REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 34 OF 2012

CATHOLIC DIOCESE OF KISII.....APPELLANT

VERSUS

PETER O. ISABOKE.....1ST RESPONDENT

EUNIAH MARIA ISABOKE.....2ND RESPONDENT

Suing as legal representatives in the estate of

EVANS ISABOKE MOKUA (Deceased)

(Being an appeal from the judgment of Hon. L. M. Nafula (SPM) delivered on 9th February, 2012 in Ogembo Civil Suit No. 124 of 2009)

JUDGMENT

1. Being aggrieved with the decision of the trial court in Civil Suit No. 124 of 2009, the appellant has lodged this appeal on the following grounds;

i. The learned trial magistrate erred both in law and in fact by finding that the respondents had capacity to sue on behalf of the estate of Evans Isaboke Mokua without the involvement of the widow who was alive at the time of the filing of the suit and the delivery of judgment;

ii. The learned trial magistrate erred both in law and in fact by finding the appellant liable to the extent of 80% on liability contrary to the evidence on record;

iii. The learned trial magistrate erred both in law and in fact by failing to consider the appellant's evidence as to the circumstances of the alleged accident and instead relied on the respondent's evidence which was not only inadequate but also contradictory;

iv. The learned trial magistrate erred both in law and in fact by failing to consider the fact that the appellant had in fact employed the deceased's widow to take over the position of her late husband and that the award in favour of the deceased's estate had the effect of compensating the deceased's estate twice;

v. The learned trial magistrate erred both in law and in fact by disregarding the evidence of PW2 and relying on the evidence of PW3 who was not even at the scene of the alleged accident;

vi. The learned trial magistrate erred both in law and in fact by awarding damages under both the loss of dependency and loss of expectation of life without taking account the award under loss of expectation of life;

vii. The learned trial magistrate both in law and in fact by awarding the respondents for funeral expenses and special damages without any evidence of proof whatsoever; and

viii. The learned trial magistrate erred both in law and in fact by shifting the burden of proof to the appellants.

2. Being a first appeal, this court is called upon to analyse and re-assess the evidence on record and reach its own conclusions bearing in mind that it neither saw nor heard the witnesses testify *(see **Selle v Associated Motor Boat Co. [1968] EA 123**)*.

3. The respondents instituted a suit against the appellant as legal representatives in the estate of EVANS ISABOKE MOKUA (Deceased) for special and general damages after their father died in a fatal road accident. The appellant filed a statement of defence contesting the claim

and pleaded that the accident had occurred as a result of the deceased's negligence.

4. The respondent called 3 witnesses in support of its case whereas the appellant called 2 witnesses.

5. Peter Oyake Isaboke (PW1) testified that the deceased, who was his father, passed away on 11th July 2008 after being knocked down by motor vehicle registration number KAT 533 Y along Ogembo Sengera road at about 3:00 p.m. He was rushed to hospital and passed away while undergoing treatment.He testified that the deceased was aged 47 years and was a casual labourer at Nyabioto Secondary School where he earned Kshs. 10,000/= per month. PW 1 stated that the dependants of the deceased were him, Mariki Isaboke, Comen Isaboke, Dennis Isaboke, Roda Isaboke and Mary Isaboke. He testified that they were all going to school and depended on the deceased for school fees, food and clothing. He also testified that they had spent Kshs. 20,000/= on funeral arrangements. He told the court that according to the police abstract, the offending vehicle belonged to the respondent which he stated had not compensated them or assisted them in the burial arrangements.

6. On cross examination, he admitted that he had not witnessed the accident. PW1 stated that at the age of 28 he was unemployed and was still depending on his father. He explained that the reason his mother's name was not included amongst the dependentswas because she was quite aged and could not understand the proceedings. He stated that his mother had not been employed by Nyabioto Secondary School and that she was jobless. He also denied that the deceased had been the cause of the accident.

