



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO.7 OF 2020

JOHN OKUMU JUMA1ST APPELLANT

PETER EPALINYANG EGESA2ND APPELLANT

VERSUS

GODFREY ORONO WESONGA (suing as Legal Representative of the Estate of

REAGAN MARTIN WESONGA (deceased).....RESPONDENT

JUDGEMENT

[1] This appeal arises from the decision of the Senior Principal Magistrate at Busia in CMC No.263 of 2018, in which the appellants, **John Okumu Juma** and **Peter Epalinyang Egesa**, were sued by the respondent, **Godfrey Orongo Wesonga**, acting on behalf of the estate of the late RMW (deceased), for both general and special damages accruing from a road traffic accident which occurred on the 6th June 2018, involving the appellant's m/v Reg No.**KCN 890 E** and the deceased along the Mumias – Busia Road within the area of Nambale Centre.

[2] It was pleaded by the respondent that on the material date the deceased was walking along the said road when he was knocked down and fatally injured by the appellants' vehicle which was at the time being driven by the second appellant in a manner that was so negligent.

The respondent contended "*inter alia*" that the vehicle was driven at a speed which was too fast in the circumstances and that he suffered loss and damage as a result of the accident. He therefore prayed for damages, against the appellants together with costs of the suit.

[3] The appellants denied the claim in their statement of defence and contended that if the material accident occurred, then it was caused by the sole and/or substantial negligence of the deceased in the manner of carelessly, negligently and recklessly crossing the road such that he was hit and injured by the appellant's vehicle which was at the time moving along or being driven on the road.

[4] At the hearing of the case before the lower court evidence in support of the claim was led by the respondent (**PW 1**) and a traffic police officer, P.C Collins Oloo (**PW 2**), while evidence in support of the defence was led by the second appellant. (**DW 1**) as the driver of the ill-fated m/vehicle.

[5] The trial court considered the evidence in its totality and concluded that the second appellant, being the driver of the vehicle was fully responsible for the accident. In arriving at the conclusion the trial court rendered itself thus:-

"The 2nd defendant also testified and said he was driving at about 80km per hour and that he saw a group of minors besides the road when he was about 50 metres away. He said that if he was driving at 50km per hour he would not have caused the accident. He saw the minor ahead before the accident. He should have slowed down given the way minors behave on the road. He ignored the risk that lay ahead. I think the 2nd defendant was to blame for the accident and that's why the police also blamed him. I found him 100% liable for the accident."

[6] Accordingly, the appellants were found liable to the respondent for damages emanating from the accident. In that regard, the respondent was awarded damages under the Law Reform and Fatal Accidents Act as follows:-

- (a) Pain & suffering Kshs.30,000/=
- (b) Loss of expectation in life Kshs.100,000/=
- (c) Loss of dependency Kshs.1,000,000/=

Additionally, there was an award of special damages in the sum of Kshs.180,850/=.

Judgment was therefore entered against the defendants (**appellants**) in favour of the plaintiff (**respondent**) in the total sum of **ksh.1,310,850/=** together with costs and interest.

[7] Being dissatisfied with the decision, the appellant preferred this appeal on the basis of the grounds set out in the memorandum of appeal dated 15th June 2020.

The hearing of the appeal proceeded by way of written submissions. In that regard, the appellant's submissions dated 15th February 2021, were filed on their behalf by **Peter M. Karanja Advocate**.

In opposing the appeal, the respondent's submissions dated 12th March 2021, were filed on his behalf by **Calistus & Co. Advocates**.

[8] The appeal was given due consideration by this court in the light of the supporting grounds and rival submissions and as it is the norm, the duty of this court was to reconsider the evidence and arrive at its own conclusion bearing in mind that the trial court had the advantage of seeing and hearing the witnesses. This is a norm which was proclaimed way back in the case of **Selle V. Associated Motor Boat Co. [1968] E.A 123**.

