



REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL NO. 54 OF 2015
(FORMERLY KISII HCCA NO. 132 OF 2011)

BETWEEN

ERASTUS OMBASA NYAKWARA 1ST APPELLANT

VITALIS DEYA OCHIENG 2ND APPELLANT

AND

PRISCILLA ATINGO ODHIAMBO (administrator and

personal representative of CHRISTOPHER ODHIAMBO suing as

**personal representative of ANNA ODIRA (deceased)
..... RESPONDENT**

(Being an appeal from the Judgment and Decree of Hon. K. Sambu, RM at the Principal's Magistrates Court in Migori in Civil Case No. 333 of 2008 dated 9th June 2011)

JUDGMENT

1. Anna Odira was 30 years old when she met her death on 3rd December 2007. According to the pleadings filed in the subordinate court, she was walking along the verge of Migori – Awendo road when the 2nd appellant drove the 1st appellant's motor vehicle registration number KXG 632 so negligently that it her causing her to sustain severe injuries which led to her death 9 days after the accident. Her personal representative filed a suit seeking damages against the appellants under the ***Law Reform Act (Chapter 26 of the Laws of Kenya)*** and ***Fatal Accidents Act (Chapter 32 of the Laws of Kenya)***.
2. After hearing the matter, the learned magistrate found the appellants fully liable. The respondent was awarded Kshs. 100,000/- for loss of expectation of life and Kshs. 30,000/- for pain and suffering under the ***Law Reform Act***, Kshs. 640,000/- for loss of dependency under the ***Fatal Accidents Act*** and Kshs. 65,500/- special damages. Out of the total sum of Kshs. 835,000/-, the learned magistrate deducted Kshs. 100,000/- awarded under the ***Law Reform Act*** making a net award of Kshs. 735,500/-.
3. The appellant now appeals against the decision on the grounds set out in the memorandum of appeal dated 7th July 2011. Mr Kanyangi distilled the grounds of appeal into three; *locus standi* of respondent to agitate the suit, liability and quantum of damages. I will deal with the issue of

liability and quantum of damages first.

4. On the issue of liability, Mr Kanyangi argued that the respondent's witnesses did not establish the fact that the appellants were negligent in accordance with the particulars of negligence set out in the plaint. He urged that in the event the court was to find that there was negligence, it should apportion liability equally as the deceased had a duty to take care of her own safety. As regards the damages awarded, learned counsel submitted that the respondent did not prove the deceased's income or dependency. Counsel also faulted the learned magistrate for failing to deduct the sum of pain and suffering from the total award.
5. The respondent opposed the appeal. Mr Abisai, learned counsel for the respondent, submitted that the respondent proved her case on the balance of probabilities and that the evidence of the witnesses was sufficient to establish liability. He contended that the appellant failed to rebut the plaintiff's evidence and it was therefore liable. On the issue of quantum, counsel submitted that an award under the **Fatal Accidents Act** was justified and well within the range of awards supported by the evidence and that no basis had been established for the court to interfere with the award. He submitted that the learned magistrate properly dealt with the duplication of awards.
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**).
7. On the issue of liability, the appellant did not call any witnesses so the respondent's evidence was unrebutted. This is how the direct witness, Benjamin Samson Adwar (PW2) described what happened on the material day;

I do recall on 3rd December, 2007 at around 6 pm, while headed home ... in the company of the late Anna Odira when at around Riziki Plaza, opposite Jamia Petrol Station I heard screams from some women behind and on looking back I saw a motor vehicle lorry driven at high speed having lost control and was not off the road..... The rest of the pedestrians ran to different directions to avoid being hit by the lorry but the deceased was unfortunately knocked down. The deceased ran towards the left side of the road but the motor vehicle lorry which was already off the road knocked her down..... It is my evidence that the deceased was knocked down about 10 feet off the road on the left side of the road on Migori-Kisii road.

