REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

HCCA NO. 19 OF 2015

(From the Original Nyamira PM Civil Suit No. 77 of 2011)

1. G4S SECURITY SERVICES (K) LIMITED...1ST APPELLANT

2. BENARD ODHIAMBO....................................2ND APPELLANT

=VRS=

FLORENCE RABERA

(Suing as Administrator of the Estate of

BERNARD MARITA NYAMBOGA).......................RESPONDENT

[Being an appeal from the Judgement and Decree of Hon. N. Njagi – PM

delivered on the 5th day of June, 2014 in Nyamira PM CC No. 77 of 2011

between Florence Rabera (Suing as Administrator of the

Estate of Bernard Marita Nyamboga =VRS= G4S Security

Services (K) Ltd and Benard Odhiambo]

JUDGEMENT

The Appellants were the registered owner and driver of motor vehicle Registration No. KAV 879Q. On 29th May 2011 at a place called Miruka along the Nyamira – Miruka Road the motor vehicle was involved in a road traffic accident with a cyclist. The cyclist Benard Marita Nyamboga, a young man aged 20 years suffered fatal injuries.

The Respondent, the Administratix of the Estate of the deceased sued the Appellants at the Nyamira Chief Magistrate's Court and claimed general damages for pain, suffering, lost years and loss of expectation of life. In the plaint she averred that she based her claim on the Highway Code, the Fatal Accidents Act, the Law Reform Act and the Doctrine of Respisa Loquitor.

At the trial the Respondent called three witnesses and the 2nd Appellant also testified. The Learned Trial Magistrate thereafter found the Appellants wholly liable for the accident and awarded the Respondent damages as follows: -

(a) Pain and suffering –	**Kshs. 20,000/=**
(b) Loss of expectation of life –	**Kshs. 100,000/=**
(c) Loss of dependancy –	**Kshs. 500,000/=**
Total –	**Kshs. 620,000/=**

(d) Plus costs and interest.

Being dissatisfied with the finding on liability and the quantum of damages, the Appellants preferred this appeal. Their memorandum of appeal lists the following grounds: -

1. THAT the Learned Trial Magistrate erred in law and fact in failing to dismiss the Respondent's suit in the Lower Court as she had not proved her case on a balance of probability.

2. THAT the Learned Trial Magistrate erred in law and fact in holding the Appellants 100% liable for the alleged accident when there was no sufficient evidence to support that finding.

3. THAT the Learned Trial Magistrate erred in law and fact in failing to hold the deceased wholly liable for the accident since it was the deceased who rammed into the Appellants' vehicle from the rear side.

4. THAT the Learned Trial Magistrate erred in law in disregarding the evidence of the Appellants' witness without any proper cause hence resulting to a wrong decision.

5. THAT the Learned Trial Magistrate erred in believing the uncorroborated evidence of the Respondent which was in any event insufficient and contradictory.

6. THAT the Learned Trial Magistrate erred in law and fact by awarding the Respondent a sum of Kshs. 20,000/= for pain and suffering while not considering that the deceased succumbed to his injuries on the spot.

7. THAT the Learned Trial Magistrate erred in law and fact by awarding the Respondent a sum of Kshs. 100,000/= for loss of expectation of life when she was not entitled to the same.

8. THAT the Learned Trial Magistrate erred in law and fact by awarding loss of dependency yet the Respondent did not prove dependency as is required under Section 4 of the Fatal Accidents Act Cap 23 Laws of Kenya.

9. THAT the Learned Trial Magistrate erred in law and fact by awarding the estate of the deceased a sum of Kshs. 500,000/= for loss of dependency/lost years that was so excessive as to amount to an erroneous estimate of loss or damage suffered by the estate of the deceased.

10. THAT the Learned Trial Magistrate erred in law and fact in awarding the estate of the deceased a total sum of Kshs. 620,000/= as general damages that was so excessive as to amount to an erroneous estimate of loss or damage suffered by the estate of the deceased.

11. THAT the Learned Trial Magistrate erred in law and fact by failing to deduct the award of Law Reform Act from the Fatal Accidents Act thus awarding the estate of the deceased twice.

12. THAT the Learned Trial Magistrate erred in law in entering judgement for the Respondent contrary to the laid down principles as to the remoteness of damages and foreseability.

13. THAT the Learned Trial Magistrate erred in law and fact in failing to consider the Appellants' submissions and the legal authorities relied upon in support of thereof.

14. THAT the Learned Trial Magistrate's decision albeit a discretionary one was plainly wrong.

The appeal was canvassed by way of written submissions. Counsel for the Appellants discredited the evidence of the witnesses for the Respondent and submitted that the same did not prove negligence against the Appellants on a balance of probabilities. Counsel contended that it was also not clear from the evidence as to whether the deceased was riding a bicycle or a motor cycle and whether he was hit while stationery or while in motion. Counsel submitted that the evidence of the Appellants had proved negligence against the deceased and that as the evidence of the witnesses for the Appellants did not shed light to the disputed facts the Trial Magistrate erred in finding the Appellants wholly liable.

On the quantum of damages, Counsel submitted that whereas the Respondent had locus standi to bring the claim under the Law Reform Act the sum of Kshs. 100,000/= awarded for loss of expectation of life was excessive. Counsel submitted that a sum of Kshs. 60,000/= should have been awarded under that.

