



REPUBLIC OF KENYA
IN THE HIGH COURT
AT MIGORI
CIVIL APPEAL NO. 3 OF 2014
CONSOLIDATED WITH
CIVIL APPEAL NO. 4 OF 2014
BETWEEN

MWITA NYAMOHANGA.....1ST APPELLANT

NKURORE FRANCIS MWIKABE.....2ND APPELLANT

AND

MARY ROBI MOHERAI suing on behalf of the

estate of JOSEPH TAGARE MWITA (Deceased).....1ST RESPONDENT

AGNES BOKE MWITA suing on behalf of the estate of

STEPHEN NYAMOHANGA MWITA (Deceased).....2ND RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. E. M. Nyagah, Ag. PM in Senior

Principal's Magistrates Court in Migori in Civil Case No. 32 & 33 of 2013 dated 22nd July 2014)

JUDGMENT

1. The two appeals before the court were consolidated because they arise from the same road traffic accident which occurred on 1st August 2011 along the Isebania - Migori Road. According to the pleadings in the court below, the 1st appellant was the owner of motor vehicle registration number KAQ 429G and the 2nd appellant was its driver. The claim on behalf of Joseph Tagare Mwita was that he was walking along the road when he was hit by motor vehicle KAQ 429G occasioning him fatal injuries. As a result his estate brought a claim under the ***Law Reform Act (Chapter 26 of the Laws of Kenya)*** and the ***Fatal Accidents Act (Chapter 32 of the Laws of Kenya)***.

2. The claim filed on behalf of Stephen Nyamohanga Mwita was that the deceased had parked motor vehicle registration number KBE 708B on the left side of the road the Isebania-Migori road next to the bus stage exit. That the 2nd appellant negligently drove motor vehicle registration number KAQ 429G and

rammed into motor vehicle registration number KBE 708 causing the deceased fatal injuries. His representative now claims damages under the **Law Reform Act** and the **Fatal Accidents Act**.

3. In their respective defences, the appellants denied any liability and pleaded that if the accident indeed occurred, the deceased were liable as they were negligent. The appellant denied that the respondents were entitled to damages.

4. The thrust of the appeal as set out in the respective memoranda of appeal is on liability and quantum. On the issue of liability, the learned magistrate found that in the circumstances of the accident, the appellants were wholly liable. The appellants dispute the findings on liability on the ground that the learned magistrate erred in holding that the conviction of the 2nd appellant was conclusive evidence that the appellants were liable without considering whether the deceased were contributed to the accident.

5. In summary, the appellants impugn the consequent award of damages on the ground that the damages awarded under the **Law Reform Act (Chapter 26 of the Laws of Kenya)** and the **Fatal Accidents Act (Chapter 32 of the Laws of Kenya)** were excessive in the circumstances.

6. As this is the first appeal, this court is called upon to analyse and re-assess the evidence on record and reach its own conclusions bearing in mind that it neither saw nor heard the witnesses testify (see **Selle v Associated Motor Boat Co. [1968] EA 123**). In **Kiruga v Kiruga & Another [1988] KLR 348**, the Court of Appeal observed that;

An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.

7. In order to proceed with this task it is necessary to set out the evidence before the trial court. I will first deal with the issue of liability. It is common ground that the 2nd appellant was charged with two counts of causing death by dangerous driving contrary to **section 46** of the **Traffic Act (Chapter 403 of the Laws of Kenya)** in **Migori Principal Magistrates Court Traffic Case No. 308 of 2011**. He pleaded guilty on both counts and was convicted. There was also no dispute as to the vehicles involved or that both the deceased died as a result of the accident.

8. The respective sides called eye witnesses. PW 4, Mwita Isaac Mwita, testified that on 1st August 2011 he saw a tanker, KAQ 429Q being driven fast coming from Isebania going towards Kisii. It knocked the driver's door of motor vehicle KBE 708B which was parked by the road side. The tanker lost control and crossed to the right side of the road and knocked Joseph Tagere who standing behind his motor vehicle and dragged him under it. Stephen Nyamohanga who was in motor vehicle KBE 708B when it was hit by the tanker.

9. The 2nd appellant testified on behalf of the defence. He stated that on the material day he was driving the tanker KAQ 429G while within Migori town he was following a motor vehicle KBE 708B which indicated that it was turning left then it suddenly made a U-Turn towards the right causing him to knock the motor vehicle. He denied that the said motor vehicle was parked by the road side and that he veered off the road.

10. The learned magistrate held that the fact that the 2nd appellant knocked motor vehicle KBE 708B which was on the left side of the road before veering onto the right side of the road and knocking yet another vehicle means could only mean that he was driving too fast to the extent that he could not control the vehicle. He disbelieved the 2nd appellant evidence and held that the appellants were fully liable.

