IN THE HIGH COURT OF KENYA

AT KIAMBU

CORAM: D.S. MAJANJA J.

CIVIL APPEAL NO. 13 OF 2019

BETWEEN

DOMITILA WANGUI KARUGU & JOHN KIARIE NG'ANG'A suing as the administrator

of the estate of JOSEPH NG'ANG'A KIARIE (DECEASED) .....APPELLANTS

AND

DAGU HIDRIS HAIDE .....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. N. M. Kyanya Nyamori, RM dated 11th December 2018 at Thika Magistrates Court in Civil Case No. 74 of 2017)

JUDGMENT

1. The appellants contest the judgment of the subordinate court in which the trial court apportioned liability equally between the appellants and respondent and award of damages following the death of the deceased. It is not in dispute that the deceased was a pedestrian walking along the Nairobi – Thika Highway at Ndarugo area on 3rd April 2016 when he was hit by motor vehicle registration number KBW 931B driven by the respondent. Since the appeal is on the issue of liability and quantum, I will deal with the issue of liability first.

2. The appellants' case set out in the plaint was that the respondent's driver was to blame for failing to stop, slowdown or swerve the motor vehicle or in any manner avoid the accident. They contended that the respondent's driver was driving the motor vehicle recklessly at a high speed and that he failed to look out and obey road signs. Further that he failed to maintain effective control of the vehicle and therefore caused the accident.

3. In his statement of defence, the respondent stated that the deceased caused and or contributed to the accident by his own negligence by failing to take care of his own safety, hitting the respondent's motor vehicle, failing to give way to it and crossing the road without due care and attention and at a place not designated as a Zebra crossing. He further averred that the deceased suddenly stood in front of the motor vehicle.

4. The matter proceeded for hearing. The appellants called two witness while the respondent's driver, Hassan Hidris (DW 1), testified. As regard the issue of liability, the Corporal James Owiny (PW 1) testified that the accident was reported according to their records and it involved motor vehicle KBW 931B and the deceased who was a pedestrian. He stated that the pedestrian was knocked down and succumbed to his injuries. When cross-examined, he stated he did not know the spot where the accident took place. He stated the deceased's body was found by the road side.

5. DW 1 confirmed that the accident took place and that he was the driver of the respondent's motor vehicle. He told the court that he had not been charged with any offence. He blamed the deceased for causing the accident. When cross-examined, DW 1 accepted that he hit a pedestrian and that he was driving at about 70 kph and that the vehicle had a good braking system. He also stated that there was a footbridge where the deceased crossed and that there were no road signs warning drivers not to slow down.

6. Based on the evidence, the trial magistrate apportioned liability equally. Counsel for the appellants submitted the apportionment was contrary to the evidence given the fact that the appellant admitted causing the accident and there was no basis upon which the trial magistrate could conclude that the deceased caused the accident as there was no evidence that the place where the accident took place was a designated pedestrian crossing. In his view, the defendant ought to shoulder the full burden of liability. Counsel for the respondent supported the decision of the trial magistrate. She submitted that DW 1's testimony was unchallenged and since he was an eyewitness, the trial magistrate was right to apportion liability in the circumstances.

7. Both parties filed extensive written submissions and cited various authorities but ultimately the issue of who is to blame is a question of fact and it is one I must turn to. Since this is a first appeal, I am alive to the principle that the first appellate court is required to reconsider the evidence, evaluate it and draw its own conclusions making an allowance for the fact that it neither heard nor saw the witnesses testify (see ***Selle v Associated Motor Boat Company Ltd*** **[1968] E.A. 123, 126**).

8. On the appellants' side only one witness testified on the issue of liability and it was the police officer. He was not a direct witness hence he could not testify on the circumstances of the accident. He only confirmed that the accident took place and the particulars of the deceased and motor vehicle. He could not point to where the pedestrian was hit but noted that the deceased's body was found by the road side. He did not testify as to the manner the vehicle was being driven. On the other hand, DW 1 accepted that he hit the deceased. He did not tell what the deceased did or did not do save to say that the deceased crossed where there was a footbridge and that he tried to avoid the accident.

9. What is not in dispute is that the respondent hit the deceased. It is not clear under what circumstances he was hit. Further, the respondent's testimony was uncontroverted as he was the only direct witness. Since it is difficult to apportion blameworthiness in these circumstances, I too, would apportion liability equally. This approach to apportionment of liability is not novel. Our courts have dealt with situations where it was difficult to apportion liability were two vehicles have collided and have apportionment liability equally (see generally ***Beckley Stewart Ltd and Others v Lewis Kimani Waiyaki*** **[1982-88] 1 KAR 1118**, ***Lakhamshi v Attorney General*** **[1971] EA 115**, ***Simon v Carlo*** **[1970] EA 284**). The same principle was outlined by the Court of Appeal in ***Hussein Omar Farah v Lento Agencies CA NAI Civil Appeal 34 of 2005*** **[2006] eKLR where it observed that**:

In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame. I*t has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.*

10. I now turn to the issue of damages where the trial court made a global award of Kshs 400,000.00 under the ***Fatal Accidents Act (Chapter 32 of the Laws of Kenya)*** on the ground that the monthly income and the dependency could not be established by the evidence. The gravamen of the appellants' case is that the claim was properly pleaded and supported by the evidence particularly the testimony of the deceased's wife, Domitila Karugu (PW 2). The appellants contended that the trial magistrate ignored their case, evidence and submissions which were based on the multiplier approach hence the award was unjustified.

