



REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL NO. 43 OF 2015
(FORMERLY KISII HCCA NO. 42 OF 2009)

BETWEEN

DOMNIC OWUOR DIBUORO 1ST APPELLANT

JOHN OKOTH ADUNDA 2ND APPELLANT

AND

**R A (administrator and
personal representative of**

M O (deceased)) RESPONDENT

***(Being an appeal from the Judgment and Decree of Hon.E.O. Awino, Ag. SPM at the Senior
Principal's Magistrates Court in Migori in Civil Case No. 167 of 2007 dated 10th February 2009)***

JUDGMENT

1. On 14th April 2007, the deceased, a 12 year old student, was walking along the Kisii – Awendo Road near Gate Primary School when the appellant's vehicle knocked him and he died as a result. His personal representative and mother filed a suit in the subordinate court 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 court apportioned liability at 20% against the deceased and the appellant bearing 80%. The respondent was awarded Kshs. 100,000/- for loss of expectation of life and Kshs. 5,000/- for pain and suffering under the ***Law Reform Act*** and Kshs. 300,000/- for loss of dependency under the ***Fatal Accidents Act***. The appellant now appeals against the decision on the grounds set out in the memorandum of appeal filed on 9th March 2009. Mr Kanyangi condensed the ground of appeal into two; on liability and on quantum of damages.
3. On the issue of liability, Mr Kanyangi argued that the witnesses who testified on behalf of the respondent did not establish the fact that the appellants were negligence in accordance with the particulars of fact set out in the plaint. He contended that the testimony of the witnesses was too general to conclude that the appellants were liable. Counsel urged that in the event the court was to find liability, it should apportion liability equally as it was not clear who caused the accident. As regards the damages awarded, learned counsel submitted that dependency was not proved and

that the respondent did not lead or establish evidence of any future prospects of the child.

4. 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. He cited the case of **Lake Flowers v Cila Francklyn Onyango Ngoga & Another NKR CA Civil Appeal No. 210 of 1996 [2008]eKLR** to support his argument. On the issue of quantum, counsel submitted that an award under the **Fatal Accidents Act** can be made in favour of children and damages so awarded are payable to the parents of the deceased child. Counsel cited the case of **Kenya Breweries Ltd v Saro [1991] KLR 408** to support this proposition.
5. 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**).
6. On the issue of liability, the respondent called one direct witness. Roy Ajengo (PW 2) recalled that on 14th April 2007 at about 1 pm, he was on the way to Awendo near Gate Primary School when the appellant's motor vehicle hit a boy who was from school. When cross-examined he stated that the vehicle came from behind him and the children were ahead of him and that the vehicle hit the child by the left front side of the vehicle. PW 1, a police officer merely produced the police abstract and confirmed that he did not investigate the accident while the mother of the child, PW 3, did not witness the accident. The respondent did not call any witness to rebut the respondent's case.
7. In analyzing the evidence, the court is entitled to draw necessary inference from the primary facts and although the learned magistrate did not set out clearly why he found the appellant liable other than to state the testimony of the witnesses was not rebutted, I find the appellant liable and I adopt the sentiments of the Court of Appeal in **Nandwa v Kenya Kazi Limited [1988] KLR 488**, where it observed as follows;

In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. If in the course of the trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in the plaintiff's favour unless the defendant's evidence provides some answer to displace that inference.
8. The testimony of PW 2 demonstrates that children were coming from school and that the child was hit on by the left front side of the vehicle. This means that that the driver may have been driving too fast to slow down near a school gate. On the other hand, the child may have been walking on the road and failed to take care of his own safety. The appellant did not call evidence in rebuttal. In **Embu Public Road Services Limited v Rimi [1968] EA 22** the court noted that;

Where the circumstances of the accident give rise to an inference of negligence then the defendant in order to escape liability has to show that there was a probable cause of the accident, which does not connote negligence or that the explanation for the accident was consistent only with the absence of negligence.
9. All in all I find that liability was proved. Since the respondent did not cross-appeal on the finding of contribution, I decline to interfere with the learned magistrate's finding on liability.
10. The appellate court will only interfere with the trial court's assessment of damages 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 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).

11. In the subordinate court, the appellant submitted that no damages were available to the respondent as the deceased was a child and dependency was not proved. The respondent proposed a multiplier approach and contended that she was entitled to damages based on the minimum wage of Kshs. 2,500/- per month, a multiplier of 20 years and a dependency ratio of 2/3 making a total of Kshs. 400,000/-.

12. As regards the appellant's argument, the Court of Appeal has rejected the proposition that a claim for loss of dependency under the *Fatal Accidents Act* could not be made in respect of young children who were not in a position to support their children. In *Sheikh Mushtaq Hassan v Nathan Mwangi Kamau Transporters & 5 Others* [1985] 4 KCA 217 the Court of Appeal stated as that;

In general, in Kenya children are expected to provide and to provide for their parents when the children are in a position to do so and to the extent of their abilities. The children are expected to do that by the established customs of the various African and Asian communities in Kenya ...

13. The position enunciated in the aforesaid case has been the established law of Kenya. In assessing such damages the court has to consider the circumstances of each case and in the case of *Kenya Breweries Limited v Saro (Supra)* the Court stated that the age of the child is a relevant consideration to be taken into account and the prospects of the child.

14. PW 3 only testified that the deceased was 12 years and that he was going to an academy. She did not provide any facts or evidence from which the court would consider his future prospects. In the circumstances, it is clear that a multiplier approach was inappropriate and a lumpsum payment was suitable. I find that an award of Kshs. 200,000/- would be most appropriate in the circumstances.

15. I therefore allow the appeal to the extent that the award of Kshs. 300,000/- awarded as general damages is reduced to **Kshs. 200,000/-** subject to the contribution. The sum shall accrue interest at court rates from the date of judgment in the subordinate court.

16. The appellant is awarded half the costs of the appeal.

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.