



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 119 OF 2014

STEPHEN ONSUMU KIBAGE.....APPELLANT

VERSUS

REBEKA MWANGO SIMION & JAMES NYAANGA

(Suing as legal rep. of the state of KEREMENSIA

ONKEO NYAKUNDI (DECEASED)..... RESPONDENT

(Appeal from the Judgment and Decree in Kisii CM Civil Case No. 272 of 2011 (Hon. J.M Njoroge - CM.)

JUDGMENT

1. The appellant, **Stephen Onsumu Kibage**, was the first defendant in **Kisii CMCC No. 272 of 2011**, which was instituted against him and another (i.e Larichem E.A Ltd) by the plaintiffs/respondents, **Rebeka Mwango Simion** and **James Nyaanga Onkeo**, suing as legal representatives of the estate of Keremensia Onkeo Nyakundi (deceased) for damages arising from a road traffic accident which occurred on the 13th September 2009, along the Kisii/Kisumu road near Soko Primary School.
2. In the plaint dated 15th August 2011, it was pleaded that at all material times, the appellant was the actual owner in possession of motor vehicle Reg No. KYG 876 Datsun and on the material date of the accident he drove or his driver/agent or servant drove the said vehicle so negligently such that it violently lost control and knocked down the deceased who was standing at the verge of the road thereby occasioning her fatal injuries.
3. It was further pleaded that the deceased was at the time aged fifty seven (57) years and a peasant farmer with high prospects of farming earning a monthly income of about Kshs. 6000/= . She enjoyed good health and was expected to live beyond the age of seventy (70) years. She left behind her dependants who included the respondents and who suffered loss and damages as a result of her death.
4. The respondents blamed the appellant for the accident and filed the present suit under the Fatal Accidents and Law Reform Acts praying for both special and general damages together with costs of the suit and interest against the appellant who denied all the allegations made against him by the respondent in his statement of defence dated 31st October 2011.
5. The appellant contended in his defence that if the accident occurred as alleged but which was denied,

then it was wholly and/or substantially caused by the negligence of the pedestrian deceased.

It was the appellant's prayer that the suit against him be dismissed with costs.

6. The suit was fully heard and thereafter, the trial court entered judgment on liability at 80% against the appellant. The respondents took 20% blame.

A total of Kshs. 597,500/= was awarded for pain and suffering (Kshs. 20,000/=), loss of expectation of life (Kshs. 100,000/=), loss of dependency (Kshs. 432,000/=) and as special damages (Kshs. 45,500/=) less 20% contributory negligence.

The net amount awarded to the respondents was Kshs. 478,000/= together with costs and interest.

7. Being dissatisfied with the judgment of the trial court, the appellant preferred this appeal on the basis of the grounds contained in the memorandum of appeal dated 22nd October 2014. He prays for the setting aside of the said judgment and substitution of the same with a proper finding. He also prays for costs of the appeal as well as costs in the lower court.

8. At the hearing of the appeal, the appellant was represented by the firm of **Omwenga & Co. Advocates** while the respondents were represented by **B.N Ogari & Co. Advocates**.

Both parties agreed to canvass the appeal by way of written submissions. These were duly filed on respective dates.

9. As was stated in the case of **Selle Vs. Associated Motor Boat Co. Ltd (1968)EA 123**, the duty of this court was to re-consider the evidence adduced at the trial and draw its own conclusions bearing in mind that the trial court had the opportunity to see and hear the witnesses.

10. In that regard, the respondents' case was briefly that on the material date, the deceased was standing on the right side of the Kisumu-Kisii road facing the direction of Kisumu when the appellant's vehicle approached a road bump at high speed with the result that it went out of control and knocked down the deceased. This was witnessed by the second respondent, **James Nyaanga Onkeo (PW 1)**, who was breaking concrete on the left side of the road as one faces the direction of Kisumu.

11. The deceased suffered injuries and was rushed to Kisii Level "5" hospital where she later succumbed to her injuries.

The accident was reported to the police at Kisii Police Station. A police abstract (P.Ex 6) to that effect was produced by **PC George Ndiema (PW 2)**, attached to the traffic department.

12. The second respondent (PW 1) obtained necessary letters of administration ad litem (P.Ex 1) and filed this suit. He stated that the deceased was his mother and was aged 57 years at the time of her death. He produced the necessary death certificate (P.Ex 8) and said that his mother was a farmer and his father died as a result of the shock of losing the deceased.

13. The second respondent together with his four siblings; Geoffrey, Joseph, Martha and Rebecca (first respondent) were left behind by the deceased. He (second respondent) stated that the deceased was a farmer and dealt in maize, coffee and vegetables which earned her a monthly income of Kshs. 6000/= which was used in support of her family.

