



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 69 OF 2018

DENNIS MAOSA KIBEGWA.....APPELLANT

VERSUS

OCHIENG'I MOSERO JOYCE & VINCENT MABUKA NYAKUNDI

(Suing as personal representatives & legal administrators of the estate of

CHARLES NYABWASU (Deceased).....RESPONDENT

(Being an appeal from the judgment of Hon. E.A. Obina S.R.M. dated 31st July 2018

in the Chief Magistrate's Court Civil Suit No. 399 of 2017 at Kisii)

JUDGMENT

1. The respondents herein, suing in their capacity as administrators of the estate of Charles Nyabwasu ("the deceased") sought damages against the appellant for causing the accident that led to the death of the deceased. It was alleged that on 6th May 2017, the deceased was riding his motor cycle registration no. KMCZ 503L along Kisii – Nyamira Road when at Getare area, the appellant who was driving motor vehicle registration number KAW 719G lost control and caused the accident in which the deceased sustained fatal injuries.

2. This is an appeal against the trial court's decision apportioning liability in favour of the respondents at a ratio of 80:20 and awarding the respondents a sum of Kshs. 1,362,600/= being special and general damages. The grounds of appeal are set out in the memorandum of appeal as follows;

a. The learned magistrate erred in law in making a finding of damages against the defendant;

b. The learned magistrate erred in law and fact in holding that the defendant was liable for the excessive damages so awarded or at all in the absence of any concrete evidence to demonstrate the same;

c. The learned magistrate erred in law and fact by apportioning dependency ration at 2/3 instead of 1/3;

d. The learned magistrate erred in law and fact in awarding Kshs. 100,000/= for pain and suffering instead of Kshs. 10,000/=

e. The learned magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendant and thereby arriving at a wrong and erroneous conclusion condemning the defendant to damages of Kshs. 1,600,000/= by taking an income of Kshs. 10,000/= without any tangible proof of the same or pleading the same;

f. The learned magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendant and thereby arriving at a wrong and erroneous conclusion condemning, the defendant to special damages of Kshs. 103,250/= without concrete documentary evidence;

g. The learned magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendant and thereby arriving at a wrong and erroneous conclusion condemning the defendant to damages of Kshs. 1,362,600/= without any tangible proof of the same;

h. The learned magistrate erred in law and fact in failing to appreciate the long established principle of stare decisis, precedent law

thus bringing law into confusion and thereby deriving an erroneous finding/conclusion in particular relating to damages;

i. The learned magistrate erred in law and fact in failing to appreciate as follows

i. That the plaintiff's pleadings and the evidence tendered in support thereof was incapable of sustaining the award of damages;

j. The learned magistrate erred in law and fact in entering judgement in favour of the plaintiffs against the defendant in spite of the plaintiffs' miserable failure to establish her case more especially on quantum; and

k. The learned magistrate erred in law and fact in failing to appreciate the legal position that there could be no liability without fault. The court award is unsustainable and baseless in the circumstances.

3. At the hearing of this appeal, counsel for the appellant argued that the trial court fell into error in finding for the respondents, who had failed to prove their case. That the witnesses called to testify in support of the respondent's case were not present when the accident occurred thus their evidence amounted to hearsay. The deceased's wife PW 1 did not witness the accident and PW2 confirmed that he was not the Investigating Officer. The defence on its part called the driver who narrated how he tried his best to avoid the accident when the deceased made a U turn in the middle of the road. Counsel submitted that whilst analysing the evidence, the magistrate had acknowledged that there was no evidence by the respondents but proceeded to hold the appellant 80% liable. Counsel relied on the case of **Kiema Muthuku-vs-Kenya Cargo Hauling Services Ltd (1991)2258** where Omollo Ag JA held that "... there is as yet no liability without fault in the legal system in Kenya and a plaintiff must prove some negligence against the defendant where the claim is based on negligence..."

4. On quantum, the trial court was faulted for awarding a multiplier of 20 years instead of 10 years for the deceased who died aged 40 years and adopting a multiplicand of Kshs. 10,000/= yet the minimum wage applicable at the time was Kshs. 6,000/=. It was further submitted that the trial magistrate had imported evidence not before it and entered judgment in favour of the respondents who had not proved their case.

5. The respondent's counsel argued that it was not in dispute that the appellant was driving the vehicle on the day the accident occurred. It was also not disputed that the deceased died as a result of that accident. He observed that the issues that had been raised regarding liability had not been mentioned in the memorandum of appeal and the appellant was therefore estopped from submitting on it. Counsel contended that the trial court noted that the accident had occurred at a market therefore the appellant should have been driving at 50 kph and not from 50kph to 60 kph. The trial court had had the privilege of hearing the witnesses testify and observed their demeanour at trial. He submitted that the apportionment of liability by the trial court was fair and should not be interfered with.

