



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT HOMA BAY**

**CIVIL APPEAL NO.99 OF 2019**

**BETWEEN**

**DANIEL WAWERU.....APPELLANT**

**AND**

**EFFIE AKINYI (Suing as a personal representative of the estate of**

**DENNISH ASETO- DECEASED).....RESPONDENT**

*(Being an Appeal from the judgment in Oyugis Principal Magistrate's PMCC No. 81 of 2016*

*by Hon. J.S Wesonga –Senior Resident Magistrate).*

**JUDGMENT**

1. Daniel Waweru, the appellant herein, was the defendant in Oyugis Principal Magistrate's PMCC No. 81 of 2016. This was a claim that arose from a road traffic accident where Dennish Aseto was fatally injured. The learned trial magistrate delivered judgment dated 23<sup>rd</sup> April, 2019. He held the appellant 100% liable and made a total award of Kshs.2, 120, 000 in favour of the respondent.

2. The appellant was aggrieved by the said judgment and filed this appeal. He was represented by the firm of Mose, Mose & Milimo advocates. He raised eight grounds of appeal as follows:

- a) That the learned trial magistrate erred in law and in fact in making a finding of damages and liability against the defendant based on hearsay evidence when the matter ought to have been dismissed.
- b) That the learned trial magistrate erred in and in fact in holding that the defendant 100% liable based on hearsay.
- c) That the learned trial magistrate erred in law and in fact in awarding unreasonable loss of dependency of Kshs.2,000,000/= without taking into consideration vagaries of life.
- d) That the learned trial magistrate erred in law and in fact in failing to appreciate the impeccable defence of the defendant thereby arriving at a wrong and erroneous conclusion condemning the defendant to net damages of Kshs.2,120,000/=.
- e) That the learned trial magistrate erred in law and in fact in failing to appreciate the doctrine of *stare decisis* in awarding damages.
- f) That the learned trial magistrate erred in law and in fact in failing to appreciate the plaintiff's pleadings and evidence were incapable of sustaining the award of damages.
- g) That the learned trial magistrate erred in law and in fact in failing to appreciate that the respondent did not establish her case on quantum.
- h) That the learned trial magistrate erred in law and in fact in failing to appreciate the legal position that there could be no liability without fault.

3. The appeal was opposed by the respondent through the firm of Everlyne Kuke & Company, Advocates.

4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

5. The appellant in his pleading had contended that there was no accident that had involved motor KAR 324Q on 17<sup>th</sup> January, 2016. However, his driver, Joseph Moira Mwangi (DW1) confirmed that indeed the accident occurred.

6. According to the police abstract, the deceased was a pillion passenger. The pleading was that the deceased was knocked down while he was a pillion passenger.

7. The evidence of Joseph Moira Mwangi (DW1) was that while at Kadel, a minibus overtook him but suddenly swerved to his lane. In order to avoid ramming into the rear of the minibus, he swerved to the other lane. There was an oncoming vehicle which made him to swerve out of the road where the accident occurred.

8. If this was pleaded, it would have formed a very good basis for enjoining the driver of the alleged minibus. However, the appellant denied the existence of the accident. Even if the trial court had disregarded the evidence of PW2 which was contradictory, it would not have arrived at a different conclusion on liability owing to the entire evidence on record. The learned trial magistrate was therefore justified to dismiss the appellant's defence for it was clearly an afterthought. Equally the finding of liability by the appellant at 100% cannot be faulted.

9. It is trite law that an appellate court will only interfere with an award of the trial court if certain circumstances are satisfied. In **Butt vs. Khan [1981] KLR 349** at page 356 Law JA stated:

**...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, or that he misapprehended the evidence in some material respect, and so arrived a figure which was either inordinately high or low.**

10. The appellant contends that the award of Kshs. 2,000,000/= damages for loss of dependency was excessive. This is because, he argued, the earnings were not proved. I agree. The best approach would have been to use the wages of a casual worker. The minimum wage for a general casual worker prevailing at the time was Kshs. 5218. Given the vagaries of life and assuming he would have remained a casual for the rest of his life then we can fairly say he would have worked for 17 years. This will work out as follows:

$$5218 \times 12 \times 17 \times \frac{2}{3} = 709,648.$$

11. I will therefore award Kshs. 709,648= for loss of dependency.

12. It is trite law that where an award has been made under the Law Reform Act and Fatal Accidents Act and beneficiaries are the same, the loss suffered under the latter Act must be offset by the gain from the estate under the former Act. The Court of Appeal in the case of **Kemfro vs. A. M. Lubia & Another [1982-1988] KAR 727** as follows:

**The 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.**

13. In the instant case the learned trial magistrate did not appreciate this legal position. I will discount the award under the head of loss of expectation of life. The total award will be as follows:

- a) Loss of dependency Kshs. 709,648=
- b) Pain and suffering Kshs. 20,0000/=
- c) Loss of expectation of life.....Kshs. 100,000/=
- Subtotal.....Kshs. 829,648/=
- Less award for loss of expectation of life .....Kshs. 100,000/=
- Net.....Kshs.729,648/=

The respondent is therefore entitled to Kshs. Kshs.729, 648/= . Since the appeal has partially succeeded, the appellant will be entitled to half costs of this appeal.

**DELIVERED AND SIGNED AT HOMA BAY THIS 21ST DAY OF JULY, 2021**

**KIARIE WAWERU KIARIE**

**JUDGE**