REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CIVIL APPEAL NO. 11 OF 2018

MURIUKI RUTH.....APPELLANT

-VERSUS-

MUENI MBALUKU & JOHN MUKUMBU MUASYA (Suing as the Personal

Representatives of the estate of) **JOHN MBALUKU(deceased)....RESPONDENTS**

(An Appeal from the Judgment of Hon. G.M Mutiso (PM) in the Principal Magistrate's Court at Makindu, Civil Case No.534 of 2015, delivered on 7th December 2017)

JUDGMENT

1. The Respondents filed a suit in the lower court seeking general damages under the Law Reform Act *(LRA)* and the Fatal Accidents Act *(FAA)* on behalf of the Estate of *John Mbaluku* pursuant to a fatal road accident on 25/08/2015 *(material day)* at kwa Katolo stage along the Nairobi-Mombasa road. They also prayed for special damages, costs of the suit and interest.

2. The Appellant filed his statement of defence denying the entire claim. The matter proceeded for hearing and judgment was eventually delivered. The learned trial Magistrate apportioned liability in the ratio of 70:30 in favor of the Respondents and assessed damages as follows;

Pain & suffering…….kshs 100,000/=

Loss of expectation of life……kshs 100,000/=

Loss of dependency……...kshs 2,255,800/=

Special damages…….kshs 121,180/=

Total……..…kshs 2,576,980/=

Less 30%.....kshs 773,094/=

Net award……..…. kshs 1,803,886/=

3. Aggrieved by the award, the Appellant filed this appeal through Muli & Company advocates and listed 15 grounds which are unnecessarily repetitive and I have summarized them as follows;

a) ***That,*** *the learned trial Magistrate erred in law and fact by making a finding on liability at 70% against the weight of the evidence.*

b) ***That,*** *the learned trial Magistrate erred in law and fact by making an award on quantum which was too high and unsupported by relevant authorities, doctrine of precedent, case law and laws of natural justice.*

4. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.

5. With regard to liability Mr. Muli for the Appellant submits that the trial court ignored the evidence of Pw1 and Dw1 indicating the lack of fault on her driver's part. She submits that the plaint indicates that the deceased had parked off the road yet the evidence on record shows that

the deceased was joining the road from a feeder road. He relies on **Migori HCCA No. 52 OF 2017; Daniel Otieno Migore –vs- South Nyanza Sugar Co. Ltd (2018) eKLR** where the Court stated that;

> *"It is now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence however strong that tends to be at variance with the pleadings must be disregarded."*

6. He submits that the negligence of the deceased should not be visited on the Appellant since the deceased is said to have been unlicensed and uninsured hence incompetent.

7. It is also his submission that the trial court shifted the responsibility of proof by finding that the distance of 10 meters, at which the driver saw the cyclist, was sufficient to brake. He contends that by so holding, the trial court turned itself into an expert on road use. He relies on **Civil Appeal No. 215 of 1997; Kenya Breweries Ltd –vs- Alex Ephraim Induswe** where the Court of Appeal expressed itself as follows;

> *"The learned Judge seems to have turned himself into an expert in driving skills and came to the conclusion he did as to the negligence on the part of the second defendant based solely on the theory of what one can do when driving below or above 50kph."*

8. Further, he submits that even the police officer confirmed that the driver acted reasonably by swerving to the far right to avoid the cyclist who was joining from the left.

9. With regard to quantum, he submits that the trial court erred by adopting a multiplicand of Kshs.11,279/= for the following reasons;

a) There was no proof that the deceased was a boda boda rider since the allegation of having parked at the roadside waiting for passengers has been debunked.

b) Pw2 did not produce any evidence to prove that the deceased was a boda boda rider.

c) Pw2 testified that she had no proof to show that the motor cycle belonged to the deceased and did not have proof of his earnings.

d) The deceased was not licensed to ride a motor cycle and cannot be classified as a rider let alone a driver.

e) The motor cycle was not insured hence could not have been fit to carry passengers or goods to satisfy the criteria of being a boda boda.