7. Corporal Nyamira Elsie (PW2) produced a copy of the abstract which had been prepared by her colleague P.C. Nyambura. She testified that the offending vehicle registration number KAT 533Y belonged to the respondent and had been involved in the accident which led to the deceased's death. She stated that from the sketch plan the possible point of impact was 5.4 metres from the right side of the road which was 6 metres wide. She admitted that she did not investigate the accident and that nobody had been charged in respect of the accident.

8. Christopher Magembe (PW3) testified that on 1st July 2008 just before 1:00 p.m., he saw the vehicle registration number KAT 533Y hit the deceased. That the driver was driving at a high speed and swayed to avoid a pothole but hit the deceased who was standing about 3 meters off the road. He testified that they rushed the deceased to the hospital and later learnt that he had passed away.

9. Pacific Kerubo Isaboke (DW1)the deceased widow, gave evidence for the defence. She stated that he was knocked down by Evans Mititi a priest and died on 12th July, 2008. She told the court that the deceased used to work at Nyabioto Secondary School and when he died she had replaced him. She told the court that she had not discussed with her family onhow the suit would be filed and that the respondents, who were her children, filed the suit without her knowledge and that they had left out her name yet she was dependent on the deceased. She testified that she had resolved with the deceased's family and neighbours and not to pursue the case.

10. Evans Nyabwaru Matiti (DW2) told the court that he was a priest by profession. On the material day at about 1:20 p.m. he was driving at 40 km/ph along Kisii- Kilgoris road and on reaching Omoringamu area, he saw a stationary vehicle on the right side of the road. Suddenly, the deceased ran from behind the Nissan and made to cross the road. He only saw the deceased when his vehicle had approached and was only 2 metres away. The deceased hit the left side of his bonnet and fell down. DW 2 stopped the vehicle and rushed the deceased to Gucha District Hospital where he received first aid and was referred to Tabaka Mission Hospital. He testified that the deceased died the same day at 10:00 p.m. and that he paid for bills and took part in funeral arrangements. He blamed the deceased for the accident as he had run into his way.

11. After hearing the matter, the trial court entered judgment for the plaintiff thus;

> 9.02.12
>
> Nyangosi present for plaintiff
>
> **LIABILITY**
>
> 20% to 70% *(sic)* in favour of the plaintiff
>
> **QUANTUM**
>
> Pain and suffering Kshs. 20,000/=
>
> Loss of expectation Kshs. 100,000/=
>
> Loss of dependency
>
> Kshs. 4,000/= x 10 x 12 = Kshs. 320,000/=
>
> Funeral expenses Kshs. 20,000/=
>
> Special damages Kshs. 20,000/=
>
> Less $^{20}/_{100}$ x Kshs. 480,000/=

Total Kshs. 384,000/=

Plus costs and interests.

Thereon

Signed 9.02.12

12. The parties canvassed the appeal by way of written submissions. The appellantcondensed the appeal into two issues being liability and quantum. On liability, the appellant disputed the apportionment of 70% to 20% stating that the evidence of the eye witness (PW3) was contradictory and that he had affirmed on cross examination that he had not witnessed the accident. The evidence of PW 3 was further diminished by the evidence of PW2 who stated that there had been no independent eye witnesses. It was their case that the deceased caused the accident by his own actions and that there was no negligence on the part of the appellant's driver. They contended that there was no legal basis for the trial court to apportion liability as it did and urged the court to find that the appellant was not liable.

13. On quantum, the appellant submitted that respondents were not entitled to an award of general damages as there was no proof of the deceased's income and that the dependency ratio had equally not been adequately proved. The appellant only conceded to an award of special damages and funeral expenses.

14. The respondent submitted in support of the trial court's apportionment of liability at 80% to 20%, stating that DW 2's testimony had confirmed PW3's evidence that he was over speeding and that he swerved to where the deceased was prior to the accident. On quantum, the respondent submitted that PW1 and DW1 had confirmed that the deceased was the sole breadwinner of his family. The respondent also found the multiplicand of Kshs. 4,000/= reasonable as the deceased was working as a casual labourer. Since the deceased died several hours after the accident, the respondent submitted that the award of Kshs. 20,000/= for pain and suffering was sufficient. It is the respondent's submission that no good reason had been advanced to interfere with the trial court's decision.