6. On the quantum of damages payable, counsel argued that the minimum wage that year was Kshs. 10,000/= and the deceased was married with three children therefore the ratio of 2/3 was adequate in the circumstances. From the chief's letter and the pleadings before court it was established that the deceased was 40 years old when he died therefore the application of the multiplier of 20 years by the court was proper. Counsel urged the court to uphold the judgment of the trial court.

7. This being a first appeal, the court is required to analyse and re-assess the evidence on record and reach its own conclusions taking into account the fact that it neither saw nor heard the witnesses testify (see **Peters v Sunday Post Ltd [1958] EA 424**).

8. At the trial court, Ochieng'i Mosero Joyce (PW1) testified that her husband Charles Nyabwasu was a motor cycle rider. While riding his motorcycle on 6th May 2017, he was involved in an accident and died the following day. She testified that they had three children together aged 7 years, 4 years and 2 ½ years old. The deceased was orphaned but had a brother who was her co-administrator. She told the court that the deceased earned a monthly income of Kshs. 20,000/= from his trade as a rider. On the expenses they had incurred as a result of his death, she testified that they spent Kshs. 20,000/= acquiring limited letters of administration in his estate, Kshs. 500/= acquiring a copy of record and Kshs. 82,700/= on burial expenses. She urged the court to compensate her for the loss.

9. PC Caleb Osodo (PW2) who was attached to Kisii Central Police Station at the time produced the police abstract on behalf of his colleague PC Mutuma who had investigated the accident. He testified that on 6th May 2017 at 5:30 p.m. at Getare, along Kisii-Nyamira road motor vehicle registration number KAW 719G Nissan X-trail which was being driven by the appellant got involved in an accident with the deceased's motorcycle registration number KMCZ 503L Yamaha. The appellant was driving from Kisii to Nyamira and lost control as he was negotiating a corner. He veered off the road colliding head on with the oncoming motor cycle. The deceased was taken to hospital and died the following day. On cross examination, he admitted that he had no sketch plans of the scene or the police file. He also admitted that the appellant had not been charged for any offence.

10. Dennis Maosa Kibegwa (DW1) testified that he was involved in a traffic accident on 6th May 2017 while travelling via motor vehicle registration number KAW 719G. He blamed the accident on the motorcyclist who joined the road and did a U-turn towards Kisii at a corner. There was a cliff and it was raining at the time. He testified that he swerved to the other lane but the motorcyclist hit the vehicle. On cross examination he explained that he and the deceased were headed towards the same direction and the distance between them was about 6 metres. He was driving at a speed of between 50 to 60 kilometres per hour. He tried to swerve to avoid the accident and his vehicle spun towards the right side facing Nyamira and landed about 10 metres away.

11. This appeal challenges the trial court's findings on liability and quantum.

LIABILITY

12. The fact that the deceased died as a result of an accident involving his motor cycle and the appellant's vehicle is not disputed. The appellant's argument is that the deceased was the author of his own misfortune. His evidence was that the deceased did an illegal turn in the middle of the road and as he tried to avoid an accident, the deceased slammed his motorcycle on the vehicle, causing the accident.

13. He who alleges a fact has to prove it. Each case must be decided on its own facts. In **Hussein Omar Farah v Lento Agencies CA NAI Civil Appeal 34 of 2005 [2006] eKLR** it was observed that; "... in our jurisdiction and also other jurisdictions ... if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame."

14. In this case, I find that both parties were equally to blame for the following reasons. PW 2 who gave evidence for the respondents' case did not witness or investigate the accident and his evidence in favour of the respondents' case was weak at best. There was no sketch plan of the accident and no independent eye witness was called to testify.

15. I however reject the appellant's bid to detach himself from blame as he admitted on cross-examination that there was a cliff and it was raining when the accident occurred. Both parties were required to be careful in these conditions. The appellant testified that he kept a distance of 6 meters from the motorcycle which was too close to avoid the accident in the circumstances. I therefore apportion liability at 50:50.

