REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO.17 OF 2016

CONSOLIDATED WITH

CIVIL APPEAL NO. 18 OF 2016

NICHOLAS NYAGWENCHI MIYOGO JOSEPH.....APPELLANT

-VERSUS-

JAMES NYAKUNDI NYAMARI.....1st RESPONDENT

HELLEN KEMUNTO ORENGE &

JOSEPHAT OMWOYO MONARI

(Suing as personal representatives of

DENNIS ONYONI - deceased) .....2nd RESPONDENTS

(Being an appeal from the Judgments and Decrees of Hon. J.M. Njoroge (C.M.)delivered in Kisii CMCC No. 367 of 2014 and CMCC No. 13 of 2015on 13th July 2015 and 17th March 2016 respectively)

JUDGMENT

1. The appellant filed **Civil Appeal No. 17 of 2016** and **Civil Appeal No. 18 of 2016** challenging the trial court's decisions in **Civil Case No. 367 of 2014** and **Civil Case No. 13 of 2015** respectively. The appeals were consolidated as they relate to the same cause of action, same accident.

2. It is not in dispute that on 7th July 2014, Dennis Onyoni, the 2nd respondent's son was riding motorcycle registration number KMDA 688R along Kisii-Keroka road. The 1st respondent was a pillion passenger on the motorcycle. When they got near Kisii High School the motorcycle and the appellant's motor vehicle registration number KAD 156 Jcollided as a result of which the respondents sustained personal injuries. Dennis Onyoni died as a result of his injuries and his estate is represented by the 2nd respondents.

3. In determining this appeal, I am guided by the principle that being a first appeal, it is the duty of this court to reconsider the evidence, evaluate it and reach its own conclusion bearing in mind that it is the trial court that saw and heard the witnesses testify and was able to assess their demeanour**(see*Selle v Associated Motor Boat Co.* [1968] EA 123).**

4. The 1st respondent, **James Nyakundi** (PW1) testified as follows that; on the day of the accident he was a pillion passenger on motorcycle registration KMDA 688R and was travelling from Keroka towards Kisii. The accident occurred at a corner next to Kisii bottlers when the appellant's vehicle, which he saw at distance of about 20 meters, veered off its left lane facing Keroka and knocked the motorcycle. The vehicle was over speeding and that the motor cyclist had tried to swerve to avoid the accident. As a result of the accident, he had sustained injuries on the chest, and had bruises on the back, the hands and an injury on the left hand. He was rushed to Kisii Level 5 hospital and the accident was reported at Kisii police station. The rider of the motorcycle had died on the spot. In cross examination, he admitted that he had no helmet when the accident occurred.

5. **PC Samuel Opiyo** (PW 2), who was attached to the traffic division at Kisii Police station confirmed that a report of the accident had been made to the station. He testified that his colleague PC Kingori was investigating the matter and admitted that he had not visited the scene. During cross examination, PC Opiyo testified that the report made by the appellant indicated that the motorcycle was being ridden at a high speed and that it landed on the front bumper of the motor vehicle. He testified that the motorcycle was trying to avoid knocking down a pedestrian and also testified that the police abstract showed that there was no motorcycle insurance cover.

6. The appellant, **Nicholas Nyagwenchi** (DW1) testified that he was driving motor vehicle registration number KAD 156 J along Kisii-Bobaracho area, and at about 11:30 a.m. he saw a motorcycle travelling from Keroka to Kisii town about 50 meters away. He saw motorcycle knock a pedestrian down, veer off and go under his vehicle. He recalled that when the accident occurred, there was only one rider on the motorcycle as the pillion passenger had fallen off when the motorcycle hit the pedestrian. When the accident occurred, his vehicle was stationary as he was watching the accident happen and also stated that he had not been charged with a traffic offence. This was the evidence in Civil case no. 367 of 2014

7. In the case of the 2nd respondents in civil case no 13 of 2015**, Hellen Kemunto Estoni,** testified that her son Dennis Onyoni was a boda boda rider and had lost his life as a result of the accident. Her son used to earn Kshs. 15,000/= per month which he used to support her and his siblings as she was a widow and was sickly and unable to work. Her son was 22 years old when he died.

8. By consent, the evidence of the appellant, 1st respondent and PC Samwel Opiyo was applied to Civil Case No. 13 of 2015 on 19th May 2015.

SUBMISSIONS

9. The appellant's appeal is against the trial court's determination on both liability and on quantum. I directed the parties to canvas the appeal by way of oral submissions which they did on 15th July 2019.

