



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT ELDORET

CIVIL APPEAL NO. 129 OF 2011

RICHARD SHIKUKU.....APPELLANT

VERSUS

ROSE NAMALWA MASINDE *sued as*

the legal representative of

CLEOPHAS WANYONGO (*Deceased*).....RESPONDENT

***[Being an appeal from the judgment and decree of G. Mmasi, Senior Resident Magistrate, in Eldoret
CMCC No. 855 of 2004 delivered on 30th June 2011]***

JUDGMENT

1. The appellant is aggrieved by the judgment and decree of the Senior Resident Magistrate dated 30th June 2011.
2. Cleophas Wanyongo Sarabai (hereafter *the deceased*) died in a road traffic accident on 16th February 1992. He was run over by an *Isuzu matatu* registration number KYW 884. It was owned by the appellant; and, driven by Patrick Wekesa (DW1).
3. The respondent, Rose Namalwa Masinde, is the widow. She brought a claim for damages against the appellant under the Law Reform Act and the Fatal Accidents Act. The suit was initially filed at the High Court as *HCCC 148 of 1993*. On 24th June 2004, by consent of the parties, the suit was transferred to the lower court and renumbered.
4. At paragraph 3 of the plaint she pleaded as follows: That on 16th February 1992, at about 6:00 p.m., at Garura Farm Lokhome in Trans Nzoia district the deceased walking along a path when the appellant's driver negligently drove the vehicle causing it to knock down the deceased. The particulars of negligence were as follows: driving at an excessive speed; failing to give any warning to the deceased; and, failing to stop or avoid the collision.
5. By a statement of defence dated 27th August 1993, the appellant denied the claim *in toto*. In particular, he blamed the deceased for attempting to jump onto a moving vehicle; and, refusing to heed the warning given by the driver. He pleaded that in the circumstances, the deceased wholly or substantially contributed to the accident.
6. The learned trial magistrate found that the appellant was solely to blame for the accident. She awarded the estate Kshs 10,000 for pain suffering; and, Kshs 320,000 for loss of dependency. The respondent was

also granted costs and interest.

7. The appellants have challenged those findings through a memorandum of appeal dated 23rd July 2011. There are six grounds of appeal. They can be condensed into *four*. First, that the learned trial magistrate erred by holding that the appellant was 100% liable; secondly, that the respondent failed to prove her case on a balance of probabilities; thirdly, that the learned trial magistrate erred by failing to find *contributory negligence*; and, fourthly, that the trial court applied wrong principles in assessment of damages leading to an *exorbitant* award.

8. The appeal is contested by the respondent. The respondent relied on written submissions dated 13th November 2012. The respondent contends that the lower court applied the correct formula to assess damages; and, that there are no grounds for interference with the discretion of the learned trial magistrate. I was implored to dismiss the appeal.

9. The appellant also filed submissions on 12th November 2012. On 30th May 2017, I heard brief arguments from both counsel. I have considered the memorandum of appeal, the record of appeal, the pleadings in the lower court, the evidence and the rival submissions.

10. This a first appeal to the High Court. It is thus an appeal on both facts and the law. I am required to re-evaluate all the evidence on record and to draw independent conclusions. There is a caveat because I have neither seen nor heard the witnesses. See *Peters v Sunday Post Limited* [1958] E.A 424, *Selle v Associated Motor Boat Company Ltd* [1968] EA 123, *Williamson Diamonds Ltd v Brown* [1970] EA 1, *Mwanasokoni v Kenya Bus Services Ltd* [1985] KLR 931.

11. PW1 was the widow. She was informed of the accident by Joina Nakhumucha (PW3). By the time she got to the scene, the deceased had died. She testified that she and her children were largely relying on the deceased for their upkeep. He used to give her Kshs 300 per day. She did not have documentary evidence. After the deceased died, she started selling vegetables. She makes about Kshs 300 per day. She gave details about her children. They are now adults. The youngest, Elias Wanjala, was 18 years at the time of the trial. She said she spent Kshs 10,000 for the funeral. She did not have payment receipts. Upon cross examination, she said as follows-

“I was told he had been hit by a vehicle.....on arrival I found he had died. I can't tell whether he was inside the vehicle or he was a pedestrian. Shikuku is my neighbor. I do not know whether accused was running after the vehicle and then fell off. I blame Shikuku as he is the owner of the vehicle. I do not have the grant for letters of administration.”

