REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CIVIL APPEAL NO. 25 OF 2015

(Being an Appeal from Naivasha CMCC No. 341 of 2011 by Hon. S. Muchungi, RM)

THE B.O.G. KARIMA GIRLS HIGH SCHOOL ……1ST APPELLANT

CHARLES WATENGA MUNGAI…….2ND APPELLANT

VERSUS

RW

KKN (Suing as representatives of FKK (Deceased).RESPONDENTS

J U D G M E N T

1. This appeal emanates from the judgment and decree of the lower court in a claim brought by the Respondents in their capacity as the legal representatives of the estate of FKK (Deceased). The facts of the case were that the deceased was aged 31 years of age and had a family. He supported his wife (1st Respondent) and 2 children and his aged father (the 2nd Respondent) from his milk vending and boda boda business.

2. On 20/3/2010 at about 9.00am the deceased was riding a motor cycle registration number **KMCF 717J** make Focin down the Naivasha-Nairobi Road. At the same time the 2nd Appellant was driving the 1st Appellant's lorry registration number KAG 104B Isuzu and was emerging from the road to Kinangop to join the Nairobi - Naivasha Highway. A collision occurred as a result of which the deceased suffered fatal injuries. The Respondents filed a suit for compensation. By their pleadings and evidence the Respondents alleged negligence against the Appellants and sought damages under the Fatal Accidents Act and the Law Reform Act.

3. The Appellants did not call evidence but in their defence they denied liability for the accident and in the alternative pleaded contributory negligence against the deceased. Six grounds are raised in the Memorandum of Appeal as follows:

"a) THAT Learned Trial Magistrate erred both in law and in fact by finding that the Appellant wholly to blame for the accident matter contrary to the evidence on record. b) THAT Learned Trial Magistrate erred both in law and in fact by shifting the burden of proof to the Appellants contrary to the law of evidence.

c) THAT Learned Trial Magistrate erred both law and in fact failing to consider the second Appellant had been acquitted of the offence of causing death by dangerous driving and the he should not have been found wholly to blame for the accident subject matter

hereof.

d) THAT Learned Trial Magistrate erred both in law and in fact by awarding a salary at Kshs 11,580.00 per month with any evidence or at all.

e) THAT Learned Trial Magistrate erred both in law and in fact by using the minimum wage which has not been gazette and which was not applicable as the time the deceased passed away.

f) THAT Learned Trial Magistrate erred both in law and in fact by awarding the Respondent under both the Law Reform Act and the Fatal Accident Act contrary to the establishment principles."

Grounds 1 -3 touch on the question of liability. Grounds 4-6 attack the quantum of damages.

4. The parties agreed to dispose of the appeal by way of written submissions. In a nutshell the Appellants argued that the trial magistrate erred by failing to apportion liability at 50:50 due to her failure to take the evidence of the police officer PW2 into account. With regard to quantum the Appellants contend that the Respondents did not prove the Appellant's income and that there was no basis for the application of the basic minimum wage in assessing damages.

5. In answer to the first argument the Respondents observe that the duty lay with the Respondents to adduce evidence in support of their pleaded defence. Secondly, they contend that the evidence of PW2 was mainly gathered from records as he was not an eye witness to the accident. That the trial magistrate correctly rejected the unsupported defence.

6. The Respondents relied on the case of **Jacob Ayiga Maruja & Anor –Vs- Simeon Obayo [2005] eKLR** for the proposition that the widow's evidence on deceased's income sufficed and that it was not mandatory to tender records. They support the trial court's use of the minimum wage as gazetted in Legal Notices. They urged the court to consider Legal Notice No. 63 of 2011 which set the monthly wage of an ungraded artisan at Shs 10,239/= or Shs 492.40 daily and urged there be no interference with the court's award.

7. The first Appellate court is duty bound to evaluate the evidence of the trial and draw its own conclusions while giving for the fact that it did not have the advantage to see and hear witnesses testify (**See Peters –Vs Sunday [1958] EA 424**, **Selle –Vs- Associated Boat Co Ltd. [1968] EA 123.**

8. The Respondents called one eye witness to the accident (PW3) as well as the police officer (PW2), in whose docket the investigation eventually landed. PW3 testified that the 2nd Appellant driver joined the major road from a feeder road while the deceased was proceeding down the main road on the Naivasha Nairobi lane. The 2nd Appellant was apparently crossing the Naivasha - Nairobi lane of the main road with a view to turn into the Nairobi – Naivasha lane when the collision occurred. Seemingly the deceased's motor cycle ran into the side of the 2nd Respondent's vehicle which had entered and was astride his lane.

9. In his evidence in chief and cross-examination PW3 denied that the deceased had signaled to turn left into the minor road from which the 2nd Respondent emerged. He was not shaken at all in cross-examination. Whatever PW2 stated as regards the accident was mainly drawn from police records. He could not purport to give evidence on the actual collision as he did not witness the accident. Thus the Appellants attempt to fault the trial court for ignoring such evidence amounts to a misdirection on their part.