10. Mr. Mose, counsel for the appellant argued that there was no cogent reason to support the apportionment of liability at 90:10 against the appellant. He submitted that according to the appellant, by the time the motorcycle hit his stationary vehicle, the pillion passenger had already been thrown off the motorcycle. He also stated that the testimony of 1st respondent did not bring out any blame against the appellant as he had simply testified that the vehicle was travelling at a high speed on its lane but did not state whether the vehicle was overtaking or whether there was an obstruction or that the vehicle lost control. As the pillion passenger had fallen off, he did not come into contact with the driver of the vehicle therefore liability could not lie. He also submitted that award made in Civil Appeal No. 17 of 2016 was excessive and should be reduced to Kshs. 80,000/=

11. Regarding Civil Appeal No. 18 of 2016, counsel submitted that there was no evidence that the rider earned Kshs. 15,000/= therefore the minimum wage of Kshs. 5,426/= according to the Legal No. 116 of 2015 would be applicable in his case.

12. In response, Mr. Nyangosi, for the respondents, submitted in support of the trial court's finding on liability and quantum. He argued that it was not opposed that the accident had taken place and that the evidence of the 1st respondent was clear that at the time of the impact he was still was a pillion passenger. He submitted that the appellant's vehicle was being driven at a high speed and that the vehicle veered off its lane and knocked the motor cycle and the point of impact was on the left lane. Counsel argued that the claim that the motor cycle rider had hit a pedestrian was a means by the appellant to preserve himself, as there was no evidence that the said pedestrian had been taken to hospital nor had his statement been recorded.

13. On the trial court's findings on quantum, counsel submitted that there was evidence that the 1 strespondenthad suffered multiple soft tissue injuries and he was therefore satisfied with the trial court's award of Kshs. 120,000/=. In the case of the 2nd respondents, counsel submitted that the deceased was aged 22 years at the time of his demise and therefore a multiplier of 30 years was reasonable. He also submitted that the court had used its wisdom in adopting a minimum wage of Kshs. 10,000/= for a boda boda rider and since the deceased was unmarried the dependency ratio of 1/3 as opposed to 2/3 was not opposed.

CIVIL CASE NO. 367 OF 2014

14. The trial court in **Civil Case No. 367 of 2014** entered judgment for the 1st respondent in the following terms;

a. Liability - 80 : 20

b. General damages- Kshs. 120,000/= less 20%

Net general damages - Kshs. 96,000/=

c. Special damages -Kshs. 7,000/=

d. Plus costs and interests

15. The appellant contests the trial court's decision on both quantum and liability. On liability, it was submitted that the 1st respondent was not wearing a helmet at the time of the accident and therefore the trial court erred in apportioning liability at 90:10. My take of this is that the accident could not be attributed in any way to the 1st respondent failure to wear protective clothing as in such a case it must be shown that the breach contributed to the accident**.** (See***Joash Nyabicha v Kenya Tea Development Authority and 2 OthersKSM CA No. 302 of 2010 [2013] eKLR***).

16. My perusal of the trial court's record shows the parties entered consent in the ratio of **80:20** in favour of the 1st respondent on 15th June 2015in court and therefore the trial court did not err in entering liability as such in its judgment which should have been reflected in the decree extracted from the judgment.

17. As for quantum, the trial court considered the authorities cited by the parties and current trends in awarding the 1st respondent general damages of Kshs. 120,000/=.The appellant had proposed an award of Kshs. 80,000/=. He relied on the case of ***Timsales Limited vs. Penina Achieng' Omondi Civil Appeal No. 192 of 2008 [2011]eKLR*** where the court made an award of Kshs. 60,000/= for the respondent who had suffered a deep cut wound on the left index finger and sever soft tissue injuries to the left index finger. He also relied on the case of ***Eastern Produce (K) Ltd (Savani Estate) vs. Gilbert Muhunzi Makotsi Civil Appeal No. 76 of 2012 [2013]eKLR*** where the court reduced general damages of the respondent Kshs. 70,000/= who had been pricked on the left foot.

18. The 1st respondent proposed an award of Kshs. 80,000/= and relied on the case of ***Kenya Power & Lighting Co. Ltd vs. Mary Akinyi HCCA No. 72 of 2007 (unreported).*** In that case, the court upheld an award of Kshs. 350,000/= for the appellant who had sustained a deep cut wound on the calf muscles of the left leg, laceration on the right knee, right shoulder and contusion on the chest and his permanent disability assessed at 20 % .

