REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CORAM; R. MWONGO, J.

CIVIL APPEAL NO. 31 OF 2017

KANJA SALOME.....APPELLANT

VERSUS

MWAURA NJOROGE (Suing as the legal representative of the of the Estate

of Nelson Njau Mwaura)(Deceased).....RESPONDENT

(Being an appeal from the judgment and/or decree of Resident Magistrate, Hon D Nyambu in Naivasha in CMCC Civil Suit No. 419 of 2013, delivered on 19th July, 2017.)

JUDGMENT

Background

1. The respondent was awarded damages of Kshs 919,425/= following the hearing of a suit concerning a fatal accident involving Nelson Njoroge, his son, on 9th March, 2013. Nelson had been riding a motorcycle registration number KMCB 779U along Nairobi – Naivasha road at Kinungi, when he was knocked down by motor vehicle registration No KBF 632B. At the hearing, the plaintiff availed three witnesses and the defendant availed one witness.

2. The trial court found and apportioned liability at 50% for each party, and awarded as follows:

Pain and suffering	Kshs	100,000/=
Loss of expectation of life	Kshs	100,000/=
Loss of dependency	Kshs	1,600,000/=
Special Damages	Kshs	38,850/=
		1,838,850/=
Less 50% Contribution	Kshs	919,425/=
Total	**Kshs**	**919,425/=**

3. Aggrieved, the appellant has challenged the award on both liability and quantum. On liability the appellant argues that there was no credible evidence on which the liability was founded; that the deceased made a risky move in crossing the road without waiting for oncoming vehicles to pass, failing in his duty to give way. On quantum, the appellant challenges all the sums awarded as inordinately high. Further, that special damages were not proved.

4. This being a first appeal, the court is bound by three principles: a) this Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions; b) In reconsidering and re-evaluating the evidence, the court must bear in mind and give due allowance for the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her, which this court has not had; and c) It is not open to this court to review the findings of the trial court simply because it would have reached a different outcome if it were hearing the matter for the first time. See: ***Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123***; ***Peter's v Sunday Post Limited [1958] EA 424***; and *Butt* ***v Khan (1977) KAR 1***.

Liability

5. The only eyewitnesses to the accident were PW2, James Mwangi, and DW1 Michael Kanja who was the driver of the vehicle that collided with the motorcycle.

6. PW1 said it was about 5.00pm; the deceased came out of a petrol station crossed and stopped for other vehicles to pass. The deceased was on the climbing lane and had stopped to let vehicles pass. He was knocked down by the vehicle which was travelling from to Naivahsa, and it stopped around 100 metres from the point of impact. There were three lanes at the place where the accident occurred. In cross examination, he said:

> ***"Deceased also left the petrol station crossed and stopped. One waits for oncoming vehicles. It was a risky move on his part"*** (Emphasis mine)

7. DW1 testified that as he was driving at about 70-80 kmph towards Naivasha. On reaching Kinungi, he saw a motor cycle crossing abruptly, from the right to the left, so he swerved to the left. He nevertheless hit the motorcycle and stopped after about ten metres from the scene of collision, and gave first aid. In cross examination, he said: the motor cycle came to his side, and was hit by the front right side of his vehicle; the point of impact being on his lane; that the deceased was under influence of beer and had been holding a beer bottle

8. PC Simon Njuguna from Naivasha police station where the accident was reported, testified as PW3. He was not the investigating officer. He said the information received was that the motorcycle was alleged to have crossed the road from the left to the right when the collision occurred. The vehicle stopped 95 metres away from the point of impact. PW3 was not aware of a petrol station at the scene. In cross examination he contradicted his earlier evidence by stating that the motorcycle crossed the road from right to left. He also said the deceased had a duty to give way. He was of the view that both vehicles contributed to the accident.

9. Both PW1 and DW1 were at one that as the deceased drove his motorcycle, he had to stop to allow vehicles to pass. It appears to me that it was the acknowledged risky movement of the motorcycle across the road that precipitated the swerving of the defendant to avoid a collision. At the same time, there is no doubt that the motorcycle was in the front of and on the right side of the car PW1 was driving. He therefore ought to have been able, in the light of the day, to slow down sufficiently to avoid an accident.