8. The clear testimony of PW 2 was unshaken on cross-examination and indeed remained unrebutted by the appellants. In my view, there is no way the deceased could have avoided the accident, she ran when she heard screams and was already off the road when she was hit. The learned magistrate was correct in finding the appellant 100% liable. I therefore affirm the decision on liability.
9. The appellate court will only interfere in the manner in which an award was assessed where trial court either took into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is not based on any evidence (see **Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727, Peter M. Kariuki v Attorney General CA Civil Appeal No. 79 of 2012 [2014]eKLR** and **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5**).
10. According to the particulars set out in the plaint, the deceased was 30 years old at the time of her death. She worked as a petrol attendant and had a son and two daughters dependent on her as well as her parents. Her mother, Priscilla Atingo Odhiambo, PW 1, testified that her daughter was working at a petrol station and that she was earning money selling vegetables. She stated that the deceased was earning Kshs. 10,000/- per month. PW 3, Beatrice Anyango, a daughter of the deceased confirmed that she had two siblings and her mother, the deceased used to support them.

11. The learned magistrate considered the evidence but in light of the paucity of evidence, he applied a multiplicand of Kshs. 4,000/- per month, a multiplier of 20 years and a dependency ratio of 2/3. It is not doubt that the deceased, a woman of 30 years was working to support her family. There was sufficient evidence to come to that conclusion and I cannot fault the magistrate on his assessment on the claim for loss of dependency. In coming to this conclusion I take into account what the Court of Appeal stated in ***Theta Tea Company Ltd & Another v Florence Njau Njambi*** NRB CA Civil Appeal No. 64 of 2000[2002]eKLR expressed the view that;

[W]here it is proved that a claimant was dependent on a deceased party but the amount of dependency is not quantifiable, that does not necessarily mean that the claim must fail. If that be so, a lot of Kenyans would be denied substantial justice, taking into account out level of literacy and such like factors.

12. The claim under the ***Law Reform Act*** is intimately connected with the capacity of the respondent to agitate such a claim. The reason being that such a claim can only be lodged by the estate of the deceased. The learned magistrate held the Priscilla Atingo Odhiambo having obtained a limited grand *ad litem* dated 24th May 2010 in ***Migori SPM P & A No. 252 of 2009*** in respect of the estate of her husband, Christopher Odhiambo, she had the legal authority to pursue the claim for her daughter.

13. The plaintiff was filed by Christopher Odhiambo who had been granted a limited grant *ad litem* in respect of the estate of Anna Odira on 25th March 2008 in ***Migori SPM P & A No. 70 of 2008***. Christopher Odhiambo subsequently died and the respondent applied for Priscilla Atingo Adhiambo to be the plaintiff. The application was allowed by consent and an amended plaintiff filed thereafter.

14. The appellant submitted that Priscilla Atingo Odhiambo had no capacity to agitate as the administrator of Christopher Odhiambo while the respondent contended that the application substitution which was allowed by consent dealt with the issue and as such the issue of capacity cannot be dealt with at this stage.

15. The issue of capacity is central to the determination of whether the respondent can pursue a claim under the ***Law Reform Act*** (see ***James Mukolo Elisha & Another v Thomas Martin Kibisu*** NRB CA Civil Appeal No. 31 of 2006 [2014]eKLR and ***Troustik Union International & Another v Mrs Jane Mbeyu & Another*** MSA CA NO. 145 of 1991[1993]eKLR). The plaintiff must have a grant of letters of administration for the estate of the deceased. The grant of representation is personal to the grantee and once he or she passes away, the grant lapses. In this case the grant issued to Christopher Odhiambo in respect of the estate of Anna Odira lapsed upon his death. Priscilla Atingo Odhiambo could only apply for a fresh grant in that respect. The right to pursue the case was not the right of her husband but that of the deceased hence she had no capacity to agitate the suit as a representative of her husband. It follows then that capacity could not be granted by consent of the parties. Accordingly the learned magistrate erred in awarding damages under the ***Law Reform Act*** as the respondent did not have the requisite capacity. She however has capacity to agitate the suit as a dependant of the deceased under the ***Fatal Accidents Act***.

16. In light of the findings I have made, I allow the appeal only to the extent that I set aside the awards under the ***Law Reform Act*** and substitute the judgement with the following award;

- a. **Loss of Dependency – Kshs. 640,000/-**
- b. **Special Damages – Kshs. 65,500/-**

The sums shall accrue interest at court rates from the date of the judgment in the subordinate court.

17. The appellant is awarded $\frac{1}{4}$ of the costs of the appeal.

18. 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 respondent to file the necessary application for consideration before the subordinate court in due course.

DATED and DELIVERED at MIGORI this 14th day of May 2015.

D.S. MAJANJA

JUDGE

Mr Kanyangi instructed by Okongo, Wandago & Company Advocates for the appellant.

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