REPUBLIC OF KENYA

HIGH COURT OF KENYA

AT KERICHO

CIVIL APPEAL NO. 26 OF 2019

TRANSKEM INVESTMENT LIMITED.....1ST APPELLANT

VINCENT PHILIP MAKAU.....2ND APPELLANT

V E R S U S

KIPSANG MALEL (suing as the Administratix and/or personal representative of the estate of

VICTOR SANG (deceased).....RESPONDENT

(Being an appeal from the Judgment and decree of Hon B. R. KIPYEGON (SRM)

in KERICHO SRM. No.238 of 2016 delivered on 24/7/2019).

J U D G M E N T

1. The Appellants in this case were sued by KIPSANG MALEL, the Respondent as Personal Representative of VICTOR SANG (Deceased) who died in a road traffic Accident on 10/8/2013. The Appellants were owner and driver respectively of Motor Vehicle Reg. KBV 649B/ZE 3117 which was being driven along KISUMU-KERICHO Road when it violently hit Motor Cycle KMDA 239F on which the deceased was a passenger inflicting him with fatal injuries.

2. A summary of the Respondent's case was as follows: - That on the 10th day of August, 2013, the deceased was a pillion passenger on Motor Cycle, Registration no. KMDA 239F along Kericho-Kisumu road, when the 2nd defendant drove the motor vehicle, registration no. KBV 649B/ZE 3117 so carelessly and negligently that he caused the said vehicle to collide into the motor cycle registration no. KMDA 239F, as a result of which the deceased sustained fatal injuries.

3. The Appellants did not offer any evidence at the Trial. The Trial Court applied the doctrine of res Ipsa loquitor as applied in case of EMBU PUBLIC SERVICES LTD -VS- RIMIL EALR [1968] and found the Appellants 100% liable for the Accident and determined damages as follows:-

Pain and suffering	-	Kshs. 100,000/=
Loss of Expectation of life	-	Kshs. 100,000/=
Loss of Dependency	-	Kshs.1,200,000/=
Special damages	-	Kshs. 11,480/=
		Kshs.1,411,480/=

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4. The Appellants have now appealed to this court on the following grounds.

(i) That the learned trial magistrate erred in law and principle, by applying erroneous principle in computation of damages payable thus arriving at excessive estimates of general damages payable;

(ii) That the award of general damages awarded to the respondent was manifestly and inordinately excessive in the circumstance;

(iii) That the trial magistrate erred in law and in principle when it failed to discount the award of Kshs. 200,000 made under the heading of pain and suffering and loss of expectation of life from the award under loss of dependency thereby causing double enrichment;

(iv) The learned trial magistrate erred in law and in fact by holding the appellant 100% liable whereas the evidence on record did not disclose any negligence or breach of any duty of care on the part of the appellant and neither was the same proved;

(v) The trial magistrate erred in law and in principle when he failed to properly evaluate evidence on record thus arriving at an erroneous decision.

5. The parties filed written submissions as follows: - the appellant submitted that the onus was on the respondent to prove his case to the required standard and that mere allegation of fatal injury will not automatically shift the burden of proof to the other party. The appellant averred that the respondent failed to adduce any evidence proving any negligence on the part of the appellant and as such the court should dismiss the suit.

6. The appellant further submitted that damages must be within limits set out by previous comparable decided cases and also within the limits that the Kenyan economy can afford and as such in the circumstance, the general damages awarded by the trial court was inordinately too high and therefore fit for interference by this court.

7. It was also submitted by the appellant that whereas the trial court adopted an award of Kshs. 100,000 to the deceased for pain and suffering, no justification was advanced by the court to warrant the award as the same is excessive and not in tandem with current law. The appellant stated that the rationale as provided by judicial precedents is that awards are based on the duration between the time of the accident and the time of death, so that higher awards would be given in cases where the pain of the deceased was prolonged. The appellant also submitted that the award for loss of expectation of life should be deducted from the final award so as to prevent double compensation to the dependants' of the deceased.

8. The respondent on the other hand submitted that there was evidence on record to prove on a balance of probabilities that the appellant was negligent thereby causing the accident, contrary to assertions made by the 2nd appellant. The respondent also submitted that the appellant did not call any witness to rebut his testimony, as such, the particulars of negligence attributed to the respondent by the appellants remain to be mere allegations.

9. The respondent further submitted that he is entitled to compensation from both the Law Reform Act and Fatal Accidents Act, contrary to assertions by the appellant; and that the appellants have failed to prove that the trial court proceeded on wrong principles or misapprehended evidence and he urged the court to dismiss the appeal with costs.

10. The issues for determination in this appeal are as follows:-

(i) Whether the Respondent proved liability at 100% against the appellants.

(ii) Whether the damages awarded to the Respondent were manifestly and inordinately excessive.

(iii) Who pays the costs of the Appeal.

11. On the issue as to whether the Respondent proved liability against the Respondents, I find that the Court relied on the doctrine of res Ipsa loquitor and held the Appellants 100% liable

12. I find that there was no eye witness to the accident and the Trial Court should have apportioned liability at 50:50%.

13. I accordingly apportion liability at 50:50% in view of the circumstances of the case.

14. On the issue as to whether the damages awarded were manifestly Excessive, there is no evidence that the Court applied erroneous principles in the computation of damages arriving at erroneous or Excessive computation of damages.

15. The Court can only interfere with an award of damages if it is established that the Trial Court applied erroneous principles. This principle was discussed in the Court of Appeal case of ***Gitobu Imanyara & 2others versus Attorney General (2016) eKLR***, where the court stated as follows ***"Further, it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."***

16. Further, in ***Johnson Evan Gicheru versus Andrew Morton & another (2005) eKLR***, the court of appeal stated that ***"In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."***

17. I find that the award is comparable taking into account the cases relied on by the Trial Court, which include:-

(i) Embu Public Road Services Limited versus Rimii, EALR (1968);

(ii) Ayiga Maruja & another versus Simeon Obayo (2005) eKLR;

(iii) Benedeta Wanjiku versus Changwon Cheboi & another (2013) eKLR;

(iv) Mwita Nyamohanga & another versus Mary Robi Moherai suing on behalf of the estate of Joseph Tagare Mwita (deceased) & another (2015) eKLR

18. I according partially allow the appeal and reduce the award by 50%.

19. The Respondents are liable to pay kshs.705,740/= in this case.

20. Each party to bear its own costs of the appeal.

21. The Judgment to abide in HCCA. No.27 of 2019 since the two arose under the same circumstances. The appellant is therefore liable to pay the respondent Kshs. 1, 228, 740 in HCCA no. 27 of 2019.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 25TH DAY OF MARCH, 2022.

A. N. ONGERI

JUDGE