REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU

Civil Appeal 61 of 2007

RICHARD OMEYO OMINO……..……..PLAINTIFF

VERSUS

CHRISTINE A. ONYANGO……DEFENDANT

JUDGMENT

This appeal arises from the decision of the Principal Magistrate at Kisumu in Kisumu CMCC No. 325 of 2004 in which the appellant, Richard Omeyo Omino, had been sued by the respondent, Christine A. Onyango, being the administratrix of the estate of the late Maurice Onyango Obumba who passed away following injuries sustained in a road traffic accident along the Kisumu – Bondo road on the 3rd August 2001 in which the appellant's motor vehicle Reg. No. KAE 518 D hit and knocked down the deceased who was lawfully cycling along the said road.

The respondent contended that the said motor vehicle was so carelessly or recklessly driven, managed and/or controlled such that it went out of control, veered off the road and knocked down the cyclist deceased thereby occasioning him fatal injuries.

The respondent therefore filed suit against the appellant praying for general damages as well as special damages.

The appellant filed a statement of defence denying the claim and contending that if the accident occurred as alleged then the same was wholly occasioned and/or substantially contributed to by the negligence of the cyclist deceased. The appellant therefore prayed for the dismissal of the suit.

In the course of the trial, the parties entered into a consent on liability in the following terms:-

"By consent liability is hereby apportioned at 75/25 in favour of the plaintiff. Parties to file submissions on quantum. Matter to be mentioned on 7-6-2007 for purposes of fixing a judgement date"

The consent was entered on the 24th May 2007. The question of liability having been settled, the trial court had only to determine the quantum of damages.

This appeal being essentially on quantum of damages, this court would confine itself to that issue.

After the trial, the learned principal magistrate awarded damages as follows:-

(i) Loss of dependency Kshs. 920,000/=

(ii) Pain and suffering Kshs. 10,000/=

(iii) Loss of expectancy Kshs. 60,000/=

(iv) Special damages Kshs. 32,900/=

_____

1,022,900/=

Total _____

Being dissatisfied with the said award, the appellant preferred five (5) grounds of appeal i.e.

(i) The trial magistrate erred in law and in fact in awarding manifestly excessive and undeserved general damages under the Fatal Accidents Act of Kshs. 920,000/=.

(ii) The trial magistrate misdirected himself in both law and fact in using a multiplicand of Kshs. 5000/= where income of the deceased was not proved and applying a dependency ratio of 2/3 despite the fact that the respondent was the only dependant of the deceased.

(iii) The trial magistrate erred in law and fact in failing to discount the award under the Law Reform Act from the ultimate award thereby making a double award to the respondent who was both a personal representative of the estate of the deceased and dependant of the deceased.

(iv) The trial magistrate erred in law and fact in not taking into account or consideration the submissions of the appellant and evidence adduced.

(v) The trial magistrate erred in law and fact in awarding Kshs. 32.900/= for special damages yet the same was not specifically proved.

These grounds were argued on behalf of the appellant by learned counsel, Mr. Songok and were opposed on behalf of the respondent by learned counsel, Mr. Onsongo.

The obligation of this court after having heard the rival arguments is to reconsider the evidence afresh and make its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses..

The respondent, Christine Anyango (PW 1) testified that after the material accident she obtained a police abstract and paid Kshs. 100/= for it. She also paid Kshs. 1,500/= for post mortem, Kshs. 2,200/= for preservation of the body of the deceased and about Kshs. 4,000/= funeral expenses. These were established by production of relevant documentary evidence (receipts).

The respondent further testified that the deceased was a charcoal vendor earning about Kshs. 8,000/= per day. This must have been per month as indicated by the judgement of the court and the written submissions of the parties.

The respondent went on to testify that the deceased was the sole bread winner of the family and that they had one child called Grace Akinyi.

The respondent’s witness, William Owiti Oindo (PW 2) mainly testified on liability. The appellant did not lead any evidence during the trial.

The learned trial magistrate considered the evidence led by the respondent and awarded the damages

being disputed in this appeal.

In his arguments, Mr. Songok, contended that the general damages awarded under the Fatal Accidents Act were manifestly excessive since there was no evidence to support the application of a multiplicand of Kshs. 5000/= and dependency ratio of 2/3rd, he said that there was no evidence to show the earnings by the deceased and the minimum applicable multiplicand was a sum of Kshs. 3000/=. He also said that there was no evidence to show that the child mentioned belonged to the deceased.

Therefore, the dependency ratio should have been placed at 1/3rd.

Generally on loss of dependency, Mr. Songok relied on the High Court case of Jane Kwanga –VS- Felix Ole Nkaha NBI HCCC No. 191 of 2002.

On ground three of the appeal, Mr. Songok, argued that there was double compensation of the respondent as the learned trial magistrate failed to take into account the damages awarded under the Law Report Act. He relied in this regard on the decisions of the Court of Appeal in the case of Kenfro Africa Ltd t/a Meru Express Services 1976 & Another –VS- Lubia & Another [1987] KLR 30 and John Tiri Mbugua Gichio – VS – Francis Macharia Ngunjiri NBI Civil Appeal No. 29 of 1981.