10. The Appellants denied liability and pleaded contributory negligence against the deceased in their defence statement. That statement remains a mere pleading and the onus lay with Appellants to

tender evidence in support of their defence. Certainly the evidence of PW2 cannot be considered to be such evidence. The evidence of PW3 as to the occurrence was not controverted therefore, and the trial magistrate was entitled to find the Appellants 100% liable for the accident.

11. On quantum, the only contention relates to the income of the deceased. There can be no dispute that the deceased had an income through which he supported his family. At the minimum, he was dealing in milk as per the business permit tendered at the trial. As the Court of Appeal observed in the **Jacob Ayiga Maruja case** it is unreasonable in the context of this country for courts to rigidly demand proof of income through documents alone. Many people work in informal businesses to support themselves and their families. They may not have bank records or income tax returns but they are nevertheless gainfully employed.

12. The only difficulty presented in this case was the fact the widow of the deceased appeared to give confusing figures on income. In her evidence-in-chief she stated that the deceased earned Shs 5,000/= per week (presumably from the milk business) and a further Shs 3,000/= per week (presumably from the boda boda business). In cross examination she said the former figure represented interest, which I take to mean profit per month and the latter as profits per week. Did the deceased earn Shs 36,400 per month (as per evidence-in-chief) or Shs 17,600/= per month (as per cross-examination)? Faced with this dilemma the trial court applied the "basic minimum wage as per the latest amendment."

13. It is not unusual for courts in such situations to revert to the minimum wage but the trial magistrate ought to have explicitly stated the source and year of the amendment. Equally she should have given a justification for preferring the gazetted minimum wage to the evidence by the widow (PW1). I do not accept the Appellant's submission that the court should have used the figure of Shs 5,000 per month which, even if believed, did not take into account the additional sum of Shs 3,000/= allegedly earned per week from the boda boda business.
14. The Labour Institutions Regulations of Wages (General) (Amendment) Order 2011 which I presume trial court referred to in its judgment sets the monthly wage of an ungraded artisan in all municipalities at Shs 9,450/= up from Shs 8,400/= in 2010 and not Shs 11,580.30 which the trial court applied. Thus under Section 60 of the Evidence Act the trial court could have correctly applied the sum of Shs 9,450/= as the multiplicand.

15. In the circumstances I would interfere with the award on loss of dependency by substituting the multiplicand of Shs 9,450/=.

Thus **20 x 12 x 9,450/= x 2/3 = 1,512,000/=.**

It is also not clear to me why the trial court deducted the sum of Shs 120,000/= awarded as damages for loss of life from the final totals. Still one complaint in the grounds of appeal, apparently abandoned during submission is that the court erred in awarding damages under the Law Reform and Fatal Accidents Act "contrary to established principles."

16. Unless it is shown that certain awards under the Fatal Accident Act are duplicated under the Law Reform Act, there can be no basis, and it is not settled principle for denying the estate of a deceased person compensation for the loss of expectation of life. Moreover there was no submission made by the Appellants to that effect at the close of the trial. In my view therefore the deducted sum of Shs 120,000/= forms part and parcel of the damages due to the Respondents.

17. In the result, the court finds that grounds 1 -3 of the Memorandum of the Appeal have no merit and are rejected. Grounds 4 and 5 have partially succeeded while ground 6 had no merit. Damages awarded in the lower court are adjusted as follows:

Under the Law Reform Act

Pain and suffering - Shs 30,000/=

Loss of expectation of life - Shs 120,000/=

Under the Fatal Accidents Act

Loss of Dependency - Shs 1,512,000/=

Special damages - Shs 48,800/=

18. I will therefore set aside the total award in the lower court judgment and substitute therefore judgment in the sum of Shs 1,710,800/= (One Million Seven Hundred and Ten Thousand Eight Hundred only). The costs of the appeal are awarded to the Respondents.

19. Finally, I have noted that the claim for compensation under the Fatal Accidents Act was brought on behalf of and for the benefit of the widow, two daughters of the deceased and his father. According to information at paragraph 7 of the Amended Plaint, the two daughters EWK and JMK were minors aged 8 and 6 years respectively as at July 2011. Hence they are still minors. Section 4 of the Fatal Accidents Act imposes a duty on the court making an award thereon to divide the awarded sum *"amongst those persons (for whose benefit the action was brought) in such shares as the court, by its judgment, shall find and direct."*

20. To protect the interest and welfare of the two minor beneficiaries, it is prudent in this case that such distribution be done and an order be made for their shares to be appropriately invested for their benefit when they are of age. In the circumstances I would remit the lower court file back to the trial court for the purpose of distribution of damages awarded under the Fatal Accidents Act. The shares among the beneficiaries will be delineated and appropriate directions made as to the secure investment of the minors' share for their benefit on their attainment of the age of majority. It is so ordered.

Delivered and signed at Naivasha this **22nd** day of **September, 2015.**

In the presence of:-

Mr. Mburu holding brief for Mr. Wamaasa for Appellants

Mr. Njuguna for Respondents

Court Assistant Stephen

C. W. MEOLI

JUDGE