Asea Brown Boveri Limited & another v Nduta & another ((Suing as the Administrators of the Estate of James Mbagara Njau - Deceased) (Civil Appeal 28 of 2019) [2023] KEHC 22769 (KLR) (28 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22769 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CIVIL APPEAL 28 OF 2019

PM MULWA, J

SEPTEMBER 28, 2023

BETWEEN

ASEA BROWN BOVERI LIMITED ..... 1ST APPELLANT

KENNETH JUMA CHIKAMAI ..... 2ND APPELLANT

AND

HANNAH NDUTA ..... 1ST RESPONDENT

ROSEMARY NJOKI WAIRIMU ..... 2ND RESPONDENT

(SUING AS THE ADMINISTRATORS OF THE ESTATE OF JAMES MBAGARA NJAU - DECEASED

(Being an appeal against the judgment of Hon. K. M. Njalale delivered on 18th January 2019 in Limuru SRMCC No. 288 of 2015)

JUDGMENT

1. The Respondents sued the Appellants in the trial court jointly and severally for general damages under the *Fatal Accident Act* and *Law Reform Act*, special damages, costs and interests as pleaded in the plaint dated 27th November 2014.

2. The Respondents averred that at all material times relevant to the suit the 1st Appellant was the registered owner of the motor vehicle KBA 654V, which was driven by the 2nd Appellant. That on 1st April 2013, the deceased was lawfully driving a Motor Cycle KMCY 335T along Nairobi - Naivasha Road at Fly-Over area where the 2nd Appellant was so careless and managed and or controlled the motor vehicle that he caused it to hit the deceased whereof he sustained fatal injuries. The Respondents relied on the doctrine of Res Ipsa loquitor. The deceased died aged 35 years and left behind 6 dependants.

During the deceased's lifetime, he engaged in farming activities and earned a monthly salary of Kshs 75,000/=.

3. The Appellants in a joint statement of defence dated 3rd December 2015 denied the occurrence of the accident and the particulars of negligence. They blamed the deceased's negligence in causing the accident as the pillion cyclist for failing to adhere to the elementary road safety rules and regulations. The Appellants also denied the deceased died aged 35 years and earning a monthly salary of Kshs 75,000/= and had dependant.

4. After the full trial the trial magistrate awarded liability in the ratio of 90:10 in favour of the Respondents as against the Appellants. The trial magistrate also found as follows on quantum: pain and suffering the deceased died on the same day and the court awarded Kshs 10,000/=, loss of expectation of life the deceased died aged 35 years and the court awarded Kshs 100,000/=, on lost years the trial magistrate awarded a global sum of Kshs 2,500,000/=. The court opined the deceased was a farmer and had a family to support left behind a wife, mother and four children. The court also awarded special damages of Kshs 150,000/=.

5. Aggrieved by the trial magistrate's judgment the Appellants filed the Memorandum of Appeal dated 13th February 2019, citing the following 8 grounds:

    i. That the learned trial magistrate erred in law and in fact in apportioning liability at only 10% against the Appellants herein when the Respondents did not adduce any evidence to hold the Appellants liable and there was no sufficient evidence tendered by the Respondents on the required standard on the negligence of the Appellants.

    ii. The learned Senior Resident Magistrate erred and misdirected herself in not considering the evidence of the Respondents who admitted they did not witness the accident and therefore could not have known how the accident occurred.

    iii. The learned Senior Resident Magistrate erred in fact in not considering there was no eye witness to the accident who testified during the proceedings.

    iv. The learned Senior Resident Magistrate erred and misdirected herself in law and in making a global award of loss of dependency of Kshs 2,500,000/= which was excessive under the circumstances.

    v. The Senior Resident Magistrate erred and misdirected herself in law as the award of loss of dependency of Kshs 2,500,000/= was not justified.

    vi. The Senior Resident Magistrate erred in law and in fact in making a global award for loss of dependency of Kshs 2,500,000/= notwithstanding the Respondents did not adduce any evidence of the deceased's earnings during the proceedings.

    vii. The learned trial magistrate erred in law in failing to deduct the award of loss of expectation of life notwithstanding the Appellants submissions that the same is deductible where an award under Fatal Accident's Act has been pleaded and awarded.

    viii. The learned trial magistrate erred and misdirected herself in finding that the Respondents were entitled to the damages so awarded.

6. The Appellants urged the court to allow the appeal, re-evaluate the evidence of the trial court set aside the judgment and consequential orders of the trial court and substitute the same with the orders of this honourable court.

7. On 25th May 2023 this court directed that the appeal be heard by way of written submissions. Both parties filed their submissions.