12. PW2 was Janem Ndayi Makana. She did not witness the accident. When she got to the scene, the deceased lying on the ground. His back was bruised. She asked the driver what happened. She was told that he had attempted to jump onto the moving vehicle. They took the deceased to Kitale District Hospital.

13. PW3 was Joina Nakhumucha. She heard a loud bang. She rushed to the scene. The deceased was lying on the ground injured. The owner of the vehicle sent someone for spirit. She could not remember the full registration number of the vehicle. She left the scene to deliver the news to PW1.

14. On 20th January 2011, the parties admitted the police abstract (exhibit 4) by consent. That marked the close of the plaintiff's case in the lower court.

15. The appellant called two witnesses. DW1 was Patrick Wekesa, the driver of the ill-fated vehicle. He was on the way to a funeral. He knew the deceased. He said the deceased tried to jump onto the vehicle and fell off. He denied that he was speeding. He testified as follows-

“I saw the deceased in front; he attempted to jump into the vehicle; he slipped and fell. The vehicle was in motion. The road is a rough road. The deceased....I knew him he was a conductor

of another vehicle. I did not hit him with a [sic] vehicle. I was not speeding as I was on a rough earth road. The earth road is the one in the 2 photographs. The conductor was in the front cabin with me. We were going to the funeral. One vehicle is a minibus.”

16. DW2 was Jepeth Muindi. He was walking along the road. The deceased was ahead of him. He saw a vehicle approaching from behind them. He said that as the vehicle passed the deceased jumped onto it but slipped and fell. The rear tyre ran over him. The witness said he was 8 feet away. He said the vehicle was not speeding as it was on a narrow murram road.

17. From that evidence it is beyond dispute that the accident occurred on 16th February 1992; and, that the deceased died from the injuries. The main issue for determination is whether the appellant’s driver was to blame; or, whether the deceased was the author of his own misfortune.

18. The learned trial magistrate found as follows-

“When DW1 was cross examined by the plaintiff’s counsel he admitted that he ran over the deceased with the rear tyre. DW2 told the court that the deceased jumped onto the defendant’s motor vehicle to get a lift. In their pleading the defence dated 24th August 1993 the defendant never pleaded the same. Hence it is not true that the deceased contributed to the accident by jumping unto the motor vehicle registration number KYW 884. It is trite law that parties are bound by their pleadings and relief not found [sic] on pleadings will not be granted. The court hence find [sic] that the deceased did not contribute to the fatal accident. The defendant/the driver caused the accident. The defendants are found 100% liable.”

19. With great respect, there were two errors. First, the defendant had specifically *pleaded* in paragraph 3 of the defence dated 27th August 1993 that the deceased “*solely*” caused the accident by “*attempting to jump onto a moving vehicle*”; and, refusing to heed the warning given by the driver. He pleaded that in the circumstances, “the deceased wholly or substantially contributed to the accident”.

20. Secondly, the evidence showed that the deceased *substantially* contributed to the accident. Neither the plaintiff nor her two witnesses saw the accident happen. Their version of events was based on *information* from the driver of the vehicle (DW1). DW1 and DW2 were emphatic that the deceased attempted to board the moving vehicle when he fell off.

21. I accept that the accident happened on a narrow murram road. That evidence from DW1 and DW2 was not contested. That is supported by the fact that the deceased was run over by the rear tyre of the vehicle. The police abstract form (exhibit 3) stated that the matter was pending under investigation. It blamed no one for the accident; and, no one was charged for a traffic offence. It is dated 17th March 1992, a month after the accident.

22. But the driver (DW1) said “*I saw the deceased in front he attempted to jump into the vehicle he slipped and fell. The vehicle was in motion.*” If the vehicle was not speeding, he could have stopped quickly. I thus find that the *both* the deceased and DW1 *contributed* to the accident. The learned trial magistrate clearly erred by blaming the appellant wholly. I blame both parties *equally*. The judgment on liability is *set aside* accordingly.

