REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 85 OF 2017

WILSON SAIYA.....APPELLANT

-versus-

DAVID WINGA ODONGO (Suing as the legal

representative of HELIDA AWINO ODONGO - Deceased).....RESPONDENT

(Being an appeal arising from the judgment and decree by Hon. R. Odenyo, Senior Principal Magistrate in Migori Chief Magistrate's Civil Case No. 395 of 2016 delivered on 30/08/2017)

JUDGMENT

1. The Respondent herein, **David Winga Odongo,** filed **Migori Chief Magistrate's Civil Case No. 395 of 2016** (hereinafter referred to as **'the suit'**) as a legal representative of the estate of the late **Helida Awino Odongo** (hereinafter referred to as **'the deceased'**) who allegedly died out of a road traffic accident on 18/09/2015. He sought for General Damages under the Law Reform Act and the Fatal Accidents Act, special damages, costs and interests.

2. The Respondent sued the Appellant herein as the driver of the offending motor vehicle registration number KCB 896Q (hereinafter referred to as '**the vehicle'**). In a Statement of Defence the Appellant denied all the averments and put the Respondent into strict proof. The suit was fully heard. The Respondent who was a son of the deceased testified and called two witnesses: **Dorothy Ojwang Ouma,** an eye witness, who testified as **PW2** and the Police Officer **No. 82252 PC Kennedy Maingi** from Migori Traffic Base who testified as **PW3**. The Appellant did not call any witness.

3. In a judgment rendered on 30/08/2017 the trial court found the Appellant wholly liable for the accident and awarded Kshs. 60,000/= for pain and suffering, Kshs. 100,000/= for loss of expectation of life under the Law Reform Act and Kshs. 800,000/= for loss of dependency under the Fatal Accidents Act further to Kshs. 116,000/= on Special Damages, costs and interests.

4. The Appellant was aggrieved by the judgment and preferred this appeal. In a Memorandum of Appeal filed on 29/09/2017 the Appellant raised nine grounds vehemently challenging both liability and quantum of damages.

5. Directions were taken, and the appeal was disposed of by way of written submissions where both parties filed their respective submissions. Counsel for the Appellant argued that the trial court erred in not considering the evidence on how the accident occurred in its totality and as such wrongly apportioned the entire blame on the Appellant whereas the deceased was the one to wholly blame. Counsel further faulted the trial court in awarding inordinately high awards on damages not based on the evidence and the law. In essence the Appellant faulted the method of assessment of damages in arguing that since the deceased was aged 72 years old then the trial court ought to have awarded a lumpsum figure on damages instead of assessing the same under the twin Acts.

6. The Respondent opposed the appeal. He supported the decision of the trial court and prayed that the appeal be dismissed with costs. In doing so, the Respondent took the Court through the evidence adduced at the trial court and referred to some decisions. He cited the Court of Appeal decisions in the cases of **Kiruga vs Kiruga (1988) eKLR** and **Selle & Ano. vs. Associated Motor Boat Co. Ltd (968) EA 123** for the principles upon which an appellate Court should consider in dealing with an appeal on quantum of damages. The Respondent also relied on some other decisions in urging this Court not to interfere with the discretion of the trial court.

7. As the first appellate Court, my role is to revisit the evidence on record, evaluate it and reach my 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).**

8. I have carefully and keenly read and understood the proceedings and the judgment of the lower court as well as the Record of Appeal, the

grounds thereof, the parties' submissions and the decisions referred thereto.

9. This appeal hinges on two limbs; that of liability and that of assessment of damages. On the question of liability, the starting point are the pleadings. It is now settled law that each party is bound by its pleadings and any evidence that tends not to support the pleadings is for rejection (See Court of Appeal in **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR** and in **G.P. Jani Properties Limited vs. Dar es Salaam City Council (1966) EA 281).**

10. In this case the Respondent testified and called witnesses in a bid to prove the averments in the Plaint. Likewise, the Appellant testified in support of his filed defence. According to the Respondent the accident was witnessed by PW2. The testimony of PW2 revealed that as PW2 was selling clothes at the Kakrao Centre she saw the vehicle moving at a very high speed from the direction of Awendo heading to Migori along the Kisii-Isebania road. That, the vehicle veered off the road and the people who were at the Centre ran helter-skelter. That, the vehicle hit the deceased who was off the road and who had gone to buy some tomatoes. The vehicle however did not stop at the scene of accident. PW2 rushed to where the deceased was and managed to take her to Migori Level 4 Hospital where she passed on as she underwent treatment. PW2 stated that there were no bumps then on the road at the Kakrao stage neither was there any other motor vehicle on the road at the time of the accident. PW2 reiterated that the deceased was not hit on the road.