19. In my view, the claimants in the authorities cited by the appellant were less severe to those suffered by the 1st respondent, while the injuries suffered in the authorities relied upon by the 1st respondent were more severe than his injuries.

20. The 1st respondent had suffered multiple soft tissue injuries without permanent disability. It was not disputed that the 1st respondent suffered the injuries listed in his plaint as tender anterior chest wall, tender lower back, bruises on both arms, lacerated tender right foreleg, swollen right foreleg and tender right foreleg lower 1/3. This was more or less reiterated by the 1st respondent in his oral evidence and was corroborated by the P3 form and a medical report prepared by Dr. Ogando Zoga which listed the injuries as blunt trauma to the chest, blunt trauma to the back, bruises on both arms and lacerations on the right leg lower 1/3.

21. In the case of ***Godwin Ireri v Franklin Gitonga Civil Appeal No. 47 of 2015 [2018]eKLR*** the court awarded the respondent who had suffered a cut on the scalp and forehead, swelling on the dorsum of the left foot and a bruise on the right knee, general damages of Kshs. 90,000/=.In ***Kithoka Youth Polytechnic v Lucy Kithira Riungu Civil Appeal No. 126 of 2006 [2008] eKLR*** the court awarded the respondent a sum of Kshs. 100,000/= for soft tissue injuries. While the respondent in the case of ***Ndungu Dennis v Ann Wangari Ndirangu & Another Civil Appeal No. 54 of 2016 [2018]eKLR*** who had suffered soft tissue injuries to the lower right leg and soft tissue injuries to the back was awarded Kshs.100,000 /= by the court. Considering these trends, I find that the trial court's assessment of general damages was reasonable and uphold the same. The award of special damages was not contested and is similarly upheld.

CIVIL CASE NO. 13 OF 2015

22. In **Civil Case No. 13 of 2015**, the trial court made the following orders in favor of the 2nd respondents;

a. Liability 90:10

b. Pain and suffering *Kshs. 30,000/=*

c. Loss of expectation *Kshs. 100,000/=*

d. Loss of dependency *Kshs. 1,200,000/=*

e. Funeral expenses and special damages Kshs. 34,000/=

1,364,000/=

Less double entitlement Kshs. 100,000/=

Total is Kshs. 1,264,000/= less 10%

Net total Kshs 1,137,600/=

f. Plus costs and interest

23. The first issue arising in respect of the 2nd respondents' claim is liability. The respondents filed suit against the appellant in their capacity as mother and brother of Dennis Onyoni "*the deceased*" respectively. The deceased's mother, Hellen Kemunto Estoni, testified and the evidence of the PW1, PW 2 and DW 1 in Civil Case No. 367 of 2014 adopted as the evidence of the court by consent. Upon considering the evidence, the trial court made the following findings on liability;

"It is the plaintiff's case that the incident occurred after the motorcycle was knocked down by motor vehicle KAD 156J. The plaintiff further produced a police abstract in support of the accident involving the motorcycle and motor vehicle driven by the defendant.

The defendant denied the accident, but only stated that the motorcycle landed unto his motor vehicle after it lost control, upon hitting a third party. The defendant didn't disclose the pleadings of the third party to the police, or in court. He didn't call any independent witness to support his suit. The court takes judicial notice, that the scene of the accident is a busy and a populated area, where many people would have witnessed the accident. The Defendant admitted to have seen the motorcycle at a distance of 50

meters, but didn't do anything to avoid the same. On the other hand there was no indication that the deceased had driven safely at the time of the accident which includes protective clothing and a helmet. I shall put the plaintiff to blame for the incident at 90%. The defendant shall shoulder 10% as contributory negligence."

24. The only eye witnesses of the accident were the appellant and the 1st respondent. The 1st respondent testified that he was travelling from Keroka towards Kisii on the motorcycle when the accident occurred at a corner near Kisii Bottlers. According to the 1st respondent, he noticed the appellant's motor vehicle 20 meters away before the vehicle veered off its lane and knocked the motorcycle down.He testified that the motorcycle tried to swerve to avoid the accident and put the blame on the appellant whom he testified had been over-speeding when the accident occurred.

25. On the other hand, the appellant stated that hisvehicle was stationary at the time of impact as he was watching the accident unfold. He testified that he had seen the motorcycle veer off the road, knock a pedestrian down and go under his car. By that time, the pedestrian had been thrown off the motorcycle.During cross examination, the police officer confirmed that the appellant had reported the incident and that according to the appellant's report, the motorcycle was being driven at a high speed and was trying to avoid knocking down a pedestrian when it landed on the front bumper of the vehicle.

