



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO.15 OF 2016

OWUOTH JARED.....APPELLANT

VERSUS

1. GEORGE KAMAU GATHEE

2. WAMBUI KAMAU..... RESPONDENTS

(Being An Appeal from the Judgment of Hon.Oduor, Senior Principal Magistrate at Limuru in Civil Suit Number 350 of 2016)

J U D G M E N T

1. This appeal emanates from the decision of **Oduor (SPM)** in Limuru **SPMCC No. 350 of 2013**. The suit was filed on 20th November 2013 by George Kamau Gatheo and Wambui Kamau in their capacity as administrators of the estate of John Kungu Kamau who died from injuries sustained in the road traffic accident, which occurred on 26th December 2012 at a place called **Kwambira** along **Naivasha-Nairobi road**.

2. The Respondents averred that the accident occurred as a result of the negligence of the driver of motor vehicle KBH 338X owned by Owuoth Jared Moses, the Appellant and which at the time was being driven by his servant or agent. The Respondents sought general damages. In his defence statement, the Appellant admitted ownership of the accident vehicle but denied negligence and liability for the accident.

3. The hearing commenced on 28th May 2015. The Respondents evidence was that the deceased was 26 years old at the material time and was running a shop at Ngarariga. That on the date of the accident he was standing along the **Nairobi-Naivasha** road on the left side facing Naivasha direction. That the Appellant's vehicle appeared from Nairobi, driving at a very high speed and attempted to overtake, only to be confronted by oncoming traffic. In trying to return to his lane, the driver lost control and veered off to the left side where the vehicle knocked down the deceased, killing him instantly.

4. The Respondents claimed that they were dependent on the deceased. The Appellant did not adduce any evidence. The trial magistrate gave judgment for the Respondents in the sum of KShs.1940,500/= with costs and interest. This judgment provoked this appeal.

5. The Appellant has raised four grounds of appeal in his memorandum of appeal, challenging the finding of liability at 100% against the Appellant, the award of KShs.1,800,000/= as damages for loss of dependency and the use of a dependency ratio of ½. Finally the Appellant complains that the learned magistrate erred in law and fact in arriving at conclusions and a judgment that was contrary to the evidence, the law and submissions.

6. The court directed that the appeal be argued through written submissions. Citing inconsistencies in the evidence of the eye witness and brother to the deceased **Kahinga Kamau (PW3)** the Appellant asserts that liability ought to be apportioned at 50:50 regardless of the fact that the Appellant did not adduce evidence, as the burden of proof lay with the Respondent. The case of **Peter Okello Omondi v Clement Ochieng [2003] e KLR** is cited on the point. On damages in respect of lost dependency, the Appellant has cited the case of **James Gakinya Karienyne and Nancy Muguro Gakinya (suing as legal representatives of the estate of David Kelvin Gakinya)** to urge that the more appropriate ratio in this case was 1/3 rather than ½. Thus the Appellant proposes, an award of KShs. 1,200,000/= as damages for lost dependency.

7. In opposing the appeal, the Respondents argue that their evidence was not controverted and that the finding on liability was proper. Regarding quantum, the Respondents reiterate their evidence at the trial and defend the finding of the court on the income of the deceased, and assert that the dependency ratio was based on the fact that the deceased supported his parents and brother and was unmarried. The Respondents have relied on several authorities including **Lucy Wambui Kihoro v Elizabeth Njeri Abuong [2015] e KLR**. The Respondents urge the court to dismiss the appeal.

8. In **Selle v Associated Motor Boat Co. [1968] EA 123** the Court of Appeal for East Africa laid down the principles guiding the exercise of

the jurisdiction of the first appellate court. The court stated:

“An appeal to this Court from the trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial Judges findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hamid Saif v. Ali Mohamed Sholan[1955] 22 EACA 270).”

9. Two broad questions fall for determination, namely whether the finding on liability was proper on the evidence on record, and whether the trial court’s assessment of damages for lost dependency was based on evidence and proper principles. Concerning the first issue, the key eye witness for the Respondent was **PW3**. He adopted his written statement during his testimony. The trial magistrate in my view correctly captured the essence of the evidence of this witness and found that the driver of the vehicle was negligent in attempting to overtake when it was unsafe to do so.