10. He has urged the court to adopt a multiplicand of Kshs.5,436/= being the minimum wage prescribed for unskilled workers. He also faulted the trial court for adopting a multiplier of 25 years and contends that life expectancy in Kenya is an average of about 50 years. He submits that 17 years is a reasonable multiplier and relies on **Nakuru HCCA No. 182 of 2003; Joseph Njuguna Mwaura –vs- Builders Den Ltd & Anor (2014) eKLR** where the Court adopted a multiplier of 17 years for a 35 year old deceased.

11. The Respondents are represented by Mr. Mochama advocate. On liability, he submits that the version in the OB belongs to the Appellant's driver as he was the reportee. He submit that no party can self-incriminate hence the deceased was condemned unheard as he was not available to record his version. Further, he submits that in the absence of an independent eye witness, the Appellant's version should be treated with extreme caution. He contends that the trial court had the opportunity of hearing and evaluating the demeanor of the witnesses hence justified in apportioning liability as it did.

12. On quantum, he supports the award of Kshs.100,000/= for pain and suffering and submit that although the deceased succumbed to his injuries on the same day, he still experienced some pain before actual death.

13. He also supports the award of Kshs.100,000/= for loss of expectation of life and relies on **Nairobi HCCC No. 1209 of 1999; Jane Achieng' Kinda –vs- Charles Mageto** where the court awarded Kshs.200,000/=.

14. In respect to loss of dependency, he submits that from the demeanor of witnesses and evaluation of evidence, the trial court must have been persuaded that indeed the deceased worked as a motor cycle taxi driver and was heading to work on the material day. He contends that the adoption of a driver's minimum wage was justified. Further, he submits that the deceased had 3 dependants hence the ratio of 2/3 is reasonable.

15. He submits that the deceased was in private business which ordinarily does not require a retirement age. He contends that the multiplier of 25 years would make the deceased 57 years which is still less than the required retirement age for public servants hence cannot be said to be excessive.

16. He submits that special damages were pleaded and proved. He has invited this court to confirm this from the trial court's record.

Analysis and determination

17. Section 78(2) of the Civil Procedure Act gives an appellate court the same powers to those of the lower court. It provides:

"(2) Subject as aforesaid the appellate court shall have the same powers and shall perform as nearly as may be same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein."

18. It is now settled that the duty of a first appellate court is to analyse and re-evaluate the evidence on record in order to reach its own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses: this was restated in the case of **Oluoch Eric Gogo –vs- Universal Ltd (2015) Eklr** where the court stated:

"As a first appellate court the duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal case of SELLE & ANOTHER –VS

ASSOCIATED MOTOR BOAT CO. LTD & ANOTHER 91968) EA 123, my duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect……"

…….From the above decisions which echo section 78 of the Civil Procedure Act, it is clear that this court is not bound to follow the trial court's finding of fact if it appears that either it failed to take into account particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally".

19. Having considered the grounds of appeal, the rival submissions and entire record, it is my considered view that the following issues arise for determination;

a) Who was to blame for the accident and to what extent?

b) Should the quantum of damages be disturbed?

Issue (a) Who was to blame for the accident and to what extent?

20. **Pw1** was **P.C Justin Karanja**, the investigating officer. He testified that on the material day at 9.20am, he received a report of an accident at *kwa Katolo* area along Mombasa-Nairobi road and proceeded to the scene. He found that the deceased had been riding a motor cycle when he was hit by a motor vehicle. The motor cycle and motor vehicle were still at the scene and the rider was badly injured. He drew a sketch plan and prepared a police abstract. There were no skid marks to show that the driver of the motor vehicle had applied emergency brakes. The driver swerved to the extreme right to avoid hitting the motor cyclist. He produced the police abstract as P.Ex-1.

