REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 145 OF 2018

JOHN KIPKEMEI SIANI.....1ST APPELLANT

COUNTY GOVERNENT OF BARINGO...2ND APPELLANT

-VERSUS-

JOSEPH CHEPLOYEI KIBOS (Suing as

the Legal Representative of the Estate of

ABRAHAM CHEPKONGA KIBOS).....RESPONDENT

(Being an Appeal for the Judgment/Decree of Hon.

N. Nthuku, Senior Resident Magistrate delivered on

03/09/2018 in Eldama Ravine CMCC No. 102 of 2017)

JUDGMENT

1. The Respondent filed ***Nakuru CMCC No. 102 of 2017*** after duly obtaining a Limited Grant of Letters of Administration Ad Litem for the Estate of Abraham Chepkonga Kibos (hereinafter 'the Deceased'). The Respondent is a son to the Deceased. The Deceased is said to have died from injuries sustained from a road accident involving motor vehicle registration No. 30CG 032A. The accident occurred on 30/03/2017 along Marigat-Mogotio Road. The 1st and 2nd Appellants are the driver and owner of the motor vehicle, respectively. The Respondent sought general and special damages, costs of the suit and interest against the Appellants jointly and severally.

2. The suit was heard on 09/07/2018. PW1, Joseph Chepyolei Kibos testified that he was informed by his brother about the accident via phone. He testified that the Deceased was rushed to Mogotio then transferred to Valley Hospital Nakuru and he died on 01/04/2017 due to blunt force trauma. He also testified that the accident was reported at Mogotio Police Station and that he had seen the vehicle at Mogotio Police Station, four days after the accident with its left head lamp and side mirror were broken.

3. He testified further that the Deceased was 74 years old and that he had worked at Marigat Irrigation Scheme until his retirement and was at the time making Kshs 200 to Kshs 500 per day from pruning crops for farmers. It was also his testimony that the Deceased was providing for 5 children in primary school. On cross examination he testified that they had spent Kshs. 50,000 on the burial.

4. PW2, Maureen Cherono testified that her kiosk was a mere 3 metres from the road and that she heard and saw the accident. PW3,

Julius Kipruto's testimony was that he was at Noiwet Centre when he heard a loud bang and when he got to the scene, he found that the Deceased who was riding a bicycle had been knocked down by a motor vehicle belonging to the 2nd Respondent. PW2 further testified that the Deceased was cycling towards Mogotio.

5. The Defence called one witness -DW1, the 1st Appellant herein. He testified that he was driving from Kabarnet and when he reached Noiwet Centre, a bicycle came from the left and he tried to hoot and brake but the bicycle joined the road. He testified that he swerved to the opposite lane, but the bicycle moved to his lane and hit his side mirror and windscreen. He said that he heard people scream and he rushed to the police station to report. According to is testimony the bicycle was the cause of the accident, and the rider had no reflector.

6. On cross examination, DW1 testified that the bicycle was moving at about 30km per hour while he was driving at 40km per hour when he got to the rubbles but had previously been driving at 60 to 70km per hour. He told the Court that he had first seen a bicycle from 50 metres away coming from the side towards the road headed towards Nakuru and when he reached where he was (the bicycle) he swerved into the road and hit him. It was also his testimony that he had collided with the bicycle on the lane headed to Marigat from Mogotio and the bicycle landed on the left side of the road while the Deceased landed in the middle of the road.

7. Upon hearing both parties and their submissions, the Learned Magistrate found in favour of the Respondent. She apportioned liability at 95% to the Appellants and 5% to the Deceased and awarded the Respondent the sum of Kshs. 970,000 as follows.

Special Damages awarded. Ksh 50000

General Damages under the Law Reform Act, -pain and suffering Kshs 20,000

Loss of expectation of life Kshs 100,000

Under the Fatal Accidents act, I award a lump sum of Kshs. 800,000

8. The Appellants, aggrieved by the Judgment and Decree filed the instant appeal vide their Memorandum of Appeal dated 14/09/2018. The Appeal is sought on the following 5 grounds:

1. THAT the learned trial Magistrate erred in law and fact by finding the Appellants liable on the basis not of evidence of any negligence but on irregular and misinformed presumptions

2. THAT the learned trial Magistrate erred in law and fact in failing to properly evaluate the evidence adduced and found the Appellant liable to the extent of 95% merely because he was driving a motor vehicle and not because he drove it in any manner that fell foul of the standard of care that the appellants owed to the respondent or any other road user.

3. THAT the learned trial Magistrate erred in law and fact in dismissing the appellants' account of the accident on the contributory negligence of the respondent merely because the respondent was old.

