



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 16 OF 2017

SOUTH NYANZA SUGAR CO. LTD.....APPELLANT

-VERSUS-

JANE ADOYO ORENKO (Suing as the Administratrix

of the Estate of LEONARD OLUOCH KATIENO (Deceased)....RESPONDENT

(Being an appeal from the judgment and decree by Hon. R. Odenyo, Senior Principal Magistrate in Migori Chief Magistrate's Civil Suit No. 97 of 2011 delivered on 25/01/2017

JUDGMENT

1. Out of a road traffic accident which occurred in the night of 18/11/2008 around Pinyowacho area along Rapogi-Pinyowacho road involving motor cycle registration number KBC 909K make TVS (hereinafter referred to as '**the motor cycle**') and motor vehicle registration number KAY 244V/ZC 9001 make New Holland Tractor (hereinafter referred to as '**the motor vehicle**'), **Leonard Oluoch Katieno** (hereinafter referred to as '**the deceased**') who was riding the motor cycle sustained fatal injuries.
2. The Respondent who is the wife of the deceased instituted **Migori Chief Magistrate's Civil Suit No. 97 of 2011** (hereinafter referred to as '**the suit**') seeking *inter alia* general and special damages under the Law Reform Act and the Fatal Accident Act.
3. The Appellant entered appearance and filed its Statement of Defence. The suit was heard where the Respondent and a Police Officer who produced the Police Abstract one **No. 81784 PC Gabriel Ndana (PW2)** testified. The Respondent did not avail its intended witness despite efforts to do so. The trial court delivered its judgment on 25/01/2017 where it allowed the claim and accordingly assessed damages. The Appellant, dissatisfied with the decision, preferred an appeal and raised nine grounds mainly challenging findings on liability and assessment of quantum of damages.
4. Directions were subsequently taken, and the appeal was disposed of by way of written submissions where both parties complied and expounded on their rival positions relying on various judicial decisions.
5. As the first appellate Court it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga –versus- Kiruga & Another (1988) KLR 348**).
6. In discharging the foregone duty, I will first deal with the issue of liability. The trial court found the Appellant wholly liable for the accident. The factual background on how the accident occurred was attempted by the evidence of the Respondent and PW2. However, both the Respondent and PW2 did not witness how the accident occurred. The Respondent only learnt of the accident long after it had occurred and visited the scene the next day only to find the motor vehicle still there. PW2 was not the investigating officer but produced the Police Abstract. The Police Abstract confirmed that indeed an accident occurred around Pinyowacho area along Rapogi-Pinyowacho road where the motor cycle and the motor vehicle collided and the deceased sustained fatal injuries.
7. The Respondent testified that she saw the motor cycle which was extensively damaged. That evidence buttressed the fact that there was a collision between the motor cycle and the motor vehicle. However, there was no evidence on how exactly the collision occurred. The difficulty in determining liability in civil cases was at one point visited by the Court of Appeal in **Civil Appeal No. 285 of 2005 at Eldoret in Michael Hubbert Kloss & Another vs. David Seroney & 5 Others** where the Court stated thus;

“The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in Stapley vs. Gypsum Mines Ltd (2) (1953) 001 A.C 663 at page 681 as follows:

“to determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it.....”

.....The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that doesn't mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those facts which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any fact can be applied generally”.

8. The Court of Appeal also dealt with situations where it was difficult to ascertain how a collision occurred where two vehicles were passing each other. In such instances the Court settled for equal apportionment of liability. (See Beckley Stewart Ltd, David Cottle and Jean Susan Cottle -versus- Lewis Kimani Waiyaki (1982-88)1 KAR 1118, Lakhamshi versus Attorney General (1971) EA 115, Simon versus Carlo (1970) EA 284 among others).

9. In this case there is no doubt that the collision occurred but liability cannot be certainly apportioned. I will hence follow the guidance by the Court of Appeal in the foregone cases, which is indeed binding on this Court, and find that the driver of the motor vehicle and the rider of the motor cycle were equally to blame for the accident. I am therefore not in agreement with the trial court that the driver of the motor vehicle was to wholly blame for the accident.

10. The second issue is on the assessment of damages. An appeal against such is an appeal on the discretion of the trial court. The Court of Appeal in the case of Kemfro Africa Limited t/a Meru Express Services, Gathogo Kanini vs. A. M. Lubia and Olive Lubia (1982-1988) 1 KAR 727 discussed the principles to be observed when an appellate court is dealing with an appeal on assessment of damages. The Court expressed itself clearly thus:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.’

11. This position was restated by the Court of Appeal in the case of Arrow Car Limited -vs- Bimomo & 2 others (2004) 2 KLR 101 and so recently in the case of Denshire Muteti Wambua -vs- Kenya Power & Lighting Co. Ltd (2013) eKLR.

12. Applying those principles to this case and having considered the evidence on record and the judgment of the trial court. I do not see how the trial court erred. The multiplier of 25 years was well founded as well as the income. That is the case with the multiplicand used as there was evidence, on the preponderance of probabilities, that the deceased was married with children. I cannot also fault the award of damages for pain and suffering before death. The upshot is that the appeal on quantum is unsuccessful.

13. From the foregone discussion, the following final orders do hereby issue: -

(a) The appeal partly succeeds on the issue of liability. The finding that the Appellant was to wholly blame for the accident is hereby set-aside and is substituted with a finding that the Appellant and the deceased (represented by the Respondent as the legal representative) were equally liable for the accident.

(b) The appeal on quantum of damages is dismissed.

(c) Since the appeal has partly succeeded each party shall bear its own costs of the appeal.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 23rd day of November, 2018.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Messrs. Odhiambo Owiti & Company Advocates for the Appellant.

Messrs. Tom Mboya & Company Advocates for the Respondent.

Evelyne Nyauke - Court Assistant