



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CIVIL APPEAL NO.43 OF 2016**

**RAZCO COMPANY LIMITED.....APPELLANT**

**VERSUS**

**CASMIEL ODHIAMBO OKATI**

**& GETRUDE MERCY NDEGE** (suing as Legal representatives of

**STEVE OBUNGA ODHIAMBO).....RESPONDENTS**

*(Being an appeal from the judgment and decree of the learned SRM J.P. NANDI dated 28.09.2016 in Oyugis PMCC No.147 of 2015)*

**JUDGMENT**

[1] This suit was commenced vide a plaint dated 18<sup>th</sup> December 2015 and filed at the Principal Magistrate's Court at Oyugis on the 23<sup>rd</sup> December 2015. The claim was for special and general damages arising from a road traffic accident which occurred on the 14<sup>th</sup> August 2014, along the Kisii-Oyugis road at Kasimba junction. The claimants were **CASMIEL ODHIAMBO OKATI** and

**GETRUDE MERCY NDEGE**, acting as the legal representative of **STEVE OBUNGA ODHIAMBO** (deceased), who died as a result of the accident involving a motor cycle Registration No. KMDB 339 D on which he was riding as a pillion passenger and a motor vehicle Registration No.KBB 432 X belonging to **RAZCO CO. LIMITED**, and driven at the time by its authorized driver, servant, agent or employee.

[2] It was pleaded that on the material date the said motor vehicle was so negligently and/or recklessly driven such that it violently collided with the said motor cycle thereby causing the deceased to suffer fatal injuries. He was at the time aged twenty-eight (28) years. His parents (claimants) therefore instituted this suit and prayed for damages under the Law Reform and Fatal accidents Act against **Razco Co. Limited**, which filed its statement of defence on 26<sup>th</sup> January 2016, denying all allegations made against itself in the plaint and contending that if the accident occurred, then it was solely and/or contributed to by the deceased and the rider of the motor cycle.

The company therefore prayed for the dismissal of the suit with costs.

[3] At the trial, evidence on behalf of the plaintiffs was led by the first plaintiff, **CASEMIEL ODHIAMBO** (PW1), **A POLICE OFFICER, PC BULIMO MWASHI** (PW2) and a passerby, **GILBERT ONYANGO** (PW3).

**DAVID ONYANGO ABOKI** (DW1), was the driver of the ill-fated motor vehicle. He testified in court on behalf of the defendant company.

After considering the evidence in its totality, the trial court apportioned liability at the ratio of 65:35% against the defendant and awarded damages in favour of the plaintiffs for the total sum of Kshs.3,950,500/- less 35% contribution i.e. Kshs.2,567,825/= together with costs and interest.

[4] Being aggrieved by the decision, the defendant company filed this appeal on the basis of the grounds in the memorandum of appeal dated 17<sup>th</sup> October 2016. The appeal proceeded by way of written submissions and in that regard, the defendant (appellant) was represented by the firm of **NISHI PANDIT & CO. ADVOCATES**, while the plaintiffs/respondents were represented by the firm of **M/S KHAN & ASSOCIATES**.

The duty of this court was to re-consider the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses (see, **SELLE –VS- ASSOCIATED MOTOR BOAT CO. LTD [1968] EA 123** and **ABDUL HAMEED SAIF –VS- ALI MOHAMED SHOLAN [1955] 22 EACA 270**).

[5] In that regard, the evidence led by both sides was re-considered by this court and from it and the submissions made herein for and against the appeal, it was apparent that the basic issue for determination was whether the accident was occasioned by the negligence of the appellant's driver (DW1) and/or that of the rider of the motor cycle or both and if so, whether the respondents were entitled to damages and to what extent.

The deceased was a pillion passenger on the motor cycle. He was not the rider and could not be said to have been in control thereof. Consequently, the allegation that he contributed to the accident by his negligence was a pure misconception. Apart from the motor cycle, he was also not in control of the activities of the motor cycle rider and how he went about his duties.

[6] In this context, negligence would mean no more than the negligence of the driver of the motor vehicle and/or that of the rider of the motor cycle who, it is instructive to note, was not enjoined in this suit as a party, neither did he testify in favour of the respondents in the trial court.