21. On cross examination, his opinion was that the file should have been disposed off in an inquest but the recommendations of a senior officer prevailed. He did not charge the driver. The motor vehicle was on the main road heading towards Nairobi and the motorcyclist was joining the main road from a feeder road on the left side when the accident occurred. The motor cycle should have given way to the motor vehicle. He did not see the insurance cover of the motor cycle and the driving licence of the motor cyclist. The driver of the motor vehicle had an insurance cover and a driving license. The motor cyclist contributed to the accident.

22. **Dw1** was **Francis Njau Munywira,** the driver of motor vehicle KCB 268M. He testified that on the material day, he was driving from Voi to Nakuru and was involved in an accident at Makindu. That a motor cyclist emerged from a feeder road on the left side of the road and entered the main road. He had 10 years of driving experience and had never caused an accident.

23. On cross examination, he said that he recorded his statement one year after the accident but his memory was very fresh. He agreed that his lights were off when the accident happened. He agreed that his statement does not indicate that the rider emerged from a feeder road but instead, it states that the rider crossed the road. He denied that he was overtaking another vehicle when the accident happened. The accident happened on the left side of the road facing Nairobi direction. He was at a distance of 10 meters away when he saw the rider. The motor vehicle hit the rider with its front left tyre. Traffic officers found him at the scene of the accident.

24. He agreed that it was him who informed the police officers how the accident occurred and they put the information in the police abstract. The rider had no opportunity to record a statement and explain the accident.

25. It is evident that the evidence adduced does not support the pleadings on how the accident occurred. In her statement, the deceased's widow (Pw2) reiterated that the deceased was sitting on a motor cycle at a parking bay when he was hit by the motor vehicle. Needless to say, she was not an eye witness but it is clear that the Respondents' intention was to wholly blame the Appellant's driver for the accident.

26. The evidence shows that the Appellant's driver was on his proper lane on a highway when the accident occurred. Although the Respondents have discredited the driver's version on the basis that he could not incriminate himself, there is the evidence of Pw1 who found the vehicle and motor cycle at the scene. His evidence that the vehicle swerved to the extreme right indicates that the driver tried to avoid hitting the motor cycle. In my view, Dw1 was a credible witness and his evidence was to some extent corroborated by Pw1. In apportioning the liability, the trial Magistrate expressed himself as follows;

"I apportion much blame to the driver of motor vehicle registration No. KCB 268m because he failed to brake or slow down so as to avoid the accident. Pw1 stated that there were no skid marks at the scene to show that the driver (Dw1) applied emergency brakes. Dw1 did not explain why he failed to apply emergency brakes yet he saw the motor cyclist at a distance of 10 meters away. A distance of 10 meters was enough for Dw1 to apply emergency brakes but he did not do so. Had Dw1 applied emergency brakes, the

accident would not have occurred or the impact of the accident would have been reduced. The injuries may not have been severe had Dw1 applied emergency brakes."

27. With tremendous respect, my view is that the analysis by the trial Magistrate was one sided because he gave too much weight on the driver's failure to apply emergency brakes. It can as well be argued that the accident would not have occurred if the rider had given way. Infact, I am of the view that the rider owed the driver a higher duty of care because he was the one seeking to join the main road from a feeder road. He therefore had a duty to ensure that the road was clear before doing so.

28. Despite the deceased's carelessness, it is evident that the driver tried to salvage the situation by swerving to the extreme right. He probably could have done more but I am convinced that he did well in the circumstances. As to whether 10 meters is sufficient to apply emergency brakes, I can only speculate. Accordingly, the evidence shows that the deceased should shoulder a higher portion of blame. I am of the view that liability should be apportioned in the ratio of 50:50.

Issue no. (b) Whether the quantum of damages should be disturbed.