4. THAT the learned trial magistrate erred in law and fact by awarding Kshs. 800,000/- for loss of dependency in respect of the deceased on whom no dependency was or could be proved and who in all likelihood was the dependant.

5. THAT the learned magistrate erred in law in making an award under Fatal Accident Act in the absence of mandatory particulars of dependants or persons on whose behalf the suit was brought in the plaint and on behalf of persons who do not qualify as dependants under the act.

9. The Appeal was argued by way of written submissions. The Appellants' submissions are dated 21/12/2021. The Appellants argue that the Respondent did not establish the exact circumstances of the accident. This is because, the Appellants submit, the Respondent's witnesses did not witness the accident when it happened, and the Police abstract indicated that the accident was still under investigation. The Appellants rely on the provisions of Sections 107 and 109 of the Evidence Act and the cases of ***Sally Kibii & another v Francis Ogaro [2012] eKLR*** **and Rehma Adhiambo Marjan v Fanuel Obwaro & Another [1999] eKLR.**

10. The Appellants contend that even though the Respondent's suit is hinged on negligence, the Respondent failed to establish or adduce evidence of the facts on which he based his claim for negligence. They submit that the Respondent did not prove causation of the alleged accident by the Appellants as well as the negligence of the driver. They have cited the cases of ***Bahari Parents Academy v LBZ (Minor suing through his father and next friend) BNZ [2020] eKLR***, ***Dharmagma Patel & another v T A (a minor suing through the mother and next friend H H) [2014] eKLR, Statpack Industries v James Mbithi Munyao [2005] eKLR*** and ***Timsales Ltd v Stephen Gachie [2005] eKLR.*** They submit that because it has been previously held that accidents may occur for several reasons, it was upon the Respondent to show that there was negligence on the part of the Appellants

11. The Appellants are agreeable with the quantum of pain and suffering and loss of life. They however argue that that the Learned Magistrate erred by making an award of general damages they term excessive for loss of dependence, yet no dependency was proved. They rely on the case of ***Sumaria & Another v Allied Industrial Ltd [2007] eKLR*** and submit that the Appellate Court should only interfere with the award of general damages by the Trial Court unless it is shown that the sum awarded was demonstrably wrong or was based on the wrong principles or misapprehension of evidence. Accordingly, they submit that the award of loss of dependency was excessive and inordinately high as the income of the Deceased could not be ascertained and there was no documentary proof of the same. They cite Section 4 of the Fatal Accidents Act and submit that there were no particulars of dependants.

12. They also submit that the Applicant having been 74 years old has passed the life expectancy age of 67 years cited in the case of ***Njowamu Construction Company Limited v Grishon Katua Ndolo & Another [2021] eKLR*** and that the Respondent also failed to prove that the Deceased was working.

13. The Appellants have cited various authorities in support of their argument that proof of dependency is required including **Rahab Wanjiru Nderitu v Daniel Muteti & 4 Others [2016] eKLR, Abdalla Rubeya Hemed v Kajumwa Mvurya & Another [2017] eKLR** and ***Samuel Mutitu Nderitu (suing on his own behalf and as a Legal Representative of the Estate of Gladys Muringi Nderitu- Deceased) v Erastus Mutahi Mugambi [2021] eKLR.*** They submit that there was no basis in making such a substantial award and propose the sum of Kshs 100,000 under that head.

14. The Respondent's submissions are dated 27/01/2022. The Respondent reminds the Court that this being a first appeal, it is incumbent that the Court notes that the Court below had the advantage of seeing and hearing the witnesses. He cites the case of ***Stephen Kamau Wanderi & another v Gladys Wanjiku Kungu [2006] eKLR.***

15. He contends that PW2 was an eyewitness, and her testimony was unchallenged. Conversely, the Respondent submits that the 1st Appellant is not to be believed since he denied being the driver of the motor vehicle, being an employee of the 2nd Appellant and particulars of negligence yet admitted the same in his testimony.

16. He argues that the 1st Appellant's occurrence of the accident was not believable. According to the Respondent it can be concluded from the evidence that Deceased was cycling on the left extreme side of the road before the accident, the Appellant must have been driving at a speed inconsistent with the circumstances i.e. very fast at a shopping centre where human traffic was expected, the 1st Appellant must have lost control of the motor vehicle after hitting road rubble and ended up knocking the Deceased who was carefully and prudently riding on his bicycle on the correct side of the road, that the Applicant could not manage to control the motor vehicle and avoid the accident is negligence on his part and that the Appellants' version of the accident unbelievable compared to the evidence adduced by the Respondent's witness. He contends that the authorities cited by the Appellants are distinguishable from the present case since they deal with a situation where there was no eye witness account of the accident yet in this case, the Respondent called eye witnesses.

