



REPUBLIC OF KENYA



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Kaguga t/a Operators Sacco v Oketch (Suing as the legal rep of the Estate of George Omollo Ogola) (Civil Appeal E044 of 2021) [2024] KEHC 6368 (KLR) (30 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6368 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL APPEAL E044 OF 2021**

JR KARANJA, J

MAY 30, 2024

BETWEEN

JAMES KAGUGA T/A OPERATORS SACCO APPELLANT

AND

EVERLINE OTIENO OKETCH (SUING AS THE LEGAL REP OF THE ESTATE OF GEORGE OMOLLO OGOLA) RESPONDENT

JUDGMENT

1. This appeal was brought by the Appellant, James Kaguga trading as operator sacco as a expression of his dissatisfaction with the judgement of the Principal Magistrate delivered on 7th July, 2021, in Kericho CMCC No. 235 of 215, in which the Respondent , Everline Otieno Oketch, the legal representative of the estate of the late George Omollo Ogola (deceased) was awarded a total sum of Ksh. 7,958,322 as damages arising from a road traffic accident which occurred on 1st May, 2014 along the Kericho-Nakuru road at Chagaka and resulted in the deceased suffering fatal body injuries.
2. It was pleaded that the deceased as a lawful passenger in a motor vehicle registration No. KAW 841E Mitsubishi Lancer when it collided with the Appellants motor vehicle registration No. KBJ 137B Nissan-Matatu which verred off its side of the road into the path of the other vehicle and caused the collision. The Respondent pleaded that the Appellant’s motor vehicle was at the material time being driven without due care and attention and at an excessive speed. That, the vehicles driver failed to exercise sufficient or adequate control of the vehicle such that he failed to swerve, slow and/or control the vehicle so as to avoid the accident.
3. The Respondent therefor prayed for damages against the Appellant under the law Reform and Fatal Accident Acts. He also prayed for the costs of the suit and/or any other relief that the court may deem just and fit to grant. The Appellant’s defence was a denial of the allegations made against himself by the Respondent and a contention that the accident was solely and/or substantially contributed to by the negligence of the driver of motor vehicle registration No. KAW 841E Mitsubishi Lancer.



4. After the trial in which the Appellant did not lead any evidence nor avail a witness as compared to the Respondent who testified and called one witness, the trial court rendered the impugned judgement.

The Appellant was found fully liable for the accident and to the Respondent in damages under both the Law Reform Act and the Fatal Accident Act.

5. The trial court awarded the Respondent damages in the total sum of Ksh 7,959,332 as follows:-

- (a) a) Pain and Suffering – kshs 50,000
 - (b) Loss of expectation of life ksh 200,000
 - (c) Loss of dependency ksh 7,708,322
- Total ksh 7,958,322

The Appellant proffered eight (8) grounds of appeal against the decision and findings of the trial court. These are contained in the memorandum of appeal dated 3rd August 2021 and filed herein of 25th November, 2021, by Kimondo Gachoka & Co. Advocates.

6. It is however, instructive to note that no substantial record of appeal was filed herein. Instead, the Appellant purported to file two supplementary records of appeal, the first one containing the impugned judgement and the second one containing the Plaintiff/Respondents written submissions and list of authority.

Both records were filed on 12th February, 2024. The Appellant also purported to file written submissions respecting the appeal. This was done on 31st January, 2024 after the court had given directions on 27th November, 2023, to the effect that the appeal be canvassed by written or oral submissions. Ironically, the hearing of the appeal proceeded as if the Appellant had not filed his written submissions. This was a pointer to the Appellant's "mix-up" in this matter.

7. Without the record of appeal, the appeal was incompetent before court and ought not have been admitted to hearing and subjected to the court's directions on the hearing date and mode of hearing. It was an error that the appeal reached this point in time despite the glaring procedural flaws.

Be that as it was and may and without undue regard to procedural technicalities the appeal proceeded with the court relying on the original lower court file in place of the substantive record of appeal. In any event, a record of appeal is normally derived from the original trial court record file.

8. Learned counsel, Mr. Nyambane, appeared for the Appellant at the hearing and proceeded to make oral submission which may now be taken to be the oral highlighting of his written submissions dated 31st January, 2023, which he inadvertently overlooked. Mr. Ojala, learned counsel, appeared for the Respondent and made oral submissions.

