



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CIVIL APPEAL NO. E001 OF 2021

DAVID MAKORI MOKUNYO.....APPELLANT

VERSUS

AGNES NYABONYI OBEBO & BOAZ MONYENYE MONGARE

(Suing as Personal Representative and legal administrators of the estate of)

HUDSON MONGARE ATEI (DECEASED).....RESPONDENTS

JUDGEMENT

1. This appeal is against the judgment of Hon C. W. Waswa Resident Magistrate at Nyamira delivered on 10th December 2020. The Appellant filed his record of appeal on 9th July 2021. Pursuant to the court's directions parties dispensed with the appeal by way of written submissions.

2. In his Memorandum of Appeal filed on 9th July 2021, the appellant challenges the impugned judgment on the following grounds:

- i. The learned magistrate misdirected herself and erred in law and in fact in finding that the appellant was 100% liable for the accident and also in awarding excessive amounts of damages in the circumstances
- ii. The trial magistrate erred in law and fact in awarding damages in a case whose circumstances indicate that it was the pedestrian who was wholly to blame for the accident
- iii. The learned magistrate erred in law and in fact in giving judgment against the weight of the evidence.
- iv. The learned magistrate failed to consider that the plaintiffs had not proved their case on a balance of probabilities and consequently the suit could have stood dismissed.
- v. The trial magistrate failed to take into account the blatant falsehoods stated by the 1st Plaintiff Agnes Nyabonyi Obago in her evidence in cross-examination.
- vi. The trial magistrate erred in law and in fact in failing to take note that the burden of proof rested on the plaintiffs.

3. Consequently, the appellant seeks the following orders:

- i. The appeal be allowed
- ii. The judgment of the Resident Magistrate's Court be set aside and substituted with an order dismissing the suit
- iii. Costs of the appeal be borne by the respondents

Brief Facts of the Case

4. The respondents herein sued the appellant for damages under the Law Reform Act and the Fatal Accidents Act following the death of their husband and father, Hudson Mongare Atei, deceased, in an accident that occurred along the Kericho – Nyamira Road at Nyaramba area on

30th December 2017. The accident involved a motor vehicle Registration No. KBF 835N belonging to the appellant. The respondent alleged that the deceased was a lawful pedestrian walking along the said road when the vehicle lost control, veered of the road and hit him causing the deceased to sustain fatal injuries. They attributed the accident to negligence on the part of the driver of the vehicle. It was later established at trial that the appellant was the sole owner of the vehicle. After considering the evidence before the court the trial Magistrate found the appellant liable to the extent of 100% liable and awarded damages as follows: -

Loss of expectation of life	Kshs. 100,000/=
Pain and suffering	Kshs 150,000/=
Loss of dependency	Kshs. 1,200,000/=
Special damages	Kshs 201,300/=
Total	Kshs 1,651,300/=

Costs of the suit and interest were awarded to the respondents

Appellant's Submissions

5. The appeal is on both liability and quantum. The appellant submits that there was no sketch plan showing the position of the motor vehicle when it caused the accident and where the deceased's body lay. Further, the Plaintiffs' witnesses did not give a credible version of the manner in which the accident occurred. PW2 stated that he was talking to his friend while facing Kericho direction when the accident vehicle heading to Nyaramba passed him at high speed. He heard a loud and saw the deceased in front of the vehicle. He was 100 metres away from the scene of the accident. In this case the appellant questions how PW2 could have seen what was happening in the opposite direction across the road 100 metres away.

6. It is the appellant's case that the deceased pedestrian was crossing the road. While avoiding an oncoming lorry with lights on he landed onto the appellant's vehicle on the right side. There was too little time to swerve and avoid hitting the deceased. He asserts that the point of impact was on the road. That the deceased pedestrian was himself negligent hence the appellant should not have been held 100% liable. Moreover, he was driving at a speed of 40 – 50KPH and it was not proved that he was over speeding. The police abstract on the other hand mentions two witnesses, Jackson Obadia and Joan Omoti who did not give evidence at the hearing.

