



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 27 OF 2019

JOSEPH KING'ORI WANDURWA1ST APPELLANT

CHINA OVERSEAS ENGINEERING CO LTD2ND APPELLANT

VERSUS

LOISE KARIMI NYAGA

ESTHER MBUCU NYAGA [Suing as the Legal Administrator

of Morris Ndwiga Njiru [Deceased].....RESPONDENTS

JUDGMENT

1. This appeal challenges the judgment of *Hon. J. Omwange (SRM)* dated 2nd May 2019 delivered in Siakago SPMCC No. 340 of 2017.
2. In the suit filed in the lower court, the respondents sued the appellants in their capacity as the legal representatives of the estate of the late *Morris Ndwiga Njiru* (hereinafter the deceased) seeking general and special damages under the *Fatal Accidents Act* and the *Law Reform Act*.
3. In their plaint dated 30th March 2017, the respondents averred that the deceased lost his life as a result of injuries sustained in a road traffic accident which occurred on 24th July 2016 along the Embu-Siakago Road; that the accident was caused by the negligent manner in which the 1st appellant, the 2nd appellants authorized driver or agent was driving motor vehicle number KBN 013N.
4. In their joint statement of defence filed on 18th May 2017, the appellants denied liability as alleged and put the respondents to strict proof thereof. In the alternative, they pleaded that if the accident occurred which was denied, it was solely caused by the deceased's negligence.
5. At the hearing, the 1st respondent testified in support of their case but the appellants chose to close their case without calling any evidence.
6. In the impugned judgment, the learned trial magistrate found the appellant's jointly and severally liable for the accident at 100% and proceeded to award the respondents damages as follows:

| | |
|-------------------------------|-----------------------|
| Loss of expectation of life - | KShs.100,000 |
| Pain and suffering - | KShs.60,000 |
| Loss of dependency - | KShs.6,386,336 |
| Special damages - | KShs.1,595 |
| Less double entitlement - | (KShs.100,000) |
| Total | <u>KShs.6,447,931</u> |

7. In their memorandum of appeal filed on 4th June 2019, the appellant's relied on four grounds of appeal which can be condensed into two main grounds as follows:

i. That the learned trial magistrate erred in his finding on liability which was contrary to the evidence on record.

ii. That the award of damages was erroneous as it was manifestly excessive in the circumstances of the case.

8. By consent of the parties, the appeal was canvassed by way of written submissions.

9. As the first appellate court, I am duty bound to reconsider and to re-evaluate the evidence and all the material presented before the trial court to arrive at my own independent conclusions bearing in mind that unlike the learned trial magistrate, I did not have the benefit of seeing or hearing the witnesses first hand and give due allowance to that disadvantage. See ***Peters V Sunday Post Limited, [1958] EA 424; Selle & Another V Associated Motor Boat Company Ltd & Others, [1968] EA 123.***

10. I have carefully considered the grounds of appeal, the evidence on record as well as the parties' rival written submissions. I have also read the judgment of the trial court. Having done so, I find that the main issues for my determination are the twin issues of liability and quantum.

11. Starting with the issue of liability, as stated earlier, the only evidence adduced before the trial court regarding how the accident in question occurred was the testimony of the 1st respondent and an independent witness who testified as PW1 as the appellants did not call any witness in support of the allegations made in their statement of defence.

PW1 who witnessed the accident narrated how the accident occurred. She recalled that on 24th July 2016 at around 6.30pm, she was travelling towards Embu along the Embu-Siakago Road as a pillion passenger on a motorcycle when lorry registration number KBN 013N overtook them at a sharp corner at high speed and moments thereafter she heard a loud bang.

12. She further testified that the bang was caused by a collision between the lorry and a motorcycle registration number KMDJ 521M which she found at the right side off the road as one faces Embu direction. At the scene of the collision, she saw the lorry which had stopped a few meters away still on the right side of the road and the body of the motorcycle rider who was the deceased in this case, a person she knew well previously. She also identified the 1st appellant as the person who was driving the subject lorry.

13. The 1st respondent, *Loise Karimi Nyaga* (PW2) did not witness the accident. In her further witness statement which she adopted as part of her evidence in chief, she claimed that as a result of the accident, the 1st appellant was charged and convicted in Siakago Traffic Case No. 145 of 2016 but she did not avail the proceedings or judgment in the traffic case to substantiate her claim.

