



**IN THE HIGH COURT AT HOMA BAY**

**CIVIL APPEAL NO. 25 OF 2013**

**CONSOLIDATED WITH**

**CIVIL APPEAL NO. 24 OF 2013 AND**

**CIVIL APPEAL NO. 26 OF 2013**

**BETWEEN**

**OYUGI JUDITH ..... 1<sup>ST</sup> APPELLANT**

**ELVIS OYUGI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**FREDRICK ODHIAMBO ONGONG suing as**

**the administrator of the estate of**

**COLLINS OCHIENG OBAMBLA (Deceased).....1<sup>ST</sup> RESPONDENT**

**FREDRICK ODHIAMBO ONGONG suing as**

**the administrator of the estate of**

**ERICK OKOTH OBAMBLA (Deceased).....2<sup>ND</sup> RESPONDENT**

**FREDRICK ODHIAMBO ONGONG suing as**

**the administrator of the estate of**

**FREDRICK OUMA OBAMBLA (Deceased).....3<sup>RD</sup> RESPONDENT**

**MOSES NYAIM.....4<sup>TH</sup> RESPONDENT**

***(Being an appeal from the Judgment and Decree of Hon. S. O. Ongeru, PM***

***in Chief Magistrates Court in Homa Bay in Civil Case No. 156, 157 & 158 of 2013***

***(consolidated) dated 21<sup>st</sup> November 2013)***

**JUDGMENT**

1. The three appeals before the court were consolidated because they arise from the same road traffic accident.

2. The plaintiff in the lower court, Fredrick Odhiambo Ongong, filed three suits in the Chief Magistrates Court as the legal representative for and on behalf of the estates of Collins Ochieng Obambla, Erick Okoth Obambla and Fredrick Ouma Obambla against the appellants herein as a result of an accident occurring on 15<sup>th</sup> June 2012, at around 2.00 pm along the Mbita – Homa Bay road at Kirindo. The accident involved collision of motor vehicle registration number KBQ 477K owned by 1<sup>st</sup> appellant and driven by the 2<sup>nd</sup> appellant and a motor cycle owned by the 4<sup>th</sup> respondent who was joined as a third party to the proceedings in the lower court. The rider of the motor cycle was one of the deceased, Erick Okoth Obambla.

3. The thrust of the appeal as set out in the respective memoranda of appeal is on liability and quantum. On the issue of liability, the learned magistrate found that the circumstances of the accident were not clear but since the accident occurred in the middle of the road, he apportioned liability equally between the appellants and the owner of the motor cycle. The appellants dispute the findings on liability on the ground that there was no evidence upon which the learned magistrate could find that the driver of the motor vehicle was 50% liable and that the learned magistrate failed to apportion liability to the rider of the motor cycle, that the learned magistrate also failed to take into account that the deceased who were pillion passengers contributed to the accident.

4. The appellants impugn the consequent award of damages on the ground that the damages awarded under the **Law Reform Act (Chapter 26 of the Laws of Kenya)** and the **Fatal Accidents Act (Chapter 32 of the Laws of Kenya)** were excessive in the circumstances. The estates of Erick Okoth Obambla, Collins Ochieng Obambla and Fredrick Ouma Obambla were awarded the sum of Kshs. 1,000,000.00, Kshs 1,080,000 and Kshs. 800,000.00 respectively.

5. 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**). In **Kiruga v Kiruga & Another [1988] KLR 348**, the Court of Appeal observed that;

*An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.*

6. In order to proceed with this task it is necessary to set out the evidence before the trial court. PW 1, the plaintiff testified that Erick Okoth Obambla, Fredrick Ouma Obambla and Collins Ochieng Obambla were his brothers and they died on 15<sup>th</sup> June 2012 a road traffic accident. Although he did not witness the accident, he nevertheless identified the bodies of the deceased after the accident. PW 2, Sergeant Mose Kisari, from the Traffic Office in Mbita, testified that he was on duty on 15<sup>th</sup> June 2012 when he received a report of an accident along Mbita – Homa Bay road at Kirindo Trading Centre. He proceeded to the scene and arrived there about 15 minutes after the accident. He found that there was a collision involving motor vehicle registration number KBR 477K Nissan Double cabin and a motor bike KMCS 173H. He also found the three bodies of the deceased. He noted that the motor vehicle was heading towards Homa Bay while the motor cycle was going to Mbita. He concluded that the accident took place in the middle of the road.

