REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO 23 OF 2011

FELIX PETER MWOVA…….....…APPELLANT

VERSUS

KANINI NGOVI ALIAS MAGDALENE KANINI

MUEMA &LOIS KOKI MUTUKU (SUING FOR AND

ON BEHALF OF THE ESTATE OF JAMES MUEMA

MUTUKU – DECEASED).....RESPONDENT

(An Appeal arising out of the judgment of Hon. B.T Jaden CM delivered on 9th February 2011 in Machakos Chief Magistrate's Court Civil Case No. 1133 of 2008)

JUDGMENT

Introduction

The Appellant were the original Defendant in Machakos Chief Magistrate's Court Civil Case No. 1133 of 2008, and has appealed against the judgment of the trial Magistrate (as she then was), which was delivered in the said suit on 25th August 2011. The Respondents were the original Plaintiffs in the said suit. The learned magistrate in her judgment apportioned liability for an accident that occurred on 6th May 2008 at 50% as against the Appellant, and awarded the Respondents a total award of Kshs 753,000/= less 50% as general and special damages.

The Appellants subsequently moved this Court through a Memorandum of Appeal dated 8th February 2011 in appealing against the said judgment. The grounds of appeal raised by the Appellants are as follows:

1. THAT the Trial Magistrate erred in law and in fact in failing to appreciate and consider the pleadings and the evidence adduced in support thereof.

2. THAT the learned Trial Magistrate erred in law and fact in failing to appreciate and consider the evidence before her and finding the Appellant 50% liable in negligence.

3. THAT the learned Trial Magistrate erred in law and in fact in failing to consider and give due weight to the Appellant's submissions and authorities attached thereto.

4. THAT the learned Trial Magistrate erred in law and in fact in assessing and awarding

general and special damages wherein the Respondents failed to prove their case.

5. THAT the learned Trial Magistrate's award lacked legal and factual basis and also amounted to an erroneous estimate of the damages due in the particular case and was manifestly excessive.

The Appellant is praying that the appeal be allowed, and that the lower court's judgment on be set aside and the suit therein be dismissed with costs. The Appellants also prayed that they be awarded the costs of this appeal.

It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts, and come up with its findings and conclusions. See in this regard the decisions in this respect **Jabane vs. Olenja [1986] KLR 661 , Selle vs Associated Motor Boat Company Limited [1968] EA 123** and **Peters vs. Sunday Post [1958] E.A. 424.**

I will therefore firstly proceed with a summary of the facts and evidence given in the trial Court. The Respondents instituted a suit in the lower court by filling a Plaint dated 4th November2008 wherein they claimed that on or about 06/05/2008, the deceased was lawfully pushing his bicycle along Machakos-Kitui Road, way off the tarmac when the Defendant either by himself, his driver, servant and/or agent so negligently drove, controlled and/or managed motor vehicle registration No. KAR 419V that he permitted the same to veer off the road and hit the deceased, as a result whereof he sustained fatal injuries. Further, that the Defendant was the registered owner of motor vehicle registration number KAR 419V Isuzu Van.

The Respondents claimed that at the time of his death, the deceased was a healthy man aged 42 years was working as a supervisor for Kisilia Kioko Wholesalers & General Traders and earning Kshs. 15,820/- per month, and that lost his expectation of life and his estate has thereby been put to loss and damage. The Respondents sought general damages under the Fatal Accidents Act and the Law Reform Act. They also sought special damages of Kshs 96,700/= which were particularized in the Plaint.

The Appellant filed a defence dated 29th January 2009 wherein he denied the allegations of an accident having occurred involving motor vehicle registration number KAR 419V and the deceased, and also denied all particulars of negligence attributed to the driver of motor vehicle KAR 419V and put the Appellant to strict proof. The Appellant stated states that if at all the accident in question did occur, the same was caused solely or substantially contributed to by the negligence of the deceased, and he gave particulars thereof.

From the record of the trial court proceedings, the suit proceeded to full hearing on 7th April 2011, when the Respondents called four witnesses. The first witness (PW1) was PC Robert Tomno, the Police officer who investigated the accident. It was his testimony that motor vehicle registration number KAR 419V was attempting to overtake the deceased who was cycling his bicycle on the end of the tarmac road, and hit the deceased from the rear

The second witness (PW2) was Kanini Ngovi alias Magdalene Kanini Mwema, the deceased's wife. She testified that she received a report of the accident and when she went to the scene she found that it was her husband James Muema Mutuku who had been involved in the accident. She stated that she found his body on the roadside. She produced a letter dated 24th July 2008 for Kisilia Kioko Wholesalers & General Traders showing that her husband was employed there and earning Kshs 15,820 . She also produced a bundle of receipts of funeral expenses incurred of Kshs 96,700/=.