17. On the issue of dependency, the Respondent submits that he obtained a Limited Grant. He contends that the Lower Court was properly guided by evidence of dependency as adduced by the Respondent which evidence was not challenged. He submits that Trial Court was properly guided by the authority of ***Albert Odawa v Gichimu Githenji [2007] eKLR*** and Section 4 of the Fatal Accidents Act.

18. I have read and considered the respective arguments in those submissions.

19. As a first appellate court, this Court's duty is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. The

duty of the court in a first appeal such as this one was stated in ***Selle & another –vs- Associated Motor Boat Co. Ltd. & others (1968) EA 123*** in the following terms:

*I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (**Abdul Hammed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270**).*

20. This same position had been taken by the Court of Appeal for East Africa in ***Peters –vs- Sunday Post Limited [1958] EA 424*** where Sir Kenneth O'Connor stated as follows:-

It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt –vs- Thomas (1), [1947] A.C. 484.

"My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

21. The appropriate standard of review established in these cases can be stated in three complementary principles:

a. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

c. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

22. In the present case, the Appellant essentially complains about two aspects of the Trial Court's judgment:

a. First, it complains that no evidence was placed before the Court to permit the conclusion that the Defendant was vicariously liable for the accident. In particular, the Appellant says that the totality of the evidence merely showed that there was an accident and that there was no eye witness testimony to permit the deduction that the Appellant was to blame for the accident. In the absence of such evidence, the Appellant argues, it behooved the Trial Court to dismiss the claim.

b. Second, the Appellant disputes that the Respondent proved dependency. As such, the Appellant argues that the amounts awarded under that head were erroneously awarded.

23. I will first deal with the question of liability. Simply put, the Appellant mischaracterizes the evidence tendered at the trial. It is not accurate to say that there was eye witness to the accident. PW2, Maureen Cherono was categorical when she stated in cross-examination that she was "outside the kiosk so [she] witnessed him being hit." Indeed, testimony cannot be more categorical than that. The witness further testified that she say the Deceased being hit as he cycled along the road "off the road". She further stated that she saw the Appellant's Motor Vehicle jump the "1st rubble and hit him on the 2nd." She had earlier stated that the Deceased was cycling on the left side of the road towards Mogotio and that he was not crossing the road. The testimony of PW3, Julius Kipruto, was largely in accord. He testified that he found the Deceased lying on the left side off the road with the bicycle on that same side after hearing a loud bang. The motor vehicle which had caused the accident had driven off.

24 In my view, the cumulative evidence of PW2 and PW3 was enough, on balance, to yield the conclusion that the 1st Appellant was negligently responsible for the accident. That conclusion is accentuated, however, by the testimony of the 1st Appellant. When it was his turn to testify, the 1st Appellant, who was the driver of the Motor vehicle that caused the accident, testified that he was driving at 40Km/h and that the bicycle was being ridden at about 30Km/h. He claimed that the Deceased was crossing the road and that it was the Deceased who hit the Motor Vehicle. He also claimed that he saw the Motor Vehicle from about 50 meters away.

25. The Learned Trial Magistrate had the following to say about the testimony of the 1st Appellant:

A person who is driving a motor vehicle is under a duty of care to other road users. The vehicle is a lethal weapon and due care is expected of the driver who is in control thereof. Let's look at the evidence of the driver: he says the Deceased was cycling at 30Km/h when he saw him whereas the vehicle was driven at 40Km/h. This was a 74 years ld man on a bicycle, how can he be able to cycle at 30Km/h" Even a young man would find it hard to cycle that fast. Secondly, if he saw the bicycle 50 metres away being cycled towards the road at 30Km/h while he drove at 40Km/h, it would mean that he had sufficient time to slow down and even stop early enough to avoid colliding with the bicycle. His testimony does not add up at all (sic)….

26. The analysis by the Learned Trial Magistrate is appropriate. The additional facts adduced by the 1st Appellant contextually confirm that he was to blame for the accident. They not only impugn his credibility when speaking of the actions of the Deceased, they confirm his negligent behaviour when speaking of his own conduct during the incident. All in all, therefore, there is absolutely no reason to depart from the findings of fact made by the Learned Trial Magistrate regarding liability for the accident. I am convinced that the Trial Court considered the evidence on record in apportioning liability and see no need to interfere with the findings of the Trial Court on liability.

