judgment of the lower court and in place thereof entering judgment for the appellants against the respondent in the following terms,

Damages for loss of dependency	Kshs. 640,170/=
Pain and suffering	Kshs. 50,000/=
Loss of expectation of life	Kshs. 60,000/=
Special damages	Kshs. 935/=
Total	Kshs. 751,105/=
Less 60,000/=	= Kshs. 691,105/=
(loss of expectation of life)	

The appellants shall have the costs in the lower court and in this appeal subject to 50% contributory negligence plus interest at court rates.

Dated, signed and delivered at Nairobi this 24th day of October, 2018

A. MBOGHOLI MSAGHA

JUDGE