



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCA NO. 33 OF 2020

BASTA LOGISTICS LTD.....APPELLANT

-VERSUS-

FRANCISCA MUENI KIMAE.....RESPONDENT

(Being an Appeal from the Judgment of Hon. J.O Magori (SPM) in the Senior Principal Magistrate’s Court

at Makindu Civil Case No.320 of 2017, delivered on 28th July 2020).

JUDGMENT

1. In a judgment delivered on 28th July 2020, the learned magistrate entered judgment for the respondent (*plaintiff in the trial court*), against the appellant (*defendant in the trial court*) on the basis of 100% liability in negligence and concluded as follows –

“Accordingly, I enter judgment in favour of the plaintiff against the defendant as follows –

Loss of dependency Kshs.2,266,704/=

Loss of expectation of LifeKshs. 150,000/=

Pain and sufferingKshs. 20,000/=

Special damages.....Kshs. 430,000/=

TotalKshs.2,867,404/=

The court also awarded costs and interest at court rates.

2. Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal through counsel M/s Wambua Kilonzo & company on the following grounds –

1) The learned magistrate erred in law and in fact in failing to consider that the respondent did not prove her case against the appellant on the balance of probabilities.

2) The learned magistrate erred in law and in fact by failing to consider that it was incumbent for the respondent to call an eye witness of the accident and a police officer who investigated the accident.

3) The learned trial magistrate erred in law and fact in finding the appellant was 100% to blame for the accident since the defence did challenge the plaintiff’s evidence.

4) The learned trial magistrate erred in law and in fact by failing to consider that it was the duty of the respondent to prove her case and not the appellant.

5) The trial magistrate erred in fact and in law by failing to consider the appellant’s submissions and judicial authorities on liability and on quantum thereby arriving at an erroneous decision.

6) The trial court erred by adapting a multiplier of 11 years which is inordinately high.

7) The learned magistrate erred in law and in fact by making awards under both the Law Reform Act and Fatal Accidents Act thereby assessing damages under both Acts which is inordinately high.

3. The appeal was canvassed through filing of written submissions. In this regard, I have perused and considered the written submissions filed by the appellant's counsel Wambua Kilonzo & company and those filed by the Respondent's counsel Ochich LLO & company.

4. This being a first appeal, I am guided by the principles enunciated in the case of **Selle –vs- Associated Motor Boat Co. Ltd (1968) E.A 123** in which the court underscored the duty of the first appellate court to put the evidence on record to fresh evaluation and come to its own independent conclusions and inferences.

5. During the trial, only one witness, the respondent Francisca Mueni Kimae, testified as Pw1. The appellant did not call any witnesses to testify in court.

6. Pw1's evidence was that she adopted her witness statement, and list of documents filed as evidence in chief. It was her evidence that she was the widow of the deceased who died in a road traffic accident in which the driver of the appellant was charged with a traffic offence, pleaded guilty and was fined Kshs.20,000/=. It was her evidence also that her husband worked for the Ministry of Sports, Culture and Arts and operated a pub at Githurai through a registered partnership business with others. According to her, the income from the business was Kshs.100,000/=.

7. In cross – examination, she said that she had two daughters, and that the deceased also owned plots of land. She said that the deceased was a Clerical Officer, but maintained that her husband's income from business was Kshs.100,000/=. She said that the plaint captured the gross salary of the deceased, who was 49 years old at death, and maintained that retirement age was 60.

8. At the close of the evidence for the respondent, the appellant's counsel closed the appellant's case without calling witnesses, and parties filed written submissions.

9. The appellant's counsel has raised several grounds on appeal. On the issue of liability, the appellant's counsel has submitted that the respondent did not prove liability in negligence against the appellant, nor did she prove 100% liability in negligence.

10. I have considered the evidence on record, and in my view, the respondent proved negligence against the appellant. Though appellant's counsel submits that the respondent was required to call an eye witness or the police, in my view that is not necessary. First there was no evidence that there was an eye witness except the driver of the appellant. Second, though the police did not come to testify, their reports were filed, exchanged, and adopted by the appellant as her evidence without any question or objection. Thirdly, if the appellant wanted to shake the evidence of the respondent there was nothing as easy as calling their driver or the police to testify in court.

11. The standard of proof in civil cases being on the balance of probabilities, in my view, the respondent's version is such that it is more likely that the incident occurred the way it was described in her evidence not otherwise. I thus find that the respondent proved on the balance of probabilities that the appellant's driver was negligent.

12. With regard to the apportionment of liability, the trial magistrate found the driver of the appellant to be 100% liable in negligence. Again on this, only the evidence of the driver of the appellant could have shaken the evidence of the respondent on the apportionment of liability, as it is not disputed that the driver was charged with causing death by dangerous driving and pleaded guilty. The counsel for the appellant, in cross-examination, also did not suggest any percentage of contributory negligence. I thus find that the trial magistrate, on the evidence on record, was not in error in finding 100% negligence on the driver of the appellant.

13. I now turn to the issue of assessment for damages. With regard to the quantum of damages, as an appellate court, I have to be guided by the principles in **Kenfro Africa Ltd –vs- Lubia** and **Bhutt –vs- Khan (1982 – 88) KAR** wherein the court stated that an appellate court should only interfere with the exercise of discretion of a trial court in assessing damages, only where the trial court either took into account irrelevant matters or failed to take into account relevant matters, or short of that the award is so inordinately low, or so inordinately high that it must be an erroneous assessment of the damage.

14. In assessing damages herein, I note that the trial magistrate considered decided cases relied upon by both sides. He awarded Kshs.20,000 for pain and suffering as the deceased died on the spot. For loss of expectation of life, he awarded Kshs.150,000/=. In my view, both awards under the Law Reform Act are not outside the bounds of conventional awards under each of the two heads.

15. With regard to the head of loss of dependency under the Fatal Accidents Act, the trial magistrate adopted a ratio of 2/3. He also observed that the deceased was 49 years old and thus used a multiplier of 11 years. He relied on a letter dated 29/9/2015 that deceased earned gross salary of Kshs.30,304/= per month, rounded it up and deducted Kshs.4,546.60/= as statutory deductions, and thus used a figure of Kshs.25,758 to calculate loss of dependency, but found that the income from business had not been proved.

16. Counsel for the appellant urges on appeal, that we take a multiplicand of Kshs.18,942/= and multiplier of 6 years, thus arrive at loss of dependency of Kshs.909,216/=. In my view, with the evidence of the letter from the Ministry, the magistrate was justified in applying the net monthly figure he applied. In addition, the magistrate was correct in using a multiplier of 11 years, as the official retirement age in Kenya is 60 years.

17. With regard to making a deduction of the award under the Law Reform Act from the award under the Fatal Accidents Act, in my view such deductions will only apply where there is evidence

of undue or unfair enrichment, and in the present case there is none. I will thus uphold the award for loss of dependency.

18. With regard to the award for special damages, I note that from the record of proceedings, the appellant did not specifically challenge any of the receipts or documentary claims made. Again, in my view the fact that a third party (the ministry) assists in paying some of the expenses of a litigant *per se*, does not mean that such expenses cannot be recovered by the person (litigant) who has the direct responsibility to bear such costs, as the relationship and arrangements between the respondent and the Ministry, were not subject to determination by the trial court. I will thus uphold the special damages awarded.

19. Consequently, and for the above reasons, I find no merits in the appeal. I dismiss the appeal with costs to the respondent.

DELIVERED, SIGNED & DATED THIS 4TH DAY OF APRIL, 2022, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE