REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

Civil Appeal 52 of 2001
(Arising From the Original BSA. SRM C.C.C. 486 OF 1999

SALIM GOLAMALI T/A

KALENJIN AUTO HARDWARE………..………………..……APPELLANT

VS

LUCAS OKOA NYONGESA…………………………..….RESPONDENT

J U D G M E N T

Lucas Okoa Nyongesa, the Respondent instituted an action against Salim Gulamali T/a Kalenjin Auto Hardware before the Senior Resident Magistrate's court at Busia in a plaint dated 29th September 1999. At the end of the trial the Respondent obtained the following awards in the resultant Judgment:

(a) Ksh.100,000/= under the Fatal accident Act. (b) Ksh.120,000/= for Loss of expectation of life

(c) Ksh.20,000/= for pain and suffering

(d) Ksh.10,000/= for funeral expenses

(e) Costs of the suit.

Being dissatisfied, the appellant now seeks for the Judgment of the learned Senior Resident Magistrate to be upset on appeal. The appellant listed 4 grounds of appeal in his memorandum of appeal dated 16th November 2001. Mr. Masinde who appeared for the appellant informed this court of his intention to abandon grounds 2 and 3. He argued the remaining two grounds of appeal together. The first ground argued was to the effect that the learned trial magistrate erred in law and fact in assessment of damages under the Law Reform and Fatal Accidents Act Contrary to the evidence on record.

Secondly, that the learned trial magistrate erred in law and fact in awarding excessive damages under the Law Reform Act Fatal Accidents Act without discounting the same.

Before I considered these grounds in detail I think it is appropriate to set out the history of the matter leading to this appeal. On the 21st day of April 1998 one Violet Akinyi Okoa, now deceased, a daughter to the Respondent was lawfully walking along Nambale – Mumias road when the defendant or his agents, servants and or driver while carelessly driving motor vehicle registration number KYC 997, make Isuzu Uhuru knocked the deceased as a result of which she sustained fatal injuries. The Respondent set out the particulars of negligence attributed to the Respondent in the plaint dated 29th September 1999. Two witnesses testified in support of the Respondent's case before the trial magistrate. The Respondent Lucas Okoa Nyongesa testified as P.W.1. He produced in evidence a letter of grant of representation in respect

of his deceased's daughter issued by this court sitting at Kisumu. The appellant offered no evidence at the trial court.

However before closing the case the parties before the trial court entered a consent Judgment in respect of liability in which the Respondent agreed to shoulder 10% contribution and the appellant 90%. It would appear pursuant to a consent order dated 21.6.2001 the Respondent filed written submission on quantum and the appellant filed none. The trial court made the awards I have herein above set out. I now wish to consider each of the grounds of appeal argued before me.

To begin with the appellant argued that the trial magistrate erred when he assessed damages under the Law Reform Act and the Fatal Accidents Act Contrary to the evidence on record. The appellant also complained that the awards were excessive in the circumstances of this case. Mr. Masinde who appeared for the appellant chose to argue these two grounds together. The learned advocate argued that the award of Kh.120,000/= in respect of Lost of expectation of life. He pointed out that the trial magistrate failed to justify its decision on this head. The appellant also complained that the trial magistrate did not give the basis of his decision to award a sum of Ksh.100,000/= on account of loss years. Finally the appellant also argued that the trial magistrate failed to make the necessary discount according to the contribution agreed upon by the parties.

The Respondent opposed this appeal. Mr.. Bogoko who appeared for the Respondent averred that the assessment of damages on the two heads was not harsh nor excessive in the circumstances. He accused the appellant of coming to complain too late on appeal when he failed to make submissions on quantum before the trial court. The Respondent however conceded that the trial court did not apportion contribution when it made its final Judgment but quickly pointed out that the failure to do so was not fatal.

This appeal is basically against the award and not the issue of liability. It is a well established principle of law that an appellate court can only interfere with a trial court's discretion to assess damages where it is shown that the court has applied wrong principles or where the damages awarded as so inordinately high or low that an application of wrong principles must be inferred. In arriving at its decision on damages, the trial court relied on the evidence tendered by the Respondent and his witness and of course the written submissions and the authorities cited by his advocate. The appellant did not submit on quantum. The Respondent had prayed an award of Ksh.140,000 on loss of expectation of life. He cited the case of **KENYA BREWARIES VS ALI KAHINDI SARO C.A. No. 144 of 1990.** In this case an award of Ksh.100,000/= was made on the instant head. The trial Senior Resident Magistrate took into account this authority and gave an award of Ksh.120,000/= . There is evidence that the learned Senior Resident Magistrate considered the written submissions filed by the Respondent's counsel in which he proposed an award of Ksh.140,000/= on the basis that the court should take into account the inflationary rates. I am now urged to consider that the award of Ksh.120,000 was inordinately high. The case cited ie **KENYA BREWERIES VS ALI KAHINDI SARO** was made in 1991, about 10 years before the trial court made its award. I do not think that the amount awarded by the learned Senior Resident Magistrate can be said to be inordinately high that the application for a wrong principle can be inferred. The trial magistrate took into account the relevant fact that the Kenya shilling depreciated in value.

The appellant is to blame himself for failing to submit on this issue before the trial court.

I see no reason why I should interfere with the discretion of the trial magistrate to make the award on this head. The appellant also complained that the award of Ksh,100,000/= on account of lost dependency under the Fatal Accident's Act was wrong because the trial magistrate did not apply a multiplier. He punctured the trial magistrate's decision on this head on the ground that the law did not recognise a global figure. The Respondent is of the view that the trial magistrate was right to give a conventional figure because the deceased was a minor aged 12 years.

On this issue the court of appeal has made the position clear in the case of **KENYA BREWERIES LTD VS ALI KAHINDI SARO (Supra)**

In which it expressed the view that:

> **"In our view damages are clearly payable to the parents of a deceased child, irrespective of age of the child and irrespective of whether there is or there is not evidence of Pecuniary contribution."**
>
> In my view the appellant's submission therefore falls on the wayside. I find the conventional amount awarded by the trial court to be reasonable and there is no basis for this court to interfere.

The final matter which the parties on appeal agreed is that the trial magistrate failed to take into account the apportioned agreed upon. I have perused the record of appeal and note that the parties agreed on contribution that is the appellant to shoulder 90% contribution and the Respondent to shoulder 10% contribution.

In the end I find that the appeal has no merit. Save for the fact that it succeeds on the issue on contribution. That is to say that the amount of Ksh.250,000/= should be reduced by 10%. The award of Ksh.250,000/= is set aside and substituted with a figure of Ksh.225,000/=. Otherwise the appeal is dismissed with costs to the Respondent.

DATED AND DELIVERED THIS 8th DAY OF April 2005

J.K. SERGON

JUDGE