14. It was also stated by the second respondent that expenses were incurred following the death of the deceased. He produced the necessary receipts (P.Ex 2, 3, 4, 5 and 10). He also produced a copy of the record from the registrar of motor vehicle (P.Ex 9) to prove ownership of the material vehicle. He contended that the appellant was the driver of the motor vehicle at the time of the accident and was to blame for driving at a high speed and losing control of the vehicle when he came across road bump between a place called Riotero and a place called Mosocho.

15. The Traffic Base Commander at Kisii Police Station, **C.IP James Ekwenye (DW 1)**, testified on behalf the appellant and confirmed the occurrence of the accident but stated that it was caused by the deceased's act of crossing the road without due care and attention. He absolved the driver of the vehicle from any blame and submitted the matter to a public inquest before a magistrate who closed the matter after ruling that there was no foul play.

16. The necessary inquest file (D.Ex 2) was produced by **Jackson Mokuu (DW 2)**, of the Kisii Chief Magistrate's Court criminal registry.

The appellant, **Stephen Kibagendi Onsongo (DW 3)**, confirmed that he was driving the material vehicle at the material time but denied that he was over speeding. He blamed the deceased for the accident and contended that he never veered off the road. He stated that the deceased emerged from the right side of the road and fell suddenly on the vehicle's bonnet. He stopped his vehicle and rushed her to Kisii Level "5" hospital.

17. Upon due consideration of all the foregoing evidence together with the grounds of appeal and the rival submissions, it is apparent to this court that the occurrence of the accident and the appellant's control and management of the vehicle at the material time were factors which were not at all or substantially disputed.

The basic issue arising for determination was whether the appellant was liable for the accident and if so, whether the respondents were entitled to damages and to what extent.

18. With regard to liability, the trial court found for the respondents against the appellant at a ratio of 80%.

However, the evidence through the base commander (DW 1) and the court official (DW 2) was in support of the appellant's contention that the deceased was crossing the road when she was knocked down.

19. These three witnesses (DW 1, 2 and 3) strongly indicated that contrary to what was stated by the second respondent ((PW 1) that the deceased was standing on the side of the road, she (deceased) was actually knocked down while attempting to cross the road from one side to the other. It was strongly indicated that she undertook the task without proper care for her safety and proper lookout for vehicles on the road.

20. Nonetheless, evidence from the respondents suggested that the appellant played a role in causing the accident in that, he was driving his vehicle at a high speed oblivious of the road bumps ahead of him.

A person who drives a motor vehicle at more than the average speed at a built up area and fails to notice the road speed bumps ahead, would obviously be driving in a manner which is reckless and negligent and without proper lookout for pedestrian crossing the road or expected to cross the road.

21. This court would from the evidence apportion liability between the appellant and the respondents at 40% to 60% against the respondents. The respondents would thus be entitled to damages against the appellant to the extent of 40% appellant's liability. The remainder 60% is the deceased's contributory negligence.

22. With regard to the quantum of damages under the Law Reform Act, the trial court's award of Kshs. 20,000/= for pain and suffering and Kshs. 100,000/= for loss of expectation of life was reasonable and adequate and does not call for interference by this court.

23. As for loss of dependency, the award of Kshs. 432,000/= from a multiplicand of Kshs. 6000/=, a multiplier of 9 years and a dependency ratio of $\frac{2}{3}$ rd, was also reasonable and adequate considering that there was no dispute that the deceased was aged 57 years at the time of her death and no substantial dispute that she was a farmer who earned approximately Kshs. 6,000/= per month from her farming activities.

24. Without doubt, a monthly income of Kshs. 6000/= from sale of agricultural products is surely a modest figure. The deceased may have been earning even more only that the respondents did not avail concrete evidence to establish her actual monthly earnings.

The multiplier of 9 years adopted by the trial court was reasonable.

In sum, this court finds no good reason to interfere with the award of general damages made in favour of the respondents by the trial court.

25. As for special damages, the respondents claimed a total of Ksh. 45,500/= being expenses incurred as funeral expenses and for copy of records and fees for the limited grant of letters of administration.

The amount established by necessary documentary evidence (i.e P.Ex 1, 2, 3, 4, 5 and 9) was Kshs. 42,500/=. This is what the respondents were entitled to rather than Kshs. 45,500/=.

26. All in all, this appeal is allowed only with regard to liability and special damages, in that the appellant shall bear 40% liability instead of 80% and the special damages awardable to the respondents shall be the sum of Kshs. 42,500/= instead of Kshs. 45,500/=.

Judgment is therefore entered for the respondent/plaintiff against the appellant/defendant for the total sum of Kshs. 594,500/= together with costs and interest less 60% respondents contributory negligence i.e Ksh. 237,800/=.

Each party shall bear their own cost of appeal.

[Delivered and signed this 7th day of March 2017].

J.R. KARANJAH

JUDGE

In the presence of

Mr. Mainyi holding brief for Mr. Omwenga for Appellant

Mr. G. Bosire holding brief for Mr. Ogari for Respondent

CC Mohe/Dorothy