The third witness who testified on behalf of the Respondents was an eye witness, Willi Mutua Ilinda (PW3), who was present when the accident happened, and his evidence was that the Appellant was driving motor vehicle registration number KAR 419V at a high speed and in a zigzag manner, and he then lost control of the vehicle and hit the deceased cyclist.

The last witness for the Respondents was Shem Muli Kisilia who testified that he runs a wholesale shop and that the deceased was an employee at the shop as a supervisor and was earning Ksh 15,820/= . He

produced a letter from Kisilia Kioko Wholesalers & General Traders that he signed to this effect as an exhibit.

The Appellant testified as DW1, and he stated that he saw the deceased cycling ahead of him at the edge of the road. His testimony was that he was driving motor vehicle registration number KAR 419V in the middle lane when the deceased abruptly crossed the road from the left side to the right side. As a result, he hit the bicycle rear wheel with the right front side of his vehicle.

The Issues and Determination

The Appellant and Respondent canvassed this appeal by way of written submissions. The Appellants' learned counsel, S.M.Chege Company Advocates, filed submissions dated 8th February 2017. He urged this Court to reverse the trial Court's finding on liability and find that the Respondent was wholly to blame for the accident for getting into the lawful path of travel of the Appellant's motor vehicle and as such, the deceased was the author of his own misfortune.

On the issue of quantum of damages, the Appellant submitted that it was held that the deceased was working as a mason at the time of the accident. However, that there was no evidence tendered in support of proof of income of the deceased, and that the minimum wage of Kshs. 3,203/- applicable to a stone cutter in the year 2006 as provided under the Regulation Of Wages (General) (Amendment) Order, 2006 for a stone cutter should have been used as the multiplicand. Reliance was in this respect placed on the decision to this effect in **Gachoki Gathuri (suing as legal Rep. of the estate of James Kinyua Gachoki (Deceased) v John Ndiga Njagi Timothy & 2 others [2015] eKLR ,**

Further, that the learned magistrate opted to use a different multiplicand of Kshs 5,000/= for the reason that the exact earnings of the deceased had not being ascertained. Lastly, that by using a multiplier of 15 years, the trial Court failed to consider the vicissitudes of life, and it was submitted relying on the authority of **Jackson Kilonzo Mbatha V Nakumatt Holding Ltd. & 2 Others [2000] eKLR** that the Court should have used a multiplier of 8 years. According to the Appellant, the award of Kshs.600, 000/= was inordinately high and not based on any justifiable proof, and the same should be substituted with an award of Kshs.204, 992/-.

The Respondent's learned counsel, L.M.Wambua & Company Advocates filed submissions dated 11th November 2016, wherein it was argued that despite the Appellant having a clear view of the road, he went ahead and hit the deceased. Further, that he did not bother to swerve, brake or stop so as to avoid the accident, and that it was also clear that from the point of landing, the position of the car after the accident and the impact on the deceased, the driver was driving at a very high speed. The Respondents urged this Court to maintain the trial Court's decision on liability.

On the different heads of damages awarded, it was submitted that the deceased died on the spot and the award of damages of Kshs. 10,000/- for pain and suffering is sufficient and reasonable in the circumstances. The case of **Kiarie Shoe Stores Limited -vs- Hellen Waruguru Waweru (suing as the legal representatives of the Estate of Peter Waweru Mwenja Deceased), Embu HCCA No. 58 of 2010** was cited in this respect. Further, that the deceased herein was a healthy 42 years old man at the time of the accident and that the sum of Kshs. 100,000/- awarded by the trial Court for loss of expectation of life was reasonable and should be maintained. Reliance was placed on the decision in **Lawi Duma Odera (Suing as the Personal Representatives of Annastacia Auma Duma -Deceased) -vs- John Obungu & Anor, Civil suit No. 369 of 2000**

On the damages awarded for loss of dependency the Respondent submitted that the award of Kshs 600,000/= was reasonable and not excessive, as the trial Court used the minimum wage of Kshs. 5,000/- and a multiplier of 15 years.

From the grounds of, and relief sought in this appeal, and the submissions made thereon by the parties, it is evident that the Appellant disputes both the issue of liability and the award of damages, especially for loss of dependency. There are two issues raised that require determination. The first is whether there was

a basis for finding the Appellants 50% liable for the accident that occurred on 6th May 2008. The second issue is whether the damages awarded to the Respondent were justified.