DETERMINATION

15. First, I must point out that the trial court's decision, which I have set out verbatim at paragraph 11 above,barely met the threshold of a judgment as provided under **Order 21 Rule 4** of the **Civil Procedure Rules**. The trial court did not enumerate the issues for determination and the reasons for reachingitsdecision were also not given. In ***South Nyanza Sugar Co. Ltd v Omwando Civil Appeal No. 214 of 2006 [2011] eKLR*** Makhandia J. (as he then was) outlined the essential components of a judgment thus:

> *"Ordinarily and in law a judgment should deal with issues raised and should not be scanty. A judgment must comply with the mandatory provisions of order 21 rule 4 of the **Civil Procedure Rules** which provide that a judgment in a defended suit shall contain a concise statement of the case, points for determination, the decision thereon and reasons for such decision. ... The trial magistrate by not setting out points for determination and reasons for his decision contrary to the aforesaid provisions of the law abdicated his judicial responsibility. As a judicial officer he was under a duty to state in writing the reasons which made him arrive at a particular decision on liability and the apportionment thereof. It could not have been done in vacuo. Any judgment that does not contain the aforesaid essential ingredients is not a judgment and an appellate court will frown at such a judgment and indeed impugn it as I hereby do."*

16. Considering the evidence adducedduring trial, it is my view that justice would be best served by determining this case finally as provided for in ***Section 78 (1) (a) of the Civil Procedure Act***.

17. The main issues arising for determination in this matter relate to liability and quantum.

18. On liability, the appellant pleaded that the deceased was the sole author of his misfortune as he had attempted to cross the road in the face of oncoming traffic. The appellant relied on the case of ***Waindi vs Pharmaceutical Manufacturing Co. Ltd & Anor [1986] KLR 506*** and ***Jamal Ramadhan Yusuf & Another vs Ruth Achieng Onditi & Another [2010] eKLR*** in support of this. Conversely, the respondents contend that the appellant's driver was over speeding and was responsible for the accident.

19. The fact that DW 2 knocked down the deceased and inflicted him with fatal injuries is not disputed. PW 3 testified that he witnessed DW 2 driving at a high speed and that he swerved to avoid a pothole and ended up hitting the deceased who was about 3 metres off the road. PW 2, who testified on behalf of the investigating officer,stated that according to the sketch plan, the possible point of impact was 5.4 metres from the right side of the road. This contradicts PW 3's evidence that deceased was off the road when he was hit by the appellant's driver. The sketch plan was not produced as an exhibit.The police abstract on the other hand was produced as P. Exhibit 4. It does not lay blame on any of the parties and simply states that the matter was pending further investigations. DW 2 on his part testified that the deceased came running from behind a stationaryvehicle and that he only saw him (the deceased) run across his path when he was 2 metres away.

20. Having considered the evidence,I find the appellant's version that the deceased was hit while crossing the road plausible. DW 2 testified that the appellant ran into his way and that he was driving at a speed of 40 kilometres per hour when he hit the deceased. DW2's speed seems improbable as theimpact of his vehicle with the deceased caused his death. I apportion liability at 50% to 50% as there was no decisive evidence on who was to blame between the two parties. *(See **Berkely Steward ltd & Others vs Lewis Kimani Waiyaki [1982-88]1KAR 101-108**)*

21. The second issue for determination in this appeal is on the quantum of damages payable to the respondents. It is admitted that the respondents were children of the deceased and that they had been issued with limited letters of administration which have not been formally challenged. **Section 4(1)** of the **Fatal Accidents Act** provides that:

"(1) Every action brought by virtue of the provisions of this Act shall be for thebenefit of the wife, husband, parent and child of the person whose death was socaused, and shall, subject to the provisions of section 7, be brought by and in thename of the executor or administrator of the person deceased; and in every suchaction the court may award such damages as it may think proportioned to the injuryresulting from the death to the persons respectively for whom and for whose benefit the action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct:

Provided that not more than one action shall lie for and in respect of the same subject matter of complaint, and that every such action shall be commenced within three years after the death of the deceased person."[Emphasis mine]

22. The Respondents are the children of the deceased and having obtained a letters of administration as litem to file suit, they had were entitled to file suit, even if their mother chose not to. They were dependants of the deceased.