7. With regard to quantum the appellant argues that there was no evidence that the deceased was aged 49 other than the Certificate of Death. There was also no proof that the deceased was earning Kshs.30,000/= a month.

Respondent's Submissions

8. The respondent in its submissions consolidated issues for determination into two grounds; namely whether the respondent's proved their case on a balance of probabilities and whether the award of Kshs.1,651,300/= was excessive.

9. It was submitted that PW2 who was at the vicinity of the accident witnessed the same. He testified that on 30th December 2017, the deceased was walking along Kericho-Nyamira road when the appellant hit him with his vehicle off the road. It was his evidence that the car was being driven at high speed. A police officer produced the Occurrence Book confirming that the accident occurred as stated at around 6.00pm. The appellant on the other hand said that it occurred at 7.00pm. He did not file any inspection report to prove that his vehicle had been hit on the right side.

10. On the second issue the respondents contend that the award of damages under each head was reasonable. That regard was given to previous decisions presented by the party and they were neither inordinately high or low. The respondent concluded that the appeal lacks merit and should be dismissed with costs.

Analysis and Determination

11. This being a first appeal, it behoves the Court to consider the case in its entirety on matters of both fact and law; notwithstanding that the court does not have a similar opportunity to the court of first instance to engage in intricacies such as the demeanour and delivery of the witnesses. The court is guided by principles set in the case of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123* guiding Appellate Courts such as this one in the determination of such appeals. In the said case it was held that:

“Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial. Judge's findings of fact appear earlier that he has clearly failed on some part to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

12. It is trite law that he who alleges must prove. It is not in dispute that an accident occurred whereby the deceased pedestrian was struck by the appellant's vehicle on 20th December 2017. The same was admitted by the appellant in his testimony. Parties are at variance on the manner in which the accident occurred. PW2 stated that the accident occurred at around 6.00pm and the deceased was walking alongside the road. He was hit off the road and fell on the grass; off the tarmac. DW1 on the other hand stated that he the deceased fell onto the right side

of his vehicle while avoiding an oncoming truck that flashed lights at him which dazzled DW1 to the extent that he did not see the deceased. According to him, the accident occurred at 7.00pm. PW2's version matches that recorded in the Police Abstract. To my mind, the Appellant's version is less probable to have occurred. If he was driving at 40 – 50 KPH as he alleges and slammed onto the emergency breaks the pedestrian wouldn't have sustained fatally severe injuries. Moreover, he should have produced a Motor Vehicle Inspection Report to prove that the point of impact on his vehicle was on the right side. Section 109 of the Evidence Act provides as follows:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

13. Lastly, the appellant is of the opinion that the damages awarded by the trial court were too exorbitant. Of note however is the fact that the appellant did not submit nor give proposals on what he would have considered proper quantum in the circumstances both in the lower court and before this court. Be that as it may in considering this ground as stipulated in the memorandum of appeal, the court is guided by the case of **Butt vs Khan (1981) KLR 349** which set the following tenets:

“An Appellate Court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”

14. As stated by the trial court, the respondents proposed an award of Kshs 500,000 on pain and suffering and were awarded Kshs.150,000/= as the deceased succumbed to his injuries 6 days after the accident; and Kshs. 150,000 on loss of expectation of life but were awarded Kshs.100,000/=. A multiplier of 10 years for a 49 year old is reasonable. The ratio of 2/3 was also justified as the deceased was the bread winner with his youngest child aged 12. Kshs.15,000/= as opposed to the Kshs.30,000/= presented by the respondents was also a reasonable estimate considering the deceased was a self-employed carpenter. Special damages of Kshs.201,300/= were proved by way of receipts. I see no reason to interfere with the same.

15. From the totality of evidence, pleadings and legal arguments advanced by the parties, it is safe to conclude that the appeal lacks merit and should be dismissed with costs. The award under the Fatal Accidents Act shall be distributed among the spouse and children of the deceased as ordered by the trial court.

SIGNED, DATED AND DELIVERED ELECTRONICALLY THIS 14TH DAY OF OCTOBER, 2021

E.N. MAINA

JUDGE