



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL APPEAL NO. 4 OF 2018

OMANGA FISH LIMITED.....APPELLANT

-VRS-

CKB & M

(Suing as the Legal Representative of the Estate of

JMM(Deceased).....RESPONDENT

{Being an Appeal from the Judgement and Decree of Hon. E. K. Nyutu – PM dated 25th August 2017 and delivered on the 6th day of February 2018 in the original Nyamira Principal Magistrate’s Court Civil Suit No. 102 of 2015}

JUDGEMENT

The appellant herein being dissatisfied with the judgement of the lower court on liability as well as quantum of damages has appealed on the following grounds: -

- “1. That the learned trial Magistrate erred both in Law and principle, by applying erroneous principle in computation of damages payable thus arriving at erroneous and grossly excessive estimates of General damages payable.**
- 2. That the award of General damages awarded to the Respondent was manifestly and inordinately excessive in the circumstance.**
- 3. That the learned Magistrate erred in law and/or in fact and in principle by ignoring the evidence in regards to the cause of accident and as noted during the trial, more specially, that the Respondent was wholly to blame or substantially to blame for the cause of the accident and ought to have shouldered substantial contributory negligence or whole liability and thus, the court acted in error in fixing liability at 100% against the Appellant and thus making grave and prejudicial omission.**
- 4. That the Learned trial Magistrate acted in error when the same failed to properly evaluate evidence on record thus reaching erroneous decision.**
- 5. That the Learned trial Magistrate acted in error when the same relied on extraneous issues as a basis of determination of Liability.”**

It is the appellant’s prayer that the entire judgement be set aside and the suit be dismissed or in the alternative that this court do revisit the issue of liability as well as the quantum of damages and apportion the same applying the right principles and the law. The appellant also prays that the respondents be condemned to the costs of this appeal.

The advocates for the parties agreed to canvass the appeal by way of written submissions but it would appear that only those of the appellant’s advocate were received. It is instructive to note that counsel for the respondent was represented when directions were given and a date for judgement given.

On the issue of liability, counsel for the appellant submitted that the only witness called by the respondent could not have witnessed the accident because he was not sure whether the deceased was riding a motorcycle or a bicycle. Counsel submitted that the evidence of the witness was inconsistent and contradictory. Counsel contended that this evidence contradicted the averment in the plaint that the deceased was a pedal cyclist implying that he was riding a bicycle. He submitted that parties are bound by their pleadings and for that reason the trial magistrate ought to have come to the conclusion that the evidence of the witness was not credible and dismiss the case.

Counsel further submitted that the evidence adduced by the appellant's witness was not rebutted and as the Traffic Base Commander who testified in the case stated there was nobody to blame in the case then the deceased was the author of his own misfortune and the only one to blame for the accident. He submitted that negligence was not proved against the appellant on a balance of probabilities and the appellant cannot be held liable. He urged this court to set aside the judgement and allow the appeal. He submitted that should this court not agree with his submissions then it should apportion liability between the appellant and the respondent in the ratio 50:50%. On this he relied on the case of **Postal Corporation of Kenya & Another Vs. Dickens Munayi [2014] eKLR** where the court stated: -

“.....for the foregoing reasons, I am clear in my mind that it is difficult to tell the extent to which each party (Respondent and Appellant's driver) contributed to the accident. And as rightly submitted by counsel for the Appellants, when court is in doubt on the extent of contribution by either party, the most prudent thing to do is to apportion the contribution at the ratio of 50%:50%.”

On the quantum of damages, counsel submitted that the trial magistrate erred in adopting a minimum wage of 10,154/= as the deceased's monthly income as that wage applied to Nairobi, Mombasa and Kisumu cities. He submitted that the applicable wage was Kshs. 5,855.20 for other areas as the accident occurred at Nyamatara area.

On the multiplier, counsel submitted that 25 years would have been more reasonable noting that it is possible that the deceased who was 28 years old may not have lived to retirement age. To support his argument, he cited the cases of: -

(a) Petrocity Enterprises (U) Ltd Vs. Roseline Sikudi suing as legal representative of the Estate of Pascal Ngadi (Deceased) & 2 others [2017] eKLR.

(b) David Kajogi M'mugaa Vs. Francis Muthomi [2012] eKLR.

Counsel noted that the appellant does not dispute the dependency ratio of 2/3 but submitted that the award for pain and suffering should be reduced to Kshs. 20,000/= as the deceased died on the spot and the award of Kshs. 100,000/= was therefore excessive. On this counsel relied on the case of **Festus Akolo & Another Vs. Dickson Taabu Ogutu [2016] eKLR**. The special damages are not disputed and counsel submitted that the appellant agrees that the award for loss of expectation of life should be discounted from the award under the Fatal Accidents Act.