[9] Having considered the evidence availed by both the appellants and the respondent in the trial, it became apparent and obvious that the basic issue which arose for determination was whether the accident was as a result of negligence attributable to the appellant (**defendants**) and if so, whether the plaintiff (**respondent**) was entitled to damages and to what extent.

On liability, grounds one (1) to seven (7) of the grounds of appeal are applicable and relevant while, on the question of quantum of damages, grounds eight (8) and nine (9) hold sway.

[10] Indeed, as was held in the case of **Kiema Mutuku Vs. Kenya Cargo Handling Services Ltd (1991) 2KAR 258**, there is no liability without fault. Therefore, any claim based on negligence must be proved by the claimant against the defendant.

In this case, the evidence by the traffic police officer (**PW 2**) indicated that the investigations carried out by the police after the accident revealed that the driver of the vehicle was culpable and at fault and that was why a traffic offence of causing death by dangerous driving was preferred against him.

[11] Dangerous driving connotes and is an element of carelessness and recklessness all of which amount to gross negligence. Speed would demonstrate or amount to recklessness if it exceeds permissible limits or is unwarranted in given circumstances. Indeed, overspeeding or fast speed in a crowded area and/or a busy area such as a trading centre would be an act of recklessness and a total disregard of the safety of all those using the road in one way or the other or those walking, standing on the side of the road or even those crossing the road.

[12] The evidence by the police officer (**PW 2**) was never discredited nor disapproved by any from the appellants. It clearly established that the deceased was a minor aged four years old at the material time and was in the process of crossing the road at a busy area when he was hit and fatally injured by the appellant's vehicle which was being driven recklessly.

The driver of the vehicle (**DW 1**) actually admitted that the accident occurred at a busy area and that he was driving a speed of over 80 KPH at the time even after having seen the minor deceased when he was 20 metres ahead of the vehicle prior to crossing the road.

[13] Most importantly, in cross examination, the driver admitted that he was actually overspeeding when he was doing a speed of 80 KPH instead of 50 KPH in a busy area and even after he took note of the deceased just before he (deceased) made the attempt to cross the road which attempt, proved fatal. He (**driver**) owned up and said that he was speeding to pick a visitor. He said in re-examination that there was no speed limit signs at the scene. However, with or without speed limit signs a reasonable and careful driver would know and is indeed required to know that a vehicle cannot be driven at an excess and/or unreasonable speed in a built up or busy stretch of the road.

[14] Without doubt, the accident was occasioned by the appellants' negligence in the manner of driving of their vehicle by the second appellant at a speed that was in excess and reckless in the circumstances. Indeed, the second appellant disregarded the safety of person near the road including those attempting or intending to cross the road such as the deceased minor for whom special attention was required after having been spotted by the second appellant just before the accident.

[15] The deceased was a child and as such greater degree of care was owed to him especially after having been spotted with other children on the side of the road. It therefore did not matter that he made that costly move to dash across or suddenly cross the road. Such mistakes are foreseeable with children playing or gathered near or sides of the road in this country and this, cannot escape the mind of any reasonable driver.

[16] The trial court did not therefore err in Law and fact, neither did it misdirect itself in finding that the appellants were negligent and fully liable for the consequences of their negligent act and/or omission.

In the circumstances, the finding must and is hereby upheld by this court to the extent that grounds one (1) to seven (7) of the grounds of appeal are hereby overruled and dismissed.

[17] With regard to the quantum of damages, an appellant court has to be satisfied that the trial court in assessing damage, took into account an irrelevant factor or left out of account a relevant fact, short of this, the court has to be satisfied that the amount was so inordinately low or

so inordinately high that it must be a wholly erroneous estimate of the damage (see, **Arrow Car Ltd Vs. Bisansio & Other (2004) 2 KLR 101** and **Kenfro Africa Ltd t/a Meru Express Service Insurer V. Anim Lubia & Another (1982 88) 1 KAR 717**).