Appellant's submissions

8. By the submissions dated 19th June 2023 counsel for the Appellants submitted that the evidence of PW1 and PW2 does not rest the blame of the accident on the Appellants. Neither PW1 nor PW2 witnessed the accident. The Respondents failed to discharge the burden of proof required in proving negligence on the part of the Appellants. The witnesses failed to prove how the material accident occurred.

9. On the head of loss of dependency, the Appellants appreciate the fact that the trial magistrate opined that the multiplier method would not be useful as the income of the deceased was unknown but faults the global sum award of Kshs 2,500,000/= since no authority was cited. Counsel submitted the award was excessive considering that there was no proof of dependency by way of birth certificate. According to counsel an award of Kshs 1,000,000/= would be adequate compensation.

10. Further counsel submitted the trial magistrate failed to deduct the award of Kshs 100,000/= under the head of loss of expectation of life. According to counsel the failure to deduct the award under loss of expectation of life amounted to double compensation.

11. In conclusion counsel urged the court to set aside the trial's court judgment and allow the appeal and the orders as prayed.

Respondent's submissions

12. Counsel for the Respondents submitted arguments on the appeal on two folds, that is, liability and the award of Kshs 2,500,000/= under the head of loss of dependency.

13. On the issue of liability, counsel submitted that the trial magistrate took great and deserved reliance on the fact that the 2nd Respondent was the driver of the accident motor vehicle and pleaded guilty to the offence of causing the death of James Mbagara Njau by dangerous driving in Naivasha Traffic Case No 8 of 2013. The plea of guilty was persuasive enough to convince the learned trial magistrate to find the Appellants liable for the accident.

14. Further counsel submitted the fact that the Appellants failed to call evidence to support their case, leaving the Respondents' case unchallenged. He cited the case of *Makarioa Makonye Monyancha v Hellen Nyangena* Kisii Civil Appeal No 113 of 2012 where the court held that:

> "the defendant/appellant by failing to call evidence to the contrary to counter the evidence by the Plaintiff/Respondent makes it difficult for them to contests the issue for the Defendant/Appellant herein. These are the issue of facts which must be rebutted by facts."

15. Counsel submitted that the trial magistrate in apportioning liability and awarding damages clearly relied on the evidential material placed before the court and exercised judicial discretion and should not be faulted. That the Appellant had failed to determine that the trial magistrate misapprehended the law and applied the wrong principles of the law.

16. In conclusion counsel urged the court to dismiss the appeal with costs to the Respondents.

Analysis of the evidence

17. This is a first appeal and the duty of this court is to re-evaluate the evidence and draw its own conclusion. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court stated as follows -

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

18. I will begin by re- evaluating the trial court evidence.

19. PW1 - PC Meshack Ngugi from Mugumo traffic base testified and produced an OB extract with respect to the accident of 1st April 2013. According to him, the investigations were concluded and the accused was charged in Naivasha Traffic Case No 8 of 2013 where he pleaded guilty and fined Kshs 150,000/= or in default 2 years in prison. During cross-examination, he told the court that he was not the investigating officer and neither was he a witness to the accident.

20. PW2 - Rosemary Wairimu testified she lives in Uthiru and engaging in farming. She told the court the deceased was her eldest son who died on 1st April 2013 in a road accident. That she only got to the scene of the accident and found the deceased lying on the roadside, dead. She adduced the post-mortem report. She testified that the deceased was married with 4 children. That he was a farmer earning Kshs 100,000/= and he supported her as well as his children.

21. During cross-examination, she testified she was not present when the accident occurred and that she had not proved the income of the deceased. She told the court she had a chief's letter that confirmed the deceased was married.

22. The Appellant's case was closed without the Defendants calling witnesses.

23. I have considered the appeal, the submissions filed and the trial court record. The issues for determination are:

    i. Whether the trial court erred in the apportionment of liability.

    ii. Whether the trial court erred in failing to deduct the award under the *Fatal Accident Act* from the *Law Reform Act*.

    iii. Whether the trial court erred in awarding an inordinately high award under the loss of dependency.

Whether the trial court erred in the apportionment of liability?

24. The Appellants have urged this court to find that the trial court erred in apportioning liability of 90:10 in favour of the Respondents. The 2nd Appellant in the Naivasha traffic case pleaded guilty to the offence of causing the death of James by dangerous driving. The trial court also opined there was no eye witness and therefore it was not clear how the accident occurred. The trial magistrate exercised her discretion and apportioned some blame to the deceased at of 10%. I am not persuaded that the trial magistrate misdirected herself in apportioning liability. I uphold the trial court's finding on liability.