7. In cross-examination PW 1 stated that the road was under construction and had loose chippings on the road. He observed that the motor vehicle had rolled after collision. He could not establish the point of impact although he said that the point of impact was on the bend of the left side of the road facing the road to Homa Bay. In his opinion both the driver and the motor cyclist were to blame. He noted that the motorcycle was carrying two pillion passengers.

8. PW 3, Odongo Bernard Kaser, testified that on the material day he was at Kiringo waiting for fish to be delivered. He saw a pick up coming from Mbita at a high speed. He said that the vehicle emerged from a corner and it lost control. There were two men standing beside the road on the left side facing Mbita and next to them was a motor cycle carrying one pillion passenger and talking to another man standing next to them. He testified that the vehicle hit the rider of the motorcycle, pillion passenger and the person standing beside them. He knew the rider of the motor cycle as Erick, the passenger as Ouma and the person standing as Collins. He stated the he did not record a statement with the police and that the police came after the accident.

9. On behalf of the defence DW 1, Joshua Elvis Oyugi, the driver of motor vehicle KBQ 477K testified that he was driving from Mbita to Homa Bay. He stated that while approaching Kirindo he saw a motor cycle approaching in a zig zag manner; it moved towards the extreme left side of the road and hit the driver's door. He lost control as a result of the impact but came back to the road. He stated that the motor cycle was carrying 2 pillion passengers. He denied that he was driving at a high speed.

10. The first point of call in analyzing the evidence is the pleadings. The plaint sets out the facts which the plaintiff seeks to prove and provides the foundation for the evidence. The plaintiff's evidence must be consistent with the pleading. According to the respective plaints, all deceased persons were lawfully riding the motor cycle hence the testimony of PW 2 that there the motor cycle was stationary and one of them standing beside it is inconsistent with the pleadings and cannot be considered otherwise the claim would have to be dismissed.

11. Mr Ojala, counsel for the respondents, contended that the evidence of the investigating officer was not helpful as it constituted hearsay. He relied on of the dictum of Maraga J., in **Simon Mwangi Mureithi v Martin O. Shikuku MSA HCCC No. 198 of 2003 [2008]eKLR** where he stated that, "*The evidence of the investigating officer does not help so much on the issue of liability. He arrived at the scene after the accident had occurred. The person who gave him the information having not testified that evidence is hearsay and I reject it.*"

12. In my view, the issue of liability is to be determined from the totality of evidence and the weight to be attached to the testimony of the investigating officer depends on the circumstances. In the case at hand, the officer came 15 minutes after the accident and he was able to make certain observations which would assist the court determine liability. PW 2 observed that there was a collision and the accident took place in the middle of the road. This is consistent with the pleading that the deceased were riding a motor cycle. He observed the points of impact. On the motor cycle, the impact was on the right side while on the motor vehicle it was on the driver side as there was damage on its right side. DW 1 stated that the car rolled after impact which implies it was being driven at a high speed yet the place where the accident occurred was at a trading centre. He ought to have been driving at a low speed.

13. In my view it is likely that the motorcyclist was driving carelessly on the road while carrying the two passengers and in an effort to avoid them, DW 1, who was driving too fast was unable to swerve or avoid the accident hence the collision. In the circumstances, I think the evidence supports the conclusion that both the driver of the motor vehicle and motorcyclist were equally to blame. I therefore find that the learned magistrate properly apportioned liability.

14. The argument that the learned magistrate failed to apportion liability to the driver of the motor cycle lacks merit. The 4<sup>th</sup> respondent, the third party in the suit in trial court, was held to be 50% liable. The motor cycle was being driven by Erick Okoth Obambila hence the owner thereof was liable. In other words, the negligence of Erick Okoth was attributed to the owner of the motorcycle, the 4<sup>th</sup> respondent. In the case of **Kenya Bus Services Ltd v Humphrey [2003] KLR 665** which followed the case of **Karisa v Solanki [1969] EA 318** the Court of Appeal dealt with the issue as follows:

*Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible (see Bernard v Sully (1931) 47 TLR 557). This presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by the evidence that*

*the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was still being driven for the joint benefit of the owner and the driver.*

15. The appellant contends that the pillion passengers should bear liability as they were riding the motor cycle in contravention of the **Traffic Act (Chapter 403 of the Laws of Kenya)**. The fact of a criminal infraction does not in itself imply that the person is negligent. It must clear that the infraction is the cause or contributes to the accident (see **Joash Nyabicha v Kenya Tea Development Authority and 2 Others KSM CA No. 302 of 2010 [2013]eKLR**). In this case there is no evidence that the pillion passengers contributed to the accident in any manner.