27. The award under the Fatal Accidents Act is usually awarded as compensation for loss of dependency. The Appellants argue that first, the Respondent neither specifically pleaded nor gave particulars of the Deceased's Dependants. The requirement to provide particulars of Dependents is found under Section 8 of the Fatal Act which provides:

8. Plaintiff to deliver full particulars of the persons for whom damages claimed In every action brought by virtue of the provisions of this Act, the plaintiff on the record shall be required, together with the statement of claim, to deliver to the defendant, or his advocate, full particulars of the person or persons for whom, and on whose behalf, the action is brought, and of the nature of the claim in respect of which damages are sought to be recovered.

28. Previous decisional from our Courts recommends that in the absence of such particulars, a Claimant is not entitled to receive compensation under this head. In ***David Sakari Wasike (Suing as the Legal Representative of the Estate of the Late Jentrix Nakhumicha Simiyu v Barisi & another (Civil Appeal 146 of 2017) [2021] KECA 145 (KLR) (19 November 2021) (Judgment)*** the Court of Appeal held that in the absence of full particulars or evidence of dependency, a person could not be said to be dependants while in ***Dickson Taabu Ogutu (Suing as the legal representative of the estate of Wilberforce Ouma Wanyama v Festus Akolo &*** the Court of Appeal held that the onus of proving dependency lies with the person claiming.

29. In the instant case, other than stating in his testimony that the Deceased had a wife and five minor children, it was neither pleaded in the Plaint, nor particulars or extent of their dependency provided. Perhaps only the Respondent, can be said to have, on a balance of probabilities shown that he was a Dependant within the meaning of Section 4 of the Fatal Accidents Act.

30. In her Judgment, the Learned Magistrate based her award of Kshs.800,000 on the Deceased having a family depending on him and children in school. However, having found that dependency was not proved to that extent, it was, in my view, erroneous to base the award on the existence of the alleged dependants.

31. In similar cases where the income and dependants of the Deceased could not be properly ascertained, the Courts have applied the global award approach. In ***Chabhadiya Visram v Agnes Nafula Wakoli [2019] eKLR*** the Court of Appel stated thus:

On the assessment of damages, the evidence was that the deceased was a trader with an income which he used to maintain his family including paying school fees for his children. Although there was no specific evidence adduced regarding the actual amount of income, it was open to the learned judge given the evidence that was available, to assess the amount of damages doing the best that he could. We are not persuaded that the approach of a global award as adopted by the learned judge was wrong. We find the awards made reasonable and have no reason to interfere.

32. In the present case, the existence of dependants was never pleaded nor proved. Not only was it not pleaded specifically, but no evidence was adduced to show that the Deceased was married or that he had children. I would agree with the precedent cited by the Appellant, to wit, ***Samuel Mutitu Nderitu (suing on his own behalf and as a Legal Representative of the Estate of Gladys Muringi Nderitu- Deceased) v Erastus Mutahi Mugambi [2021] eKLR*** when the Court remarked:

On perusal of the plaint, it is noted that the appellant did not list in the plaint any of the dependants of the deceased. Further, on cross-examination, the appellant stated that the Deceased was survived by five children who were well over 18 years and that none of them depended on the deceased. Furthermore, the appellant did not adduce any evidence of any form to show proof of the Deceased's dependents. The income of the deceased was not proved either.

In that regard, I do find that the appellant failed to prove dependency. I uphold the Trial Court's finding that the Appellant was not entitled to an award on the said item.

33. So is it here. When all - including the age of the Deceased - is considered, the sum of Kshs. 100,000 would be sufficient under this head.

34. In the end, therefore, the appeal partly succeeds. The Trial Court's findings on liability survive the appellate challenge by the Appellant. However, the Appellant has succeeded in reversing the specific award on dependency. Instead, only a global award of Kshs. 100,000 will be made under that head. There was no appeal regarding the amounts awarded under special damages, general damages for pain and suffering and loss of expectation of life. Those amounts will remain un-changed.

35. Consequently, I make the following orders:

I. The award of damages is varied as follows:

a) Special Damages - Kshs 50,000

b) General Damages for pain and suffering - Kshs 20,000

c) Loss of expectation of life - Kshs 100,000

d) Compensation under the Fatal Accidents Act - Kshs. 100,000

Total Kshs: 270,000

Less 5% Kshs. 256,500

II. Interest on 1(a) above shall be from the date of filing the suit and interest on 1(b), 1(c) and 1(d) from the date of this

Judgment.

III. The Appeal having succeeded partially, each party shall bear its own costs.

36. Orders Accordingly

DATED AND DELIVERED AT NAKURU THIS 28TH DAY OF APRIL, 2022.

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JOEL NGUGI

JUDGE