



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY

CIVIL APPEAL NO. 60 OF 2015

Consolidated with

CIVIL APPEAL NO. 61 OF 2015

BETWEEN

APHIA PLUS WESTERN KENYA 1ST
APPELLANT

PROGRAM FOR APPROPRIATE TECHNOLOGY IN HEALTH 2ND
APPELLANT

AND

MARY ANYANGO KADENGE suing as legal representative of the estate of

STEVEN OMONDI KADENGE (Deceased).....
1STRESPONDENT

DAVID OUMA ATHIAMBO suing as legal representative of the estate of

GEORGE OOKO ATHIAMBO (Deceased)..... 2ND
RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. P. N. Gichohi, CM at the Chief Magistrates Court at Homa Bay in Civil Case No. 51 of 2013 dated 11th June 2015 and Civil Case No. 52 of 2013 dated 11th June 2015 respectively)

JUDGMENT

1. Although the appeals arise from different judgments, they were consolidated because they arise from the same cause of action. The claims arose from a collision between a motorcycle registration number KMCH 229E (“the motorcycle”) and a motor vehicle registration number KBS 582 D (“the motor vehicle”) on 9th August 2012 along the Homa Bay – Kendu Bay road near Rangwena.
2. The undisputed facts were that at the material time, the motor vehicle was registered in the name of the 1st appellant and was in possession of the 2nd appellant. The cyclist, George Ooko Athiambo, who was carrying Stephen Omondi Kadenge as a pillion passenger. Both the cyclist

and pillion passenger died and their representatives filed the respective suits to claim damages under the **Law Reform Act (Chapter 26 of the Laws of Kenya)** and the **Fatal Accidents Act (Chapter 32 of the Laws of Kenya)**. The learned magistrate apportioned liability as between the appellants and the deceased cyclist at 90%:10%.

3. In **Civil Suit No. 51 of 2013**, the legal representatives and dependants of the late Steven Omondi Kadenge were awarded **Kshs. 288,000/-** made up as follows;

Loss of Dependency under the **Fatal Accidents Act**

(Kshs. 2,800 X 25 X 12 X ½) Kshs. 420,000/-

Less under the **Law Reform Act**

Loss of expectation of life (Kshs. 100,000/-)

Less 10% liability (Kshs. 32,000/-)

TOTAL KSHS 288,000/-

4. In **Civil Suit No. 52 of 2013**, the legal representatives and dependants of the late George Ooko Athiambo, were awarded **Kshs. 1,044,000/-** made up as follows;

Loss of Dependency under the **Fatal Accidents Act**

(Kshs. 7,000 X 30 X 12 X 1/2) Kshs. 1,260,000/-

Less under the **Law Reform Act**

Loss of Expectation of Life (Kshs. 100,000/-)

Less 10% Liability (Kshs. 116,000/-)

TOTAL KSHS. 1,044,000/-

5. The appellants contest the learned magistrate's determination on the liability on the grounds that the learned magistrate erred in finding the appellants 90% liable or at all contrary to the weight of evidence. The appellants also contest the quantum of damages awarded in **Civil Suit No. 52 of 2013**. As the quantum of damages awarded in not contested in **Civil Suit No. 51 of 2013**, the judgment will only be affected in the event the appeal on liability is allowed.
6. As this is the first appeal, I am alive to the responsibility of the court. 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** and **Kiruga v Kiruga & Another [1988] KLR 348**).
7. I will first deal with the issue of liability. The material evidence was recorded in **Civil Case No. 52 of 2013**. Patrice Ochieng Obong' (PW 2) testified that on 9th August 2012 at about 2.30pm, he was grazing cattle near Rangwe Primary School along the Homa Bay –Kendu Bay road. A vehicle belonging to H-Young Company was parked by the road. At that time he saw a motorbike going towards Homa Bay from Kendu-Bay riding on the left side of the road. After a white motor vehicle double cabin passed, he heard a loud bang. When he looked where the sound came from, he saw that the motor vehicle had hit the motorcycle. He went to the scene and noted that both deceased had been knocked on the left side of the road facing the Homa Bay direction. He stated that the H-Young vehicle remained stationary as the motor vehicle overtook it and hit the motorcycle from behind. When cross examined, PW 2 stated that the motor vehicle was over

speeding and that the motor cycle passed the stationary motor vehicle first. He further stated that there was a feeder road on the left side of the road facing Homa Bay but that the motorcycle did not join the road from the feeder road.

