



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CIVIL APPEAL NO. 82 OF 2018

BETWEEN

FRANCIS MUGA.....1ST APPELLANT

ODHIAMBO FRANCIS.....2ND APPELLANT

AND

RACHEL ASIKO MALANDA.....1ST RESPONDENT

RICHARD MAGOMELE AMALEMBA.....2ND RESPONDENT

(suing as administrators and personal representatives of the estate of Joseph Okanga Njeri)

(Being an Appeal from the Judgment and Decree in Nyando SPMCC No. 24 of 2015

by Hon. P.Olengo (PM) on 09th August, 2018)

JUDGMENT

1. **Rachel Asiko Malanda** and **Richard Magomele Amalemba (Respondents)** suing as administrators and personal representatives of the estate of **Joseph Okanga Njeri (Deceased)** sued **Francis Muga** And **Odhiambo Francis (Appellants)** in the lower court claiming damages for fatal injuries suffered by their brother and wife respectively on 13.12.12 when 2nd Appellant's motor vehicle KBM 518D which was being driven by the 1st Appellant along Ahero-Katito Road knocked down the deceased who was lawfully riding motor cycle KMCR 810 Z along the same road allegedly due to the negligence of the 1st Appellant.

2. The Defendants/Appellants in their statement of Defence denied the claim and blamed deceased for the accident.

3. The learned trial magistrate apportioned liability at 100% in favor of Respondents against the Appellants and in a judgment dated **09.08.18**, awarded damages in the sum of Kshs. 6,923,400/-.

The Appeal

4. The Appellant being dissatisfied with the lower court's decision preferred this appeal and on 09.09.18 filed the Memorandum of Appeal dated 09.09.18 which sets out 7 grounds of appeal which I have summarized into 6 grounds that:

- 1) **The finding that Appellant was wholly liable was erroneous**
- 2) **The assessment on quantum and award under loss of dependency do not tally**
- 3) **The police abstract was not produced by its maker**
- 4) **That the multiplicand of Kshs. 34,067/- was erroneous**
- 5) **The multiplier of 25 years was erroneous since the deceased was not a civil servant**

6) The award for loss of expectation of life ought to have been deducted from the award under loss of dependency

Analysis and Determination

5. This being the first appellate court, its duty is to re-evaluate 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 **Selle & Another v Associated Motor Boat Co. Ltd & Another (1968) EA 123.**)

6. 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 **Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v A.M. Lubia and Olive Lubia (1985) 1KAR**) and **Denshire Muteti Wambua V Kenya Power & Lighting Co. Ltd, Civil Appeal No. 60 of 2004.**)

7. I have considered the entire record of appeal and considered the submissions of counsels for both parties. I note that the appeal revolves around the question of both liability and quantum.

a. Liability

8. PW2 ROBERT OUKO ODHIAMBO in his testimony stated that M/V KBM 518D (*accident motor vehicle*) was being driven at high speed from Katito general direction on the Ahero-Katito road whereas the deceased was riding from the opposite direction headed towards Katito. It was his evidence that the deceased swerved to avoid a collision with the accident motor vehicle but the vehicle still swerved to the deceased's lane and knocked him down together with his pillion passenger.

9. The 1st Appellant who was the driver of the *accident motor vehicle* did not testify. The case of **Kerugoya HCCA No. 18 of 2013 Michael K. Kimaru v Margaret Waihera Waina [2015] eKLR** cited by the Appellants where is distinguishable for the reason that the respondent in that case was asleep at the material time of the accident and therefore could not have been in a position to tell how the motor vehicle she was travelling was being driven whereas the evidence of an eye witness in this case clearly describing how the accident occurred was not controverted. The cardinal principle of law that, '*he who alleges must prove*' captured in Sections 107 to 109 of the Evidence Act was from the evidence on record proven and **China Wuyi & Co Limited v Samson K Metto [2014] eKLR** is therefore inapplicable to this case.

10. From the foregoing, I find that the analysis by the trial magistrate on liability and the verdict thereof was well founded and I decline to interfere with that finding.

b. The police abstract

11. The Appellants' counsel was in court on the date that the police abstract was produced as an exhibit and did not raise any objection to its production by the 1st Respondent. Had an objection been raised. I have no doubt that the trial court would have resolved it. In any case, the objection concerning the production of the police abstract is not merited for the reason that it only establishes that an accident which is not denied occurred.

c. Multiplicand

12. Whereas the deceased's net pay in September, 2012 which was 3 months before his death was Kshs. 34,067/-, the said sum had by November, 2012 a month before deceased died reduced to Kshs. 30,067.60 and not that's the multiplicand that ought to have been applied.

d. Multiplier

13. Deceased died at the age of 35 years and the trial court considering retirement age to be 60 years applied a multiplier of 25 years. The deceased was in the private sector which has a longer working life. Considering the vicissitudes of life, I find that a multiplier of 25 years applied by the trial court is reasonable and requires no interference.

e. Award under the Fatal Accidents Act and Law Reform Act

14. In the case of **Hellen Waruguru Waweru (Suing as the Legal Representative of Peter Waweru Menja (Deceased vs. Kiarie Shoe Stores Limited [2015] eKLR)**, the Court of Appeal (Waki, Nambuye and Kiage JJA) stated that:

“...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 are the same, and consequently the claim for lost years and dependency will go to the same person. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation life as these are only awarded under the Law Reform Act, hence the issue of duplication does not arise.

15. In **David Kahuruka Gitau & Another V Nancy Ann Wathithi Gitau & Another [2016] eKLR**, Mativo J analysed Section 15(5) of the Law Reform (Miscellaneous Provisions) 1934 Act and Section 2(5) of the Law Reform Act and stated as follows:

“I am fully aware of numerous authorities where damages have been deducted to avoid double compensation but little has been stated about the true meaning and interpretation of Section 2 (5) of the Law Reform Act. My natural and logical interpretation and understanding of Section 2 (5) of the Law Reform Act cited above is that the right conferred for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on dependents by the Fatal Accidents Act.”

16. In David Kahuruka Gitau case (above), the judge in cited in Richard Omeyo Omino vs Christine A. Onyango Kisumu Civil Appeal No. 61 of 2007 with approval, where **Karanja J** in discussing the provisions of Section 2 (5) of the Law Reform Act stated: -

"The Law Reform Act Section 2 (5) provides that the rights conferred by or under the benefit for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependents of the deceased persons by the Fatal Accidents Act. This therefore means that a party entitled to sue under the Fatal Accidents Act still has the right to sue under the Law Reform Act in respect of the same death.

The words "to be taken into account" and "to be deducted" are two different things. The words in Section 4 (2) of the Fatal Accidents Act are "taken into account". This section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the Fatal Accidents Act the trial judge bore in mind or considered what he had awarded under the Law Reform Act for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction."

17. I fully associate myself with the findings in the above cited cases and therefore find that the trial magistrate appropriately awarded damages both under the Fatal Accidents Act and Law Reform Act.

f. Special damages

18. None were awarded.

DISPOSITION

19. In view of the finding I have made, the appeal only succeeds on the issue of multiplicand of Kshs. 34,067/- which I substitute with Kshs. 30,067.60. Respondents shall bear half costs of the appeal.

DATED, DELIVERED AND SIGNED THIS 05th DAY OF *December* 2019.

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - AmondiOkodoi

For Appellants - N/A

For Respondents - N/A