I have considered counsel's submissions but as a first appellate court I have a duty to reconsider the evidence of the court below so as to arrive at my own conclusion (**See Selle Vs. Associated Motor Boat Company [1968] EA 123**). I am also alive to the principle that I should be slow to interfere with the lower court's findings of fact as the same was based on witnesses seen and heard an advantage which I did not have. This court can only interfere if the finding of the lower court is clearly wrong, or is based on no evidence at all or if the wrong principle is applied.

The trial magistrate delivered a well-considered judgement. However, it is my finding that she misdirected herself in finding the appellant wholly to blame for this accident. This court is persuaded that Pw1 may not have witnessed the accident as the police officer (Dw1) who investigated the accident stated that there were no witnesses at the scene. The investigating officer being an independent witness would have had no reason to lie to the court. Be that as it may both the investigating officer (Dw1) and the appellant admitted that an accident did in fact occur on the date and at the place it is alleged to have occurred. They also admitted that the accident involved the appellant's motor vehicle and the deceased. It is my finding that the occurrence of the accident having been admitted the question of whether the deceased was a motor cyclist or a pedal cyclist is not material. What is material is the question of who was to blame for the accident. If we were to take the appellant's version or account of how the accident occurred, it is clear that he must shoulder the biggest blame. He had seen the motor/pedal cyclist and was overtaking him when he alleges that the motor/pedal cyclist was sucked into his vehicle. In his own words this happened towards the middle of the vehicle away from the view of the side mirror. It is my finding that firstly he must as was found by the trial magistrate have been at a very high speed. Secondly because his side mirrors did not have a view of the whole of his vehicle then his failure to keep a proper look out also contributed to the accident. Had the vehicle had side mirrors that could assist the driver to see right to the end of the trailer then the accident could have been avoided. The deceased also failed to keep to the extreme left as was expected of a vehicle that was being overtaken and he too must shoulder some blame. I would apportion liability in the ration 75%:25% in favour of the respondent against the appellant.

On the issue of damages, the principle is that this court should not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate or if it is shown that in arriving at the award, the trial magistrate proceeded on wrong principles or that the trial magistrate misapprehended the evidence in some material respect – **see Kimotho & others Vs. Vesters & Another [1988] KLR 48**.

On the assessment of damages, the trial magistrate was right to base the deceased's income on the minimum wage provided in the Regulation of Wages (General Amendment) order 2015. She however misdirected herself in using the sum of Kshs. 10,154/= as the same was applicable only in Nairobi, Mombasa and Kisumu cities. I agree with counsel for the appellant that the correct figure should have been Kshs. 5,844.20 as that is what was payable in other areas such as the one where this accident occurred.

On the multiplier, the trial magistrate did not consider the vagaries of life and I agree that a multiplier of 25 years would be reasonable. My decision on this is fortified by the case of **David Kajogi M'mugaa Vs. Francis Muthomi [2012] eKLR**. The dependency ratio was not disputed and it will not therefore be disturbed. Damages under the Fatal Accidents Act shall therefore be calculated as follows: -

5,844.20 x 25 x 12 x 2/3 = 1,168,840/=

For pain and suffering the deceased having died on the spot a sum of 20,000/= would have sufficed.

The appeal herein therefore partially succeeds and the judgement of the lower court is to that extent set aside and judgement entered as follows: -

1. The appellant to shoulder only 75% Liability.

2. General Damages

(A) Under the Law Reform Act

Pain & Suffering - Kshs. 20,000

Loss of Expectation of Life - Kshs. 100,000

(B) Under Fatal Accident Act

Loss of dependancy

= $5,844.20 \times 25 \times 12 \times \frac{2}{3}$ - Kshs. 1,168,840

Sub-total - Kshs. 1,288,840

Less award for loss of expectation of life - Kshs. 100,000

Sub-total - Kshs. 1,188,840

(C) Special damages

(i) Funeral Expenses - Kshs. 60,000/=

(ii) Legal Fees (Letters of Administration

ad Litem) - Kshs. 20,000/=

Sub-total - Kshs. 1,268,840/=

Less 25% Contribution - Kshs. 317,210/=

TOTAL - Kshs. 951,630/=

3. Interest on special damages at court rates from the date of filing suit.

4. Interest on general damages at court rates from the date of judgement in the lower court.

5. Costs of this appeal be borne by the respondent.

The award under the Fatal Accidents Act shall be distributed equally between the spouse and the children of the deceased and shall in the case of the minor children be invested in an interest earning account in a reputable bank until they attain 18 years, their mother only withdrawing from the account with leave of this court.

Signed, dated and delivered in Nyamira this 7th day of February, 2019.

E. N. MAINA

JUDGE