



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

(CORAM: CHERERE-J)

CIVIL APPEAL NO. 100 OF 2018

BETWEEN

GORDON OUMA SUNDA.....1ST APPELLANT

STELLA AWUOR NDISIO.....2ND APPELLANT

(suing as legal representatives of the estate of Benson Odhiambo Sunda)

AND

ADAN ABDIKADIR OMAR.....1ST RESPONDENT

BENARD KIPKEMOI ASENA.....2ND RESPONDENT

(Being an Appeal from the Judgment and Decree in Nyando SPMCC No. 108 of 2017

by Hon. P.Olengo (PM) on 27th September, 2018)

JUDGMENT

1. **Gordon Ouma Sunda and Stella Awuor Ndisio (1st and 2nd Appellants respectively)** suing as legal representatives of the estate of **Benson Odhiambo Sunda** (deceased) filed suit against **Adan Abdikadir Omar and Benard Kipkemoi Asena (1st and 2nd Respondents respectively)** in the lower court claiming damages for fatal injuries suffered by their son and husband respectively, on 02.01.16 when 1st Respondent's motor vehicle KCD 907 E which was being driven by the 2nd Respondent along Ahero-Ombeyi road knocked down the deceased who was cycling on that road allegedly due to the negligence of the 2nd Respondent.

2. The Defendants/Respondents in their statement of Defence denied the claim and blamed deceased for the accident.

3. By judgment dated 27th **September, 2018**, the learned trial magistrate apportioned liability at 100% in favor of Appellants against the Respondents and awarded damages in the sum of Kshs. 746,810/-.

The Appeal

4. The Appellants being dissatisfied with the lower court's decision preferred this appeal and on 19.12.18 filed the Memorandum of Appeal dated 23.10.18 which sets out three grounds but mainly that the applicable dependency ratio for deceased who was married with 3 children ought to have been 2/3 and not 1/3.

SUBMISSIONS BY THE PARTIES

5. This appeal was argued by way of written submissions. In further exposition of the appeal, both parties cited various authorities.

Appellant's submissions

6. The Appellants submitted that a dependency ration of 2/3 ought to be adopted because the deceased had a wife and three children. They argued that the mere fact that he supported his wife and children warranted a dependency ratio of 2/3. **Benedeta Wanjiku Kimani vs Changwon Cheboi & Another [2013] eKLR** where the court stated that:

“...there is no rule that two thirds of the income of a person is taken as available for family expenses. The extent of dependency is a question of fact to be established in each case.”

Respondent’s submissions

7. It was submitted for the Respondents that the 2nd Appellant did not produce a marriage certificate and birth certificates to prove that the deceased was married with children and that the 1/3 dependency ratio was appropriate.

Analysis and Determination

8. This being the first appellate court, its duty is to re-evaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. (See **Selle & Another v Associated Motor Boat Co. Ltd & Another (1968) EA 123.**

9. The extent to which an appellate court may interfere with an award of damages is well settled. It must be shown that the trial court in awarding of the damages took into consideration an irrelevant fact or the sum awarded is inordinately low or too high that it must be a wholly erroneous estimate of the damage, or it should be established that a wrong principle of law was applied (See **Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v A.M. Lubia and Olive Lubia (1985) 1KAR**) and **Denshire Muteti Wambua V Kenya Power & Lighting Co. Ltd, Civil Appeal No. 60 of 2004.**

10. I have perused the entire record of appeal and considered the submissions of counsels for both parties.

11. PW1 in her testimony stated that the deceased was her husband and that they were blessed with three children. In support thereof, she produced the chief’s letter as PEXH. 3 which listed her and her children as dependents of the deceased.

12. I have considered the Respondents’ assertion that PW1 did not produce a marriage certificate and birth certificates to prove that the deceased was married with children and with respect, find that marriage and birth of children can *be proved by evidence other than marriage and birth certificates respectively. This being a civil case, I find that PW1 proved on a balance of probability that the deceased had four dependents who included his wife and three children.*

13. Appreciably, it is reasonable to expect that as an African man, the deceased financially supported his wife and three children. This court finds and holds that it was also reasonable to have expected that deceased would have to spend a large chunk of his income on his dependents. From the foregoing, I am persuaded that a dependency ratio of 2/3 is warranted.

DISPOSITION

14. In view of the findings I have made, the appeal succeeds. The dependency ratio of 1/3 adopted by the trial court is set aside and substituted with a dependency ratio of 2/3. The Appellants costs of this appeal shall be borne by the Respondents.

DATED, DELIVERED AND SIGNED THIS.....05th....DAY OF....December....2019.

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Amondi/Okodoi

For Appellant - N/A

For Respondent - N/A