On the issue of liability, the testimony by **GILBERT ONYANGO** (PW3) indicated that he witnessed the accident as it occurred. He said that the motor cycle was in the process of joining the main Kisii-Oyugis road at a junction when the motor vehicle moving along the said road in a zigzag manner hit and knocked down the motor cycle whose pillion passenger suffered fatal injuries. He (PW3) indicated that the motor cycle while approaching the main road from a minor rough road stopped at the junction prior to joining the main road.

[7] However, the driver of the motor vehicle (DW1) contended that the motor cyclist entered the main road without giving way at the junction as he was required. He thus implied that the cyclist joined or entered the main road without stopping at the junction to give way to vehicles using the main road.

Whereas, PW3 blamed DW1 for the accident, DW1 blamed the motor cycle rider who did not testify in court and who was blamed for the accident after police investigation and charged in court as indicated by **PC BULIMO** (PW2) and an accident's investigator (PW2).

[8] Most important, the driver (DW1) indicated that there was no contract made between his vehicle and the motor cycle and that what happened is that the deceased who was the pillion passenger on the motor cycle jumped off the motor cycle perhaps sensing danger on noticing the vehicle nearby while the motor cycle was entering the main road. This was confirmed by the accident's investigator (DW2).

It would therefore follow that PW3 did not tell the truth when he stated that the motor cycle was hit by the motor vehicle and implied that the deceased died from the injuries arising from the impact. He (PW3) either did not see the accident happening or he could not tell exactly how it happened.

[9] Given that the deceased was run-over by the vehicle when he jumped off the motor cycle and fell on the road along the vehicle's path, it goes without saying that he was led into doing what he did by the dangerous situation he was placed on by the negligent act of the motor cycle rider in failing to give way while joining a main road from a minor road at a road junction.

[10] The motor cycle rider thus took the most blame for the occurrence of the accident rather than the driver of the motor vehicle

whose contribution would be placed by this court at 30% based on his failure to exercise proper look out and slowing down while approaching a road junction.

Therefore, on liability, this court apportions blame in the ratio of 70% - 30% against the motor cycle rider rather than 65% - 35% against the driver of motor vehicle as found by the trial court.

As the motor cycle rider was not joined in this suit, the respondents would be entitled to damages from the appellant only to the extent of the motor vehicle driver's contribution to the accident i.e. 30%. The balance thereof of 70% may be recovered from the motor cycle rider by way of a separate suit.

[11] With regard to quantum of damages, the father of the deceased, **CASEMIEL ODHIAMBO** (PW1) testified that the deceased was aged 28 years at the time of the accident, single and worked with an insurance company earning a monthly salary of Kshs.40,000/= part of which he used towards the welfare of his parents and payment of school fees for his younger siblings.

However, no documentary evidence of the said earnings was produced by PW1. There was no letter from the deceased's employer to confirm his employment and earnings nor was there any payslip to confirm the deceased monthly salary of Kshs.40,000/=.

[12] It would therefore follow that the application of the multiplier approach in the calculation of damages under the Fatal Accidents Act was not the most suitable. Instead, a global approach was most

suitable and ought to have been applied by the trial court in the circumstances as there was no evidence to provide a suitable multiplicand sum. In that regard, the damages awarded by the trial court under the head of Fatal Accident Act (i.e. loss of dependency) in the sum of Kshs.3,840,000/= was overly excessive.

[13] However, damages under the Law Reform Act i.e. loss of dependency in the sum of Kshs.100,000/= and for pain and suffering in the sum of Kshs.10,000/= were proper and reasonable.

The special damages in the sum of Kshs.20,500/= and the Funeral Expenses in the sum of Kshs.80,000/= were also lawfully awarded by the trial court.

Other than the award on loss of dependency, all the other awards were proper and adequate to require any interference with them from this court.

[14] As for damages for loss of dependency, this court would apply the global approach and award a sum of Kshs.2,300,000/= under the head.

In the upshot, this appeal is allowed to the extent that the total award of Kshs.3,950,500/= less 35% contribution i.e. Kshs.2,567,825/= made by the trial court be set aside and substituted for a total sum of Kshs.2,510,500/= less 70% third party contribution i.e. Kshs.753,150/= together with costs and interest.

The appellant shall have costs of the appeal. Ordered accordingly.

**J.R. KARANJAH**

**JUDGE**

**05.02.2019**

[Dated and signed this 5<sup>th</sup> day of February 2019]



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