8. Sergeant Charity Matiek (PW 3), a police officer from the Traffic Section at Homa Bay Police Station, testified on behalf of the investigating officer. She confirmed the particulars of the motor vehicle and the motorcycle and the fact that there was a collision between them on the material day along the Homa Bay Kendu Bay Road leading to the death of the deceased. She noted that the matter was still pending under investigation. When cross-examined, she stated that the investigating officer concluded that the motorcycle joined the road from the left side of the road and was being ridden in a zig zag manner and as the driver of the motor vehicle tried to avoid hitting it by swerving to the right side while breaking, he hit the motorcyclist by his left near side of the motor vehicle.
9. Jacob Omany Nyaguatho (DW 1), the driver of the motor vehicle, testified that the motorcyclist entered the road without checking and as he approached, he swerved so that he could not collide with it. As he was about to pass, the cyclist hit the motor vehicle on the left side causing the side mirror and bumper to be broken. When cross-examined, DW 1 stated that he was driving towards Homa Bay on the left side and that he saw the cyclist after passing the bridge coming from the opposite side. He saw the cyclist from a distance of about 50-70metres and that he hooted, applied brakes and swerved to the right to avoid colliding with the cyclist. He stated that he was driving at about 120kph although there was a school in the area as he was approaching Homa Bay Town. In re-examination he admitted that he was over speeding.
10. Ms Kusa, learned counsel for the appellants, submitted that testimony of PW 3 together with that of the DW 1 blamed the motorcyclist. She pointed out that the PW 3 stated that the investigating officer found the cyclist liable and that DW 1 tried all he could to avoid the accident. She further noted that both witnesses confirmed that there was a feeder road which the motorcyclist joined without giving way to the other road users and he was moving in a zig zag manner. She urged that from the totality of the evidence, the court should have apportioned liability equally otherwise, the motorcyclist was solely to blame.
11. Mr Ojala, learned counsel for the respondent, supported the conclusion of the learned magistrate. He submitted that PW 2, who was an eye witness, testified that the motorcyclist was riding on the proper side of the road and that the motorcycle was knocked from behind. He also noted that DW 1 admitted that he was driving at 120kph while approaching Homa Bay town which corroborated the testimony of PW 2. As regards the testimony of PW 3, counsel submitted that the matter was still pending under investigation hence her testimony should be viewed from that light.
12. I have reviewed the evidence and I take the following view of the matter. The testimony of PW 3 apart from confirming the particulars of the accident was not helpful assisting the court determine the issue of liability as it was not clear upon what basis the investigating officer based his opinion. Moreover, PW 3 testified that the matter was still under investigation. This leaves the testimony of the two eye witnesses PW 2 and DW 1.
13. It is clear to me that the testimony of DW 1 is inconsistent. In examination in chief he stated that the motorcyclist entered the road from the left side and moved towards him in a zig zag manner causing him to swerve hence his vehicle was hit on the left side. In cross-examination, he stated that he saw the cyclist coming from the opposite direction and that the accident occurred on $\frac{3}{4}$ on the right side of the road. If the cyclist was coming from the opposite side it would have been impossible for the cyclist to hit the vehicle on the left side. It would have most likely hit the right of vehicle. I therefore reject the testimony of DW 1 and accept that of PW 2 which seems to be consistent that the accident occurred on the left side of the road when the motor vehicle hit the cyclist from behind while over speeding. Since DW 1 was at least 50 – 70m away when he saw the motorcyclist, he had the opportunity to slow down and avoid the motorcyclist. I affirm the learned magistrate's apportionment of liability.

14. I now turn to the issue of quantum raised in **Civil Suit No. 52 of 2013**. The general principle applicable is that the assessment of damages is within the discretion of the trial court and the appellate court will only interfere where trial court, in assessing damages, 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**).
15. The appellant's main contention is that respondents did not prove dependency. Learned counsel for the appellant submitted that the persons named as dependants in paragraph 8(a) of the plaint were not dependants of the deceased and that PW 1 did not prove the relationship between PW 1 and the people named in the plaint. The respondent supported the judgment and submitted that dependency was proved.
16. According to paragraph 8(a) of the plaint, the persons named for whose benefit the action was brought were David Ouma Athiambo (brother), Patrice Ochieng (father) and Leonard Odhiambo (brother). According to the particulars pleaded the deceased was 25 years old at the time of death and enjoyed good health. He was said to be a boda boda operator earning a total of Kshs. 10,000/- per month out of which sum he used to give his family Kshs. 8,000/- for their upkeep. David Ouma (PW 1) testified that his brother was a boda boda rider and would earn Kshs. 15,000/- per month and would give his mother, Monica Auma Adhiambo, Kshs. 8,000/-. The deceased would remain with Kshs. 4,500/- and give Kshs. 2,500/- to his brother Evans Ayonga Adhiambo. When cross-examined PW 1 stated as follows;

The deceased's dependants are David Ouma Adhiambo, Monica Auma Adhiambo, Evans Oyonge Adhiambo and another brother who is already deceased (shown plaint). Those listed are my uncle and cousin. Patrick is my uncle.