For the sum awarded under the Fatal Accidents Act Counsel faulted the Trial Magistrate and submitted that the Respondent being a sister of the deceased she was not entitled to damages under that head. To support this submission he relied on **Section 4 of the Fatal Accidents Act.** Counsel argued this Court to set aside the award under that head for the aforegoing reason as well as for being excessive.

Counsel for the Appellants further pointed out a contradiction in regard to the date of the accident as pleaded in the amended plaint and as indicated in the Police Abstract. He urged that as parties are bound by their pleadings the Trial Magistrate ought to have taken cognizance of that variance and dismissed the case against the Appellants. On this, Counsel relied on ***Delmonte Kenya =vrs= David N. Gerald, HCCA (NRB) 520 of 2002*** where at page 3 Visram J, as he then was held:-

“a Magistrate would not be entitled to enter judgement for the Plaintiff where the pleadings and the testimony are at variance.”

Counsel further submitted that the Trial Magistrate misdirected himself in omitting to deduct the award made under the Law Reform Act from the award made under the Fatal Accidents Act. He contended that the entire judgement was erroneous and urged this Court to allow the appeal and set aside the entire judgement.

Counsel for the Respondent on his part invited this Court to find that the Trial Magistrate exercised his discretion correctly in arriving at the findings on liability as well as the quantum of damages. He urged this Court to dismiss the appeal with costs to the Respondent.

As the first appellate court, I have reconsidered and evaluated the evidence before the Trial Magistrate while bearing in mind that I did not see or hear the witnesses testify. I have also considered the submissions of Learned Counsel and the authorities cited in support of those submissions.

From the evidence adduced by both sides, it is not in doubt that an accident occurred between the deceased in this case and the vehicle belonging to the Appellants. That accident was admitted by the 2nd Appellant. It was his evidence that the accident occurred at Miruka junction and that he was driving motor vehicle KAV 879Q while the deceased was riding a bicycle. It was also his evidence that the accident occurred on 28th May 2011 the same day it was, according to Pw3, reported to Nyamira Police Station. That an accident occurred on that date and place is therefore not in doubt and this Court does not consider the contradiction in the evidence and the amended plaint fatal to the claim. It would of course have been different had the accident been denied.

On liability, the Respondent called an eye witness, Joyce Kerubo (Pw2) who testified that the deceased was riding on the left edge of the road when he was knocked from behind by the Appellant’s motor vehicle. It was her evidence that the road was straight at the point of impact and that the deceased was stationary at the time. She blamed the driver of the vehicle for speeding. The 2nd Appellant gave evidence that he had slowed down at the junction when he was knocked at the rear by a cyclist who was drunk. It is however instructive that he did not adduce any evidence of the cyclist’s drunkenness.

Between his account and that of Pw2, I find that of Pw2 more credible. This is because she is an independent witness who was going about her business when the accident occurred. It is also more probable given that it is unlikely that the cyclist could have sustained such severe injuries from hitting a vehicle which itself was in motion. The more probable version is that the deceased was hit by a speeding vehicle whilst he himself was stationary. It is also instructive that instead of waiting at the scene for the Police to determine the point of impact, the 2nd Appellant drove off with the victim. I am not, in the circumstances, persuaded that the Trial Magistrate erred in making a negative inference against the 2nd Appellant or in finding the Appellants wholly liable for the accident.

On the quantum of damages it is my finding that the Trial Magistrate acted on a wrong principle when he awarded the Respondent damages under the Fatal Accidents Act. Section 4 of that Act clearly stipulates that such damages can only be awarded for the benefit of the wife, husband, parents and child of the deceased. The Respondent in this case is a sister of the deceased and she ought therefore not to have benefitted from the claim brought under the Fatal Accidents Act. The ward of Kshs. 500,000/= being based on a wrong principle of law shall therefore be set aside.

As for the awards made under the Law Reform Act, my finding is that the same are not excessive but are reasonable and what the Courts normally awarded for pain and suffering and loss of expectation of life at the time. In **Nakuru HCCC 181 of 2001 Cila Franklyn Onyango Ngonga (suing as personal and legal representative of the estate of Florence Agwingi Ogam (deceased) =vrs= Josephine Mumbi Ngugi & Lake Flowers**, for instance the Judge awarded Kshs. 10,000/= for pain and suffering and Kshs. 80,000/= for loss of expectation of life. That was on 20th September, 2002. In January 2001, Angawa, J awarded Kshs. 10,000/= for pain and suffering and Kshs. 60,000/= for loss of expectation of life in **HCCC 2409 of 1998 – David Ngunje Mwangi =vrs= The Chairman of the Board of Governors of Njiri High School.**

Accordingly taking into account similar awards, the passage of time and inflation, the sums awarded to the Respondents under the Law Reform Act are reasonable and shall remain undisturbed. The Appellants therefore partially succeed in the appeal and the sum of Kshs. 500,000/= awarded to the Respondent under the Fatal Accidents Act is set side. The costs of the Respondent in the Lower Court shall take that deduction into account and the Appellants shall have half the costs of this appeal.

It is so ordered.

Dated and Delivered at Nyamira this 12th day of July, 2018.

E. N. MAINA

JUDGE