23. I will now turn to assessment of damages. As a general rule, an appellate court will not interfere with quantum of damages unless the award is so high; or, inordinately low; or, founded on wrong principles. See *Butt v Khan* [1982-88] KAR 1, *Arkay Industries Ltd v Amani* [1990] KLR 309, *Karanja v Malele* [1983] KLR 42, *Akamba Public Road Services Ltd v Omambia* Court of Appeal, Kisumu, Civil Appeal 89 of 2010 [2013] eKLR.

24. In assessing damages under the Fatal Accidents Act, the court must be guided by the age of the deceased, life expected, vicissitudes of life and the acceleration of the lump sum payment. See *Kemfro v Lubia* [1982-88] KAR 727, *Rev. Fr. Leonard O. Ekisa & another v Major Birge* [2005] eKLR.

25. The deceased was 31. He was a conductor. There was no documentary evidence of his earnings. The respondents had urged the lower court to accept a figure of Kshs 6,000. I agree with the learned trial magistrate that there was *no* evidential basis. The trial court correctly used the basic wage of Kshs 2000. There is precedent for that. See David Ngunje Mwangi v The Chairman B.O.G. Njiiri's High School, Nairobi, High Court [2001] eKLR. I also think the multiplier of 20 years was reasonable. The arithmetic worked out as follows $Kshs\ 2000 \times 2/3 \times 12 \times 20 = Kshs\ 320,000$. The learned trial magistrate failed to cater for acceleration. I will reduce this sum by 30% to cater for acceleration of the lump sum payment. See Kemfro v Lubia [1982-88] KAR 727. That leaves an award of Kshs 224,000 under that head.

26. This claim is brought under both the Law Reform Act and the Fatal Accidents Act. The deceased died on the spot. The lower court awarded general damages for pain and suffering at Kshs 10,000. That award is *not* inordinately *high* and keeps with latest trends on the subject. See generally, Radhakrishnan Khamaney v Murlidhar [1958] E.A 268. I uphold the award.

27. I would have awarded the respondent a further sum of Kshs 100,000 for loss of expectation of life. The lower court did not do so; and, there is *no* cross-appeal. Furthermore, it makes little difference because the amount would have had to be *discounted* against the award under the Fatal Accidents Act. See Kemfro v Lubia [1982-88] KAR 727. The rationale is that all these amounts end up in the *same* estate. I say all that *obiter*.

28. It is trite that special damages *must* be *specifically* pleaded; and, *strictly* proved. See Kampala City Council v Nakaye [1972] E.A 446, Coast Bus Service limited v Sisco E. Murunga and others, Nairobi, Court of Appeal, Civil Appeal 192 of 1992 (unreported). The respondent had *specifically* pleaded for special damages of Kshs 10,200 made up as follows: funeral expenses Kshs 10,000; police abstract Kshs 100; and, the cost of the death certificate Kshs 100. However, she *failed* to *strictly* prove any of those items.

29. The upshot is that this appeal succeeds partly. The judgment and the decree of the lower court are set aside. Liability shall now be shared *equally* between the appellant and the deceased. The award on loss of dependency is scaled down to Kshs 224,000 to cater for accelerated payment. The summary of the award is as follows-

General damages for pain and suffering.....Kshs 10,000.

Loss of dependency.....Kshs 224,000.

Sub-total.....Kshs 234,000.

Less 50% contributory negligence.....Kshs 117,000.

Net award.....Kshs 117,000.

30. The upshot is that the appellant shall pay to the respondent Kshs 117,000. I also grant the respondent interest on the sum from 30th June 2011, the date of the original decree. Costs follow the event and are at the discretion of the court. I grant the respondent costs in the lower court. Each party shall however bear its own costs in this appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 6th day of June 2017.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:-

Mr. Angu for Mr. Onyinkwa for the appellants instructed by Onyinkwa & Company Advocates .

Mr. Miyianda for Mr. Kenei for the respondent instructed by Gumbo & Company Advocates.

Mr. J. Kemboi, Court Clerk.