Whether the trial court erred in failing to deduct the award under the Fatal Accident Act from the *Law Reform Act*?

25. Under the heading pain and suffering the trial court awarded Kshs10,000/= as it found it was not clear whether or not the deceased died instantly after the accident. This court finds that the award of Kshs 10,000/= was not excessive and the same is upheld.

26. Under the head loss of expectation of life, the trial court made an award of Kshs 100,000/=. Counsel for the Appellants pointed out that the award is made to the same beneficiaries of the deceased and faults the trial magistrate for failing to deduct the same. According to the Appellants the award amounts to double compensation, in line with the Court of Appeal case in *Kemfro Africa Ltd v A.M. Lubia* (1982- 85) 1 KAR 727 .

27. The Court of Appeal in Hellen Waruguru Waweru (suing as the Legal representative of *Peter Waweru Mwenja (deceased) v Kiarie Shoe Stores Limited* [2015] eKLR, held as follows -

> 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 dependents 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. The confusion appears to have arisen because of different reporting of the *Kemfro case* (supra) which was heavily relied on by Mr Kiplagat. The version he relied on is from [1982-88] 1 KAR 727 which concentrates on the decision of Kneller JA in extracting the ratio decidendi. The same case, however, is more fully reported in [1987] KLR 30 as *Kemfro Africa Ltd t/a Meru Express Services 1976 & another v Lubia & another (No 2)* and the *ratio decidendi* is extracted from the unanimous decision of all three Judges. It was held, *inter alia*, that: -
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> > An award under the *Law Reform Act* is not one of the benefits excluded from being taken into account when assessing damages under the *Fatal Accidents Act*; it appears the legislation intended that it should be considered. The *Law Reform Act* (Cap 26) section 2 (5) provides that the rights conferred by or for the benefit for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependents of the deceased persons by the *Fatal Accidents Act*. This therefore means that a party entitled to sue under the *Fatal Accidents Act* still has the right to sue under the *Law Reform Act* in respect of the same death. The words 'to be taken into account' and 'to be deducted' are two different things. The words in Section 4 (2) of the *Fatal Accidents Act* are 'taken into account'. The Section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the *Fatal Accidents Act*, the trial judge bore in mind or considered what he had awarded under the *Law Reform Act* for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction." The deduction of the entire amounts made under the LRA in this case was erroneous and once again, we have to interfere with the final award of damages. We observe that the High Court reduced even further the figure of Kshs 100,000 awarded for loss of life expectation to Kshs 70,000 despite

> confirmation in its judgment that there was no dispute on the award. Mr Kiplagat attempted to justify the reduction by the argument that it would be beneficial to Hellen because less amount would be deducted from the FAA award. With respect, that argument is misguided since there is no compulsion in law to make the deduction."

28. From the above-cited authority, this court is not persuaded that the trial court should deduct the award of damages for loss of expectation of life from the award of loss of dependency. I will therefore uphold the trial court's award under loss of expectation of life in the sum of Kshs 100,000/=.

Whether the trial court erred in awarding an inordinately high award under the loss of dependency

29. In *Butt v Khan* [1982-88] KAR 1, it was held - "An appellate court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."

30. From the proceeding at the trial court PW2 stated the deceased died at the age of 35 years, he worked as a farmer and earned some Kshs 100,000/= in a month. He supported his family and left behind his mother, wife and 4 children. No documentary evidence was adduced in court to show that the deceased earned a monthly income of Kshs 100,000/=. The trial court in awarding damages under the heading loss of expectation of life, went ahead to find that in the absence of documentary evidence proving the earnings of the deceased a global sum approach would suffice.

31. The trial magistrate gave reasons for adopting the global sum approach. And since the matter fell in her discretion this court finds that she did not err in so doing did not misdirect herself in that regard.

32. The Appellants faulted the trial court for using the global sum approach in awarding loss of dependency as the trial magistrate did not rely on any authorities in awarding the sum of Kshs 2,500,000/= which the appellant felt was excessively high and should be reduced to Kshs 1,000,000/=.

33. Taking into consideration the deceased died aged 35 years, and left behind a wife, mother and 4 children, I find that the trial court's award of Kshs 2,500,000/= under the head of loss of dependency was not excessive. I will uphold the award.

Determination

34. The upshot is that the appeal herein lacks merit and the same is dismissed. The Respondent will have the costs of the appeal and the trial court.

It is so ordered

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 28TH DAY OF SEPTEMBER 2023.

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P.M. MULWA

JUDGE

In the presence of:

Kinyua/Duale – Court assistants

N/A - for the Appellants

Mr Gitau - for the Respondents