REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 271 OF 2011

RONALD MANONO OYAGI (Suing as the legal representative and

father of B N M - deceased)…..APPELLANT

VERSUS

TIMOTHY MACHANA

EVANS MASEGA AYUMA……RESPONDENTS

(Appeal from the Judgment in Kisii CM Civil Case No. 572 of 2008 (Hon. P. Shinyada RM.)

JUDGMENT

1. This appeal emanates from the decision and judgment of the Resident Magistrate in **Kisii CMCC 572 of 2008**, in which the appellant, **Ronald Manono Oyao** suing as the legal representative of the late B N M (deceased), sued the respondents **Timothy Machana** and **Evans Masega Ayuma**, for damages arising from a road accident which occurred along the Kisii – Migori road at Ekerorano Market in which the deceased was hit and fatally injured by a motor vehicle Registration No. KAW 235R Toyota Matatu belonging to the first respondent and driven at the time by the second respondent.

2. In the Plaint, it was averred that on the 17th October 2007, the deceased was walking along the said road when the second respondent negligently drove, managed and/or controlled the said vehicle such that it violently knocked down the deceased and caused her fatal injuries.

It was further averred that the accident was occasioned by the negligence of the second respondent in the manner of driving his vehicle.

3. It was also averred that at the time of her death, the deceased was aged nine (9) years, enjoyed good health, hardworking and energetic school going pupil with a bright future.

The Plaintiff therefore prayed for special and general damages plus costs of the suit and interest against the respondents jointly and severally.

4. The defence by the two respondents was a denial of ownership of the material vehicle and occurrence of the accident as alleged by the appellant. They contended that if the accident indeed occurred, then it was solely caused and/or substantially contributed to by the negligence of the deceased.

The respondents therefore prayed for the dismissal of the appellant's suit against them.

5. The appellant testified at the trial but did not call any witnesses.

The respondents did not attend the hearing nor did they testify in support of their case.

After the trial, the learned trial magistrate dismissed the appellant's case for want of proof of the occurrence of the accident. It was however noted that, had the appellant proved his case, a sum of Ksh. 10,000/= would have been awarded for pain and suffering and a sum of Ksh. 100,000/= for loss of life expectation. Special damages would have been omitted for want of proof.

6. Being dissatisfied with the trial court's decision, the appellant preferred this appeal on the basis of the grounds contained in the memorandum of appeal dated 16th December 2011 and filed herein on 21st December 2011.

Learned counsel, **Mr. Sagwe**, appeared for the appellant at the hearing of the appeal while the learned counsel, **Mr. Soire**, appeared for the respondents. Both proceeded by way of written submissions which were duly filed.

7. This court's duty in determining the appeal is to re-visit the evidence adduced at the trial and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses (see, **Selle Vs. Associated Motor Boat Co. Ltd (1968)EA 123** and **Williamson Diamonds Ltd Vs. Brown (1970)EA 1).**

8. In that regard, the appellant's case was that on the material date at around 5.30 pm, the deceased was at a place called Ekeroro when she was knocked down by a vehicle as a result of which she suffered injuries. She was rushed to Nyangena hospital where she died from her injuries. The matter was reported to the police and a police abstract (P.Ex 2) was issued.

Later, the appellant obtained the necessary letters of administration (P.Ex4) and filed this suit against the two respondents as owner and driver respectively of the ill-fated vehicle.

9. The respondents filed their statement of defence but did not attend trial nor avail any evidence in support of their pleadings. The appellant's case therefore remained uncontroverted.

The trial court considered the evidence availed by the appellant and concluded that the occurrence of the accident was not proved as required. Consequently, the appellant's case was dismissed.

The trial court made no orders as to costs for reason that the respondents (defendants) tendered no evidence to challenge the plaintiff's claim.

10. Having considered the evidence in the light of the rival submissions for and against the appeal, this court is of the view that the basic issue for determination was whether the accident was as a result of the respondents' negligence and if so, whether the appellant was entitled to damages and to what extent.

The occurrence of the accident or the ownership of the ill-fated vehicles were factors which were not at all or substantially disputed.