16. In the written submissions, the respondents' ask the court to enhance the liability to 80%:20% against the motor vehicle. They also contend that the court should draw an adverse inference as a result of the failure of the defence to call the passenger who was riding in the vehicle. I reject this contention as there was no cross-appeal against the issue of liability and as such there no basis to interfere with the finding. I therefore uphold the learned magistrate's finding on liability.

17. The general principle applicable in considering an appeal on quantum is that while the assessment of damages is within the discretion of the trial judge, the appellate court will only interfere where trial judge 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 based on no evidence (see **Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727**). The Court of Appeal in **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5** stated as follows;

*An appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles of that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.*

18. The appellants argue that the learned magistrate in awarding the damages applied wrong principles which resulted in damages that were excessive as to amount to an erroneous estimate of loss. On the other hand, the respondents' counsel stated that the learned magistrate assessed the damages properly and there were no ground to intervene in the award of damages by the learned magistrate.

19. According to the pleadings and evidence Collins Ochieng Obambla was aged 28 years at the time of his death and enjoyed a good health and happy life as a fisherman. It was claimed that he was earning about Kshs. 20,000.00 per month which he used to support his family comprising a wife, four children and a brother. The learned magistrate found that although there was no proof that he was earning Kshs. 20,000/- per month, he used Kshs 5,000/- being the "*approved municipal rate*" as the multiplicand. He applied a multiplier 27 and a dependency ratio of 2/3 which came to Kshs. 1,190,000/- The claimant was awarded Kshs. 10,000/- for pain and suffering, Kshs.100,000/- for loss of expectation of life which was deducted from the entire claim making a total of **Kshs. 1,080,000/-**.

20. As regards Fredrick Ouma Obambla, it was pleaded that at the time of his death he was aged 18 years old and a student in Form 2 at St Monica Bondo Kosiembo Secondary School and was an aspiring engineer. The learned magistrate awarded a lump sum of Kshs. 800,000/- for lost years under the **Law Reform Act**, Kshs, 10,000/- for pain and suffering and Kshs. 100,000/- for loss of expectation of life. The total awarded was **Kshs. 800,000/-** after deduction the award for pain and suffering and loss of expectation of life.

21. According to the plaint and testimony, Erick Okoth Obambla was 30 years old and enjoyed good health at the time of his death, he was married with a wife and two children. It was stated that he was a businessman and a boda boda operator earning Kshs. 10,000/- per month. The learned magistrate used the sum of Kshs. 5000/- being the '*municipal rate*' as the multiplicand, a dependency ratio of 2/3 and a multiplier of 12 years making a total of Kshs. 1,000,000.00 after subtracting the sum of Kshs. 10,000/- for pain of suffering and Kshs. 100,000/- for loss of expectation of life.

22. The plaintiff founded his claims based on the *Law Reform Act* and the *Fatal Accidents Act*. The manner of assessment of damages under the Act was succinctly put by Ringera J., in *Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another* Nairobi HCCC No. 1638 of 1988 (UR) where he stated as follows;

*The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature.*

23. The learned magistrate used the multiplier approach to assess damages in favour of Erick Okoth and Collins Ochieng. In both cases, no documentary evidence was produced to support the earnings. The plaintiff did not provide any basis for the amount which was proposed as the deceased income for example by providing comparative figures of persons in the same business. The amounts proposed were, in my view, speculative at best. This is not to say that the deceased, in both cases, never earned any income. In *Jacob Ayiga Maruja & Another v Simeone Obayo* CA Civil Appeal No. 167 of 2002 [2005]eKLR the Court of Appeal observed that;

