



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 71 OF 2012**

**MOHAMED MOHAMOUD.....1<sup>ST</sup> APPELLANT**

**ALI MOHAMED SHEIKH.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**JULIETA WANARI KABITHI (Administratrix of the Estate of**

**ERASTO KABITHI NGARI (DECEASED).....RESPONDENT**

**Being an appeal from the judgment of Hon. S.A. Okato (Mr.) Principal Magistrate delivered on 3<sup>rd</sup> February, 2012 in Milimani CMCC No. 1058 of 2003)**

**JUDGEMENT**

This appeal arises from the Judgment of the lower court delivered on 3<sup>rd</sup> February, 2012 following a suit brought by the respondent herein against the appellants in which one Erasto Kabithi Ngare died as a result of a road traffic accident on 24<sup>th</sup> May, 2002 after being knocked down by motor vehicle registration No. KAD 926 A owned by the 2<sup>nd</sup> appellant and driven by the 1<sup>st</sup> appellant at the time of the accident.. The respondent was the wife and administratrix of the estate of the deceased. The lower court awarded a global sum of Kshs. 350,000/= after finding the appellants 100% liable in the said accident.

In the Memorandum of Appeal filed on 27<sup>th</sup> February, 2012 but which has not been included in the bound record of appeal, the appellants faulted the lower court for not considering the evidence in support of the defence and submissions, and that it erred in law and fact in making a finding on liability at 100% against the appellants, while the evidence adduced did not support such a finding.

The court was also faulted for awarding a global figure in favour of the respondent without taking into considering the claims under the Law Reform Act and Fatal Accidents Act were distinct and separate. The computation of loss of dependency was also faulted in that, the lower court did not compute the same and it erred on its finding on loss of dependency, when the income of the deceased had not been established or proved. Further, the dependants of the deceased as pleaded were all adults and therefore not dependants as envisaged by law, which the trial court failed to appreciate. Both parties have filed submissions which I have noted.

As required of me, I have made an evaluation and reconsidered the evidence adduced before the trial court. The occurrence that led to the death of the deceased was based on the evidence of P.W. 2 who gave evidence before the trial and gave an account of how the accident happened, which was also countered by the 1<sup>st</sup> appellant who was the driver of the motor vehicle.

The 1<sup>st</sup> appellant told the lower court that he was driving along Jogoo road when, on approaching a bus stage there was a public service vehicle 30 to 40 metres ahead. He was on the right lane of the road while the PSV was on the right. On the right side of the road there was a fence. It was his evidence that, the deceased emerged suddenly from the front of the PSV and it was too late to avoid hitting him.

The deceased was trying to avoid the PSV. On impact the deceased fell on the right side of the road. The 1<sup>st</sup> appellant stopped but members of public threatened to kill him and so he drove to Makongeni Police Station and from there he was referred to Buru Buru police station where he recorded his statement. It was his evidence that his speed was 40 to 45 kph and that there was no zebra crossing at the scene, but there was a foot bridge 10 metres away. He could not have seen the pedestrian because his view was blocked by the PSV.

On the other hand, P.W. 2 contradicted the 1<sup>st</sup> appellant in that he said the old man was beside the road, and on being hit he was tossed into the air. He was at the end of the road on the right side. He went to the old man after the impact gave him first aid and put him in a vehicle that took him to hospital. It was also his evidence that, the vehicle that knocked the deceased was being driven very fast and that he had screeching which made him believe the speed was very high. Since it was near a stage, it was this witness's evidence that one should not drive fast. He added that the driver was not careful otherwise the accident would not have occurred.

According to him there, was no zebra crossing but there is a foot bridge near the stage about 100 metres away. Under cross examination, he told the trial court that the old man was finishing to cross and had already reached the flowers and that the road was not busy. The motor vehicle that was being driven by the 1st appellant was the only vehicle along that lane. He contradicted the 1<sup>st</sup> appellant by saying that the vehicle was not a left hand drive but a right hand drive.

The trial court believed P.W. 2 and held the appellants liable jointly and severally. The fact that there was a stage at the scene of the accident is confirmed by both the 1<sup>st</sup> appellant and P.W. 2. Any driver approaching such a place is required to exercise more care and attention in that, pedestrians are known to cross from either side of such a scene. The 1<sup>st</sup> appellant saw a PSV, he did not slow down, he did not hoot neither did he swerve. Had he done so, he would have said that in his evidence.

The deceased was 92 years old. By any standards, he could not have ran onto the road. On the other hand, if he was walking across the road, he must have been doing so very slowly. I elect to go by the evidence of P.W. 2 and disbelieve that of the 1<sup>st</sup> appellant. There is no suggestion that the deceased contributed to the occurrence and therefore the finding of the trial court on liability cannot be faulted.

On quantum, the lower court made a global award of Kshs. 350,000/=. The plaint claimed damages under both the Fatal Accidents Act and the Law Reform Act. The deceased died on the same day of the accident. The court has not been provided with any evidence showing how soon after the accident he died. That notwithstanding, following the impact subsequent injuries and admission to hospital the deceased must have sustained severe pain.

The death certificate showed that the cause of death was chest and right lower injuries. In my judgment an award of Kshs. 50,000/= was adequate compensation for pain and suffering. At the age of 92 years, no doubt the deceased was of advanced age. There is no evidence he had any physical impairment and even at that age, he could operate alone just like on the day he died.

There was no allegation that he was in poor health. In that regard I make an award of Kshs. 50,000/= for loss of expectation of life.

The respondent pleaded special damages amounting to Kshs. 47,300/=. However, in her evidence which appears at page 75 of the record of appeal, and which was backed by exhibits produced the total is Kshs. 30,000/=. This was not awarded by the trial court which elected to give a global award.

The respondent did not specifically plead loss of future earnings. Evidence was led to suggest that the deceased ran a business of selling chips, which however was being operated by the respondent. That business continued even after his death. Loss of future earnings is in the category of general damages. However, the court cannot make an award without any foundation by way of pleadings and possible earnings by the deceased.

The location of such a business was never given, there was not even any licence from the local authority provided and what such a business earned, say per day or per month. The court does not have any foundation to address such a claim. In that regard therefore, I am unable to make any finding. I can only add that the respondent is limited in the form of inadequate pleadings and evidence.

In the end this appeal succeeds in part. The lower court judgment is hereby set aside and in place thereof I enter Judgment in favour of the respondent in the sum of Kshs 50,000/= pain and suffering, Kshs. 50,000/= loss of expectation of life and Kshs. 30,000/= proved special damages. The respondent shall have costs of the suit in the lower court plus interest at court rates, while in this appeal each party shall bear their own costs.

*Dated, signed and delivered at Nairobi this 21<sup>st</sup> Day of November, 2019.*

**A. MBOGHOLI MSAGHA**

**JUDGE**