



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CIVIL APPEAL NO.113 OF 2012**

**BETWEEN**

**MAKARIO MAKONYE MONYANCHA ..... APPELLANT**

**AND**

**HELLEN NYANGENA (suing as the personal  
representative of the Estate of CHRISTOPHER**

**BOSIRE MATOKE (Deceased) .....RESPONDENT**

*(Being an appeal from the Judgment and decree of Honourable A. Onginjo, Chief Magistrate, dated  
and delivered on 27<sup>th</sup> July 2012 in Kisii CMCC No.286 of 2004)*

**JUDGMENT**

Introduction

1. The appellant Makario M. Monyancha filed this appeal against Hellen Nyangena (the Respondent) following the judgment and decree in Kisii CMCC No.286 of 2007 delivered on the 27<sup>th</sup> July 2012 by Hon. A. Onginjo Chief Magistrate who entered judgment as follows:-

- **Pain and suffering ..... 300,000/=**
- **Loss of dependency ..... 2,670,640/=**
- **Loss of expectation of life .....100,000/=**
- **Special damages ..... 514,394/=**
- **Funeral expenses ..... 100,000/=**

**Total ..... 3, 684,394/=**

**Less loss of expectation of life ..... 100,000/=**

**3, 584,394/=**

The Respondent’s Case

2. The background to this case was that the respondent sued the appellant herein in her capacity as personal representative of Christopher Bosire Matoke (deceased) who died while undergoing treatment for injuries he suffered in a Road Traffic Accident on the 16<sup>th</sup> January 2006. The deceased herein was travelling in motor vehicle registration No. KAS 377 H along Kisii-Migori road when it collided with motor vehicle registration NO. KWX 963. According to the testimony of PW3 a fellow passenger with the deceased in motor vehicle registration No. KAS 377 H, motor vehicle registration No. KWS 963 was trying to overtake at a small bend around Daraja Mbili when the collision occurred. He said the deceased was seated behind the front passenger seat and was injured seriously and he later died while undergoing treatment. According to him the accident occurred at 3.30 p.m. and the road was very clear, their driver was driving at a slow speed as it was a market day. The vehicle they were travelling in was damaged at the front.
3. PW1 wife of the deceased and the plaintiff/respondent herein was not at the scene of the accident. She produced the death certificate for the deceased, grant of letters of administration and told the court that the deceased was admitted at Kisii Level 5 hospital from 16<sup>th</sup> January 2006 and thereafter transferred to Kenyatta National Hospital for specialized treatment where he succumbed to the injuries on the 6<sup>th</sup> March 2006. She told the court that the deceased was 52 years old at the time of death and was a tutor at Kisii Institute of Technology earning Kshs.40,000/= as salary per month. She produced pay slip for March 2005 and told the court that they were blessed with three sons who were all dependants of the deceased as at the time of his death. She identified the police abstract in respect to the accident and produced receipts for treatment and for funeral expenses.
4. PC George Ndiema PW2 produced the police abstract in respect of the accident herein although he told the court that he was not the investigating officer. He told the court that Makario Makonye Monyancha was charged in connection with the accident that resulted in the deceased's death.

#### The Appellant's Case

5. The appellant did not call any witness during the trial, although his advocate filed submissions. In her judgment the court found the appellant 100% liable for the said accident and went ahead and made judgment as above stated.

#### The Appeal

6. Being dissatisfied with the said judgment and decree the appellant filed a memorandum of appeal on quantum dated 14<sup>th</sup> August 2012 based on the following 5 grounds:-
  1. *The Learned Magistrate erred in Law and in fact in making an award on liability and quantum that was so excessive as to amount to an erroneous estimate of loss or damages suffered by the Respondent.*
  2. *The Learned Magistrate erred in Law and in fact in allowing an award of special damages which was not supported by evidence tendered.*
  3. *The Learned Magistrate erred in Law and in fact in failing to address the evidence and submissions tendered by the Appellant and therefore failed to take into account relevant facts while awarding damages.*
  4. *The Learned Magistrate erred in Law and in fact in failing to rely on the duly established legal principles in determining the award on liability and quantum.*
  5. *The Learned Magistrate misdirected himself in arriving at a wrong decision in awarding damages which were against the weight of evidence adduced.*
7. Reasons wherefore the appellant prays for orders that:-
  1. *The appeal be allowed in its entirety.*
  2. *The judgment and decree in Kisii CMCC NO.286 of 2007- Hellen Nyangena –vs- Makario M. Monyancha be set aside.*
  3. *The honourable court be pleased to make its own decision on the*