11. When the accident was reported to the police, it was PW3 who rushed to the scene and later to the hospital. PW3 did not find the vehicle at the scene but at a place called Cham Kombe where the Appellant had been cornered and seriously assaulted by motor cycle riders who gave chase after the accident occurred. The vehicle was damaged and the Appellant injured as well. According to investigations, PW3 established that the accident occurred when the Appellant veered off the road as he attempted to avoid hitting a motor cyclist. That, the vehicle then hit the deceased who was completely off the road. PW3 further testified that he did not charge the Appellant with any offence since the scene had been interfered with by the motor cyclists who were at the Stage when the accident occurred.

12. The foregone was the Respondent's evidence which was countered by the Appellant. The Appellant testified that he was driving the vehicle at a speed of 50 km/hr. heading to Isebania. On reaching Kakrao stage there was a matatu which was parked besides the road but partly on the road. That, he hooted as he overtook the stationary matatu only for the deceased to suddenly rush onto the road from the left side as one faced Migori general direction. That, he braked and swerved and went off the road to the extreme right. That, despite his efforts to avoid the accident he hit the deceased on the other lane just after the dividing line. That, he stopped the vehicle to assist the deceased only to be pelted with stones by the people who were at the scene leading him to abandon his car and ran away aiming to call the police. That, the crowd eventually caught up with him and assaulted him mercilessly leading to his admission in hospital. The Appellant wholly blamed the deceased for crossing the road when it was not safe to do so.

13. By juxtaposing the evidence of the Appellant against that of PW2 and PW3 several issues come to the fore. First, whereas the Appellant stated that he stopped the vehicle when the accident occurred, PW2 stated that the Appellant did not stop at the scene of the accident. PW2's evidence was corroborated by that of PW3 who stated that he rushed and was at the scene barely around 40 - 50 minutes after the accident occurred and did not find the vehicle at the scene. PW3 stated that the police found the vehicle abandoned at a place called Cham Kombe. It therefore means that the Appellant did not stop at the scene as he alleged.

14. The second issue is the exact point of impact between the vehicle and the deceased. According to PW2 the impact was off the road where the deceased was as the vehicle veered off the road. The investigations carried out by PW3 likewise confirmed that as the vehicle was driven from Kisii towards Migori it veered off the road at the Kakrao stage as it avoided hitting a motor cyclist who was on the road. That, the vehicle swerved to the right, but the Appellant could not control it hence it veered off the road and hit the deceased who stood well off the road. That well corroborated evidence was denied by the Appellant who contended that it was the deceased who rushed onto the road and right into the path of travel of the vehicle and that despite exercising all due care and diligence the accident could not be avoided. The Appellant stated that as a result of a stationary matatu he drove onto the other lane as he overtook the matatu and only realized an oncoming motor cyclist. That, he then ***'braked and swerved at the same time and went off the road on the extreme right…'***

15. If the Appellant's position is true then the inevitable question is how come that the Appellant stated that ***'I hit the pedestrian (meaning the deceased) on the other lane just after the dividing line?'*** Going by the Appellant's version on how the accident occurred then the vehicle could only have hit the deceased either at the very extreme right or off the road but not allegedly at the middle of the road. If truly the deceased was at the middle of the road then the vehicle would not have hit her since it had already pulled to the very far right. That therefore renders the evidence of the Appellant highly doubtful and unbelievable. This Court is hence persuaded by the evidence of PW2 and PW3 and hold that the deceased was hit by the vehicle while she stood far off the road.

16. In such a scenario there is no way the deceased could be said to have been on the wrong as to be liable or at all. The liability must be wholly shouldered by the Appellant. I hence affirm the finding of the trial court in finding the Appellant 100% liable for the accident and hereby dismiss the appeal on liability.

