



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL NO. 43 OF 2017
CONSOLIDATED WITH
CIVIL APPEAL NO. 45 OF 2017

BETWEEN

HAYER BISHAN SINGH & SONS LIMITEDAPPELLANT

AND

EUNICE ACHIENG OGILO &

MONICA AKELO OLALO suing as legal representatives of estate of

ENOCK OTIENO WANYAGO (DECEASED)..... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. T. Obutu, PM dated 8th May 2017 at the Chief Magistrates Court at Kisumu in Civil Case No. 625 of 2014)

JUDGMENT

1. The respondents case in the subordinate court is that on 23rd August 2013, the deceased was walking along the Bondo-Kisian road when motor vehicle registration number KBE 371E belonging to the appellant was driven carelessly causing it to veer off the road and hit the deceased who died as a result. Thereafter the deceased's estate and dependants filed suit under the *Law Reform Act (Chapter 26 of the Laws of Kenya)* and the *Fatal Accidents Act (Chapter 32 of the Laws of Kenya)* claiming damages.
2. In its statement of defence, the appellant denied the accident took place or that the deceased was walking along the Bondo-Kisian road as alleged or at all. It further averred that if the accident took place, then the deceased was the sole author of the accident or that he substantially contributed to the accident as a result of his own negligence. The appellant denied that the deceased, his estate or dependants suffered any loss or damage as alleged or all.
3. After the hearing, the appellant was found fully liable and the respondents were awarded **Kshs. 889,814/-** made up as follows;

- | | |
|---------------------------------|-----------------|
| (a) Pain and suffering | Kshs. 30,000/- |
| (b) Loss of expectation of life | Kshs. 100,000/- |

(c) Loss of dependence

(Kshs. 5,844/- X 24X12X 1/2)

Kshs. 841,564/-

(d) Special damages

Kshs. 28,250/-

TOTAL

Kshs. 889,814/-.

4. Before dealing with the issues in contention in this appeal, I must bear in mind the principle that the first appellate court must re-evaluate the evidence adduced before the trial magistrate before reaching its own independent determination as to whether or not to uphold the decision of the trial magistrate bearing in mind that it neither saw nor heard the witnesses testify (see *Peters v Sunday Post Ltd* [1958] EA 424). I now turn to deal with the issue of liability first.

5. Before the trial court, the respondent called 3 witnesses while the appellant called one witness. From the entirety of the evidence the fact that an accident took place at the stated place and time was not disputed. The matter in dispute was whether the appellant's driver knocked down the deceased and if so, whether the deceased was to blame, wholly or in part, for the accident.

6. The deceased's wife Eunice Achieng Ogile (PW 1) testified that on the material evening, the deceased left home with a panga and a torch for a meeting. After a while she was informed that he had been involved in an accident. When she went to the scene, the deceased's body had been removed from the scene and taken to the hospital. Haron Hezron Asunga (PW 2), a motorbike rider, was riding his motorbike at about 9.30pm and as he was moving along the Bondo-Kisian Road towards Kisian, he saw two buses and a pick-up overtake him. The pick-up swerved off the road and hit a man walking on the left side of the road. He testified that the vehicle hit the man's legs and he fell by his head. He told the court that the man was about a metre off the road and the vehicle was about 20 metres off the road. In cross-examination, PW 1 stated that the pick-up lights and his lights were on. He denied that the accident took place in the middle of the road but stated that the deceased body was 2 metres into the road. He insisted that the deceased was not hit by the buses as they did not stop.

7. PC Eustus Machewa (PW 3) confirmed that he was not the investigating officer. He produced the police abstract which confirmed that the deceased had been injured in the road accident involving the appellant's motor vehicle. He indicated that no one was charged with causing death of the deceased. Although he did not produce any sketch plans, he told the court that the deceased's body was found inside the road.

8. The appellant's driver, Richard Asambe Gaji (DW 1) recalled that he was driving the appellant pick-up on the material night coming from Bondo towards Kisumu. He was following two buses. At Holo, the bus he was following served left and he saw an object in the middle of the road. He also swerved right off the road and landed in a ditch. When he came out of the vehicle, he found that someone had landed in the middle of the road. He denied that he had caused the accident and that he was not prosecuted for the offence.

9. The appellant has submitted that liability ought to have been apportioned between the appellant and the deceased at 30% to 70% for reasons that the deceased's body was retrieved from the centre of the road. That the deceased disregarded his own safety and was crossing a busy highway which is not well lit at night and that because the respondent's driver has never been charged in any court of law with any traffic offence he could not be held liable. The appellant contended that its motor vehicle did not have any post-accident damage which would be consistent with having knocked someone down.

10. On the other hand, the respondents argued that the evidence of PW 2 was clear that it is the appellant's motor vehicle that hit the deceased. Further that there was no evidence adduced to show that the deceased was crossing the road. That the only evidence adduced is that the deceased was walking along the road when the motor vehicle veered off the road and knocked him down. The respondent was also of the view that the fact that the appellant's driver was not charged with a traffic offence did absolve

the appellant of any liability.

11. From the evidence of PW2 the vehicle veered off the road and knocked the deceased who was walking about one meter from the road. PW2 stated that the vehicle knocked him on the lower limbs and he fell into the road. On the other hand, DW 1 testified that the bus in front of him swerved to the left and as he was driving he saw something on the road and he veered to the right and got into a ditch. At first he did not know it was a person but when he got out of the motor vehicle he realised that it was a person lying on the road. The bus in front of them stopped for a while then drove off.

