



REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL NO. 19 OF 2014
(FORMERLY KISII HCCA NO. 67 OF 2014)

BETWEEN

RISHI HAULIERS LIMITED APPELLANT

AND

JOSIAH BOUNDI ONYANCHA (administrator and

personal representative of

MALACK OKENGO BOUNDI (deceased) RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. E. M. Nyagah, PM at the Senior Principal's Magistrates Court in Migori in Civil Case No. 195 of 2010 dated 13th May 2014)

JUDGMENT

1. On 20th March 2008, the deceased was injured and died when the motor vehicle he was riding in, a Toyota station wagon registration number KBA 778 (“the station wagon”) owned by one Ole Saiyua, was hit by a tractor registration number KAJ 201R (“the tractor”) owned by the appellant. His personal representative and the dependants filed a suit seeking damages against the appellant and his co-defendants under the *Law Reform Act (Chapter 26 of the Laws of Kenya)* and *Fatal Accidents Act (Chapter 32 of the Laws of Kenya)*.
2. After hearing the matter, the learned magistrate found the appellant and the co-defendants fully liable for the accident. The respondent was awarded Kshs. 800,000/- for damages for loss of dependency under the *Fatal Accidents Act*. The appellant contents the decision on the issue of liability and quantum.
3. In the memorandum of appeal dated 11th June 2014, the appellant challenges the finding on the issue of liability on the ground that the learned trial magistrate failed to state whether it was joint or several as against the defendants. The respondent also contended that liability against it was not proved. As regards the issue of quantum the thrust of the grounds of appeal was that the award of damages was made in the absence of any evidence and that therefore the damages were excessive in the circumstances.
4. The respondent supported the decision of the subordinate court. He contended that the claim was against all the defendants who were the owners of the motor vehicles and as such the

court was entitled to enter judgment against all them. He contended that the appellant did not adduce any evidence to rebut the respondent's evidence hence the finding on liability was justified. Counsel for the respondent submitted that the award of damages was reasonable in the circumstances.

5. As this is the first appeal, this court is called upon to analyse and re-assess the evidence on record and reach its own conclusions bearing in mind that it neither saw nor heard the witnesses testify (see *Selle v Associated Motor Boat Co.* [1968] EA 123). In *Kiruga v Kiruga & Another* [1988] KLR 348, the Court of Appeal observed that;

An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.

6. In order to proceed with this task it is necessary to set out the evidence before the trial court. Only three witnesses testified on behalf of the respondent. The appellant did not call any witnesses. I will deal with the issue of liability first and then quantum.

7. The principal witness on the issue of liability was Vitalis Opuch Owino (PW 2) who testified that on 20th March 2008, he boarded the station wagon driven by **Joseph Macharia** headed to Awendo. There was a tractor ahead of them when **Macharia** hooted and began to overtake it. As he was midway the tractor turned and hit the station wagon causing it to roll off the road.

8. PW 3, Sergeant Lawrence Charo, a police officer stationed at Awendo Police Station, testified that a report of the fatal accident between the station wagon and tractor was reported on 20th March 2008. He stated that according to the investigation both vehicles were heading to Awendo from Mariwa and that the station wagon began overtaking the tractor and in the process, the tractor hit it causing it to roll several times on the right side of the road facing Awendo. He produced a sketch map of the scene and witness statements. He further testified that **Joseph Macharia** was charged with the offence of causing death by dangerous driving and fined Kshs. 10,000/- in default 2 years imprisonment. He produced a police abstract which blamed the driver of the tractor.

9. The learned magistrate considered the evidence and held that the totality of the evidence was that the tractor was negligently driven and caused the accident. He therefore found the defendants in the suit to blame for the accident.

10. The key issue raised by the appellant is that the trial court failed to apportion liability as between the defendants. The resolution of this issue calls for an appreciation of the pleadings before the subordinate court. The original plaint was filed on 15th October 2010 and the defendants were **Rishi Hauliers Limited** and **James Otieno Opolle** sued as the owner and driver of the tractor respectively. They filed a joint defence in which they denied liability but stated that the owner of station wagon and the respondent were to blame for the accident. The respondent filed a reply to defence denying the particulars of contributory negligence against the deceased.

11. Thereafter the respondent applied for and was granted leave to amend the plaint on 30th May 2011. The amended plaint was filed on 29th June 2011 and it was in effect an amendment to join **Ole Saiyua** and **Joseph Macharia** as the 3rd and 4th defendants to the suit. According to the record, summonses to enter appearance were never issued but over a year later on 18th December 2012, the plaintiff applied for a re-issue of summonses to enter appearance. There is no evidence that the summonses to enter appearance were served on the 3rd and 4th defendants.

12. Although the 1st and 2nd defendants blamed the driver of station wagon, they did not take out

third party proceedings against him. Assuming that the amended plaint was valid, they also did not file a defence to the amended plaint in which they could blame the 3rd and 4th defendants to enable them file a notice of claim against the co-defendants. Given the state of the pleadings, it is clear that the subordinate court could not apportion liability as between the 1st and 2nd defendant and the 3rd and 4th defendants.

13. In an ideal case the 4th defendant, **Joseph Macharia**, could not deny liability as he had been convicted of causing death by dangerous driving. The issue of contribution from the 1st and 2nd defendants was still for open for determination but as the appellant did not take out third party proceedings, it was properly held liable for the accident.