17. On quantum, I must state that there are two settled schools of thoughts in assessing damages in fatal cases. One school has it that damages must be separately assessed under the **Law Reform Act** and the **Fatal Accidents Act**. The other school has it that a lumpsum figure can suffice upon a trial court considering the entire circumstances of the matter. From various case law, it appears that both approaches are right. However, the approach on a lumpsum figure is mostly preferred in cases where the deceased was for instance a minor. I would likewise say, without faulting the mode of assessment of damages taken by the trial court, that in a case where the deceased is very old and has no defined source of income, the lumpsum figure approach would be more ideal.

18. In this case the deceased was aged 72 years old. There was no evidence that despite her age she was ailing or in any way incapacitated in life. She enjoyed a good life and met her death as she went to the market to buy tomatoes. Just as some people have short lives, the converse is also true. The deceased therefore expected to continue enjoy her life which was, but cut short by the accident. I will hence not disturb the award of loss of expectation of life of Kshs. 100,000/=.

19. Likewise, I will not disturb the award on pain, loss and suffering of Kshs. 60,000/= as the deceased died hours after the accident and in

great pain. On the loss of dependency, the Respondent conceded that **Isaack Otieno Odongo** and himself, although they were children of the deceased, were not her dependants. The Respondent however testified that the deceased took care of her two grandchildren, **Pauline Awuor** aged 16 years old and **Evans Ouma** aged 14 years old and that the two were children of a daughter to the deceased. The Appellant denied that averment in his defence. On his part, the Respondent did not tender any evidence to prove the averment. There is no evidence that the said children were indeed grandchildren to the deceased and that their mother had died. The Respondent did not see it fit to at least avail one of them to testify on their dependency despite their advanced childhood. There was neither a letter from the Area Chief confirming the girls' dependency status. I am therefore not persuaded that the said two grandchildren were dependent on the deceased. I hence find that the dependency ratio of 2/3 to be on the higher side. With tremendous respect to the trial court, the dependency ratio of 2/3 must be and is hereby interfered with and do hereby find that a dependency ratio of 1/3 is supported by the record.

20. On the monthly income, the trial court found that the deceased had gone to the market to sell her wares when she met her death. Respectfully, that finding was not supported by the evidence although PW1 stated that the deceased was a peasant farmer and engaged in small businesses. PW2 testified that the deceased had gone to the market to buy tomatoes. There was hence no evidence that the deceased was engaged in any defined business to be able to ascertain the possible income therefrom. PW1 also stated that he and his brother used to occasionally assist the deceased. This Court however takes judicial notice of the fact that elderly women in rural areas in Kenya are mostly engaged in various economic activities and actually able to sustain their lives. I therefore find the monthly figure of Kshs.10,000/= not to be without any basis even without proof of business income. The said sum is hereby affirmed. On the multiplier, the trial court found 10 years as ideal. From the various case law on record I am persuaded that the multiplier of 10 years for a 72-years old is on the higher side. I will hence also set it aside and substitute it with a multiplier of 5 years. That therefore brings the loss of dependency to Kshs. 200,000/=.

21. On special damages, the award of Kshs. 8,000/= on Mortuary fees is set-aside for want of proof thereby bringing the special damages to Kshs. 108,600/= whose interest shall rum from the date of filing of the suit.

22. Having considered the twin limbs of the appeal, the upshot is that the following orders hereby issue: -

(a) The appeal against liability is hereby dismissed;

(b) On General damages the following awards issue: -

(i) Pain and suffering - Kshs. 60,000/=

(ii) Loss of expectation of life - Kshs. 100,000/=

(iii) Loss of Dependency - Kshs. 200,000/=

(c) Special Damages - Kshs. 108,000/=

(d) Costs of the suit shall be borne by the Appellant whereas each party shall bear its own costs of the appeal since the appeal has partly succeeded.

(e) Interest at court shall run from the date of filing of the suit on the special damages whereas on the general damages the interest shall run from the date of judgment in the suit.

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: -

Mr. Sam Onyango instructed by the firm of Sam Onyango & Co. Advocates for the Respondent.

Messrs. Masire & Mogusu Advocates for the Appellant.

Evelyne Nyauke – Court Assistant