10. Assessing the evidence of both eyewitnesses, it is clear to me that the driver of the vehicle was confronted by a motor cycle that suddenly crossed over onto the road from his front right side. It is also clear that there was daylight, which is why DW1 says he swerved to the left. Unless he was not paying attention to the road, or was driving too fast, he ought to have been able in the daylight to see the motorcycle on his right hand side and applied his brakes. There is no evidence that he applied brakes. He also says he was driving 70-80 kmph. That, however, appears unlikely given that from the accounts of the police and PW2 it took 95-100 metres from the point of impact for DW1 to stop after hitting the motorcycle with his front right hand side. All drivers and cyclists driving on a road have a duty of care. I agree with the trial court that both contributed to the accident in the circumstances. I therefore would not interfere with the 50% finding on liability.

Quantum

11. The appellant challenges the awards on pain and suffering, loss of dependency and special damages.

12. On pain and suffering the appellant argues that the deceased died instantly and the award should have been between nil and 10,000/=. In the lower court, he cited the case of ***Albert Odawa v Gichimu Gichenji Nakuru HCCA 15/2003 [2007] eKLR.*** *The respondent relied on* ***Monica Muthoni Mwanga v Peterson Wanjohi & Another Nairobi HCCC of 2001*** *where the court stated it had no evidence of when the deceased died and made no award; and* ***Joseph Njuguna Mwaura v Builders Den Ltd and Anwarali Brothers Ltd Nakuru HCCC No 182 of 2003*** *where the court awarded 130,000/= for combined loss of expectation of life and pain and suffering.*

13. On appeal, the respondent however submits that in more recent cases, awards for instant death have been made for shs 100,000/=.

14. The trial court stated that the deceased died on the spot, on the strength of the evidence of PW1 who asserted that fact. The trial magistrate did not advert to any authorities upon which the award of Kshs100,000/= was premised, and those which had been cited did not support the award. I therefore agree with the appellant that the award of 100,000/= is excessive and cannot stand.

15. On loss of dependency, it is not disputed that the deceased was 30 years old at the time he died. There was no evidence of a wife or children. PW1 said the deceased used to help him with money, and that he used to live with the deceased. In the lower court, the appellant proposed an income of Kshs 5,000/= and multiplier of 12 years (based on a supposed life expectancy of 45 years) and a multiplicand of 12 with a ration of 2/3. The lower court found an income of Kshs 10,000/= X 20 X 12 X 2/3 =Kshs 1,600,000/=. The question is whether this amount was excessive and unjustified.

16. The appellant based his figure on the case of **Dyal Singh Virdee v David Mwangi Kabiru & Another [2013] eKLR**, and **Alpha Plus Western Kenya & Another v Mary Anyango Kadenya & Another [2015]eKLR.** In the **Dyal Singh case**, the deceased was a farmer aged 55 years at the time of his death in 2001 and the court held that he may have lived for 10 years and adopted an income of 5,000/=. Here the deceased died in 2013 aged 30. **Alpha Plus Western case**, was a consolidated case in which different income amounts were awarded for 25 years and 30 years respectively. In my view, these cases did not support the appellant's case in the lower court.

17. The evidence of PW2 was the deceased had been a motorbike rider for three years. However, there was no proof of income of the deceased, but that does not disentitle the respondent to damages under this head. Courts have held that where there is no documentary proof of income a lump sum amount may be awarded or the calculation may be based on the government minimum wage guidelines. '

18. In the ***Albert Odawa Case (supra)*** *it was stated that the* **aim in an award of damages is:**

> ***"to approximate what loss the estate of the Deceased has suffered following the wrongful death of the Deceased. It is, of course, not possible to come up with a precise figure for the loss. The Court merely tries to use all available evidence to come up with a figure which is fair and reasonable in the specific circumstances of the case. Where that is absolutely not possible, the Court resorts to the minimum wage as a last resort.***

19. In absence of better evidence, I will revert to the government minimum wages. The **Regulation of Wages (General) Amendment Order, 2011**, was in force at the time of the accident in March 2013. The wage of a light van driver in areas outside Municipalities was Kshs was 7, 811/= and the wage for a light wheeled tractor driver Kshs 7,507/=. As the object of an award of damages is not to award a precise amount with scientific exactitude, I would take the amount of Kshs 7,500/= as an appropriate approximate amount of the deceased's wages. I would accept that he would have live up to 50 years and will apply a multiplier of 20 years.