On the issue of liability, I have evaluated the evidence given in the trial Court, and note in this regard that the Respondents in their Plaint alleged that the Appellant's driver was driving with excessive speed and without sufficient care and/or attention; he failed to brake, swerve, slow down or control the motor vehicle; and that he drove the motor vehicle carelessly and dangerously. They have also relied on the doctrine of *res ipsa loquitor*. This doctrine is applicable where a party claims that the fact of the accident happening speaks for itself. The party must however prove the facts which gave rise to inference of the doctrine.

What then were the facts were proved by the Respondent from the evidence presented in the trial Court? Firstly, that the deceased died as a result of an accident involving him and motor vehicle registration number KAR 419V, which was being driven by the Appellant as testified by PW 3 and the Appellant himself. Secondly, that the said motor vehicle was owned by the Appellant. Thirdly, that the accident occurred when the deceased was hit from the rear by the said motor vehicle as he was riding his bicycle on the side of the road.

Do these facts then speak to the allegations of negligence on the part of the Appellants? In my view a reasonable man would answer in the affirmative, particularly in light of the evidence that the deceased was hit from the rear during daytime, and the Appellant would therefore have seen the deceased and should have tried to avoid the accident. There was thus sufficient evidence to show on a balance of probability that the Appellants was to blame for the accident. The trial Court therefore did not err in inferring negligence on the Appellant and finding him 50% liable for the accident.

On the second issue of the damages awarded, It is an established principle of law that that the Appellate court will only interfere with quantum of damages where the trial court either took into account an irrelevant factor or left out a relevant factor, or where the award was too high or too low as to amount to an erroneous estimate, or where the assessment is not based on any evidence (see **Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727, Peter M. Kariuki v Attorney General CA Civil Appeal No. 79 of 2012 [2014]eKLR** and **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5)**.

The Appellants in this respect contest the award of general damages on the ground that it was inordinately high. The generally accepted principle is that very nominal damages will be awarded under the heads of pain and suffering and loss of expectation of life if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs 100,000/- while for pain and suffering the awards range from Kshs 10,000/= to Kshs 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.

In the present appeal PW2 testified that the deceased died instantly, and at the scene of the accident. The awards of Kshs 10,000 for pain and suffering and Kshs 100,000/- for loss of expectation of life were therefore reasonable and in order and are upheld.

On the damages for loss of dependency, this Court is guided by the manner of assessment of damages for loss of dependency under the Fatal Accidents Act. The applicable method was aptly explained by Ringera J. (as he then was)in **Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another, Nairobi HCCC No. 1638 of 1988** as follows;

> **The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of**

the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature."

In the present appeal, a multiplicand of Kshs 5000/= minimum wage per month and a multiplier of 15 years was used by the trial Court, on the basis that this is the minimum wage the deceased should have been earning at the time of his death. However, the evidence by PW2 and PW4 was that the deceased was earning Kshs 15,820/= per month at the time of his death, and they provided proof to this effect. There was therefore no basis for application of a multiplicand of a minimum wage in light of evidence as to the actual wages earned by the deceased. The trial Court in this regard ruled that there were no payment vouchers nor any NHIF or NSSF deductions reflected. In my view the Court should have made reasonable provisions for these deductions in arriving at a net salary figure. In addition the fact that the occupation of the deceased was shown to be a mason in his death certificate did not discount his getting a different type of employment. In my view a net salary of Ksh 10,000/- would have been more reasonable in the circumstances.

The trial Court also adopted a dependency ratio of 2/3 and a multiplier of 15 years. The deceased died at the age of 42 of years. He therefore lost at least 18 years of working life, and the said multiplier used by the trial Court was reasonable. I therefore find that there were errors in the assessment of loss of dependency which ought to have been calculated as follows- Kshs 10,000x12x15x2/3 = Kshs 1,200,000/=.

Lastly, the Appellant did not contest the award of special damages of Kshs 96,700/=. The principle of law in this regard is that special damages must first be specifically pleaded, and then strictly proved. See in this regard the decisions in **Kampala City Council vs. Nakaye [1972] E.A 446** and **Hahn vs. Singh [1985] KLR 716**. The Respondent did plead special damages of Kshs 96,700/= and she provided evidence of receipts for funeral and related expenses in excess of the Kshs 96,700/=.

This appeal therefore fails. However, as the Respondents did not appeal on the issue of quantum of damages for loss of dependency, I will uphold the award by the trial Court.

The Appellant shall bear the costs of the appeal.

It is so ordered.

DATED AT MACHAKOS THIS 3RD MAY 2017.

P. NYAMWEYA

JUDGE