14. Upon my own appraisal of the evidence on record, I am unable to fault the trial court's finding that the 1st appellant caused the accident in which the deceased lost his life through negligent driving of the subject lorry which was owned by the 2nd appellant. PW1's evidence which was not controverted by any evidence to the contrary established on a balance of probabilities that the 1st appellant lost control of the lorry after overtaking the motorcycle she was riding on at a corner at high speed and knocked down the deceased who had been riding a motorcycle on the correct lane on the road.

15. It is important to note that though the appellants blamed the deceased for the accident in their statement of defence, they did not offer any evidence to prove the particulars of negligence they attributed to the deceased in the defence.

16. In view of the foregoing, I find no merit in the appellants complaint that the finding of the learned trial magistrate on liability was against the weight of the evidence and that in arriving at his decision, the magistrate ignored crucial evidence on record. It is my finding that the learned trial magistrate properly interrogated the evidence and arrived at the correct conclusion that the appellants were jointly and severally liable for the accident at 100%. The trial court's finding on liability is thus confirmed.

17. On quantum, the appellants' view is that the damages awarded by the trial court under both the *Law Reform Act* and the *Fatal Accidents Act* were excessive. On the damages awarded under the *Law Reform Act*, the appellants submitted that since the deceased died on the spot, the trial court ought to have awarded the respondents KShs.10,000 for pain and suffering. For this proposition, they relied on the persuasive authority of ***John Mureithi Kariuki V George Mwangi, [2012] eKLR.***

18. The respondents on the other hand supported the trial court's award arguing that it was reasonable given that in ***Alice O. Alukwa V Akamba Public Road Services Limited & 3 Others, [2013] eKLR*** and in ***Irene W. Kagundu & Another V W.K. Tilley (Muthiaga) Limited & Another, [2018] eKLR,*** the court awarded KShs.50,000 as damages for pain and suffering for a deceased who died on the spot and KShs.60,000 for a deceased who died on the same date of the accident.

19. I have considered the above rival submissions in light of the material that was placed before the trial court. I have noted that though given an opportunity to file written submissions, the appellants did not file written submission to guide the court in the assessment of damages. In their written submissions, the respondents proposed a sum of KShs.100,000 relying on the authority of ***Alice O. Alukwa V Akamba Public Road Services Limited & 3 Others, [supra].*** Relying on that authority, the trial court exercised its discretion and awarded the respondents KShs.60,000 for pain and suffering. Considering the time lapse between when the authority was decided and the time the trial court made its decision as well as inflationary trends, I find no good reason to interfere with the trial court's exercise of discretion in making the said award and the same is hereby upheld.

20. Regarding loss of expectation of life, the trial court's award of the conventional sum of KShs.100,000 was in my view inadequate for a person who died at the prime age of 34 years but since as an appellate court I should not substitute my own discretion with that of the trial court and there being no indication from the record that in arriving at the award, the trial court erred in principle, I do not find any basis to disturb the award. The award is consequently confirmed.

21. Turning to the award for loss of dependency, it is not disputed that the deceased died at the age of 34 years and that he was survived by three dependents namely, the 1st respondent who was his wife and two children. I refuse to accept the respondent's contention that the 2nd respondent who is the 1st respondent's sister who was 37 years old at the time of the deceased's demise was also his dependent. This was a mature adult who was expected to fend for herself and no evidence of special circumstances which would have made her dependent on the deceased was adduced. In any event, under *Section 4* of the *Fatal Accidents Act*, the only people who qualify to be dependents of a deceased person are his or her spouse, parent or child.

22. The respondents pleaded that prior to his death, the deceased was engaged in the *miraa* trading business. PW2 in her evidence testified to that effect and produced bank statement as proof of the income the deceased was earning from the business.

23. The appellants did not adduce any evidence to rebut this evidence but they have sought to challenge it in their submissions in this appeal arguing that the respondents did not avail any documentary evidence to prove existence of such a business and that without a profit and loss account, it was impossible to prove the deceased's earnings at the time of his death; that in the premises, the court should adopt the minimum wage in the sum of KShs.5,436.90 which was in force in 2015 as the multiplicand for purposes of calculating damages for loss of dependency and a multiplier of 16 years. The dependency ration of $\frac{2}{3}$ applied by the trial court was not contested.

24. The respondents on their part supported the manner in which the trial court calculated damages for loss of dependency maintaining that the deceased was a businessman in the *miraa* trade as evidenced by the transactions in his bank account which also proved that he used to earn an average income of KShs.70,000 from the business.

