



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CIVIL APPEAL NO. 131 OF 2013

JOSEPH JUMBA EGALAAPPELLANT

VERSUS

MESHACK OMURUNGA SANDE

(suing as legal administrator of the

estate of SARAH MAKONJIO SANDE)..... RESPONDENT

JUDGMENT

1. The role of this Court as the appellate Court of the first instance is well settled. This Court is duty bound to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. This Court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in *Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278* and *Kiruga –versus- Kiruga & Another (1988) KLR 348*.

2. The parties testified before the trial court where the Respondent herein, then Plaintiff called one witness. The Appellant, then Defendant, did not call any witness. This was in Butere Principal Magistrate's Court Civil Case No. 156 of 2012 (hereinafter referred to as “*the suit*”).

3. I have carefully perused the evidence of PW1 and PW2 on how the accident occurred in the suit. I have equally weighed that evidence against that of the Appellant herein and I find no difficulty in holding that I find no error on the part of the trial court. PW2 testified on how he saw the deceased walking along Ekeru – Ebuyangu Road who was ahead of him and how she was knocked down by the vehicle from behind her, was thrown down a result of which he suffered her premature death. PW2 further confirmed that the vehicle’s registration number plate fell off as a result of the impact but the driver did not stop the said vehicle. PW2 proceeded to report the accident at Butere Police Station.

4. Looking at the foregone PW2’s evidence against that of the Appellant, the version tendered by the Appellant leaves more gaps which makes it highly doubtful. It is not clear how the number plate of the accident vehicle came off when the vehicle allegedly ran over the deceased who was lying on the road. But even if we may go by that version, one wonders why the Appellant did not take steps to avoid hitting the object which he saw was on the road. We were not told that there was any oncoming traffic on the other side of the road since when the Appellant allegedly saw the object on the road the motor-bike had already passed him. He instead aligned the wheels of the car so that the object could be between the wheels. But that did not end well, he ended up crashing the object which in his own words “*heard a slight thud.*”

5. After 'slightly' hitting an object on the road, one wonders why it became so important for the Appellant to report such an occurrence to the Police when he reached Bungoma town. There must have been a reason which compelled the Appellant to do so and that is why this court agrees with the analysis of the trial court that it must have been upon his realization that the vehicle registration number plate had fallen off during the accident.

6. Again during cross-examination, the Appellant revealed that the outer part of the front bumper was damaged but not so extensively. He further confirmed that the incident occurred at night and he was unable to see properly although the vehicle's lights were fully on. To him, it all happened in a fraction of a second. If the Appellant then conceded that it was dark and was unable to see ahead and hence could not tell whether what he saw was a human being or not, one hence wonders how he would want this court to find that he ensured that the object was between the vehicle wheels instead. Where did that precision all over a sudden come from in view of the Appellant's inability to see? But then, if it is true that the deceased was on the road and the Appellant ran over, that is a clear indication that the Appellant was not careful enough in managing the vehicle that he failed to see the deceased on the road and take evasive steps to avoid hitting her.

7. The Appellant's contention in his submissions that liability ought to be equally apportioned cannot therefore hold. The authority of **Lakhamshi =vs= Attorney General (1971)EA 118** referred to related to cases where a Court is unable, due to the insufficiency of the evidence, to establish negligence on any party and in such a case a Court ought to equally apportion this blame. However, that was not the case in the matter. There is overwhelming evidence on how the accident occurred as adduced by both PW2 and the Appellant. To that extent the said otherwise binding judicial authority is distinguishable.

8. I find that liability was rightly apportioned at 100% against the Appellant since the Appellant admitted that he could not see well that night and hence did not see the deceased on the road well in time to avoid hitting her with the vehicle. To him, the accident just happened in a fraction of a second. The appeal on liability is hence dismissed.

9. The other aspect for determination relates to damages under the Law Reform Act and the Fatal Accidents Act. It is settled that a Court can award damages to the deceased's estate under the Law Reform Act on account of the pain and suffering before death as well as on the loss of expectation of life or otherwise referred to as "*the lost years.*" Likewise a Court can award damages under the Fatal Accidents Act to the dependants for the loss of dependency. However, when dealing with a claim under both said Acts, a Court is to be carefully to offset the amount awarded on the loss of expectation of life/lost years from the award made under the loss of dependency. This was clearly laid down by the Court of Appeal in the case of **Kemfro Africa Limited t/a Meru Express Service, Gathogo Kanini =vs= A. M. Lubia & Olive Lubia (1982-88), KAR 727.**

10. On the other side, the principles upon which an appellate Court can interfere with an award of damages are equally settled. In the case of **KEMFRO AFRICA LIMITED t/a MERU EXPRESS SERVICE, GATHOGO KANINI vs A.M.M. LUBIA & ANO. (1982-88)1 KAR 777** where the Court of Appeal stated as follows:

'...the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.'

11. This position was restated by the Court of Appeal in the case of **ARROW CAR LIMITED -vs- BIMOMO & 2 OTHERS (2004) 2 KLR 101** and so recently in the case of **DENSHIRE MUTETI WAMBUA -vs- KENYA POWER & LIGHTING CO. LTD (2013)eKLR.**

12. The trial court made the following award on damages:-

- a) Pain and Suffering - Kshs. 50,000/=
- b) Loss of expectation of life - Kshs. 150,000/=
- c) Funeral expenses - Kshs. 62,100/=
- d) Los of Dependency - Kshs. 504,000/=

13. In arriving at the figure on loss of dependency, the Court adopted a multiplicand of 12 years with a minimum wage of Kshs. 7,000/= as the deceased was a Pastor and a local business person although no evidence was tendered to prove that aspect. The trial court however took it that the deceased must have been in some earnings as she supported her family members including paying university fees for her brother. That approach is both reasonable and not far-fetched. I would wish not to disturb that finding and award and likewise on the damages for pain and suffering as well as on the loss of expectation of life.

14. I would have proceeded to dismiss this appeal had the trial Court adhered to the requirement of deducting the damages on loss of expectation of life from the award on the loss of dependency. However, that was not the case.

15. I therefore find that the trial court erred in the assessment of damages in not taking into account a relevant factor; that is not off-setting the award on loss of expectation of life from that on loss of dependency.

16. The appeal therefore partly succeeds on the issue of damages and the trial court's finding is hereby set-aside and judgment on damages is hereby entered as follows:-

- a) Pain and Suffering - Kshs. 50,000/=
- b) Los of Dependency - Kshs. 354,000/=
- c) Funeral expenses - Kshs. 62,100/=

TOTAL KSHS. 466,100=

16. Needless to say, the award of Kshs. 466,100/= remains within the ceiling in the Schedule under the **Insurance (Motor Vehicle Third Party Risks) (Amendment) Act, 2013** which came into force on 28/01/2014.

17. As the deceased's dependants are adults and since no issue has been raised on the apportionment of the award, I will leave that to their agreement with liberty to apply.

18. Consequently the Respondent shall be entitled to costs in the suit with interests on (a) and (b) from the judgment date, that is 07/10/2013 and interest on (c) from the date of filing of the suit. Since the appeal has partly succeeded, the Appellant will be entitled to one-half of the costs of the Appeal.

It is so ordered.

DATED and SIGNED at MIGORI this 30th day of October, 2015

A. C. MRIMA

JUDGE

DATED, COUNTERSIGNED and DELIVERED at KAKAMEGA this 25th day of November, 015.

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JUDGE