REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CIVIL APPEAL NO. 3 OF 2017

(Being an appeal from the judgement and decree of the Chief Magistrate's court at Narok by Hon. Mr. A. K. Ithuku SPM dated 26/3/2015 in Narok Chief Magistrate's Court No.87 of 2013)

REUBEN ONGIRI MAGUTU …..…….1ST APPELLANT

MOI SECONDARY SCHOOL NAKURU ……..2ND APPELLANT

VERSUS

NEPATOO OLE MUNCHA

(Suing as the administrator of the Estate of

TONGE OLE MUNCHA (Deceased).…….…….....RESPONDENT

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JUDGEMENT

1. This is an appeal against both liability and damages in the sum of Sh.902,400/= which was awarded to the respondent arising out of a motor vehicular accident of 4/7/2012.

2. The respondent has opposed the appellants' appeal in respect of both liability and quantum of damages.

3. The judgement is based on the evidence of No. 86016 PC Mohammed Alake (PW 1) and Nepatoo Ole Muncha (PW 2). The evidence of PW1 is that he visited the scene of the accident which was at Ntulele shopping centre. Upon arrival at the scene of the accident on 4/7/2012, he confirmed that the deceased pedestrian aged 65 years old was involved in the fatal accident. PW 1 further testified that the deceased was crossing the road from right to left as one faces Narok town from Ntulele. He sustained injuries following being knocked down by motor vehicle registration No. KBN 731E which was owned by Moi Girls secondary school. PW 1 further testified that the deceased was knocked in the middle of the tarmac road. He further testified that there was a zebra crossing about 25 meters ahead of the scene of the accident. His further evidence was that the accident occurred in the middle of the tarmac road and that it occurred within Ntulele shopping centre during that morning at about 10.00 a.m.

4. Furthermore, there is evidence of the son of the deceased, Nepatoo Ole Muncha (PW 2) who is a resident of Ntulele. His evidence was that the deceased died while undergoing treatment at Narok District hospital. He testified that he was not an eye witness to this accident. Finally, it is PW2 who was appointed the administrator of the estate of the deceased in respect of which he was issued with letters of

administration. The appellants offered no evidence.

5. The appellants have filed 6 grounds of appeal in their memorandum of appeal to this court. In ground a, the appellants have faulted the trial court for ignoring the legal principles applicable and the authorities cited which he relied on. In this regard the trial court believed the evidence of PW1 and found his evidence to be credible. He found that the appellants' driver knocked the deceased within Ntulele shopping Centre, which in itself showed that the offending driver lacked a proper look out in the circumstances obtaining as at that time at the scene of the accident. That court further found that the appellants' driver must have either been at high speed or was driving without due care. In its judgement, the court concluded that the doctrine *res ipsa loquitur* applied in the circumstances of this appeal. Simply stated, the trial court found that the appellants' driver was *prima facie* negligent in the absence of any evidence to show either that he was not negligent or that the accident occurred due to factors beyond his control. It is clear from the evidence that the appellants did not adduce any evidence in opposition to the evidence tendered by the Respondent/Plaintiff. The doctrine of *res ipsa loquitur* was authoritatively pronounced in *Msuri Muhiddin v. Nazazzor Bin Self (1960) EA 201*. In that case the application of the doctrine of *res ipsa loquitur* arose and the court held that the question of what the appellants had to show in order to avoid liability on a presumption of negligence was either that there was no negligence on their part which contributed to the accident; or that there was a probable cause which did not connote negligence on their part or that the accident was due to the circumstances not within their control.

6. In the light of the evidence which was that the accident occurred at about 10 a.m. in broad day light in the middle of a tarmac road within Ntulele shopping centre and the presence of a zebra crossing 25 metres from the point of impact clearly established a prima facie case of negligence against the appellants. This is clearly the position because the appellants did not give evidence to rebut the presumption of negligence on their part. It therefore follows that the finding of fact by the trial court that the appellants' driver must have been either at the high speed and was driving without due care, did drive motor vehicle registration No. KBN 731E negligently. The driver was therefore rightly found to be 100% negligent. This is a finding of fact which is based on the unrebutted evidence of the Respondent.