11. Mr Otieno, learned counsel for the appellant, complained that the learned magistrate erred in finding that the conviction was conclusive evidence that the appellant were fully liable without considering the

element of contributory negligence. Mr Abisai, learned counsel for the respondents, contended that the learned magistrate could not be faulted as he analysed the evidence and concluded that the appellants were fully liable.

12. It is settled law that the mere fact of conviction does not bar the appellant from raising the issue of contributory negligence. **The Court of Appeal for East Africa in *Robson v Oluoch* [1971] EA 376, 378B-D** explained the issue as follows;

The respondent to this appeal was convicted by a competent court of careless driving in connection with the accident, the subject of this suit. Careless driving necessarily connotes some degree of negligence, and we think, without deciding the point, that in those circumstances it may not be open to the respondent to deny that his driving in relation to the accident, was negligent. But that is a very different matter from saying, as Mr Sharma would have us say, that a conviction for an offence involving negligent driving is conclusive evidence that the convicted person was the only person whose negligence caused the accident, and that he is precluded from alleging contributory negligence on the part of another person in subsequent civil proceedings. That is not what S.47A [of the Evidence Act] states. We are satisfied that it is quite proper for a person who has been convicted of an offence involving negligence, in relation to a particular accident, to plead in subsequent civil proceedings arising out of the same accident, that the plaintiff, or any other person, was also guilty of negligence which caused or contributed to the accident. ...

13. Did the deceased contribute to the accident? From the testimony of PW 4 outlined above, I find that Joseph Tagare Mwita could not have contributed to the accident as he was standing behind his motor vehicle which was by the road side at a bus stage when the 2nd appellant drove the tanker in a negligent manner thereby causing his death. In order to cause the impact on two vehicles, the 2nd appellant must have been driving too fast at that early hour of the morning to cause an impact on two vehicles. Stephen Nyamohanga's vehicle was also parked at the stage and he died when his vehicle was hit by the 2nd appellant. Like the magistrate, I doubt that the 2nd appellant was avoiding an accident caused by KBE 708E an illegal U-turn to the right. If the 2nd appellant version is correct, then he would have swerved to the left to avoid the vehicle or applied brakes to stop. It is likely that he was driving carelessly and that he knocked the deceased on the left side of the road causing him to swerve right which is consistent with the testimony of PW 4. I therefore uphold the learned magistrate's finding on liability.

14. I now turn to the issue of damages. Agnes Boke, the wife of Stephen Nyamohanga, testified that her husband was 27 years old when he died and that they had two children aged 7 years and 4 years. She stated that the deceased was employed as a taxi driver and that he was providing for them. She stated he was earning about Kshs. 9,000/- per month. In assessing damages for loss of dependency under the **Fatal Accidents Act**, the learned magistrate applied the **Regulation of Wages (General Amendment) Order** and applied a multiplicand of Kshs 15,559.35 as the minimum wage for a driver. He applied a dependency ratio of 2/3 and a multiplier of 25 years. The total award was therefore Kshs. 3,111,870.00 made up as follows Kshs. 15,559.35 x 4 x 25 x 2/3.

15. According to the evidence before the lower court, Joseph Tagare Mwita was aged 27 at the time of his death. He was married and he had three children aged 7, 4 and 1 year old respectively. His wife testified that he was a driver at the time he died he was 27 years old. She stated that he earned about Kshs. 10,000.00 per month and that he provided for his family and paid school fees for his children. In the judgment, the learned magistrate held as follows, "*Following my findings in CC No. 32 of 2012 I will award a sum of Kshs. 3,111,870/= as general damages under the Fatal Accident Act.*"

16. Mr Otieno submitted that the learned magistrate erred in **PMCC NO. 33 of 2012** by adopting the award in **PMCC No. 32 of 2012** without assessing the evidence and special circumstances of the deceased in that case. Counsel submitted that the learned magistrate erred in relying on the **Regulation of Wages (General Amendment) Order** to assess the multiplicand when the party had given evidence of the actual income. He contended that the dependency ration of 2/3 was erroneous as there was no proof of the extent of dependency hence the ratio of 1/3 was proper. He urged that the multiplier of 25 years was also

on the higher side. Mr Abisai supported the assessment of damages and submitted that they were supported by the evidence. He urged the court to find that the court did not err in this respect.

17. The general principle applicable in considering an appeal on quantum is that the assessment of damages by a trial court is an exercise of discretion and that the appellate court will not normally interfere with such exercise of discretion unless the judge has either acted on wrong principles or awarded so excessive or so inordinately low damages or has taken into consideration irrelevant matters or failed to take into consideration relevant matters and in the result arrived at the wrong decision (*see Butler v. Butler* [1984] KLR 225 and *Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another* [1982-88] 1 KAR 727).

18. The plaintiff founded his claims based on the *Law Reform Act* and the *Fatal Accidents Act*. The manner of assessment of damages under the *Act* was succinctly put by Ringera J., in *Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another* Nairobi HCCC No. 1638 of 1988 (UR) where he stated as follows;

The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature.