*We do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving earning is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things.*

24. Where a person is employed and the salary is not determined, his or her income may be determined by reference to the government wage guidelines issued from time to time. The absence of documentary or other evidence led the magistrate to rely on “municipal rates.” The meaning of municipal rates was not explained in the judgment nor was the amount referenced to some official document or standard. In my view, this constitutes an error of principle. As the income could not be ascertained with precision, the court ought to have awarded a global sum. In this respect I would adopt the reasoning by Ringera J., in *Mwanzia v Ngalali Mutua and Kenya Bus Services (Msa) Ltd & Another* quoted by Koome J., in *Albert Odawa v Gichimu Gichenji* NKU HCCA No. 15 of 2003[2007] eKLR where he expressed the following view;

*The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependancy, and the expected length of the dependancy are known or are knowable without undue speculation where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do.*

25. The same principle was adopted in *Mary Khayesi Awalo & Another v Mwilu Malungu & Another* ELD HCCC No. 19 of 1997 [1999] eKLR where Nambuye J., stated that:

*As regards the income of the deceased there are no bank statements showing his earnings. Both counsels have made an estimate of the same using no figures. In the courts opinion that will be mere conjecture. It is better to opt for the principle of a lumpsum award instead of estimating his income in the absence of proper accounting books.*

26. In sum I find and hold that the multiplier approach was wholly inappropriate in light of the paucity of evidence. Taking the aforesaid principles into account, I award the dependants of Eric Okoth Obambla and Collins Ochieng Obambla the sum of **Kshs. 700,000.00** each.

27. Fredrick Ouma was in Form 2 when he met his death. The claim pleaded was in respect of the loss to his estate under the **Law Reform Act**. The learned magistrate awarded a lumpsum of **Kshs. 800,000.00** based on **Simon Mwangi Mureithi v Martin O. Shikuku & Another MSA HCCC No. 198 of 2003 (UR)** where the court awarded Kshs. 720,000/- for loss of earning capacity. The plaintiff in that case was a polytechnic student in his final year. Quite unlike in this case, the future prospects of the deceased were not known nor was there any basis to speculate that he would have been an engineer. Even if he was, the plaintiff did not proffer any evidence to show the level of expected earnings or his prospects in the future. In the circumstances, a multiplier approach was wholly inappropriate as a basis for assessment of damages. A global sum to recognise the loss to his estate would be preferred. I would therefore award the sum of **Kshs. 120,000.00**.

28. Finally, in assessing the damages under the **Law Reform Act** and **Fatal Accidents Act**, the learned magistrate deducted from the amount found due, the awards for loss of expectation of life and pain and suffering on the ground that the same amounted to duplication of awards. This principal was explained by the Court of Appeal in **Kemfro v A. M. Lubia & Another [1982-1988] KAR 727** as follows;

*[T]he net benefit will be inherited by the same dependants under the Law Reform Act and that must be taken into account in the damages awarded under the Fatal Accidents Act because the loss suffered under the latter Act must be offset by the gain from the estate under the former Act.*

29. The 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 hence the claim for lost years and dependency will go to the same persons. The principal 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. However, as the respondents did not cross-appeal on this point I will not disturb the award.

30. In light of the findings, I set aside the respective judgments in the subordinate court and substitute them with the following amounts subject to the contribution;

**a. RMCC No. 157 of 2012**

Collins Ochieng Obambla – **Kshs. 700,000.00**

**b. RMCC No. 156 of 2012**

Fredrick Ouma Obambla – **Kshs. 120,000.00**

**c. RMCC No. 158 of 2012**

Erick Okoth Obambla- **Kshs. 700,000.00**

31. The said amount shall accrue interest from the date of judgment in the subordinate court.

32. Finally, when the court makes an award under the **Fatal Accidents Act** it must, in accordance with **section 4(1)** thereof, apportion the amount awarded to each dependant of the deceased. I therefore direct that the appellants to file the necessary application for consideration before the subordinate court in due course.

33. I make no order as to costs.

**DATED and DELIVERED at HOMA BAY this 27<sup>th</sup> day of October 2014.**

**D.S. MAJANJA**

**JUDGE**

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

Mr Mainga instructed by Omwenga and Company Advocates for the respondents.