29. Awarding damages is largely an exercise of judicial discretion and the instances that would make an appellate Court interfere with that discretion are well established. In **Butt –vs Khan (1977)1KAR** it was held that;

"*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 the 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.*

Award under Law Reform Act

30. On pain and suffering, the death certificate (P.Ex 3) indicates the date of death as 01/09/2015. That was approximately one week after the accident. It is trite that the consideration to be borne in mind while awarding damages under this head is the length of time that a person suffers before succumbing to injuries.

31. I find relevance in the words of Majanja J. in **Sukari Industries Limited –vs- Clyde Machimbo Juma; Homa Bay HCCA No. 68 of 2015 [2016] eKLR** where he stated that;

"[*5] On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased's estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs.10,000/= to Kshs.100,000/= over the last 20 years hence I cannot say that that the sum of Kshs.50,000 awarded under this head is unreasonable."*

32. Similarly, it is my considered view that the award of Ksh.100,000/= in the instant case was not inordinately high.

33. The complaint with regard to the award for loss of expectation of life is that the trial Magistrate allowed for double compensation by failing making the relevant deductions. I find relevance in the explanation given by the Court of Appeal in **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru**

Mwenja (Deceased) –vs- Kiarie Shoe Stores Limited [2015] eKLR. The learned Judges expressed themselves as follows**:**

"*20. This court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the Law Reform Act and dependants under the Fatal Accidents Act are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the Law Reform Act, hence the issue of duplication does not arise.*

21. The confusion appears to have arisen because of different reporting of the Kemfro case (supra) which was heavily relied on by Mr. Kiplagat. The version he relied on is from [1982-88] 1 KAR 727 which concentrates on the decision of Kneller JA in extracting the ratio decidendi. The same case, however, is more fully reported in [1987] KLR 30 as Kemfro Africa Ltd t/a Meru Express Services 1976 & Another -VS- Lubia & Another (No. 2) and the ratio decidendi is extracted from the unanimous decision of all three Judges. It was held, inter alia, that:-

"*6. An award under the Law Reform Act is not one of the benefits excluded from being taken into account when assessing damages under the Fatal Accidents Act; it appears the legislation intended that it should be considered.*

7. The Law Reform Act (Cap 26) section 2 (5) provides that the rights conferred by or for the benefit for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accidents Act. This therefore means that a party entitled to

sue under the Fatal Accidents Act still has the right to sue under the Law Reform Act in respect of the same death.

8. The words 'to be taken into account' and 'to be deducted' are two different things. The words in Section 4 (2) of the Fatal Accidents Act are 'taken into account'. The Section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the Fatal Accidents Act, the trial judge bore in mind or considered what he had awarded under the Law Reform Act for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction."

34. In our case, the plaint indicates the deceased's dependants to be his wife, father and three children. His widow, Pw2 produced birth certificates for two children as P.Ex 5 & 6. The FAA provides that the dependants of a deceased person are parents, spouse and children and the LRA provides that the rights conferred by the Act are for the benefit of the estates of deceased persons.It is therefore evident that the beneficiaries in both regimes are the same. There is no indication in the judgment that the trial Magistrate considered the award under the LRA in making the award under the FAA. Accordingly, I agree with the Appellant that the award under the LRA should be deducted.

Award under the Fatal Accidents Act

35. With regard to the multiplicand, it was pleaded that the deceased was a motor cycle rider with an average income of kshs 2,000/= per day. The deceased's wife testified that the deceased owned a motorcycle and worked as a *boda boda* operator. Further, she testified that the deceased used to give her kshs 2,000/= every evening for her expenses together with the children. It appears that the deceased used to surrender all his daily income and start the next day on zero. To me, it doesn't appear realistic because even in the motor cycle business, there are expenses such as fueling.

36. Be that as it may, the Appellant does not agree that the deceased was in the motor cycle business. I noted the evidence of Pw1 to the effect that he did not see an insurance cover on the motor cycle and did not see the deceased driving licence. The Respondents were ably represented by counsel hence reasonably expected to be aware of the issues of licensing and ownership that were raised in cross examination.

