REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL APPEAL NO. 101 OF 2015

AGNES NDUBI {Suing as Administratix of the Estate of

NDUBI ONGUSO (Deceased)...APPELLANT

=VRS=

SAMWEL OMBATI ATANDI..RESPONDENT

{Being an Appeal from the Judgement and Decree of Hon. N. Njagi – PM dated and delivered on the 15th day of January 2015 in the original Nyamira Principal Magistrate's Court Civil Case No. 60 of 2014}

JUDGEMENT

On 16th September 2013 the appellant's husband, Charles Ndubi Onguso, deceased was hit by a motor vehicle Reg. No. KBK 898Y that was being driven by the respondent. He sustained fatal injuries. She filed a claim against the respondent for compensation under the Law Reform Act and the Fatal Accidents Act but it was dismissed. Being aggrieved she preferred this appeal.The appeal is premised on grounds that: -

> **"1. The Learned Trial Magistrate erred in law when he decided the case against the weight of evidence led at the trial and in dismissing the suit and or generally on no legal basis at all.**
>
> **2. The Learned Trial Magistrate erred in law when he failed to evaluate the evidence relating to liability and ended up erring in his findings in toto notwithstanding the fact that plaintiff had had pleaded and proved negligence at the trial.**
>
> **3. The Learned Trial Magistrate erred in law when he failed to appreciate that the standard of prove in civil litigation is different from the standard of prove required in criminal/inquest proceedings.**
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> **4. The Learned Trial Magistrate erred in law when he failed in is duty as the trial court to evaluate the evidence, consider the pleadings and to make his own findings in his judgement from the evidence led at the trial and to note the material corroborations in the pleadings filed by the applicant and in the evidence which the applicant led at the trial.**
>
> **5. The Learned Trial Magistrate erred in law when he failed to apportion liability for the occurrence of the said accident and in failing to do so he grossly erred.**
>
> **6. The court erred in law in joining the fishing investigations of the IO.**
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> **7. The Learned Trial Magistrate erred in fact and law in his could be award as relates to damages thus ended up looking at a figure, too minimal as to cast doubt at his discretion.**
>
> **8. The Learned Trial Magistrate erred in fact and in law when he failed to awarded specials and or appreciate the fact that the appellant had proved the instant case on specials by tendering pertinent evidence and receipts as exhibits.**
>
> **9. The Learned Trial Magistrate erred in law and in fact when he failed to award the appellant costs of the suit though pleaded and proved.**
>
> **10. The Learned trial Magistrate erred in fact and in law when he used his discretion wrongly in applying the law generally."**

By the appeal this court is urged to set aside the judgement of the lower court, re-evaluate the evidence itself and arrive at its own

independent findings or in the alternative remit the case to the court below for retrial. The court is also urged to award the appellant the costs of the case in the lower court.

The appeal was canvassed through written submissions. The same have been considered fully but as the first appellate court I have a duty to re-evaluate the evidence in the trial court so as to arrive at my own conclusion. I am guided by the principle in **Selle Vs. Associated Motor Boat Company Ltd [1968] EA 123** which was restated in **Toyota (Kenya) Limited Vs. Express (Kenya Limited [2013] eKLR** that: -

> ***"On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."***

In this case the appellant adduced evidence that her husband was hit by a motor vehicle whose registration number she did not know. The registration number of the vehicle was availed by the respondent who admitted in his statement and also testimony in court that it was his vehicle Reg. No. KBK 898Y that hit the deceased and that the deceased succumbed to injuries sustained in that accident. The police officer called by the respondent also confirmed that an accident involving the respondent's vehicle and the deceased occurred.

The appellant's evidence was disregarded because firstly she did not witness the accident and secondly because her witness Raymond Bakari Nyankabaria (Pw2) was not among those listed in the police abstract as one of those who witnessed the accident. The trial court believed the officer and came to the conclusion that he could not have been at the scene and that he was therefore an untruthful witness. The trial court may be entitled to arriving at that finding of fact. However, having considered and evaluated the evidence myself it is my finding that there were other circumstances pointing to negligence on the part of the respondent or upon which his evidence could be inferred. In his statement which he adopted as his testimony the respondent stated that when he first saw the deceased he was on the left side of the road. He then stated that the deceased suddenly moved to the road and that he swayed to the left to try not to hit him. According to him the deceased landed on the bonnet. Although he does not mention it he hit the deceased and that is the reason he landed on his bonnet. Clearly the respondent was negligent. It was at 9.30 am and visibility was good. He therefore had ample opportunity to observe the deceased but instead of stopping he swerved to the left, the very side where the deceased was coming from and knocked him. Not only was he negligent for swerving towards the direction of the deceased but for driving so fast that he could not avert the accident. The high speed is demonstrated by the fact that the deceased was thrown up in the air hence landing on the bonnet of the car, the extensive damage done to the car and the fact that the respondent suffered injuries to the extent that he too was hospitalized. It is my finding that the deceased also contributed to the accident for attempting to cross the road without confirming that it was safe to do so. Much as the driver was under a duty to keep a proper look out for other road users the deceased also had a responsibility as a pedestrian to ensure there were no vehicles using the road and that it was safe for him to cross. However, being the driver of the car the respondent must bear the larger blame and I would apportion liability in the ratio 90%:10% in favour of the appellant against the respondent.

On the issue of damages the court is guided by the principle that: -

> ***"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate based on some wrong principle or on a misapprehension of the evidence."*** **See Shabani Vs. City Council of Nairobi [1985] KLR 516.**

The trial Magistrate correctly held that since there was no proof of income the minimum wage of 6,000/= would apply. I do however fault him for holding that since there was no proof that the deceased had children the dependency ratio could only be 1/3. The appellant's evidence that she was the deceased's wife was accepted by the court even though she did not tender proof of marriage. Likewise evidence that the marriage was blessed with issues should have been accepted albeit without proof as the same was not controverted. Moreover, a claim under the Fatal Accidents Act is brought for the benefit of a spouse, parent and children. It is expected that since the deceased had family most of his earnings would be spent on the family rather than on self and especially in this case where he was the sole bread winner. My finding therefore is that a dependancy ratio of 2/3 would be more just.

On the multiplicand the court heard that the deceased was self-employed. He was 50 years old and he certainly would have worked for 10 more years until he was 60 years old. Given that life expectation extends to 70 years I find that a multiplicand of 10 years would be more suitable. The 5 years applied by the trial Magistrate is set aside and substituted with 10 years.

The trial Magistrate's awards under the other heads shall not be disturbed and this court awards damages as follows: -

(a) Pain and suffering – Kshs. 20,000/=

(b) Loss of expectation of life – Kshs. 80,000/=

(c) Fatal Accidents Act (Being what

was proposed by Counsel for the

Respondent – 13,674 x 10 x 12 x 2/3 –

– Kshs. 1,093,920/=

(d) Specials

Post mortem – Kshs. 5,600/=

Reasonable funeral

Expenses – Kshs. 10,600/=

Sub-total – Kshs. 16,200/=

Total – Kshs. 1,210,120/=

Less 10% Contribution - (Kshs. 121,012/=)

Total – Kshs. 1,089,108/=

Accordingly, this appeal succeeds. The judgement of the lower court is set aside and judgement is entered for the appellant against the respondent as set out above. The appellant shall get the costs of the suit in the court below as well as in this appeal and interest on the sums awarded shall be at court rates and shall be calculated in the usual manner. It is so ordered.

Signed, dated and delivered in Nyamira this 13th day of June 2019.

E. N. MAINA

JUDGE