20. The calculation for loss of dependancy will therefore be:

7,500 X 12 X 20 X2/3 = 1,200,000/=

21. On special damages, the appellant argues that no receipts were availed at the hearing, and relied on the court record. The respondent

22. The record of proceedings shows that the only exhibits formally produced in court were PExb 1 the Grant, and PExb 2 the Police Abstract, by PW1 and PC Simon Njuguna, PW3, respectively. In the lower court file there is an Exhibit form showing Exhibits 1-7which exhibits are on the file. There is no indication in the proceedings that they were produced in open court by any particular witness. They include: Copy of vehicle records and receipt; some faded and illegible receipts; post mortem report and a demand letter. This is despite the respondent having pleaded for funeral costs of 37,000/= under special damages.

23. To the extent that these documents were not formally produced they cannot be relied upon as evidential documents in proof of special damages. However, there is some case law, with which I agree, to the effect that the absence of production of documents evidencing expenses incurred does not prevent the court from making an award on certain irrefutable costs. For example, reasonable mortuary costs and burial costs will inevitably be incurred if the deceased was taken to a mortuary and buried. Here, the oral evidence of PW1 was that the deceased was taken to the mortuary.

24. That was the position taken by the Court of Appeal in ***Jacob Ayiga Maruja & Another v Simeon Obayo [2005] eKLR*** when dealing with this point where it stated:

> ***"What has caused us some considerable difficulty is the award of Shs.117,325/= as special damages arising out of funeral expenses. That is the complaint in ground three of the memorandum of appeal. Of that sum Shs.4,000/= was claimed as the cost of the coffin, Shs.5,000/=, was claimed as mortuary bill and Shs.106,850 as funeral expenses. There was another Shs.1,475/= claimed in respect of the filing of an application for letters of administration. We think the claim for Shs.4,000/= as cost of the coffin and Shs.5,000/= as mortuary fee were reasonable in all the circumstances of the case though one would think receipts for these could have been produced. But we are not prepared to differ with the Judge on these items"***.

25. It is of course true that in **Jacob Ayiga's case**, the court awarded 60,000/= for funeral costs but clearly stated that they were not prescribing a rule that such a figure must always be awarded for funeral costs:

> ***"We, however, must not be understood to be laying down any law that in subsequent cases, Shs.60,000/= must be given as the reasonable funeral and other expenses".***

26. Following that authority, I held in **HCCA No 8 of 2018 David Kimani Githinji v Mutahi Hardware Stores** as follows:

> ***"In the case of Jacob Ayiga Maruja & Another v Simeon Obayo [2005] eKLR, the court awarded the plaintiff Kshs. 60,000/= for funeral expenses and held:***
>
> > ***"We agreed and the courts have always recognized that a reasonable award ought to be made in respect of reasonable and legitimate funeral expenses. But when such a large sum is claimed for such expenses then there ought to be proof of what the money was spent on. We however must not be understood to be laying down any law that in subsequent cases Kshs. 60,000/= must be given as reasonable funeral expenses. Those items are and must remain subject to proof in each and every case and the KShs. 60,000/= we have awarded herein apply strictly to the circumstances of this case."***
>
> ***The point need not be belaboured. It is well recognized that expenditure for burials in the African society is a rule rather than the exception. Burials in the African setting generally, but not always, cover costs such as coffin, mortuary costs, transporting the body, interment costs and so on. I am of the view that an award for funeral expenses can be made even in the absence of receipts as long as the amount is pleaded, and it is shown that there was a body to bury, and the amount claimed is reasonable. Similarly, the award made must be reasonable in the circumstances"***.

27. In light of the foregoing, I would award a global figure of 25,000/= as reasonable for both mortuary and burial costs in this case.

Disposition

28. In the result, I set aside the trial court's award and substitute the award as follows:

a. Pain and suffering Kshs 10,000.00

b. Loss of life expectancy Kshs 100,000.00

c. Loss of dependency Kshs1,200,000.00

d. Add Special damages Kshs 25,000.00

Sub-total 1,335,000.00

Less 50% Contribution *667,500.00*

Total **Kshs 667,500.00**

29. The appellant/defendant shall pay the respondent /plaintiff the amount awarded. Each party shall bear its own costs of the appeal.

30. Orders accordingly

Dated and Delivered at Naivasha this 12th day of February, 2020.

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RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Mburu K. for the Appellant
2. Gichuki holding brief for Nzavi for the Respondent
3. Court Clerk - Quinter Ogutu