[18] The trial court awarded general damages under the Law Reform Act in the sum of ksh.30,000/= for pain & suffering and ksh.100,000/= for loss of expectation of life. In doing so, the trial court was guided by the authorities cited by the respondent. Herein, the appellant contended that the sum of ksh.30,000/= for pain and suffering was excessive as the deceased died instantly after being hit by the vehicle. Such awards are primarily meant to compensate and console the estate of the deceased for pain and suffering endured by the deceased before succumbing to the injuries suffered. They are supposed to be nominal damages dependant on the period of time that pain was endured.

[19] The deceased may have died instantly but given the current trend of inflation and economic well being of this nation, a sum of ksh.10,000/= as suggested by the appellants would be too low to offer any meaningful compensation to the estate of the deceased. On the contrary, the sum of ksh.30,000/= awarded by the trial court was reasonably adequate and is hereby affirmed. The award of ksh.100,000/= for loss of expectation of life was a reasonable correctional figure which was not substantially or at all disputed by the appellant and is also affirmed.

In essence, this court does not find any legal and factual reason to interfere with the awards made by the trial court under the Law Reform Act.

[20] The award made under the Fatal Accident Act was for loss of dependency. The trial court awarded a sum of ksh.1 million under the head on the basis of the proposal made by the respondent and the authority cited in respect thereof. In this appeal, the appellant's arguments gravitate on the contention that the amount of ksh.1 million was manifestly or inordinately high and ought to be reduced downwards to half the amount or thereabout.

[21] When it comes to children of tender years and the concept of dependency, varied views are abound. What is certain is that such children are invariably dependant on their parents for their welfare, well being, lifestyle, education, future economic prospects etc. without parents, children of tender years are completely helpless and that is why society always comes to their aid as an obligation through relatives, family friends and of course, the state and its agencies.

[22] Being the actual and true dependants of their parents and/or guardians, the award of damage, under the Fatal Accidents Act for children of tender year would be more appropriate and proper only if the global rather than the multiplier approach is applied. Even then, there are certain parametres based on the future economic prospects of a child which are wholly dependant on his education and educational performance. A child's education coupled with his/her education performances is the key to future economic and social success.

[23] The respondent in his testimony before the trial court indicated that the deceased was at the time aged about three (3) years but was not in any school. It is not uncommon in this country to find many children of that age and even above not going to school for one reason or the other. However, this does not necessarily mean that such children would never at all go to school in a future date and lay foundation for a bright and successful future to be able to be of use to their parents, family and society.

[24] The circumstances arising in this case with regard to the deceased would in this court's opinion favour an award of ksh.400,000/= as proposed by the appellant under the Fatal Accident Act for loss of dependency. In that regard, the award of ksh.1 million made by the trial court was rather excessive and is hereby reduced to ksh.400,000/= .

As for special damages, the respondent was entitled to only what he specifically pleaded and proved by necessary documentary evidence. Consequently, he was entitled to a sum of ksh.23,350/- which was specifically proved by necessary documentary evidence (**P.Ex 7,9 &12**). The documents which were marked for identification but were not formally tendered in evidence could not be relied upon to prove special damages. Such documents remain mere documents without any probative value. They cannot therefore be proper and admissible evidence to establish expenses incurred by a claimant. (see, **Des Ray Sharma Vs Rex (1953) 19 EACA 310** and **Harrison Wafula Khamala Vs Isaac Ndarwa Kiarie (2016) eKLR**).

[25] All in all, this appeal succeeds partly to the extent that the award made by the trial court for loss of dependency in the sum of ksh.1 million is hereby reduced to ksh.400,000/= and the award made for special damages in the sum of ksh.180,850/= is also reduced to ksh.23,350/=.

Judgment is therefore entered in favour of the respondent against the appellants in the total sum of ksh.887,500/= - together with costs and interest.

The cost of the appeal shall be borne by each party.

Ordered accordingly.

J.R. KARANJAH

J U D G E

[DELIVERED AND SIGNED THIS 15TH DAY OF JUNE 2021]

[In the presence of Mr. Ouma for the respondent]