23. In support of his claim for damages for loss of dependency under the Fatal Accidents Act, PW 1 testified that the deceased died at the age of 47 years and that he worked as a causal labourer and earned Kshs. 10,000/= per month. He did not provide proof of the deceased's earnings. In cases where there is no proof of earnings, the courts will resort to the minimum wage for unskilled labourers to determine the multiplicand.The Regulation of Wages (Agricultural Industry) 2008 provided for Kshs. 5,000/= for unskilled employees. (See ***Philip Wanjera & Another vs Ahmed Liban&another Civil Appeal No. 343 of 2014 [2016] eKLR***.)

24. On the multiplier applicable, the respondents in their submissions before the trial court suggested 13 years. The appellants did not make any proposals under this head. The deceased was an employed casual labourer and would probably have worked to the conventional retirement age of 60 years. In***Susan Warima Muthee & 2 others v Samuel Ng'ang'a Mbugua Civil Suit No. 148 of 2010 [2017] eKLR*** the court adopted a multiplier of 10 years for the deceased who died aged 47 years.Similarly, in the case of ***Richard Macharia Nderitu v Phillemon Rotich Langas[2013]eKLR*** the court used a multiplier of 10 years for the deceased who died aged 47 years. I therefore uphold the multiplier of 10 years as applied by the trial court.

25. As for the applicable dependency ratio, I find the ratio of 2/3 suitable. PW 1's testimony that the deceased supported him and his siblings was corroborated by the testimony of the deceased's widow, DW 1, who indicated that she was also dependent on the deceased. Damages for loss of dependency is computed at **Kshs.400,000/=** made up as follows:

Kshs. 5,000/= x 10 years x 12 months x 2/3 = 400,000/=

26. It has been held that courts will ordinarily make a reasonable award for legitimate funeral expenses. (See ***Jacob Ayiba Maruja & Another v Simeon Obayo Civil Appeal 167 of 2002 [2005] eKLR***) PW 1 testified that a sum of Kshs. 20,000/= was spent on funeral arrangements, though he failed to produce documentary evidence in support of this, I find the amount reasonable and award the same.

27. Turning to damages under the Law Reform Act, the respondent proposed an award of Kshs. 100,000/= for loss of expectation of life, which is the conventional sum and I thus adopt it.After the accident the deceased was rushed to hospital where he died while undergoing treatment. He did not suffer greatly and I find an award of Kshs. 20,000/= reasonable under this head.

28. In the end, Isubstitute the award made by the trial court with an award of **Kshs. 270,000**/=made up as follows:

i. General damages for loss of dependencyKshs. 400,000/=

ii. Funeral expenses Kshs. 20,000/=

iii. Loss of expectation of life Kshs. 100,000/=

iv. Pain and suffering Kshs. 20,000/=

Total 540,000 /=

Less 50% contribution of Kshs. 270,000 /=

29. The above sum shall be shared as follows; Pacific Kerubo Isaboke (DW 1) shall get 5%, the children below the age of majority shall get 40% to be shared between them equally, the remaining share shall be shared between the other children equally. The dependants as listed in paragraph 5 (a) of the plaint dated 20th April 2009. The respondents who are the legal representatives of the estate of the deceased shall hold the sums accruing to any minors in trust until they attain the age of majority.

30. As the appeal has only been partially successful, each party shall bear its costs. Interest shall be at court rates.

Dated, signed and delivered at Kisii this 1st day of March 2019.

R.E.OUGO

JUDGE

In the presence of;

For the Appellant

For the Respondent

Rael Court clerk