12. Although PW 2 was the only independent witness to the accident and he saw the deceased being hit by the vehicle. It is also probable that the deceased's body being found in the middle of the road means that the deceased was walking on the road when DW 1 tried to swerve off the road and this hitting him. It is likely that the DW 1 was driving too fast to see the deceased walking on the road that is why he swerved, hit the deceased and went into the ditch and the deceased's body was thrown in the middle of the road. I would therefore apportion liability at 80:20 in favour of the respondents.

13. I now turn to the second issue, that is quantum of damages. The general principle is that for the appellate court to interfere with an award of damages it must be shown that the trial court, in awarding of the damages, took into consideration irrelevant factors or failed to take into account relevant factors or the sum awarded is inordinately low or high so as to lead to the conclusion that the award was a wholly erroneous estimate of the damage. The appellant may also establish that a wrong principle of law was applied (see **Butt v Khan [1981] KLR 349**).

14. According to the plaint, the deceased was 36 years old at the time of his death. He was working mason earning an income of about Kshs. 800/- daily which he was using to maintain himself, his wife, aged 36 years and four children aged 14, 11, 6 and 1 years. The respondent also claimed Kshs. 28,250/- as special damages. The testimony of PW 1 largely mirrored what was pleaded in the plaint. The evidence was not disputed by the manner in which the trial magistrate assessed the evidence. I shall therefore consider each head of the award.

15. The trial magistrate awarded Kshs. 30,000/- for pain and suffering under the **Law Reform Act**. The appellant submitted that no award should have been made under this head as the deceased did not endure any pain as he died instantly. The respondent's position was that even in such circumstances, the courts have always awarded damages for pain and suffering. I do not find that award unwarranted or unreasonable and I adopt and reiterate what I stated in **Sukari Industries Limited v Clyde Machimbo Juma HB HCCA No. 68 of 2015[2016]eKLR** that:

[5] On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased's estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs 10,000 to Kshs 100,000 over the last 20 years hence I cannot say that that the sum of Kshs 50,000 awarded under this head is unreasonable.

16. The appellant argued that a sum of Kshs. 100,000/- would have been sufficed for loss of expectation of life. Counsel for the appellant cited **Benedata Wanjiku Kimani v Changwon Cheboi and Another NKU HCCC No. 373 of 2008 [2013]eKLR** where Emukule J., stated that the award under this head is commonly referred to as a conventional award and has over the years increased from Kshs. 10,000/- to Kshs. 100,000/- based on the increase of life expectancy over the last two decades. The respondent argued that the court should have awarded Kshs. 140,000/- given that such an amount had been awarded by the courts for example in **Simeone Kiplimo Murey and 3 others v Kenya Bus Management Services Limited and 4 Others HB HCCA No. 1 & 2 of 2013[2014]eKLR**. In my view, the fact that the trial magistrate awarded Kshs. 100,000/- cannot be said to be out of the ordinary to warrant appellant intervention.

17. The trial magistrate in assessing the award for the loss of dependency under the *Fatal Accidents Act* relied on the minimum wage under *Legal Notice No. 117 of 2015* for a general labourer being Kshs. 5,885/- per month to determine the multiplicand. The trial magistrate rejected the PW 1's evidence that the deceased was a mason because there was no evidence that he was a trained mason. Although the respondents urged that the proper wage for a mason in Kisumu was Kshs. 10,954.70 under the *Legal Notice*, this issue was not the subject of the cross-appeal. Likewise, the respondent urged that the trial magistrate should have used a dependency ratio 2/3 instead of 1/2 but the issue was not the subject of the cross-appeal.

18. The trial magistrate reasoned that since the deceased was 36 years, he would have worked for a further 24 years as a mason. The appellant submitted that 14 years would have been an appropriated multiplier to take into account the vagaries of life. The Court of Appeal in *Board of Governors of Kangubiri Girls High School & Another v Jane Wanjiku Muriithi & Another NYR CA Civil Appeal No. 35 of 2014 [2014] eKLR* held that the choice of multiplier is a matter of the courts discretion which must be exercised judiciously. The trial magistrate did not consider the possibility that the deceased would not work for until he retired considering the nature of work done by the deceased, the conditions of life of the deceased could have lived keeping in mind that the standard of life and the life expectancy in Kenya. Taking these factors into account, I would award a multiplier of 20 years.

19. The total amount for loss of dependency is therefore Kshs. 706,200/- made up as follows 5885 X 12 X 20 X 1/2.

20. The cross-appeal is about mis-calculation of the sums awarded to the dependants by the trial court. The complaint is now cured by the court now making the allowing the appeal substituting the judgment in the subordinate court with the following award

(a) Pain and suffering	Kshs. 30,000/-
(b) Loss of expectation of life	Kshs. 100,000/-
(c) Loss of dependency	Kshs. 706,200/-
(d) Special damages	Kshs. 28,250/-
	Kshs. 864,450/-
Less 20%	(Kshs. 172,890/-)
TOTAL	Kshs. 691,560/-

21. The amount shall accrue interest at court rates from the date of judgment in the subordinate court. The respondent shall have costs of the suit in the subordinate court and the appellant shall have costs of the appeal which I assess at **Kshs. 30,000/-** all inclusive.

DATED and DELIVERED at KISUMU this day of 7th February 2018.

D.S. MAJANJA

JUDGE

Mr Onsongo instructed by Onsongo and Company Advocates for the appellant.

Mr Okoth instructed by Geoffrey O. Okoth and Company Advocates for the respondents.