*assessment of damages and liability.*

4. *Any other relief this honourable court deems fit to grant.*
5. *Costs of appeal awarded to the appellant.*
  
8. Both counsel for the appellant and respondent agreed to canvass the appeal by way of written submissions.

#### The Submissions

9. It was the submission of the counsel for the appellant that the evidence tendered before the honourable court did not suffice to hold the appellant 100% liable. That the evidence by PW2 who was an eye witness was not corroborated by that of PW3 the police officer. He submits further that where two motor vehicles have been involved in an accident, the police officer ought to shed light on the accident and in particular produce a sketch map which would inform the court where the said accident took place and the point of impact of the two vehicles. Thus the learned trial magistrate erred in law and in fact in failing to address the evidence and submission tendered by the appellant and therefore failed to take into account relevant factors while apportioning liability.
10. On quantum, counsel for the appellant submitted that a multiplier of 5 years could have been used instead of 10 years. Further that the learned magistrate should only have been guided by the pay slips of the deceased and none other. That it is indicated in the deceased's pay slip of February 2006 that he earned Kshs.7,875.30 as his net pay which amount could be used in calculating his damages for dependency.
11. As for pain and suffering he submits that the deceased was at Kenyatta National Hospital for two months and at the time of his death was 50 years old and that there was no guarantee that he could have worked upto the age of 65 years or beyond. He calculates the total figure to be Kshs.1,228,784/= and asks the court to find that this appeal has merit and to allow the same as prayed.
12. In their submissions, counsel for the respondent submitted that on the 7<sup>th</sup> May 2012 the defendant (appellant) closed his defence without calling any witness and further that the third party proceedings were struck out. That since the said dismissal, the appellant has never appealed against the said order, thus it would be illogical to submit on the issue of third party and prays that this court should not countenance such misconceived submission. He has cited numerous authorities which this court has had a chance to go through and submitted that in his opinion he does not believe the trial court erred in law or in fact in coming to its judgment.

#### First Appeal

13. It is the duty of this court on a first appeal to reconsider and evaluate the whole case with a view to reaching its own conclusion always remembering however that it did not hear the parties or observe their demeanor, an advantage which only the trial court had. Sir Kenneth O'Connor presiding over the Court of Appeal sitting at Nairobi expressed himself as follows on the duty of a first appellate court in the

case of **Peters –vs- Sunday Post Ltd. [1985] E.A. 424:-**

**“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses ..... But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion .....**”

14. This court must therefore give a fresh and complete look at the matter in the lower court to confirm whether it was given the treatment the law required and whether the complaints raised by the appellant in his Memorandum of Appeal have any basis that would lead to this court interfering with the findings of the learned trial magistrate.

#### Basis for the Rival Submissions

15. In an attempt to establish liability the plaintiff/respondent relied on evidence given before the trial court by PW3 who was in the same vehicle with the deceased and who actually saw what happened on the 16<sup>th</sup> January 2006 and the evidence of PW2 police constable George Ndiema who produced the police abstract although he was not the investigating officer. This court notes that the said production of the abstract was not objected to by the defence which means that it is not in contention that the accident occurred.
16. This court notes that the defence did not call any witness to rebut the allegations by the plaintiff/respondent although submissions were filed on behalf of the defendant/appellant. It is not lost to the court that every fact pleaded to by a party to a suit must be proved by evidence.
17. Counsel for the defendant/appellant has submitted that the evidence tendered before the honourable court does not serve to hold the defendant 100% liable. In this case, there was no other evidence to counter the evidence adduced by the plaintiff/respondent. I agree with the arguments in the case cited by the plaintiff/respondent's counsel **Lake Flowers –vs- Cila Franclyn Onyango Ngonga suing on behalf of Florence Agwingi and another – CA No.210 of 2006** where it was held that:-

