



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL NO.78 OF 2015

GLADYS NANDOKHO.....1ST APPELLANT

JOB ALFRED WABULE.....2ND APPELLANT

(Both suing as personal representatives of JAMES BARASA WABULE)

VERSUS

HESKINS BAGOGO MASINDE.....1ST RESPONDENT

NZOIA SUGAR COMPANY LIMITED.....2ND RESPONDENT

[An appeal from the judgement in Webuye CMCC NO. 586 of 2010 delivered by HON Kingori Chief Magistrate on 27th June 2015]

J U D G M E N T

By plaint dated 9th March 2007 the appellants who were plaintiff in magistrate's court saw the Respondents (who were defendants) claims general damages under the Law Reform Act and Fatal Accident Act. Their claim was that on 18th February, 2015 the deceased James Barasa Wabwile was a pillion passenger along Bungoma Kanduyi road when the 1st defendant being a driver of motor vehicle registration KAH 743F owned by the 2nd Respondent so neglecting drover, managed and/or controlled the said motor vehicle that it hit the deceased was sustained serious injuries from which he died.

The particulars of negligence on part of the defendants were set out in paragraph 5 of the plaint as follows;

- a) Driving too fast and at an excessive speed in the circumstance.***
- b) Driving the said motor vehicle KAH 743 F in total disregard to traffic rules and common prudence.***
- c) Failing to stop, slow down, swerve or act in any other way so as to manage and control the said motor vehicle.***
- d) Driving defective vehicle.***
- e) Causing the accident by reckless driving.***
- f) Failing to have sufficient regard to other road users and failing to apply breaks sufficiently.***
- g) Driving on the wrong side of the road and hitting the deceased from behind.***

The particulars of dependents pursuant to Fatal Accident Act and special damages were set out under paragraph 7 and 8 respectively.

The Defendants entered appearance and subsequently filed his statement of defence dated 16th April 2007 denying the Plaintiff's claim and setting out particulars of contributory negligence on part of the deceased under paragraph 6 of the statement of defence as follows;

- i. Entering the Kanduyi-Bungoma road suddenly and riding a bicycle without reflectors.***
- ii. Failing to wear appropriate gear while on the said road.***

iii. Failing to give way while fully aware of the approach of the vehicle.

iv. Failing to observe provisions of the high way code and Traffic Act.

The case was fixed for hearing as against the defendants. The evidence before the trial court was that, Pw1, the Plaintiff, Gladys Lumbasi, she testified that deceased James Barasa Wabule was husband. She testified that he was involved in an accident on 18/2/2005 and she was not present when he died. She testified that she at home and she was informed through a phone call. She testified that she obtained letter of grant to file this suit and the same was issued to her. She stated that she paid Advocate fees of Kshs.22,500/= and produced a receipt. She testified that she was also issued with death certificate.

Pw2 Job Alfred Wabule testified that the deceased was his brother and he was issued with letters of grant. He testified that he was not at the scene of the accident and the accident was reported to the police and police abstract issued. He testified that he followed up and knew that the suit motor vehicle belonged to Nzoia Sugar Company. He testified that the deceased left a family that needs to be compensated.

On defence hearing the 1st Defendant Heskins Bagogo Masinde testified that he works at Nzoia Sugar Company as a driver. He testified that on 18/12/2005 he was from Bungoma and when he reached Ndekwe Area, it 5.30am and it was still dark but his headlights were on. He testified that that some motor cyclists crossed in front of him. He testified that they hit the vehicle's left hand side and headlight and fell down. He testified that they approached from the left and he swerve to the right to avoid the accident but he could not avoid the accident. He testified that he was driving at 50km/h and the cyclists had no reflectors. He testified that he drove to Bungoma Police Station and at the time of the accident he had a valid driving licence.

The parties recorded consent on liability at 90:10 % in favor of the plaintiff. After full hearing and consideration and upon the above evidence the trial magistrate entered judgement for the plaintiff on a grand total of Kshs.478,000/= as damages.