11. The respondents failed to testify and dispute their alleged ownership of the vehicle or the non-occurrence of the accident.

The variance in the date of the accident as between the plaint and the police abstract (P.Ex 3) was not fatal to the appellant's case and may be attributed to a typographical error in the plaint.

12. This is more so considering that the death certificate (P.Ex 2) clearly indicated that the date of death was 17th November 2007.

There was also another typographical error in the limited grant of letters of administration (P.Ex 4) which showed that the deceased died on 17th November 2008 instead of 17th November 2007.

The learned trial magistrate was clearly in error when he held that the occurrence of the accident was not proved merely because of variance in date of accident between the plaint and the police abstract.

13. On its part, the court would hold that the occurrence of the accident was not disputed and was in any event, established on a balance of probabilities by the appellant's evidence.

The same evidence further established that the accident was as a result of the negligent manner in which the second respondent with the authority of the first respondent drove the ill-fated vehicle.

There was nothing to show that the deceased contributed in anyway to the occurrence of the accident.

On liability, this court would find for the appellant against the respondents at 100%.

14. The appellant would thus be entitled to damages under the Law Reform Act as well as proven special damages.

At the time of her death, the deceased was aged nine (9) years and school going pupil. She depended on her parents for her welfare and other needs. However, the parents like any other parent had hopes that the deceased would in future assist them in one way or another.

15. The claim for loss of expectation of life is based on the principle that the deceased had been deprived of normal expectation of life due to the wrongful act of the tortfeasor.

The practice of the Kenya Courts over the years is to award a convential sum under the head. This would however vary from one case to another depending on the age of the deceased at the time of death.

These days the figure varies between Ksh. 70,000/= to Ksh. 100,000/=.

16. In this case, the plaintiff (appellant) proposed a sum of Ksh. 200,000/= for pain and suffering. However, the trial court opined that a sum of Ksh. 100,000/= for loss of life expectation and a sum of Ksh. 10,000/= for pain and suffering was adequate.

This court fully agrees with that assessment of the trial court as it was reasonable and adequate under the two heads.

17. The plaintiff referred in his pleadings to damages under the Fatal Accident Act but did not insist on them in his submissions. He may have abandoned the claim under that head. It may be noted that in the case of **Attan Mbarak Vs. Mulji Valji Construction Co. ltd MSA HCCC No. 973 of 1984**, the High Court observed that with regard to children, damages under the Fatal Accidents Act are given for financial loss or for loss of support but in English Law, damages under the head are not given where there is a mere possibility that the child when grown up may render support to the parents. They are only awarded when the evidence shows that the parents reasonably expected pecuniary benefits.

18. The court went further to observe that in our society, the courts have taken perhaps more realistic attitude that parents expect financial help from their children when they grow up. Generally, even after they get married, children continue to give financial support to their parents.

It was therefore not wise for the appellant to abandon the claim under the Fatal Accidents Act. All he was required to do was to establish that the deceased was doing well in school such that the expectation that she would grow up to be a very successful person and help her parents were quite high.

19. Turning to special damages, the plaintiff prayed for a total of Ksh. 37,615/= under the head. These were mostly for funeral expenses in addition to expenses incurred for the death certificate, police abstract

and the limited grant. However, the amount established by necessary documentary evidence was Ksh. 7,615/= all inclusive. This is the amount that the appellant is entitled to under the head.

20. In sum, this appeal succeeds to the extent that the judgment of the trial court dismissing the appellant's case be and is hereby set aside and substituted for a judgment in favour of the appellant against the respondents jointly and severally for the total sum of Ksh. 117,619/= being Ksh. 100,000/= for loss of expectation of life, Ksh. 10,000/= for pain and suffering and Ksh. 7,615/= special damages.

The appellant is also awarded costs in the lower court and in this appeal.

Ordered accordingly.

[Delivered and signed this 30th day of November 2016].

J.R. KARANJAH

JUDGE

In the presence of

Mr. Moracha holding brief for Mr. Sagwe for Appellant

Mr. Kaburi holding brief for Mr. Soire for Respondents

Njoroge CC