**“Without the appellant adducing evidence at the trial to counter what the 1<sup>st</sup> respondent blamed its driver for, it was difficult for it to contest the liability blamed against it by the superior court and/or attempt to partly or wholly blame the 2<sup>nd</sup> respondent. Neither can it deny ownership without any evidence to counter the police abstract produced.”**

18. I do hold the same view in this particular case. The defendant/appellant by failing to call evidence to the contrary to counter the evidence by the plaintiff/respondent makes it difficult for them to contest the issue of liability which cannot be contested in submissions as is being insinuated by counsel for the defendant/appellant herein. These are issues of fact which must be rebutted by facts.
19. I therefore find that the learned trial magistrate was properly directed in law and fact to come up with her finding of 100% liability award as against the defendant/appellant.
20. On the issue of special damages the trial court relied on the receipts the plaintiff/respondent was issued with by hospitals where deceased underwent treatment prior to his death amounting to Kshs.621,618/= though they had pleaded Kshs.514,394/=. Although the production of the receipts herein was not objected to it is trite law that special damages must be specifically pleaded and strictly proved. The respondent was thus bound by her pleadings. There having been no amendment to the amount under special damages, she could only get what was pleaded and proved.
21. The assessment of general damages is always within the discretion of a trial magistrate and an appellate court will not disturb the awards unless it is so inordinately high or low as to present an entirely erroneous estimate. For this court to interfere, it must be shown that the trial magistrate proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which is either inordinately high or low.
22. With regard to damages awarded under the head of pain and suffering, the accident occurred on 16<sup>th</sup> January, 2006 but the deceased died on 6<sup>th</sup> March, 2006 about two months after. It is not in dispute that the deceased did not die instantaneously. Having not died instantly, it cannot be denied that he suffered pain prior to succumbing to injuries sustained. The trial magistrate considered the length of time the deceased spent in hospital which was 90 days but from the records it was about 60 days. For this reason I would set aside the amount of Kshs.300,000/= under this head and substitute it with the sum of Kshs.150,000/-.
23. I find no reason to interfere with the award on loss of expectation of life under Law Reform Act as the same is always awarded at Kshs. 100,000/- across the board and the same was eventually deducted to avoid double award to same beneficiaries.
24. On loss of dependency counsel for defendant appellant has suggested a multiplier of 5 years instead of 10 years. The deceased was 50 years as at the time of his death and was earning Kshs. 33,383 after statutory deductions. There was no dispute from defence that the deceased could have worked for another ten years thus the trial court preferred a multiplier of 10 years to calculate

- damages for loss of dependency.
25. It is not in doubt that the deceased was married and had children who depended on him. Having been married a multiplier of  $\frac{2}{3}$  was correctly applied by the trial court.
26. In the case of **Kiruga –vs- Kiruga & another [1988] KLR 348** it was held *inter alia* that “**where it happens that a decision may seem equally open either way, the appellate approach is that the decision of the trial judge who has enjoyed the advantage not available to the appellate court becomes of paramount importance and ought not to be disturbed.**”
27. The trial magistrate had the advantage of hearing witnesses in this case. The opinion she formed was not outrageous. I therefore see no reason to disturb it. In the circumstances I uphold the multiplier of 10 years.
28. In the premises the appeal partially succeeds in respect of the award on pain and suffering. The total award will therefore be as follows:-

• Pain and suffering .....	150,000/=
• Loss of dependency .....	2,670,640/=
• Loss of expectation of life .....	100,000/=
• Special damages .....	514,394/=
• Funeral expenses .....	100,000/=
<b>Total .....</b>	<b>535,034/=</b>
<b>Less loss of expectation of life .....</b>	<b><u>100,000/=</u></b>
<b>Total .....</b>	<b><u>3,535,034/=</u></b>

29. Having confirmed the judgment in favour of the Respondent on other heads, costs and interests shall be borne by the appellant as ordered by the court. The respondent shall have the costs of this appeal.

**Dated and delivered at Kisii this 12<sup>th</sup> day of June, 2014**

**R.N. SITATI**

**JUDGE**

In the presence of:-

M/s Nyaundi Tuiyot (absent) for the Appellant

Miss Kusa for Mr. Nyangosi for the Respondent

Mr. E. Mongare - Court Assistant