The appellants being dissatisfied then filed this appeal citing the following grounds:

i. The learned trial Magistrate erred in law and fact in failing to consider relevant factors in arriving at quantum;

ii. The learned trial Magistrate erred in law and fact in awarding damages which were inordinately low;

iii. The learned trial Magistrate erred in law and fact in failing to use a correct multiplier and failed to award proper and proved funeral expenses.

iv. That the learned magistrate erred in law and fact in disregarding the appellant's submission on quantum.

By order of the court, this appeal was canvassed by way of written submissions. The appellant submitted through Advocate Magare. He submitted that appellants pleaded funeral expenses of Kshs.20,000/= and this was proved however the same was ignored by trial court. He urged this court to rely on case law in *Mary Shesi Kivairu Vs. Jeffa Enterprises Ltd & Another Kakamega HCC. No. 17 of 2004*. He submitted on pain and suffering that the court would have awarded a convenient amount of Kshs.50,000/= and relied on case in *Sukari Industries Limited Vs. Clyde Machimbo Juma[2016] eKLR*. He submitted that the trial court erred in making award under Fatal Accident Act then deducting it from award under Law Reform Act.

He submitted that the court erred in using a multiplier of 18 years and multiplicand of Kshs.3000/= on deceased who was 39 years old and the same had no basis in law and fact. He submitted that he urged this court to reevaluate the quantum awarded.

The Respondents through Masinde Advocate submitted that the trial court did not error and properly assessed quantum on damages under the law Reform Act and Fatal Accident Act.

He submitted that the trial court was fair giving a dependency ratio of 2/3 considering deceased left behind widow and children however no birth certificate was produced. He submitted that the learned trial magistrate took into account all relevant factors appraised evidence on quantum and eventually assessed quantum.

This being a first appeal, this court is obliged to re-evaluate and reexamine the evidence before the lower court and arrive at its own independent conclusion. This is the principle of law that was well settled in the case of *Selle V Associated Motor Boat Company Ltd [1968] EA 123* where Sir Clement De le Stang stated that:

“ This court must consider the evidence, evaluate itself and draw its own conclusion though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect .

However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular Advocate 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 (Abdul Hammed Sarif V Ali Mohammed Solan [1955] 22 EACA 270).

I have carefully considered the evidence adduced and as analyzed by the trial court in the judgment. I have also considered the submissions made before this court by the appellant and the respondent taking into account all the decisions relied on. In my view, the issues for determination in this appeal is whether the quantum of damages awarded by trial court properly accessed.

From evidence it is not in dispute that an accident occurred and the deceased died due to the accident. The issue of contention is the quantum of damages awarded with regard to injuries sustained. The appellants contention is that is that quantum of damages awarded were too low.

On issue of quantum the principles upon which appellant court can consider in reversing the finding of an award of a lower court are well stated in **Butler Vs. Butler Civil Appeal No.49 of 1993**. The appellant must demonstrate that the court in exercising its discretion acted on wrong principles, failed to take into consideration matters which ought to have been considered or that the award is so excessive or low as would reflect on erroneous application of the principles of assessment of damages. On issue of special damages the trial court awarded special damages on what was proved and I have analyzed and I find the same is in order.

On issue of time of death the Respondent it is apparent on record that deceased died same day of the accident and trial court awarded was awarded damages of Kshs.10,000/= for pain and suffering. It is not clear from evidence how long it took for the deceased to die. It is my finding that he died on the same date of accident and thereof since award of damages is discretional, the trial court awarded of Kshs.10,000/= which I find to have been properly awarded.

On issue of loss of expectation the trial court held that the deceased was 39 years old at the time of death and awarded Kshs.80,000/= ,according to evidence adduced by PW1 it was alleged that the deceased earned Kshs.20,000/= and would have worked as a driver for another 28 years. However no evidence was adduced to prove his earning at time of death or employment thereof award under this head was properly done by the trial court.

With regard to lump sum amount awarded, the trial court awarded a lump sum amount of Kshs.478,305 .It is my finding that general damages under the Law Reforms Act must be deducted in full from the total lumpsum award made under the Fatal Accidents Act and the trial court properly deducted damages under Law Reform Act from the lumpsum amount because Deceased's estate cannot benefit twice.

In the premises, I do find that this appeal lacks merit and appeal is hereby dismissed with costs.

Dated, signed and Delivered at BUNGOMA this 5th day of June, 2020.

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S N RIECHI

JUDGE