International Hauliers East Africa Ltd & another v Munguti & another (Civil Appeal 443 of 2019) [2022] KEHC 12609 (KLR) (Civ) (25 July 2022) (Judgment)

Neutral citation: [2022] KEHC 12609 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 443 OF 2019

JK SERGON, J

JULY 25, 2022

BETWEEN

INTERNATIONAL HAULIERS EAST AFRICA LTD ..... 1ST APPELLANT

DAVID MUSELA ..... 2ND APPELLANT

AND

RICHARD KITHOKOI MUNGUTI ..... 1ST RESPONDENT

ROSE SYOKWIA KITHOKOI (SUING FOR AND ON BEHALF OF THE ESTATE OF STEPHEN KITOKOI - DECEASED) ..... 2ND RESPONDENT

(Being an appeal against the judgment and Decree of the Hon. I. Orenge (SRM) delivered on 12th July 2019, in CMCC No.3020 of 2016)

JUDGMENT

1. At the onset, the respondents herein lodged a suit against the appellants, vide the plaint dated 16th March, 2016 and prayed for reliefs in the nature of general and special damages of Kshs.50,650/= together with costs of the suit and interest on the same.

2. The respondent averred in his plaint that on or about 9th January 2014 along Mombasa-Nairobi road while the deceased was lawfully standing at a bus stop near China care the appellant by the driver negligently carelessly and or recklessly drove, managed or controlled the motor vehicle registration No. KBC 791V Mercedes Benz that it caused the same to lose control and violently knocked down the deceased who sustained fatal injuries leading to his death.

3. The appellants attributed the fatal injuries to negligence on the part of the respondents by setting out their particulars under paragraph 5 of the plaint.

4. The appellants entered appearance on being served with summons and filed their statement of defence on 27th September, 2016 to deny the respondents' claim. The matter proceeded for hearing and judgment was eventually delivered in favour of the respondents against appellants in the sum of Kshs.2,220,650/=

5. The appellants have now sought to challenge the aforementioned judgment on appeal and has put forward eleven (11) grounds of appeal as seen in the memorandum of appeal dated 29th July, 2019:

    i. That the learned trial magistrate erred in law and facts by failing to properly scrutinize and evaluate the pleadings and submissions tendered by the appellants and correctly relate the same to the case law cited therein and thereby failed to arrive at a fair and reasonable assessment on the issue of compensation to the respondents.

    ii. That the learned trial magistrate erred in law and facts by failing to consider the evidence of the 2nd appellant who testified in the above matter arriving at an erroneous conclusion on liability the face of the record of the judgment.

    iii. That the learned trial magistrate erred in law and facts by failing to properly scrutinize and evaluate the evidence tendered by the appellants and correctly relate the same to the case law cited in court and thereby failed to arrive at a fair and reasonable assessment on the issue of liability and compensation to the respondents.

    iv. That the learned trial magistrate erred in law and facts by deciding the case against the weight of the evidence on record and apportioning liability at 85-15% against the appellants.

    v. That the learned trial magistrate erred in law and facts in awarding Kshs.70,000/= for pain and suffering which is manifestly excessive and by failing to take into considerations the fact that the said award would be double compensation if the same is not deducted from the total amount awarded.

    vi. That the learned trial magistrate erred in law and facts in awarding a global sum of Kshs.2,000,000/= as general damages for loss of dependency which is manifestly excessive and inordinately high in the circumstances.

    vii. That the learned trial magistrate erred in law and fact and made an award of Kshs.2,000,000/= being the global sum while noting that there was no proof of the nature of the engagement/work the deceased was involved in, no proof of income and of income and no proof of the support to the mother, father or the child yet relying on the authorities of a business man.

    viii. That the learned trial magistrate erred in law and facts by failing to take into consideration the deceased's age who was actually 23 years but instead stating that the deceased was 33 years and actually awarding a global sum of Kshs.2,000,000/= which was not supported by any concrete reason and was excessive under the circumstances.

    ix. That the learned trial magistrate erred in law and facts by failing to properly take into account the proper legal principles and awards in cases of similar nature regarding quantum of damages while considering the judgment.

x. That the learned trial magistrate erred in law and facts by failing to take into account the written submissions and authorities of the defendant/appellant's advocates whilst making the award.

xi. That the learned trial magistrate erred in law and facts by making an award on general damages that was inordinately high in favour of the plaintiffs/ respondents amounting to a miscarriage of justice.

6. When the appeal came up for hearing, this court gave directions to have the appeal disposed of by written submissions. I have further considered the rival submissions plus the authorities cited by the parties. Though the appellant put forward a total of eleven (11) grounds of appeal those grounds may be summarized to two main grounds:

i. Whether the court erred when assessing liability

ii. Whether the trial magistrate erred on the award of quantum of damages.

7. As regards the first ground of appeal, it is the submission of the appellant that the evidence of PW1 Magdalene Kimuma confirmed that on the said date 9th January 2014 she was going to work with the deceased along Mombasa road and as they were crossing the road the deceased was with her in the motor vehicle KBC 979 and he fell down, he was hit on the left side.

8. The appellants submitted that during cross examination PW1 stated that there was no footpath or pedestrian crossing and that there was no busy traffic and she further stated that the said road had 3 lanes and that the deceased was hit on the 3rd lane and thrown off the tarmac.

9. The appellants contend that the 2nd appellant stated that he was driving in the middle lane and had a clear view of the road, and that the deceased was crossing the road from left to right when the minibus struck him at the intersection of lanes one and two, refuting the aforementioned claims. According to the appellants, DW1 stated that he used emergency brakes to prevent running over the deceased.

