Omari & another v Onkoba (Suing as a personal representative and administrator of the Estate of Marcus Onkoba Okari (Deceased) (Civil Appeal E027 of 2021) [2024] KEHC 764 (KLR) (1 February 2024) (Judgment)

Neutral citation: [2024] KEHC 764 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERICHO

CIVIL APPEAL E027 OF 2021

JR KARANJA, J

FEBRUARY 1, 2024

BETWEEN

DANIEL OMARI ..... 1ST APPELLANT

MOIZ MOTORS LTD ..... 2ND APPELLANT

AND

MARTHA KWAMBOKA ONKOBA (SUING AS A PERSONAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF MARCUS ONKOBA OKARI (DECEASED) ..... RESPONDENT

JUDGMENT

1. The appellants Daniel Omari and Moiz Motors Ltd were the defendants in CMCC No.466 of 2019 at Kericho in which they were sued by the respondent, Martha Kwamboka Onkoba as the legal representative of the estate of the late Marcus Onkoba Okari (deceased) for damages arising from a road traffic accident which occurred on 30th March 2018 along the Kericho – Nakuru road at Chepseon shopping centre involving the appellants motor vehicle No. KCN 414R Toyota matatu belonging to the second appellant and driven at the time by the first appellant.

2. It was pleaded that on the material date the appellants/defendants said motor vehicle was so negligently, carelessly and/or dangerously driven, managed or controlled such that it caused an accident thereby resulting in the death of the deceased who was a passenger in the vehicle. The plaintiff/respondent further pleaded that the accident was wholly caused by the negligence of the defendants in the manner of driving the motor vehicle at an excessing speed and without due care and attention to other road users, among other factors.

3. The plaintiff/respondent therefore prayed for general damages under the *Fatal Accidents Act* and the *Law Reform Act* as well as damages for loss of consortium and special damages in the sum of Kshs.262,230/= together with interest and cost of the suit.

   The defendant/appellants denied the claim on the basis of the averments contained in their statement of defence and contended that if the accident indeed occurred, then it was solely and/or substantially contributed to by the negligence of the respondent/deceased in the manner of failing to take any or any adequate precaution for his own safety, among other factors.

4. The respondent testified at the trial and called a witness Zablon Barack (PW 2) as PW1 to support the claim. The defendants did not testify nor call any witness. They therefore closed their case without providing any evidence in support of their defence.

   The trial court considered the evidence presented before itself by the plaintiff/respondent and noted that it remained unchallenged and uncontroverted. The court therefore concluded that the claim had been proved against the defendant as required.

   The defendants/appellants were thus found fully liable to the plaintiff/respondent in damages amounting to the sum of Kshs.3,062,330/= for pain and suffering, loss of expectation of life, loss of dependency, loss of consortium and special damages.

5. Being aggrieved by the decision, the appellant preferred twelve (12) grounds of appeal as set out in the memorandum of appeal dated 9th September 2021. In an apparent response, the respondent cross-appealed on the award of Kshs.2,400,000/= made to her by the trial court for loss of dependency. The memorandum of cross-appeal was dated 20th September 2021. It would however, appear that the cross-appeal was abandoned along the way.

   The main appeal was canvassed by way of written submissions which were duly filed by both parties through Kimondo Gachoka & Co. Advocates for the appellants and D. N. Onyancha & Co. Advocates for the respondent.

6. Having considered the appeal on the basis of the supporting grounds and the rival submissions, the duty of this court was to revisit the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witness. In that regard, the court considered the evidence of the respondent (PW 1) and her witness (PW 2) and noted that it raised no particular dispute with regard to the occurrence of the accident and the ownership of the ill-fated motor vehicle.

7. Also not disputed was the fact that the deceased husband of the respondent was aboard the ill-fated motor vehicle when the accident occurred. He was travelling in the vehicle as a passenger heading to a church function in Nakuru from Kisii. Zablon (PW 2) was also a passenger in the vehicle. He survived the accident but indicated that the deceased succumbed to his injuries while undergoing treatment three hours after the accident.

   Being a passenger in the vehicle the deceased could not have possibly contributed to the occurrence of the accident and in the unlikely event that he did, then the defendants did not least any evidence to demonstrate how and in what manner.