9. Having considered the appeal on the basis of the supporting grounds and the rival submissions, this court reconsidered the evidence with a view to arriving at its own conclusions and in doing so, it had in mind that the trial court had the advantage of seeing and hearing the witnesses.

It was worth of note that the Appellant did not lead any evidence in support of his pleadings in defence of the claim. This meant that the Respondent's claim sailed smoothly without being obstructed or confronted by huge waves or icebergs.

10. Nonetheless, the Respondent had an obligation to establish and prove by necessary evidence her claim against the Appellant. Her evidence as the first witness (PW1) coupled with that of a witness, John Lala (PW2) was sufficient and credible enough in discharging her obligation of establishing on a balance of



probabilities that the material accident was caused by the negligent and/or reckless manner in which the Appellant's motor vehicle was driven leading to the untimely death of the deceased through serious bodily injuries suffered in the process.

11. The Appellant was thus responsible for the consequences of his negligent act, and/or omissions and therefore fully liable to the Respondent in damages. Indeed, on the question of liability, the Appellant was rightly held by the trial court to be fully or 100% liable for the accident. This fact was not doubted by the Appellant in this appeal in as much as he abandoned the aspect of liability and by extension grounds, 1,2,6 and 7 of the grounds of appeal as well as the submissions in support thereof.
12. The Appellant therefore restricted the appeal to the question of quantum of damages and contended that the award of damages made by the trial court was erroneous for being against. The weight of the evidence and not being in accordance with the applicable principles for award of such damages. The Respondent agreed with the findings of the trial court in that regard and called for the dismissal of this appeal with costs.
13. With regard to the damages under the *Law Reform Act* i.e for pain and suffering and for loss of expectations of life, there was undisputed evidence that the deceased died on the spot. He therefore endured minimal or no pain from the injuries which he suffered and proved to be fatal. The award of Ksh. 50,000 for pain and suffering was in the circumstances excessive and is hereby reduced to a moderate figure of ksh. 25,000. The award for loss of expectations of life was also excessive consideration being given to the fact that the deceased as per the post mortem report (P. Exhibit 1) was aged approximately 46 years old at the time of his demise. The amount of ksh. 200,000, under the head:, therefore reduced to Ksh. 100,000.
14. With regard to damages under the Fatal Accident Act i.e loss of dependency it was evident that the deceased was in gainful employment at the time of his death. He was a high school head teacher or principle earning a gross income of Ksh 83,555 as per his pay slip (P exhibit 4). The net income was kshs 45,906/80cts after statutory and non-statutory deductions were factored in.
15. The deceased died at age 46 years and was expected to retire at age of sixty (60) years. He therefore had about fourteen (14) years to go before retirement. In assessing damages for loss of dependency, the trial court applied a multiplicand of Ksh. 64,236/01 after deducting the statutory deduction of kshs 19,318/90 from the gross salary of Ksh 83,555. As for the multiplier, the court applied fifteen (15) years.
16. In this court's opinion, consideration being given to the fact that the deceased net monthly salary was Ksh 45,906 and this is what he took home to expend on himself and his family and that he had fourteen (14) years to go before his retirement as a school principle, the multiplicand of Ksh. 64,235/01 and the multiplier of 15 years were on a higher side. In the circumstances it would be just and fair for the multiplicand to be reduced to Ksh 45,906 and the multiplier to 14 years so that the Respondent be entitled to damages for loss of dependency as follows:- $Ksh\ 45,906 \times 12 \times 14 \times 2/3 = 5,141,472$.
17. All in all, this appeal succeeds only to the extent that the total amount payable to the Respondent is hereby reduced from Ksh 7,958,322 to Ksh 5,266,472 made up as follows:-
 - (a) Pain and Suffering – Ksh. 25,000
 - (b) Loss of Expectation of life - Ksh 100,000
 - (c) Loss of Dependency -5,141,472Total payable Ksh 5,266,472



18. The award of the trial court in that regard is hereby set aside and substituted for the award made hereinabove.

The Appellant shall however, bear the costs of appeal due to his lack luster manner of preparing this appeal thereby increasing costs for himself and the Respondent.

19. Ordered accordingly.

J.R. KARANJAH- JUDGE

DELIVERED AND DATED THIS 30TH OF MAY, 2024.

J.R. KARANJAH

JUDGE.

In the presence of

Mr. Ojala for the Respondent

No appearance for the Appellant.

Alex Court Assistant

