



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

APPELLATE SIDE

Civil Appeal No. 26 Of 2009

(Being an appeal against the judgment and order(s) in Kilifi Principal Magistrate's Court Civil Case No. 287 of 2009 before P. M. Kiama - RM)

MOHAMOOD ABDALLAH MOHAMED AND

ABU RIZIKI APPELLANTS

VERSUS

BEBI AISHA ALI SWALEH & 2 OTHERS RESPONDENTS

JUDGMENT

1. This appeal emanates from the decision of the Principal Magistrate, Kilifi. The two appellants were the 1st and 2nd defendants in the original suit. They had been sued by the 1st respondent in an action for negligence regarding an accident involving motor vehicles KAR 227C and KAE 953D, the latter allegedly owned by the 2nd respondent herein and the former by the 1st appellant.
2. The 3rd respondent and the 2nd appellant were sued as the 2nd and 4th defendants respectively, as drivers of the two vehicles. The 1st respondent sued in her capacity as the representative of the estate of the late Ali Bilari Kheri Bilali. It was alleged that the said deceased sustained fatal injuries following the collision of the two vehicles. Liability was found at 70% against the 1st and 2nd appellants and at 30% against the 2nd and 3rd respondents.
3. The grounds of the appeal appear to challenge the entire judgment and award, the key one being grounds 1, 2, 3, 4 and 6 which state:

“1. The learned magistrate erred in law in failing to hold that the respondent/plaintiff has failed to discharge her burden of proof on the issue of liability against the appellants.

2. The learned erred in awarding excessive general damages.

3. With the greatest respect, the learned magistrate misdirected himself on the principles applicable in determining liability on matters based on negligence, the rules of evidence applicable and the evidence before him which led to an erroneous decision.

4. The learned magistrate erred in law in determining apportionment of liability against the 1st and the 2nd appellants at 70% and 30% against the 2nd and 3rd respondents.

6. The learned magistrate erred in law in failing to hold that on evidence adduced, the plaintiff had failed to establish a case on a balance of probability.”

4. The parties agreed to canvass the appeal by way of written submissions. The appellants contended that no liability was proved against them. They urge that if they are found liable, this court should apportion liability between them and the 2nd and 3rd respondents jointly at 50:50. Regarding damages under the Law Reform Act, they assert that the same are not recoverable as the suit was filed six months after the grant of Limited Letters of Administration. They also take issue with the multiplier and multiplicand applied to award damages under the Fatal Accidents Act.
5. In their submissions, the 2nd and 3rd respondents support the findings of the Lower Court on liability and award in damages. In particular, they argue that the appellants are estopped from raising the question of limitation under Section 2(3) of the Law Reform Act not having raised it at the trial. Concerning the award of damages the respondents contend that the court appealed to can only interfere with the Lower Court’s exercise of discretion if satisfied that the said court had acted on a wrong principle of law, misapprehended the facts or otherwise made an erroneous estimate. In this regard they relied on the case of **Mariga v Musila (1984) KLR 251** and **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 1.**

Further they urged the court to consider the time taken up by since the suit was filed to completion and noted that the decree holder should not be unduly kept away from the fruits of her judgment, their portion of which the said respondents have already paid, before they were dragged into this appeal by the appellants.

6. For her part, the 1st respondent asserts that a high degree of care was placed on the 2nd appellant as the deceased was in her vehicle. They relied on **Panesar v Lochab [1966] EA 40.** On apportionment of liability, they point to the failure by the appellants to file for indemnity against their co-defendants in the primary suit. They contend that the action was brought in full compliance with the Fatal Accidents Act and the Law reform Act.
7. I have considered the submissions of the respective parties. As the first appellate court, this court is obligated to consider the evidence on record and re-evaluate the same in order to draw its own conclusions. While doing so the court must bear in mind that the trial court had the opportunity to see and hear the witnesses testify (see **Peters v Sunday Post [1958] EA 424** and **Jabane v Olenja (1986) KLR 661.**
8. There is no dispute that the two accident vehicles collided on 25th April, 2004 at Shariyani, along the Mombasa/Kilifi road. The deceased who was a passenger in the 1st appellant’s vehicle KAR 227C driven by the 2nd appellant sustained fatal injuries. The 1st respondent did not call any evidence regarding the occurrence of the accident as her witnesses PW1 and PW3 arrived at the accident scene after the accident had occurred. Similarly, the driver of the vehicle KAE 953D (the 3rd respondent, agent of the 2nd respondent) did not testify. The 2nd appellant testified as DW1. He claimed that he was driving carefully at 45kph the motor vehicle KAR 227C. And that he swerved off the road when the vehicle driven by the 4th defendant (KAE 953D) driving from the opposite direction veered to his side and eventually hit his vehicle. Although DW1 was charged with a traffic offence in relation to the accident, he was acquitted.
9. This is what the learned magistrate stated in his judgment:

“It is not in doubt that the deceased died on 28th April, 2004 while travelling in motor vehicle registration No. KAR 227C. This is confirmed by the evidence of the driver (thereof) DW1. Further, PW1 PC. Robert Okoth said vehicle KAR 227C caused the said accident due to a tyre burst. The driver DW1 was charged in court but acquitted...Since the driver was acquitted, and since the 4th defendant failed to attend court liability will be apportioned at

70% against the 1st and 2nd defendants and 30% against the 3rd and 4th defendants.”

10. DW1 having denied that he caused the accident or that his vehicle had a tyre burst, it was a misapprehension on the part of the trial court to rely on the hearsay evidence of PC. Okoth (PW1) as to the cause of the accident. PC Okoth admitted in cross-examination that he did not investigate the case or even visit the scene. Besides he did not witness the accident. Pressed further in cross-examination he stated:

“The vehicle had a burst tyre. The saloon vehicle (DW1’s) according to the file caused the accident...” (sic)

The fact that DW1 had been acquitted for a traffic offence did not in any way resolve the question of liability in negligence. (see **Robinson v Oluoch [1971] EA 376**).

11. In this case, DW1 gave evidence to challenge liability for the accident while the driver of the other vehicle did not even testify. If anything, it seemed logical that the other driver should have carried a higher burden in liability. The basis upon which liability was fixed at 70:30 is not clear from the judgment of the Lower Court. If indeed DW1 drove as carefully as he claimed, the accident should not have happened in the ordinary course of things (see Section 119 of the Evidence Act). Having considered the evidence, I think that in light of the admitted head on collision and failure by the plaintiff (1st respondent) DW1 and the 4th respondent to explain precisely how the accident occurred, this was a suitable case for finding liability at 50:50 against the two drivers. (See **Hubert Kloss & Anor v David Seroney & 5 Others [2009] eKLR**). I am satisfied that liability should be apportioned at 50:50 between the 1st and 2nd appellants on the one hand, jointly and severally, and the 3rd and 4th respondents, jointly and severally, on the other hand.

12. Regarding damages for pain and suffering and loss of expectation of life, the 2nd and 3rd respondents argue that the appellants having acquiesced to the claim in the Lower Court are estopped from raising an objection at this stage under Section 2(3) of the Law Reform Act. Section 2(3) States:

“No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person unless either –

- a. **Proceedings against him in respect of that cause of action were pending at the date of his death; or**
- b. **Proceedings are taken in respect thereof not later than six months after his executor or administrator took out representations.”**

The section is not applicable here. This section clearly refers to a claim brought against a deceased’s estate and not for the estate’s benefit.

13. The relevant section for the latter case above is Section 2(1) and (2) of the Law Reform Act.

In particular Section 2(2) states:

“where a cause of action so survives for the benefit of the estate of the deceased person, the damages recoverable for the benefit of the estate of that person:-

- a.
- b.
- c. **Where the death of that person has been caused by the act or omission which gives rise to the cause of action? shall be calculated without reference to any loss or gain except that a sum in respect of funeral expenses may be included”**

The appellants' objection based on Section 23(3) therefore has the no merit.

14. The damages awarded under the Law Reform Act head are at the conventional rate. The court will not ordinarily interfere with an award of damages unless it is demonstrated that a wrong principle was applied or that a relevant factor was not considered while an irrelevant one was taken into account and that the resultant award is wholly erroneous (see **Kemfro African Ltd t/a Meru Express Services & Another vs Lubia & Anor [1987] KLR**). The deceased in this case was a young man aged 30 years at death. The multiplier of 15 years used by the lower court is not unreasonable and is in fact on the lower side. Nor the multiplicand of Shs. 5000/-. The award in the Lower Court cannot be faulted. Total general and specific damages awarded was Kshs. 440,250/-.

15. The judgment of the Lower Court is hereby set aside and substituted with judgment for the 1st respondent against the 1st and 2nd appellants jointly and severally in the sum of Shs. 220,125/- with costs and interest in the Lower Court and on appeal and against the 2nd and 3rd respondents jointly and severally in the sum of shs. 220,125/- with costs and interest in the original suit and on appeal.

Delivered and signed at Malindi in the absence of the parties this 25th day of **March, 2014** in the absence of the parties, with notice.

Court clerk - Samwel

C. W. Meoli

JUDGE