11. In the plaint, the appellants pleaded that the deceased was aged 47 years and was at the time of his demise, a driver of earth movers. He supported his widow, two sons aged 26 and 22 respectively and two daughters aged 19 and the other, a minor. PW 1 adopted her witness statement dated 26th July 2016 in which she stated at the material part:

The loss has been great since my husband was supporting us since my daughter, MW, is in class four and SNN who is in college depended on his salary he was getting while working.

12. When cross-examined on this issue of income, PW 1 stated as follows:

I have no documents. He was a casual labourer. He was paid daily. He died on the spot. I know he would drive earth movers.

13. The trial magistrate, in reaching the conclusion that a global award was appropriate, held that the appellants had not tendered any evidence to show how much the deceased earned or that he was employed as an earth mover hence the global approach was preferable.

14. In an appeal concerning the quantum of damages awarded by the subordinate court, I accept the principle that this court will not ordinarily interfere with the findings of a trial court on an award of damages unless it can be shown that the court proceeded on wrong principles, or misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low (see ***Butt v Khan*** **[1981] KLR 349**).

15. Did the trial magistrate err in adopting the global approach in assessing damages under the ***Fatal Accidents Act***" 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** he expressed the following view which I adopt;

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.

16. In my view, I do not find any error as the appellants did not establish the deceased's monthly income or even give any indication of it. PW 1 mentioned a *"salary"* in her statement but did not say who the employer was. Further, in the plaint, the appellants claimed that the deceased was a driver of earth movers but did not plead his income. It is not clear whether he was in fact employed. The nature of his work only emerged during cross-examination where PW 1 stated that he was a casual labourer and would sometimes drive earth movers. In view of the pleadings and evidence, the trial magistrate did not err in adopting the global approach.

17. The trial magistrate relied on the case of ***John Wamae and 2 Others v Jane Kituku Nziva and Another*** **MKN HCCA No. 119 of 2017 [2017] eKLR** where the court awarded a global sum of Kshs. 400,000.00. In that case, the deceased was 61 years old and had children but the evidence on their ages and nature of dependency was the subject of inconsistent evidence leaving the court in doubt. I find that the trial magistrate did not pay heed to the facts of that case when he cited it as authority to award the same amount. Even in cases where a global amount is awarded, the court must consider the circumstances of each case to ensure that the award results in fair compensation.

18. In this case the deceased was 47 years and there is evidence that he had a minor child and was supporting his wife thus a sum of Kshs. 400,000/- was inordinately low as to warrant interference. I would enhance that amount to Kshs. 800,000/-.

19. Before I conclude the judgment, I note that the trial magistrate deducted the amounts awarded under the ***Law Reform Act (Chapter 26 of the Laws of Kenya)*** for pain and suffering purportedly under **section 4(1)** of the ***Fatal Accidents Act***. This was a misdirection and I would quote the Court of Appeal in ***Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited*** **NYR CA Civil Appeal No. 22 of 2014 [2015] eKLR** where it clearly explained the principle of duplication of awards the trial magistrate relied on as follows;

[20] This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the **Law Reform Act** and dependants under the **Fatal Accidents Act** are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the **Fatal Accidents Act** should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the **Law Reform Act**, hence the issue of duplication does not arise.

20. In conclusion, I affirm the trial court's finding on liability. I allow the appeal to the extent that I set aside the award of Kshs. 400,000.00 as damages under the ***Fatal Accidents Act*** and substitute it with judgment for Kshs. 800,000/-. In addition, the appellants shall be entitled to the award under the ***Law Reform Act*** being Kshs. 10,000/- for pain and suffering and Kshs. 100,000/- for loss of expectation of expectation of life.

21. For avoidance of doubt there shall be judgment for the appellants against the respondent as follows:

Fatal Accidents Act	Kshs. 800,000.00
Pain and suffering	Kshs. 10,000.00
Loss of expectation of life	Kshs. 100,000.00
Special Damages	Kshs. 89,150.00
	Kshs. 999,150.00
Less 50%	
TOTAL	**Kshs 499,575.00**

22. Since the appellants have partially succeeded, they shall have half the costs of this appeal and costs in the subordinate court. Apart from the special damages, interest on the damages shall run from the date of judgment before the trial court.

DATED and **DELIVERED** at **KIAMBU** this 10th day of **JANUARY** 2020.

D.S. MAJANJA

JUDGE

Mr Maina instructed by Chris Maina and Company Advocates for the appellants.

Ms Simiyu instructed by L. W. Wang'ombe and Company Advocates for the respondent.