8. So, on the question of liability this court affirms the trial court's finding that the defendants were culpable for the accident at a 100% ratio. They were thus responsible for the consequences of their negligence and/or reckless act which led to the death of the deceased, hence liable to the plaintiff in damages.

9. The plaintiff claimed general damages under the *Law Reform Act* and the *Fatal Accidents Act* together with damages of loss of consortium and special damages.

   Under the *Law Reform Act*, the trial court awarded Kshs.100,000/= for pain and suffering and Kshs.150,000/= for loss of expectation of life. It was established that the deceased did not succumb to his injuries immediately after the accident but three hours later. He must have suffered great pain and suffering within the period. Therefore, the award of Kshs.100,000/= for such pain and suffering was reasonable and so too was the sum of Kshs.150,000/= for loss of life expectation considering that the deceased was aged sixty-six (66) at the time of his death and a healthy person. His life was cut short by the defendant's act of negligence yet he may have lived many more years with the Grace of God.

10. The awards aforementioned were based on sound legal principles as fortified by the authorities cited by the plaintiff which were relevant and applicable in the circumstances. This court hereby confirms the award.

    As regards loss of dependency under the *Fatal Accidents Act*, the trial court applied a multiplicand of Kshs.50,000/= a multiplier of six (6) years and a dependency ratio of 2/3rd to arrive at the figure of Kshs.2,400,000/=.

    The evidence by the deceased widow (PW1) pointed to the deceased having been a farmer and a businessman with a bias in the transport sector. He was said to have been earning an income of Kshs.50,000/= from his transport business. A copy of the Registration certificate availed herein showed that the deceased owned a tipper lorry Reg No. KVN 535.

11. Such vehicles are not used for luxury. It was most probable than not that the deceased used the lorry for his transport business for which he must have been earning an income which was summarized to be about Kshs.50,000/= per month based on the bank statements (P. Ex 10) which did not amount to payment receipts and/or invoices but gave a picture of the huge income generated by the deceased from his transport business. There was no evidence from the defendants to disprove this fact. The estimate of Kshs.50,000/= was therefore a safe figure otherwise it would have been more as demonstrated by the bank statements.

12. It is therefore the finding of this court that the plaintiff did on a balance of probabilities establish that the deceased earned an income of approximately Kshs.50,000/= from his transport business. It mattered not whether he drove the lorry himself in carrying out his business or he engaged a driver to do so. What mattered is the income the lorry generated from the transport business.

    The trial court's application of a multiplicand of Kshs.50,000/= was proper and is hereby affirmed and so too was the application of a multiplier of six (6) years and a dependency ration of 2/3rd. this justifies the award of Kshs.2,400,000/= for loss of dependency.

13. With regard to the award of Kshs.150,000 for loss of consortium, the respondent did not address the same in her submissions thereby implying that she was conceding the appeal on the award/or that she agreed with the appellants submissions that such awards are not provided for under both the Law Reform and Fatal Accidents Acts and ought therefore have not been indicated in his claim. This court, cannot agree more for reasons well articulated in the cited case of Innocent Kerie Denge v Peter K Cheserek & Another [2014] eKLR. The trial court erred in principle in awarding damages for loss of consortium which is hereby set aside.

14. With regard to special damages, these must not only be pleaded but also be specifically proved.

    The plaintiff sought a sum of Kshs.262,330/= special damages. The trial court found that the amount was duly established and proved by necessary documentary evidence (P. Ex 8 (a – f) and awarded it.

There was no evidence from the defendants to disprove and/or invalidate the documentary evidence aforementioned. It would therefore follow that that the trial court did not err in awarding the claimed amount. The special damages referred to in the appellant's submissions are alien to this matter.

15. All in all, apart from the setting aside of the award of Kshs.150,000/= for loss of consortium the appeal largely fails with orders that the total judgement amount of 3,062,330/= be reduced by Kshs.150,000/= to become 2,912,330/=.

Each party to bear their costs.

Ordered accordingly

DELIVERED, DATED AND SIGNED AT KERICHO THIS 1ST DAY OF FEBRUARY, 2024.

J. R KARANJAH

JUDGE