19. As concerns the estate of Stephen Nyamohanga, the learned magistrate relied on the *Regulation of Wages (General Amendment) Order* to determine the multiplicand. In my view, this was an error as the deceased's wife testified that he earned Kshs. 9,000/= per month. The learned magistrate in relied on the case of *Nyamira Tea Farmers Sacco v Wilfred Nyambati Keraita and Another Kisii Civil Appeal No. 68 of 2005* [2011]eKLR where Asike-Makhandia J., stated, "*In absence of proof of income, the Trial Magistrate ought to have reverted to Regulation of Wages (General Amendment) Order, 2005*" [Emphasis mine] I agree with this statement of principle but in the case under consideration there was proof of income by way of the deceased's wife testimony which was sufficient to prove income hence there was no need to fall back to the *Regulation of Wages Order*. The multiplicand is the net income of the deceased and therefore the court ought to reduce the sum by deducting income taxes where applicable and statutory taxes. As the sum of Kshs. 9,000/= does not attract income tax, I would use a multiplicand of Kshs. 8,500 to take into account other statutory deductions.

20. It is correct to state that the dependency ratio is a question of fact. The evidence is clear that the deceased was a family man with young children hence the he must have used a significant amount of his income to support his family. I therefore do not find any error in the dependency ration of 2/3 applied.

21. As regards the multiplier, the Court of Appeal in *Board of Governors of Kangubiri Girls High School & Another v Jane Wanjiku & Another* NYR CA Civil Appeal No. 35 of 2014 [2014]eKLR stated that, "*The choice of a multiplier is a matter of the courts discretion which discretion has to be exercised judiciously with a reason.*" The multiplier of 25 year was reasonable taking into account that the deceased was 27 years and would have had an active working life of 30 years. I therefore uphold the award save the multiplicand which I set aside and substitute it with the sum of the Kshs 8,500.00. The total award under the *Fatal Accident Act* is therefore as follows Kshs. 8,500 X 12 X 2/3 X 25 = **Kshs. 1,700,000.00.**

22. As regards the estate of Joseph Tagare Mwita, I agree with counsel for the appellant that the learned magistrate erred in applying the findings loss of dependency from one case to another. He ought to have considered the case on its own merits despite the similarities in circumstances. The deceased's widow

testified that the deceased earned about Kshs. 10,000.00. As the amounts fall below the income tax threshold, I would consider the net income to be Kshs. 9,500.00. The deceased was a family man with a young family hence a substantial amount of his income was used to support his family. A dependency ratio of 2/3 would therefore be appropriate. A multiplier of 25 years would not be unreasonable as the deceased was 27 years old at the time of his death. The total award under the **Fatal Accidents Act** is therefore $Kshs. 9,500 \times 12 \times \frac{2}{3} \times 25 = \text{Kshs. 1,900,000.00}$.

23. Finally, in assessing the damages under the **Law Reform Act** and **Fatal Accidents Act**, the learned magistrate did not make an award for pain and suffering and loss of expectation of life on the ground that the same would amount to double compensation. This principal was explained by the Court of Appeal in **Kemfro v A. M. Lubia & Another [1982-1988] KAR 727** as follows;

[T]he net benefit will be inherited by the same dependants under the Law Reform Act and that must be taken into account in the damages awarded under the Fatal Accidents Act because the loss suffered under the latter Act must be offset by the gain from the estate under the former Act.

24. The duplication occurs when the beneficiaries of the deceased's estate under the **Law Reform Act** and dependants under the **Fatal Accidents Act** are the same hence the claim for lost years and dependency will go to the same persons. The principal does not mean that a claimant under the **Fatal Accidents Act** should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the **Law Reform Act** hence the issue of duplication does not arise. As the respondents did not cross-appeal on this point I will not disturb the award.

25. The finding on liability by the learned magistrate is upheld. I however set aside the awards made under the **Fatal Accidents Act** made in the subordinate court and substitute them with the following awards;

a. PMCC No. 32 of 2013

Estate of Stephen Nyamohanga Mwita – **Kshs. 1,700,000.00**

b. PMCC No. 33 of 2012

Estate of Joseph Tagare Mwita – **Kshs. 1,900,000.00**

26. The said amount shall accrue interest from the date of judgment in the subordinate court.

27. When the court makes an award under the **Fatal Accidents Act** it must, in accordance with **section 4(1)** thereof, apportion the amount awarded to each dependant of the deceased. I therefore direct that the appellants to file the necessary application for consideration before the subordinate court in due course.

28. The appellant shall have one-third of the costs of the appeal.

DATED and DELIVERED at MIGORI this 13th day of February 2015.

D.S. MAJANJA

JUDGE

Mr Otieno instructed by O.M. Otieno & Company Advocates for the appellants

Mr Abisai instructed by Abisai & Company Advocates for the respondents.