REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL APPEAL NO. 1 OF 2017

COUNTY GOVERNMENT OF NYAMIRA.....APPELLANT

=VRS=

CHARLES NYAIGOTI NYAGOTO & ALICE

KEMUNTO NYAOGOTI

(Suing as Legal Representatives of the Estate of

ROBERT ONCHOMBA NYAIGOTI – Deceased).....RESPONDENTS

[Being an Appeal from the Judgement of Honourable Kahara (RM) delivered on 8th February 2015 in Keroka SRM's Court Civil Suit No. 172 of 2015]

JUDGEMENT

The appellant was a defendant in the lower court where the respondents had sued in a claim for damages under the Fatal Accidents Act and Law Reform Act arising out of an accident where the deceased sustained fatal injuries. The lower court entered judgement in favour of the respondent herein. On liability at the ratio of 80:20%, pain and suffering Kshs. 10,000/=, loss of expectation of life Kshs. 100,000/=, loss of dependency Kshs. 1,920,000/=, special damages Kshs. 60,600/= and costs of the suit together with interest.

The appellant being aggrieved with the entire judgement preferred this appeal and raised the following grounds: -

"a. The learned magistrate erred in law in making a finding of damages against the defendant.

b.The learned magistrate erred in law and fact in holding that the defendant was liable for the excessive damages so awarded or at all in the absence of any concrete evidence to demonstrate the same.

c. The learned magistrate erred in law and fact in holding that the defendant 80% liable.

d. The learned magistrate erred in law and fact in holding that the defendant was liable for the excessive damages so awarded or at all in the absence of any concrete evidence to demonstrate the same.

e. The learned magistrate erred in law and fact in awarding unreasonable Loss of Dependency of Kshs. 1,920,000/= by taking a multiplicand of 32 years without taking into consideration the vagaries of life.

f. The learned magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendant and thereby arriving at a wrong and erroneous conclusion condemning the defendant to damages of Kshs. 1,920,000/= by taking an income of Kshs. 10,000/= without any tangible proof of the same.

g. The learned magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendant and thereby arriving at a wrong and erroneous conclusion condemning the defendants to special damages of Kshs. 60,000/= without concrete documentary evidence.

h. The learned magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendant and thereby arriving at a wrong and erroneous conclusion condemning the defendant to excess general and special damages without concrete documentary evidence.

i. The learned magistrate erred in law and fact in failing to appreciate the long established principle of stare decisis, precedent law thus bringing law into confusion and thereby deriving an erroneous finding/conclusion, in particular relating to damages.

j. The learned magistrate erred in law and fact in failing to appreciate as follows:

(i) That the plaintiff's pleadings and the evidence tendered in support thereof was incapable of sustaining the award of damages.

1. The learned magistrate erred in law and fact in entering judgement in favour of the plaintiffs against the defendant in spite of the plaintiff's miserable failure to establish her case more especially on quantum.

2. The learned magistrate erred in law and fact in failing to appreciate the legal position that there could be no liability without fault. The court award is unsustainable and baseless in the circumstances."

On 5th July 2018 the court directed that the appeal be canvassed by way of written submissions. Both parties complied. The appellant filed their submissions on the 27th July 2018 and the respondents on 14th August 2018.

Counsel for the appellant submitted that the deceased who was a rider suddenly overtook a truck that was driving in the same direction thus hitting the appellant's ambulance which was coming from the opposite direction. Counsel submitted that the deceased was to blame and should have been held 100% liable. On quantum of damages, Counsel submitted that the award was exaggerated and he prays for review and setting aside of the same. He proposed an award as follows: -

Pain and suffering – Kshs. 10,000/=

Loss of expectation of life – Kshs. 100,000/=

Loss of dependency 5000 x 1/3 x 28 x 12 – Kshs. 560,000/=

Less 100,000/= to avoid double compensation.

Net – Kshs. 570,000/=

Counsel for the respondent submitted that the trial magistrate carefully examined and analysed the evidence on record and gave clear reasons as to why she found the appellant's drive 80% and the deceased 20% to blame. On quantum, Counsel submitted that the trial magistrate was properly guided in the award and that the special damages of Kshs. 60,600/= was proved.

I am alive to the principle that as an appellate court I cannot interfere with the trial magistrate's findings of fact or indeed the award unless it was based on no evidence or the trial magistrate misdirected herself or acted on the wrong principle of law or unless the award was demonstrably so low or so high that it could not have been a proper assessment of the damage. (See Bhatt v Khan [1981] KLR 349)

In this case there was no eye witness. The plaintiff's now respondent evidence was that he arrived at the scene after the accident had already occurred. He was emphatic that he did not witness the accident. He did not call a witness who could have told the court how the accident occurred. The defendant on the other hand called Wycliff Mogaka (Dw1) the person who was driving the vehicle that was involved in the accident. It was his evidence that he was driving the vehicle, an ambulance KBY 418K and that he was taking a patient to hospital. He stated that when he reached Birongo area there was an oncoming vehicle and as they bypassed a motor cycle rider emerged from the rear of the oncoming vehicle and drove into his path hitting the right tyre of the ambulance. He, Dw1, swerved to the extreme left and stopped at some nappier grass. He blamed the motor cycle rider for the accident and stated that as a consequence he (Dw1), was not charged with any traffic offence. He reiterated his evidence upon cross examination by Counsel for the appellant.

The evidence of the appellant's driver was not rebutted. There was no evidence at all that the ambulance was over speeding and it is my finding that the trial magistrate's evidence that it was not only based on no evidence but that it was based on speculation and conjecture. In the absence of evidence pointing to blameworthiness liability was not proved as there can be no liability without fault. It is my finding therefore that the respondent did not prove his case on a balance of probabilities and that the trial magistrate's finding on liability at 80:20 is erroneous and should not be allowed to stand. The appeal has merit and it is allowed with consequence that the finding on liability and the award of damages are set aside with costs to the appellant.

In the event that I am wrong however I proceed to assess damages as follows: -

(a) Pain and suffering – Kshs. 10,000/=

(b) Loss of expectation of life. The amount awarded by the trial court – Kshs. 100,000/=

(c) Loss of dependency – no evidence was tendered on the sum earned by the deceased from his "boda boda" taxi but I find the Kshs. 10,000/= used by the trial magistrate as a multiplicand was close to the minimum wage and hence reasonable. The deceased was not married so the more reasonable ratio would have been 1/3 and as he was 22 years he had 38 years of work left given that he was self-employed. A multiplier of 25 years would have been more reasonable so as to take into account the vagaries of life. The damages awarded under this head therefore would be: -

10000 x 25 x 12 x 1/3 = Kshs. 1,000,000/=

Search – Kshs. 500/=

Specials – Kshs. 20,000/=

Funeral expenses – Kshs. 20,000/=

Coffin – Kshs. 20,000/=

Total = Kshs. 1,170,500/=.

I would then have ordered that the sum awarded for loss of expectation of life be deducted from the above sum. As I have found the appeal merited it is allowed and the entire judgement of the court below is set aside with costs to the appellant.

It is so ordered.

Signed, dated and delivered at Nyamira this 18th day of October 2018.

E. N. MAINA

JUDGE