7. I have reassessed the evidence on this ground as I am required to do as a first appeal court according to *Peters v. Sunday Post Ltd (1958) EA 424*. I find myself in agreement with the trial court that the appellants are 100% liable in negligence. This ground of appeal is without merit and is hereby dismissed.

8. In ground b, the appellants have faulted the trial court for proceeding on wrong principles in relation to assessment of damages that were awarded in favour of the respondent. In this regard, I have considered the principles applied by the trial court in assessing the damages awarded to the respondent. I agree with counsel for the appellants that the trial court applied the wrong principles in assessing the damages awarded to the respondent in the following ways.

9. First, the trial court ought to have reduced or deducted Sh.100,000/- being general damages in respect of loss of expectation of life from the global award. This is the principle applied when the court makes an award for lost years. In coming to this conclusion, I am guided by the case of *Timothy Muirigi and Nancy Nkirote (minor) suing through Damaris Kanario Mureithi v. Moses Kinyua Muriuki and 2 others, High Court [Bwonwonga, J] at Embu, Civil Case Nos. 101, 102 and 103 of 2012* in which damages awarded under the head of loss of expectation of life were reduced or deducted from the global award. Stated differently the Sh. 100,000/= general damages in respect of loss of expectation of life should be deducted from the global award, in order to avoid double compensation.

10. Furthermore, the multiplier of 10 years which the trial court applied in view of the fact that the deceased was past the retirement age of 60 years was wrong in principle. I therefore agree with counsel for the appellants that a multiplier of 7 years is reasonable in the circumstances of this case.

11. Finally, the multicand which the trial court used was not in existence as at the time the accident occurred. In this regard, I find that the multicand applicable in terms of the basic minimum monthly wages was shs.4,577.20 in terms of Legal Notice No. 71 of 2012, which Legal Notice is made pursuant to the Labour Institutions Act No. 12 of 2007. Furthermore, the applicable dependency rate is one third,

since there is no evidence that the deceased had dependants.

12. In the light of the foregoing principles, I find that the assessment of damages should have been as follows:

Damages under the Fatal Accidents Act, Cap 32 Laws of Kenya

(a) Loss years

1/3 X 7 years x 12 months x shs.4577.20 per month = Shs. 128,161.60

Add

Damages under the law Reform Act, Cap. 26 laws of Kenya

a) Loss of expectation of life – Shs.100,000/=

b) Pain and suffering – shs.20,000/=

Total Shs.248,161.60

Deduct Shs.100,000.60

Amount payable =Shs.148,161.00

The appellants' appeals are hereby dismissed. Both appellants are jointly and severally at 100% on liability in negligence. On quantum the total award is Shs.148,161.60 in favour of the respondent.

13. In ground 6, the appellants have faulted the trial court both in law and fact in holding that special damages were proved. In this regard, I find that special damages namely medical expenses in the sum of sh. 1000/- and police abstract report in the sum of shs.100/= were pleaded. The key witness in this regard namely Nepatoo Ole Muncha (PW 2) failed to prove special damages as required by law. His evidence was t hat they spent money during the burial of the deceased. Additionally, he testified that he did not have receipts. He then concluded his evidence that they should be compensated for those expenses. It is trite law that special damages must be pleaded and proved according to the Court of Appeal in *Kampala City Council v. Nakaye (1972) EA 446 at page 449 paragraph H*. I therefore uphold this submission and this ground of appeal therefore succeeds.

14. The appellants' appeals on liability are hereby dismissed. The appellants' appeals on quantum of damages are hereby allowed.

15. The judgement and decree of the trial court dated 26/3/2015 is hereby set aside. Judgement is hereby entered for the respondent in the sum of Shs.148, 161.60 with interest at court rates.

16. In view of the fact that the appellants have succeeded in some grounds of appeal and lost in respect of liability, each party will bear its own cost.

Judgement delivered in open court this 19th day of October, 2017 in the presence of Mrs. Masikonde for appellants and Mr. Onduso for respondents.

J. M. Bwonwonga

Judge

19/10/2017