10. The testimony by **PW3** and the police abstract confirmed that the accident occurred on the left side of the Nairobi/Naivasha highway. The fact that **PW3** stated during cross-examination that the deceased stood on the left side facing Limuru does not in my view amount to contradiction, as it seems that the scene of the accident may have been at a spot before Limuru on the Nairobi/Naivasha highway. In any event **PW3**’s version of the accident was not controverted as the Appellant did not call witnesses. The standard of proof in civil proceedings is on a balance of probabilities which threshold was met in this case. The trial court could not apportion liability at 50:50 when there was clear evidence that the Appellant was the culpable party who caused the accident, without any contribution on the part of the deceased.

11. Regarding quantum, I think the tricky question at the trial was the proof of the income of the deceased and ratio of dependency. The Court of Appeal has set out the principles upon which an appellate court will interfere with the discretion of the trial court on the assessment of damages. In **Bashir Ahmed Butt v Uwais Ahmed Khan [1982 – 1988] I KAR 5**, court stated that:

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low”

see also **Kemfro Africa Ltd t/a Meru Express Service & Another [1982 – 1988] I KLR 727**.

12. On this appeal, the Appellant does not appear to take issue with the assumed income of KShs.15,000/= per month that was used to assess the lost dependency, rather the ratio of dependency applied. In his judgment, the trial magistrate noted that no documentary proof of income was tendered but relied on the Defendant’s authority in **Ann Njoki Njenga v Umoja Flour Mills and Another [2006] e KLR** where the court assumed a net income of KShs.10,000/= per month and considering inflation, settled for the sum of KShs.15,000/=. The trial magistrate was equally moderate with the multiplier, adopting 20 years.

13. In **Chunibhai J. Patel and Another v PF Hayes & Others [1957] EA 748**, cited in the Respondents’ authority **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja) v Kiarie Shoe Stores Ltd [2015] e KLR** and in **James Gakinya Kamenye and Another (suing as the legal representatives of David Kelvin Gakinya – deceased) v Rerminus Kariuki Githinji [2015] e KLR** relied on by the Appellants, the Court of Appeal had given the following guidelines in assessing damages under the Fatal Accidents Act:

“The court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependents, the net earning power of the deceased (i.e. his income less tax) and the proportion of his net income which he would have made available for his dependents. From this it should be possible to arrive at the annual value of the dependency which must then be capitalized by multiplying by a figure representing so many years’ purchase. The multiplier will bear a relation to the expectation of earning life of the deceased and the expectation of life and dependency of widow or children (dependants).... The resulting sum (which must depend upon a number of estimates and imponderables) will be the lump sum the court should apportion among the various dependants.”

14. In this case, the pleaded dependants were the mother and father of the deceased who were aged 50 and 49 years respectively as at 2013. The deceased himself was 26 years old. Their dependency must in a sense approximate to these ages and further the court ought to have considered that the deceased may have married in the future, thus reducing the level of support to his aging parents. In my own view, by adopting a ratio of ½ over 20 years, the court assumed that the deceased would have no other dependents in his entire working life and would always spend half his earnings on his parents regardless of the change in his personal circumstances. This in my view is not a realistic approach. Thus in my view the more realistic ratio ought to have been a little higher than ? but not more than 40% over the period of 20 years. Thus $40/100 \times 15,000 \times 20 \times 12 = 1,440,000/=$.

15. The award for damages in respect of lost dependency is therefore reviewed downwards to KShs.1,440,000/=.

The awards in respect of the Law Reform Act were as follows:

- a) Pain and suffering - KShs. 20,000/=
- b) Loss of expectation of life - KShs. 120,000/=

c) Specials - KShs. 500/=

Total - KShs.1,580,500/=

The Appellants are awarded half the costs of this appeal.

DELIVERED AND SIGNED AT KIAMBU THIS 19TH DAY OF OCTOBER, 2018

C. MEOLI

JUDGE

In the presence of:

Miss Maina holding brief for Miss Kimaru for Appellants

Respondent – No appearance

Court clerk - Nancy