On special damages, Mr. Songok, argued that the same were not proved to the extent held by the learned trial magistrate. He contended that only a sum of Kshs. 5,000/= was established and that the receipt of Kshs. 2,200/= was not evidence of payment as it did not have a stamp. He relied in this regard on the Court of Appeal case of David Bagine –VS- Martin Bundi Nbi Civil Appeal No. 283 of 1996.

On his part, Mr. Onsongo, learned counsel for the respondent, asked this court to consider in relation to special damages, the first case in the appellant's list of authorities i.e. the case of Apollo Nyangayo Hongo –VS- Kenya Bus Services Co. Ltd & Another Kericho HCCC No. 70 of 2002.

On ground three of the appeal, Mr. Onsongo, contended that it is not mandatory for an award under the Law Reform Act to be discounted while awarding damages under the Fatal Accidents Act. He invited this court to refer to page 3 of the decision in the case of Kenfro Africa Ltd t/a Meru Express Services 1976 & Another (Supra).

On dependency, Mr. Onsongo, submitted that loss of dependency presupposed any dependant of the deceased and not necessarily a biological child. He contended that the dependency ratio of 2/3rd was correct. He also contended that the award of general damages was discretionary and that the general damages awarded herein were not excessive. He further contended that the multiplicand applied by the trial magistrate was not excessive and was based on minimum wage.

In that regard, Mr. Onsongo, relied on the decisions in the case of Kigarangai –VS- Aya [1985] KLR 273 and Tom Mboya Kombo – VS- Nairobi Frame Industries NBI Civil Appeal No. 347 of 2002.

Upon due consideration of all the foregoing contentions in the light of the evidence and the grounds of appeal, this court holds the opinion that, with regard to ground one, the award made by the learned trial magistrate respecting loss of dependency was not manifestly excessive. In setting the multiplicand, the learned trial magistrate acknowledged that there was no documentary evidence of earnings. He therefore applied a figure of Kshs. 5000/= based on the minimum wage of employees at the time.

Even if the learned trial magistrate had taken Kshs. 3000/= as the minimum wage as desired by the appellant, a reasonable improvement on that amount was not unjustified. It was not disputed that the deceased was a charcoal dealer who earned at least Kshs. 8000/= a month from his trade.

Deceased died at a very young age of 22 years. He was married to the respondent and they had one child. These were his dependants whether or not a birth certificate was produced to establish parenthood. It is instructure to note that most rural folks in this country would not bother about birth certificates.

Quite a number give birth at home with the help of traditional birth attendants. Also, a child must not necessarily be biological to receive legitimacy.

The multiplier of 23 years and the dependency ratio of 2/3rd applied by the learned trial magistrate was correct.

This court sees no good reason to interfere with the award of Kshs. 920,000/= made by the learned trial magistrate for loss of dependency. Ground one and two of the appeal must therefore fail.

With regard to ground three, it is apparent that the appellant expected that the amount awarded as general damages under the Law Reform Act be discounted or deducted from the award made under the Fatal Accidents Act.

This expectation was erroneous as may be demonstrated by holding No. 7 and 8 in the case of Kenfro Africa Ltd t/a Meru Express Services (Supra) to the effect that:-

7. " The law Report Reform Act (Cap 26) section 2 (5) provides that the rights conferred by or for the benefit for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accidents Act. This therefore means that a party entitled to sue under the Fatal Accidents Act still has the right to sue under the Law Report Act in respect of the same death".

8. "The words "to be taken into account" and "to be deducted" are two different things. The words in section 4 (2) of the Fatal Accidents Act are "taken into account". The section says what should be taken into account and not necessarily deducted. It is sufficient if the judgement of the lower court shows that in reaching the figure awarded under the Fatal Accidents Act, the trial judge bore in mind or considered what he had awarded under the Law Reform Act for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction".

Ground three of the appeal is also a failure. As to ground four, although the judgement of the learned trial magistrate was rather short and straight forward there is no obvious suggestion that he did not take into consideration the submissions made by the parties nor the evidence adduced in court. This ground must also fail.

Ground five was the subject of the special damages awarded by the learned trial magistrate.

This court would agree with the appellant that the amount awarded in the sum of Kshs. 32,900/= was not fully proved by the evidence presented before the court.

The relevant receipts are contained in the lower court record. They amount to a total sum of Kshs. 7,300/=. This is the amount that was specifically proved and ought to have been awarded as special damages instead of Kshs. 32,900/=.

Consequently, ground five of the appeal is upheld.

All in all, save for ground five, the appeal is dismissed. The award on special damages is however set aside and substituted with a sum of Kshs. 7,300/=.

The costs of the appeal will be borne by each party.

Ordered accordingly.

[Delivered and Signed at Kisumu this 16th day of July 2009].

J.R. Karanja

J U D G E

J.R.K/va