



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CIVIL APPEAL NO. 34 OF 2018

BETWEEN

CALEB OMBIMA.....1ST APPELLANT

DAMARIS OMBIMA.....2ND APPELLANT

AND

**FLORENCE AKOTH AWINO & TERESA ADHIAMBO OKOTH (suing as legal
representative of the estate of the late Michael Ouma Okoth)RESPONDENTS**

(Being an Appeal from the Judgment and Decree in Tamu SRMCC No.18 of 2017 by Hon. E.M. Onzere (SRM) on 24th April, 2018)

JUDGMENT

- 1. FLORENCE AKOTH AWINO and TERESA ADHIAMBO OKOTH (hereinafter referred to as Respondents) sued CALEB OMBIMA and DAMARIS OMBIMA (hereinafter referred to as Appellants) in the lower court claiming damages for fatal injuries suffered by their husband, Michael Ouma Okoth, when motor cycle KMDC 491 SKYGO (hereinafter referred to as the motorcycle) that he was riding collided with Appellants' motor vehicle KBP 704S (hereinafter referred to as the accident vehicle) on 23rd October, 2016 allegedly as a result of the negligence of the 1st Appellant who was the driver of the accident motor vehicle.**
- 2. The defendant/respondent filed a statement of Defence and blamed the deceased for the accident.**
- 3. In a judgment delivered on 24th April, 2018, the trial court found the Respondents' case proved, apportioned liability at 100% against the Appellants and awarded the Respondents a total of Kshs. 3,378,457.60.**

The Appeal

4. The Appellant being dissatisfied with the lower court's decision preferred this appeal and raised 7 grounds of appeal that may be summarized into the following 3 grounds that: -

- 1. The learned trial magistrate failed to consider the demand for contributory negligence**
- 2. The learned trial magistrate failed to consider the evidence produced on behalf of the Appellants**
- 3. The learned trial magistrate proceeded on wrong principles when assessing damages awarded to the Respondents**

Analysis and Determination

5. This being the first appellate court, its duty is to reevaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. See Sumaria & Another -Vs- Allied Industrial Ltd (2007)2KLR and Abok James Odera T/A A.J. Odera & Associates Vs John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR. It then behooves this court to summarize the evidence that was tendered before the trial court.

APPELLANTS' CASE

6. **PW2, PIUS OWITI NGÍELA** recalled that on the material day, he was riding towards Ahero general direction when he saw a motor vehicle and a motor cycle being driven from the opposite direction. It was his evidence that the accident motor vehicle which was being driven behind the motor cycle knocked the motor cycle on the rear pushing it from the left to the right lane where the deceased fell. **PW3 CPL BRENDA AKINYI ONYANGO** investigated the accident and had the 1st Appellant who was the driver of the accident motor vehicle charged with causing death by dangerous driving. She produced a Police Abstract PEXH. 3 which demonstrates that the 1st Appellant pleaded guilty and was fined Kshs. 20,000/- in default 6 months' imprisonment.

RESPONDENT'S CASE

7. The 1st Appellant and his witness who was a passenger in the accident motor vehicle told court that the motor cycle rider swerved from the service lane onto the road ahead of the accident motor vehicle thereby causing the accident.

SUBMISSIONS BY THE PARTIES

8. The parties agreed to argue the appeal by way of written submissions which the Respondents duly filed and cited various authorities. From the grounds of appeal, the Appellants are challenging the judgment both on liability and quantum.

9. Respondents hold the view that the Appellants were rightfully found solely liability for the reason that the 1st Appellant had been convicted for causing the deceased's death and had not appealed against the conviction and sentence. It was also argued that Appellants did not rebut the application of the principle of *res ipso loquitor* or tender evidence concerning steps taken by the 1st Appellant to avoid the accident. Reliance was placed on **Kathini Titus v Almicdad Parcel Services Limited & Another [2014] eKLR**; **Francisca Njeri Mwangi v James K. Mwangi & Another [2015] eKLR**; **Keats Njuguna Muchiri v Mash Express Ltd [2008] eKLR**; **Rahima Tayab & Others vs. Anna Mary Kinanu Civil Appeal No. 29 of 1982 [1983] KLR and Heaven v. Pender (11 Q. B. D).**

10. I have considered the evidence on liability. In **Kathini Titus v Almicdad Parcel Services Limited & Another [2014] eKLR**, the court held that:-

“A final judgment of a competent court in any criminal proceedings which declares any person guilty of a criminal offence shall after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein whichever is the latest shall be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.”

11. In my considered view, the conviction of the 1st Appellant who was the driver of the accident motor vehicle, on his own plea of guilt, is conclusive evidence that he was to blame for the accident. Having said that, I find that the trial court appropriately apportioned liability wholly against the 1st Appellant and 2nd Appellant who were respectively the driver and owner of the accident motor vehicle.

12. In relation to damages, the extent to which an appellate court may interfere with an award of damages is well settled. It must be shown that the trial court in awarding of the damages took into consideration an irrelevant fact or the sum awarded is inordinately low or too high that it must be a wholly erroneous estimate of the damage, or it should be established that a wrong principle of law was applied (see **Butt v Khan [1981] KLR 349**).

13. With reference to quantum, there is evidence that in arriving at the award, the trial court considered the cited authorities placed before it. I am convinced that the court rightfully awarded Kshs, 20,000/- for pain and suffering on the ground that the deceased died instantly. The deceased was 39 years old and the court justly awarded Kshs. 100,000/- for loss of expectation of life. The court further awarded specifically pleaded and proved special damages of Kshs. 34,000/-. The deceased's income was ascertained from his payslips and the trial court correctly applied the net salary as the multiplicand. Deceased was married and the court in my view properly applied the dependence ratio of 2/3rd and a multiplier of 21 years since the deceased died at the age of 39 years.

DISPOSITION

14. Consequently, I find that the learned trial Magistrate trial acted judiciously and decline the invitation to interfere with the judgment. This appeal is thus found to have no merit and it is dismissed with costs to the Respondents.

DATED AND DELIVERED AT KISUMU THIS 9TH DAY OF MAY 2019

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

For the Appellants - Absent