17. The main issue is whether the persons pleaded at paragraph 8(a) of the plaint were dependants of the deceased. The dependants contemplated under the **Fatal Accidents Act** are expressly defined under **section 4(1)** as follows;

Every action brought by nature of the provisions of this act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused [and shall.....be brought by and in the name of the executor or administrator of the person deceased].....
[Emphasis mine]

18. The brothers or uncles of the deceased are not dependants for purposes of the **Fatal Accidents Act**. In **Mary Nabwire Omalla v David Wachira & 2 Others NBI HCCC No. 605 of 2009 [2011] eKLR**, Rawal J., stated that, "I do agree that the dependants/beneficiaries under the [Fatal Accidents] Act are specified under Sec. 4 (1) of the said Act. Thus I shall not consider the sisters and brothers of the deceased as the dependants of the estate." (See also **Tombe Tea Factory Limited v Samuel Araka KSI Civil Appeal No. 185 of 2007 [2010]eKLR** and **Paul Githaiga v Paul Macharia Muturi and Another NBI HCCC No. 274 of 1990 [2001]eKLR**)

19. Further, the mandatory provisions of **section 8** of the **Fatal Accidents Act** provide as follows;

In every action brought by virtue of the provisions of this Act, the plaintiff on the record shall be required, together with the statement of claim, to deliver to the defendant, or his advocate, full particulars of the person or persons for whom, and on whose behalf, the action is brought, and of the nature of the claim in respect of which damages are sought to be recovered. [Emphasis mine]

20. In this case, the dependants set out in the plaint were deceased's brothers and father. However from the evidence I have outlined, the person referred to as the father turned out to be the uncle

and was therefore not a beneficiary within the contemplation of **section 4(1)** of the **Fatal Accidents Act**. Moreover, was Patrice Ochieng Obong (PW 3) who stated that, “*I found one of the children who had been knocked was my nephew called Ooko George Adhiambo ...*” the self-same father referred to in the plaint? Even discounting this fact, I find that the evidence is clear that the person listed as the father was actually the uncle. Although PW 1 alluded to his mother being a dependant, her name was not included in the particulars set out in the plaint.

21. I therefore find and hold that the learned magistrate erred in calculating damages on the basis that the deceased died at the age of 25 and “*supported his mother and siblings*” for two reasons. First, the persons set out as dependants in the plaint were not dependants within the meaning of **section 4(2)** of the **Fatal Accidents Act**. Second, the mother of the deceased was not pleaded in accordance with the provisions of **section 8** of the **Fatal Accidents Act**. It must now be clear that the claim under the **Fatal Accidents Act** could not be sustained. I therefore set it aside and dismiss that aspect of the claim. However, the estate of the deceased is still entitled to an award for loss of expectation of life which was assessed at **Kshs. 100,000/-**.

22. Before I conclude this judgment, I would like to correct the misapprehension of the law regarding the principle of duplication of awards set out by the learned magistrate as follows;

[33] The principle in Kemp & Kemp on Damages is that where a claim is made under both the Fatal Accidents Act and the Law Reform Act, and where the claimant succeeds in both, the award made under the Law Reform Act must be deducted in full from the award made under the Fatal Accidents Act as the deceased’s estate cannot benefit twice. Both parties appreciate the principle and have cited case law where the principle has been adopted. I hereby adopt the same.

23. In response, I would do no better than quote what the Court of Appeal stated in **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited NYR CA Civil Appeal No. 22 of 2014 [2015] eKLR** that;

[20] This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; 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, and consequently the claim for lost years and dependency will go to the same persons. It 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.

24. In conclusion, I affirm the apportionment of liability. As there was no cross-appeal on the deduction of the sums due under the **Law Reform Act**, I affirm the judgment and decree in **Civil Suit No. 51 of 2013** and dismiss the appeal therefrom.

25. I allow the appeal against the judgment and decree in **Civil Suit No. 52 of 2013** to the extent that I set aside the sum awarded for loss of dependency and substitute it with an award of **Kshs.100,000/-** under the **Law Reform Act**. The total award less 10% liability is **Kshs. 90,000/-**. The amount shall accrue interest from the date of judgment in the subordinate court.

26. As the parties have won and lost the respective appeals in equal measure, each party shall bear their respective costs of the appeal.

DATED and DELIVERED at HOMA BAY this 30th day of November 2015.

D.S. MAJANJA

JUDGE

Ms Kusa instructed by O. M. Otieno and Company Advocates for the appellants.

Mr Ojala instructed by P. R. Ojala and Company Advocates for the respondents.