37. Pw1 testified on 02/03/2017 and Pw2 testified on 18/05/2017. The period in between is approximately 2 months and 2 weeks. In my view, if indeed the deceased had an insurance cover and a licence, there was more than sufficient time for the Respondents to file a supplementary list of documents and avail the documents. They chose not to do hence at this point, the probability that the deceased did not have the documents is higher. Further, Pw2 conceded that she had not produced anything to prove that the motor cycle was owned by the deceased.

38. The fact that the deceased was hit while riding a motor cycle does not automatically mean that he operated a motor cycle taxi. Accordingly, it is my considered view that the deceased's alleged occupation as a *boda boda* operator was not proved on a balance of probabilities. I agree with the Appellant that the multiplicand should be the minimum wage for an unskilled laborer.

39. The deceased having died on 01/09/2015, the applicable minimum wage is as provided in the **Regulations of wages (General) (Amendment) Order, 2015** which came into operation on 01/05/2015. The accident occurred within Makueni county and the deceased was taken to Makindu hospital before being transferred to Kenyatta national hospital. I will therefore adopt Makueni county as his residence. Accordingly, his category is that of a general laborer under column 4 for *'all other areas'* hence entitled to a minimum wage of Kshs.5,844/20.

40. With regard to the multiplier, the deceased was 32 years old and the trial Magistrate adopted a multiplier of 25 years. The Appellant submitted that the reasonable multiplier would have been 17 years.

41. I have observed the trends in decided authorities and in **Machakos HCCC No. 53 of 2014; Hyder Nthenya Musili & another –vs- China Wu Yi Limited & another [2017] eKLR,** a multiplier of 25 was adopted for a 32 year old deceased. In **Nairobi HCCC NO. 1299/1998; Elijah Ole Kool –vs- George Ikonya Thuo,** a multiplier of 20 was adopted for a 36 year old deceased.

42. It is therefore my considered view that the multiplier used in the instant case is within an acceptable range.

43. The dependency ratio of 2/3 was not contested and I believe it was justified as the deceased was married with 3 children. It was also pleaded that his father was a dependant as well. Accordingly, the award for loss of dependency should therefore work out as follows; 5,844.20x 12 x 25 x 2/3 = 1,168,840/=.

44. The special damages pleaded were kshs 124,763/= and in awarding Kshs.121,180/=, the trial Magistrate expressed himself as follows;

"*Some of the receipts produced in support of the claim for funeral expenses are not legible. However, the deceased died and must have been buried at high expenses. The body was transported from Kenyatta Hospital Mortuary where he died to his home at Kiundani Makueni county as per the plaint and the evidence of Pw2. During burial preparations, people are mourning and they rarely keep receipts for burial expenses in anticipation of filing case for compensation. I award Kshs 120,000/=as reasonable funeral expenses. I further award Ksh 680/= as court fees for obtaining letters of Administration and Kshs.500/= for official search.*"

45. Indeed, the receipts from KNH are not legible but it is evident and obvious that funeral expenses were incurred. The legible receipts amount to kshs 10,200/=. Be that as it may, I agree with the trial Magistrate that the amount awarded was reasonable in the circumstances.

46. The award should therefore be as follows;

Pain & suffering…….Kshs 100,000/=

Loss of dependency……...Kshs 1,168,840/=

Special damages…….Kshs 121,180/=

Total…….……..Kshs 1,390,020/=

Less;

Loss of expectation of life……Kshs 100,000/=

1,290,020/=

Less 50%.....Kshs 645,010/=

Net award……..…. Kshs 645,010/=

47. The upshot is that the appeal succeeds to the extent stated above. The judgment of the trial court is set aside and substituted with a judgment for Kshs.645,010/= plus interest and costs. The Respondent will pay half the costs of the appeal.

Orders accordingly.

Delivered, signed & dated this 10th day of November 2020, in open court at Makueni.

.....

H. I. Ong'udi

Judge