14. The respondent submitted that the even in this appeal, the court could not apportion liability as the parties who are directly affected are not party to the appeal. The rules of natural justice demand that before a finding is made against any person, that person must be given the opportunity to be heard. The 3rd and 4th defendants, **Ole Saiyua** and **Joseph Macharia**, were not parties to the suit and even assuming they were, they are not party to this appeal hence the appellant must shoulder full liability for the accident. I decline to intervene in the finding on liability as proposed by the appellant as such a finding would be inconsistent with the pleadings before the court.

15. I now turn to the issue of quantum. The general principal is that the assessment of damages is within the discretion of the trial court and the appellate court will only interfere where trial court either took into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment was based on no 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**).

16. According to the plaint, *“The Deceased was at the time of his death 50 years, was in good health, lived a happy and vigourous life. He worked as an administration police officer. The deceased was survived by the following dependants who are his children; Martha Nyasiti Malaki, Edna Nyamboni Malack, Pasiphica N. Malack, Joseph Oriango Malack, Everline Nyasiaboka Malack, Esther Gwansa Malack, Abnego Nyakiega Malack.”*

17. PW 1, Josiah Boundi Onyancha, a brother of the deceased, testified that at the time of the accident, the deceased was earning Kshs. 50,000 per month from farming and carpentry business. He further stated that the deceased had two wives who were deceased and 5 of his children were under the age of 18 years. In cross-examination, the witness confirmed that the deceased was a retired civil servant.

18. In assessing damages, the learned magistrate stated as follows;

No evidence was adduced to show how much the deceased earned but considering he was a retired civil servant I believe he was pensionable and from his other sources of commerce I am of the view an average sum of Kshs. 10,000/- could be earned per month and its reasonable. Under the Fatal Accidents Act I will award a sum of Kshs. 10,000/- x 12 x 10 x 2/3 = Kshs. 800,000/-.

19. On the issue of income, the appellant submitted that the respondent did not plead the deceased's income as required by law nor produce any records to show that the deceased was earning a pension or was in business. In the absence of such a pleading and lack of evidence, the appellant submitted that a minimum and generous award of Kshs. 3,000/- should be considered. The appellant argued that taking into account the vicissitudes of life, a multiplier of 5 years would be suffice since the deceased was 50 years old and he would have probably continued to work until he was 60 years old. As regards the dependency ratio, the appellant contended that the respondent did not disclose how old the dependants were and what they were doing for a living. He urged that

a dependency ratio of 1/3 was most appropriate.

20. In the instant case the learned magistrate used the multiplier approach to assess damages. No documentary evidence was produced to support the earnings to show for example that the deceased was earning a pension. The respondent did not provide any basis establishing how much the deceased earned from his income. The amount of Kshs. 50,000/- proposed by the respondent lacked any factual basis as was the sum of Kshs. 3,000/ proposed by the appellant. This is not to say that the deceased never earned any income. In **Jacob Ayiga Maruja & Another v Simeone Obayo CA Civil Appeal No. 167 of 2002 [2005]eKLR** the Court of Appeal observed that;

We do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving earning is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things.

21. On the same issue of proof, the Court of Appeal in **Theta Tea Company Ltd & Another v Florence Njau Njambi NRB CA Civil Appeal No. 64 of 2000[2002]eKLR** expressed the view that;

[W]here it is proved that a claimant was dependent on a deceased party but the amount of dependency is not quantifiable, that does not necessarily mean that the claim must fail. If that be so, a lot of Kenyans would be denied substantial justice, taking into account out level of literacy and such like factors.

22. This was a proper case for the court to have awarded a global sum in view of the age of the deceased and the scanty evidence provided by the respondent. In this regard I adopt the reasoning by Ringera J., in **Mwanzia v Ngalali Mutua and Kenya Bus Services (Msa) Ltd & Another** quoted by Koome J., in **Albert Odawa v Gichimu Gichenji NKU HCCA No. 15 of 2003[2007] eKLR** where he expressed the following view;

The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependancy, and the expected length of the dependancy are known or are knowable without undue speculation where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do.

23. The same principle was adopted by Nambuye J., in **Mary Khayesi Awalo & Another v Mwilu Malungu & Another ELD HCCC No. 19 of 1997 [1999] eKLR** where she stated as follows:

As regards the income of the deceased there are no bank statements showing his earnings. Both counsels have made an estimate of the same using no figures. In the courts opinion that will be mere conjuncture. It is better to opt for the principle of a lumpsum award instead of estimating his income in the absence of proper accounting books.

24. Further difficulty in assessing the dependency is the fact that the respondent did not provide the full particulars of the children and their ages to enable the court calculate an appropriate multiplier. I therefore find and hold that the multiplier approach was wholly inappropriate in the circumstances. Taking the aforesaid principles into account, I would award the respondent a global sum of **Kshs. 500,000.00** for loss of dependency.

25. The appeal is allowed only to the extent that the award for loss of dependency is set aside and

substituted with an award of **Kshs. 500,000/-**. The amount shall accrue interest at court rates from the date of judgment in the subordinate court.

26. The appellant shall have 1/3 of the costs of the appeal.

DATED and DELIVERED at MIGORI this 14th day of May 2015.

D.S. MAJANJA

JUDGE

Mr Otara instructed by Mose, Mose & Millimo Advocates for the appellant.

Mr Abisai instructed by Abisai & Company Advocates for the respondent.