



IN THE HIGH COURT OF KENYA AT NYAMIRA

CORAM: D.S. MAJANJA J.

CIVIL APPEAL NO. 13 OF 2016

BETWEEN

JOHNSON KAMAU NJUGUNA.....APPELLANT

AND

HANNAH WANGARI & SAMUEL MBUGUA

suing as legal representative of the estate of

CHARLES NJOROGE MBUGUA (DECEASED).....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. N. M. Kyanya

Nyamori, RM dated 11th December 2018 at Thika Magistrates Court in Civil Case No. 74 of 2017)

JUDGMENT

1. The appellant is dissatisfied with the judgment of the trial court where it held the appellant fully liable and awarded the respondent **Kshs. 50,000.00** and **Kshs. 80,000.00** for pain and suffering and loss of expectation of life under the **Law Reform Act (Chapter 26 of the Laws of Kenya)**, **Kshs. 800,000.00** for loss of dependency under the **Fatal Accidents Act (Chapter 32 of the Laws of Kenya)** and **Kshs. 57,500.00** for special damages. The appellant contests the trial court's finding on liability and quantum.
2. The fact that an accident took place and that the deceased died is not dispute. On 17th November 2012, the deceased was a pedestrian along the Nairobi – Naivasha Highway when he was hit by the respondent who was the driver of motor vehicle registration number KBE 532U.
3. The appellant's main contention is that deceased was a pedestrian who had a duty to care of his own safety and who contributed to the accident. Counsel for the appellant submitted that in the circumstances and at the very least the trial court ought to have apportioned liability. Counsel for the respondent took the view that from the circumstances, there was no evidence upon which the court could apportion liability as the evidence led on behalf of the respondents was not controverted and it showed that the deceased was blameless.
4. The matter proceeded for hearing. The appellant called one witness, Joseph Mburu Mwega (PW 2) to support its case. He recalled that in the evening of the material day, he was with the deceased at the bus stage when the deceased was hit by a motor vehicle. He told the court that the driver of the motor vehicle came at a high speed, lost control and hit the deceased who collapsed and died in front of him. When cross-examined, PW 2 admitted that he and the deceased had been drinking on that day at a merry-go-round meeting. He stated that, "*the deceased was also drunk*". He added in re-examination that he was not staggering and that he talking to the deceased at the stage when the deceased was knocked down.
5. The appellant called a police officer, Corporal Thomas Obonyo (DW 1) who gave the particulars of the accident. He stated that the matter was still under investigation and that that the accident took place at night when two men crossed the road from left to right and the deceased was hit by the side mirror and died. In cross-examination, he stated that PW 2 had written a statement in which he stated that he was standing at the stage and that according to the sketch on file, the deceased fell at the stage.
6. The question of who is to blame is a question of fact. Since this is a first appeal, I am alive to the principle that the first appellate court is required to reconsider the evidence, evaluate it and draw its own conclusions making an allowance for the fact that it neither heard nor saw the witnesses testify (see **Selle v Associated Motor Boat Company Ltd [1968] E.A. 123, 126**).
7. In this case there was only one direct witness who testified as to how the accident took place. PW 2 was firm that the deceased was knocked down at the stage by the appellant. In cross-examination, DW 1 confirmed that this is what PW 2 stated in his recorded statement to

the police. DW 1 did not give any evidence to show how the accident took place that would support the appellant's version of events. The respondent's case on the issue of liability was therefore uncontroverted. A bus stage is by its nature a place where people stand to wait for vehicles to stop. The suggestion that the deceased was drunk was admitted but the respondent failed to discharge its burden that the deceased behaved in a manner that he contributed to the accident. That the respondent drove into the bus stop at a high speed and knocked the deceased is clear evidence of negligence and I too, on my assessment of the evidence, find the respondent fully liable.

8. I now turn to the issue of damages. According to the memorandum of appeal dated 11th July 2016, the appellant contends that the global award of Kshs 800,000/- under the **Fatal Accidents Act (Chapter 32 of the Laws of Kenya)** was excessive and unjust considering the age of the deceased, that he was a pedestrian and in view of conventional awards in relation to such claims.

9. According to the plaint, the deceased was aged 54 years. He was an enterprising and hardworking businessman earning approximately Kshs. 20,000.00 per month from which he supported his family comprising his widow and four children; three adults and one child. The deceased's wife, Hannah Wangare Njoroge (PW 1), told the court the deceased used to buy and sell vegetables and even deliver them to Nairobi. He would earn Kshs. 20,000.00 or Kshs. 5,000.00 in a month.

10. Based on the evidence, the trial magistrate held that in the absence of proof of income, the global approach to assessing loss of dependency was most appropriate and relied on the words of Ringera J., in **Mwanzia v Ngalali Mutua and Kenya Bus Services (Msa) Ltd & Another** quoted by Koome J., in **Albert Odawa v Gichimu Gichenji NKU HCCA No. 15 of 2003[2007] eKLR** where he expressed the following view;

The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependancy, and the expected length of the dependancy are known or are knowable without undue speculation where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do.

11. I understand the appellant to be urging that the sum of Kshs. 800,000/- as awarded was inordinately high. In considering this award, the trial court cited the case of **Oyugi Judith and Another v Fredrick Odhiambo Ongong and 3 Others HB HCCA No. 25 of 2013 [2014] eKLR** where the court awarded Kshs. 700,000/- as a lump sum for a 30 year old boda boda operator whose income was not proved. In this case, the deceased was aged 54, was doing business where the income was estimated to be about Kshs. 20,000 per month and had a wife and child to support.

12. Counsel for the appellant urged that the trial court ignored the conventional award for damages in similar cases. I doubt that there can be a conventional award for damages for loss of dependency under the **Fatal Accident Act** as each case depends on the age of the deceased, the number of dependants, the age of dependants and period of expected dependency and income of the deceased amongst other factor. I also do not see how the status of the deceased as pedestrian would affect the manner of calculation of these damages.

13. In dealing with the issue of quantum of damages, the applicable principle is that this court will not ordinarily interfere with the findings of a trial court on an award of damages unless it can be shown that the court proceeded on wrong principles, or misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low (see **Butt v Khan [1981] KLR 349**). From what I have stated above, I cannot say in the circumstances that the award was too high to attract interference.

14. I dismiss the appeal with costs to the respondent.

DATED AND DELIVERED AT KIAMBU THIS 10TH DAY OF JANUARY 2020.

D.S. MAJANJA

JUDGE

Mr Muthee instructed by Kairu and McCourt Advocates for the appellant.

Mr Njuguna instructed by P. K. Njuguna and Company Advocates for the respondent.