26. The trial court was presented with two plausible versions of the accident. No sketch plan was prepared by the police to aid in ascertaining who was to blame between the two parties and in the absence of an independent witness, it is impossible to see how one account was more plausible than the other.In***Hussein Omar Farah v Lento Agencies CA NAI Civil Appeal 34 of 2005 [2006] eKLR***the Court of Appeal held;

In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.

27. I therefore find that the trial court erred in apportioning liability at 90:10 in favour of the 2nd respondents and I substitute it with a judgment apportioning liability equally between the appellant on one hand and the 2nd respondents on the other.

28. As for quantum, the parties were in agreement on the award of pain and suffering and loss of expectation of life under the ***Law Reform Act***. It should however be noted that an award of loss of expectation of life, should not be deducted from the award made to the estate of the deceased. (seet ***Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) –vs- Kiarie Shoe Stores Limited [2015] eKLR)***

29. Under the ***Fatal Accidents Act***, the appellant protested the multiplicand of Kshs. 10,000/= and the multiplier of 30 years adopted by the trial court.

30. There was sufficient evidence that the deceased earned a living as a boda boda operator before his demise. The testimony of deceased's mother, that he assisted her educate his siblings out of his income as a boda boda rider, was not shaken on cross-examination. This was corroborated by the evidence of the 1st respondent who was the deceased's pillion passenger at the material time.

31. The appellant argues that since there was no proof of earning, the minimum wage of Kshs. 5,436/=prescribed in Legal Notice No. 116 of 2015 which is the Regulation of Wages (Agricultural Industry)(Amendment) Order should apply. However, in his written submissions, before the trial courtthe appellant suggested a multiplicand of Kshs. 4,000/=. The trial court agreed with the 2nd respondents' proposal of Kshs. 10,000/= as a reasonable amount, as there was no proof of the deceased's earnings.

32. In the case of ***David Mwenda & another v Alice Kawira (Suing the Administrator of the Estate of John Munyoki Malyunga (Deceased)) Civil Appeal No. 109 of 2017 [2018] eKLR*** the court found a proposed monthly income of Kshs. 10,000/= reasonable for a boda boda operator.

33. An appellate court will not ordinarily interfere with the findings of a trial court on an award of damages unless it can be shown that the court proceeded on wrong principles, or misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low (see *Butt v Khan* **[1981] KLR 349***).* In this case, I am not convinced that the trial court's finding on the deceased's income should be interfered with.

34. Regarding the multiplier, it was established that the deceased died aged 22 years. This fact was supported by the oral evidence of the deceased's mother and backed by a copy of the certificate of death which was produced as evidence of the court. Taking the conventional retirement age of 60 years, the trial court adopted a multiplier of 30 years, which I cannot fault as this takes into account the vagaries and uncertainties of life.

35. I similarly uphold the award of Kshs. 34,000/= for funeral expenses and special damages which was supported by documentary evidence.

36. I allow the appeal against the trial court's award and substitute it with an award of Kshs. 682,000 made up as follows;

a. Liability 50:50

b. Pain and suffering Kshs. 30,000/=

c. Loss of expectation Kshs. 100,000/=

d. Loss of dependency Kshs. 1,200,000/=

e. Funeral expenses and special damages Kshs. 34,000/=

1,364,000/=

Total is Kshs. 1,364,000/= less 50%

Net total Kshs 682,000 /=

f. Plus costs and interest

37. In conclusion I make the following final orders:

i. The appeal against the judgment of the court in **Kisii CMCC NO. 367 OF 2014** is dismissed with no order as to costs.

ii. Liability in the decree of the court in **Kisii CMCC NO. 367 OF 2014** is substituted with an apportionment of liability at 80:20 in favour of the 1st respondent;

iii. The appeal against the judgment and decree in K**isii CMCC No. 13 of 2015** is allowed to the extent that the award of Kshs. 1,137,600/= is substituted with an award of Kshs. 682,000/=. The sum shall attract interest from the date of judgment. The appellant shall have half the costs of the appeal having partially succeeded. It is so ordered.

Dated, **signed** and **delivered** at Kisii this **3rd** day of **October 2019.**

R.E.OUGO

JUDGE

In the presence of;

Mr. Wesonga **For the Appellant**

1st Respondent **Absent**

2nd Respondents **Absent**

Rael **Court clerk**