10. It is the appellants' submissions that during cross examination, DW1 confirmed that the deceased was crossing the road while running. He clarified the deceased was alone on the road and not with three others people as alleged by PW1.The appellants further stated that parties are bound by their pleadings .

11. In its submissions, the appellants have made reference inter alia, to the case of *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd* (2018) eKLR where the court held and pronounced itself as follows:

> It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded'

12. The appellants therefore urge the court to find that the 2nd appellant was not negligent as he did not cause the accident and that the particulars of negligence can be attributed to the appellant and in any way if the court should find the appellant contributed to the occurrence they should apportion 70% to the deceased as he was the author of the accident.

13. The respondents on the other hand submit that the appellant's driver failed to keep proper lookout of the pedestrians on the road and negligently operated his vehicle without due care and under high speed thereby knocking down the deceased who succumbed fatal injuries.

14. The respondents aver that the driver did not swerve or operate the motor vehicle in a manner to deviate from knocking down the deceased and as such he should be held liable for his conduct.

15. To buttress its point above, the appellant cites the case of *Baker v Willoughby* 1970 AC 483 which relied upon by Justice F.K Apallo in *Joseph Mutunga Wambua v Kantilal Khimji Patel & another* (1986) eKLR in respect of the duty of care that is required to be observed by drivers;

> "A pedestrian has to look to both sides as well as forwards. He is going at perhaps three miles an hour and at that speed, he is rarely a danger to anyone else. The motorist has not got to look sideways though he may have to observe over a wide angle ahead, and if he is going at a considerable speed, he must not relax his observation for the consequences may be disastrous. And it sometimes happens .. he sees that the pedestrian is not looking his way and takes a chance that the pedestrian will not stop and that he can safely pass behind him.... It is quite possible that the motorist may be very much to blame than the pedestrian."

16. From the evidence on record it is clear that indeed there was an accident involving the deceased and motor vehicle KBC 791 V on the said date. The police abstract which confirmed the fact of the accident, the date it occurred and the driver of the subject vehicle was to blame because the road was clear. It is also clear that the deceased was crossing at a non-designated area, I therefore find that the appellant's driver was to blame to large extend ,as he did not even try to swerve away when he saw the deceased cross the road and try and avoid the accident.

17. In the case of *Farida Kimotho v Ernest Maina* (2002) eKLR that the happening of an accident is not prima facie evidence of negligence but there ought to be affirmative evidence of negligence that caused the accident.

18. I therefore agree with the trial court in terms of apportioning the liability at the ratio of 85% to 15% in favor of the respondents.

19. I now move to the second issue which is on the award of damages. Awarding damages is largely an exercise of judicial discretion and the instances that would make an appellate court interfere with that discretion are well established. In *Butt –vs Khan* (1977)1KAR.

20. On the issue of loss of dependency, the appellant submits that a ratio of 1/3 and a multiplier of 15 years would be reasonable as the deceased was not married nor had any child. Which would have worked out to this 9,780 x 1/3x12x15 =Kshs.586,800/=

21. The respondent on the other hand submitted that the findings on using the global sum approach was appropriate in the circumstance as the deceased earning were not ascertained. They therefore submit that the court's finding was proper and pray the same should be upheld.

22. On loss of dependency, in the absence of evidence on income and dependency the court should take the approach of a general/global sum as there was no evidence of earnings. I am in agreement with the trial court approach of using the global award considering the deceased nature of engagement was not known at the time of death, the salary was not ascertain from the evidence by way of pleading.

23. In *Albert Odawa vs. Gichimu Gichenji* Nakuru HCCA No. 15 of 2003, Koome, J (as she then was) expressed herself as hereunder:

> "On the issue of loss of dependency, no evidence whatsoever was adduced before the trial court on the deceased's earnings and thus the multiplicand of Kshs. 8,100.00 was without basis. In the absence of evidence of actual earnings of the deceased, the correct approach

would have been to assess the deceased's income by applying the basic salary, which is paid to unskilled workers, and this would also have been difficult, as the age of the deceased was not stated. So the best option would have been to apply the global award.

24. Accordingly, I find that the global sum of Kshs.2,000,000/= awarded by the trial court to be reasonable.

25. On the issue of Loss of expectation of life & Pain suffering, the appellant submitted that the award of Kshs.100,000/= for loss of expectation and Kshs.70,000/= for pain and suffering that the trial court erred in awarding the said amounts as it amounted to double compensation.

26. In my view the award of Kshs.70,000/= for pain and suffering is not manifestly excessive in the instant case and is in line with awards given in similar cases.

27. The trial court awarded Kshs.100,000/= for loss of expectation of life. In the case of *Mercy Muriuki & Another –vs- Samuel Mwangi Nduati & Another (Suing as the legal Administrator of the Estate of the late Robert Mwangi)* (2019) eKLR the Court observed that: -

> " The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs. 100,000/- while for pain and suffering the awards range from Kshs. 10,000/= to Kshs.100,000/= with higher damages being awarded if the pain and suffering was prolonged before death."

28. In my view I find the award of Kshs.100,000/= to be adequate.

29. The upshot is that the awards made by the trial magistrate should not be disturbed.

30. The Appeal has no merit, the same is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 25TH DAY OF JULY, 2022.

J. K. SERGON

JUDGE

In the presence of:

..... for the 1st Appellant

.....for the 2nd Appellant

.....for the 1st Respondent

.....for the 2nd Respondent