QUANTUM

16. It is a well-known principle of law that an appellate court will not ordinarily vary an award of damages unless it is shown that the trial court proceeded on wrong principles of law or misapprehended the evidence in some material way as to reach an amount inordinately high or low. (See **Butt v Khan, [1981] KLR 349.**)

17. For special damages, the principle is that they must not only be specifically pleaded, but must also be strictly proved with as much particularity as circumstances permit. (See **National Social Security Fund Board of Trustees vs Sifa International Limited (2016) eKLR, Macharia & Waiguru vs Muranga Municipal Council & Another (2014) eKLR**)

18. The appellant argued that the trial court had erred in awarding the respondents special damages of Kshs. 103,250/= without concrete documentary evidence to prove the same. The respondents did produce receipts totalling to a sum of Kshs. 82,700/= for taking out limited letters of administration, coffin and transport expenses, catering as well as mortuary expenses. Had the respondents intended to claim a higher figure, they would have amended the pleadings to reflect that amount. Taking into account that the deceased's relatives are not expected to keep receipts of all expenses incurred to meet the funeral expenses, I find that the appropriate sum to be awarded for special damages would be the sum pleaded which is Kshs. 99,650/= thus the award of Kshs. 103,250/= for special damages is set aside.

19. On loss of dependency under the Fatal Accidents Act, the appellant argued that the multiplier adopted by the trial court and the multiplicand were excessive. The respondents contended that the trial court had considered the evidence adduced in assessing quantum and urged this court not to disturb the award.

20. It was not disputed that the deceased died at the age of 40 and was a married man with 3 young children all aged below 7 years. The deceased worked as a motorcycle rider to sustain his family. The respondents estimated his income as Kshs. 20,000/= however not much was done by the respondents to prove his expenditure or demonstrate how they had arrived at that figure. The appellant proposed a sum of Kshs. 6,000/= which he argued was the minimum wage at the time. The trial court adopted a minimum wage of Kshs. 10,000/= but did not explain how it had arrived at the figure.

21. Where a person is employed and the salary is not determined, his or her income may be determined by reference to the **Regulation of Wages (General) (Amendment) Order** as amended from time to time. However, in this case, the deceased was self-employed. The evidence pertaining to his earnings being minimal, I find that a lump sum award would be more appropriate.

22. Ringera J., in **Mwanza v Ngali Mutua and Kenya Bus Services (Msa) Ltd & Another** quoted by Koome J., in **Albert Odawa v Gichimu Gichenji NKU HCCA No. 15 of 2003[2007] eKLR** and Majanja J. in **Bon Ton Limited v Beatrice Kanaga Kereda suing as Administrators of Estate of Richard Alembi Ochenga (Deceased) CA KSM Civil Appeal No. 57 of 2017 [2018] eKLR** held;

The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependancy, and the expected length of the dependancy are known or are knowable without undue speculation where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do.

23. Considering the fact that the deceased was married, the length of dependency on the deceased by his young children and his age, I assess the loss of dependency at Kshs. 1,000,000/=.

24. For compensation under the Law Reform Act, the appellant proposed a sum of Kshs.10, 000/= while the respondents proposed Kshs. 150,000/= for pain and suffering. The trial court assessed damages for pain and suffering at Kshs. 100,000/= and must have taken into consideration the case cited by the respondents of **Alice O. Alukwe -vs- Akamba Public Road Services Ltd & 3 Others (2013) eKLR** where the court awarded Kshs. 50,000/= for pain and suffering 5 years earlier. In the case of **Stella Mumbua Mwololo & Anor v Paul W. Gitonga Civil Case No. 550 of 1996 [2012] eKLR** which was relied on by the appellant at the trial court, there was no evidence that the deceased was alive after the accident.

25. In the present case, the deceased died a day after the accident had occurred and must have been in considerable pain at the time. I therefore find no reason to interfere with the sum of Kshs. 100,000/= awarded for pain and suffering.

26. The trial court assessed loss of expectation of life at Kshs. 100,000/= and proceeded to deduct the sum of Kshs. 200,000/= assessed under the Law Reform Act from the total award. The Court of Appeal in **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited Civil Appeal No. 22 of 2014 [2015] eKLR** explained that such a deduction

is erroneous. The Court held;

*“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.”*

27. Since there was no cross- appeal on this point, I set aside the award of Kshs. 1,362,600/=and substitute it with an award of **Kshs. 549,825/=** made up as follows;

Loss of dependency- Kshs. 1,000,000/=

Special damages- Kshs. 99,650/=

Less liability of 50 %.

28. Each party will meet its own costs of the appeal.

Dated, signed and delivered at Kisii this **18th**day of **July 2019**.

R.E.OUGO

JUDGE

In the presence of;

Appellant

Absent

Miss Gogi h/b Mr. Ochoki

For the Respondent

Ms Rael

Court clerk