25. Having carefully analysed the evidence on record and considered the parties' submissions, I am persuaded to agree with the respondents' claim that prior to his death, the deceased was engaged in the *miraa* trade considering that this claim was not rebutted by the appellants during the trial. Given the nature of business the deceased was engaged in, it would be unreasonable and unrealistic to expect the respondents to produce documentary evidence in the form of written agreements or books of account as submitted by the appellants. The fact that the respondents produced bank statements which showed transactions in the deceased's bank account is in my view sufficient evidence to prove that the deceased was engaged in some business before his death.

26. Having found that the deceased was a businessman prior to his death and that he died at the age of 34 years, the multiplier of 22 years adopted by the trial court was in my opinion reasonable considering that the deceased was not subject to the mandatory retirement age of 60 years applicable to public servants. I agree with *Kamau J* when she held in *Chania Shuttle V Mary Mumbi, [2017] eKLR* that an average Kenyan man can engage in economic activity even beyond the age of 70 years and that there is no retirement age for business people. Besides, the appellants did not lay any basis to justify their argument that a multiplier of 16 years was more appropriate in this case.

27. Regarding the multiplicand, my study of the bank statements produced in evidence by the respondents does not support the respondents contention that the deceased used to earn a monthly income of KShs.70,000 from his business. The bank statements show that only KShs.21,000 was credited to his account in the month of May 2016, KShs.48,000 in June 2016 and KShs.12,000 in July 2016. These were three months just before the deceased's demise. These figures in my view would form a good basis for computing the deceased's average gross monthly income from which reasonable business expenses would be deducted.

28. The trial magistrate in his decision to adopt KShs.36,286 as the multiplicand calculated the average of total deposits credited to the deceased's account from January to July 2016 without considering that the deposits may not have represented the deceased's actual income. Taking into account that the deceased must have incurred some costs in running the business, I find that a multiplicand of KShs.20,000 was more reasonable in this case. I consequently set aside the multiplicand adopted by the trial court and substitute it with a multiplicand of KShs.20,000. Given the foregoing findings, damages for loss of dependency would work out as follows:

$$\text{KShs.20,000} \times 12 \times 22 \times \frac{2}{3} = 3,520,000$$

29. It is noteworthy that from the amount awarded for loss of dependency, the learned trial magistrate deducted KShs.100,000 awarded for lost years as in his view, failure to deduct it would amount to double compensation to the respondents for the same loss. This was a flawed argument in my view because as was held by 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* and as I have stated in several decisions including the recent one in *David Kiprono & 2 Others V Mary Wambeti Mugira (suing as the legal representative of James Mbogo Njagi [deceased]), [2020] eKLR*.

30. *Section 2 (5)* of the *Law Reform Act* makes it clear that the rights conferred by or for the benefit of estates of deceased persons shall be in addition to and not in derogation of any rights conferred on dependents of the deceased persons under the *Fatal Accidents Act*. This means that personal representatives of a deceased person's estate who also happen to be the deceased's dependents can seek and obtain damages under both the *Law Reform Act* and the *Fatal Accidents Act*. Besides, under *Section 4 (2)* of the *Fatal Accidents Act*, an award made under the *Law Reform Act* is excluded from the benefits which the court is directed to take into account when assessing damages for loss of dependency.

31. I do not therefore agree with the appellants submissions that I should affirm the trial court's decision of deducting KShs.100,000 awarded for lost years from the award for loss of dependency. It is important to mention that the authority cited by the appellant in support of their submissions urging me to uphold the trial court's decision is the authority that was overturned by the Court of Appeal in *Hellen Waruguru Waweru [Suing as the Legal Representative of Peter Waweru Mwenja [Deceased] V Kiarie Shoe Stores Limited, [supra]*.

32. In the *Hellen Waruguru Waweru case [supra]*, the Court of Appeal cited with approval the decision in *Kemfro Africa Ltd T/A Meru Express Services V Lubia & Another, No. 2, [1987] KLR 30* where it was held that the law only required the trial court to take into account the award made under the *Law Reform Act* and that taking into account did not require the court to engage in mathematical deductions. Considering that the deceased died at the prime age of 34 years, an award of KShs.100,000 for lost years was negligible and would not have

amounted to unjust enrichment on the respondents. It is thus my finding that the learned trial magistrate erred in deducting the award for lost years from the award for loss of dependency.

33. The award of special damages was not challenged on appeal and the same will remain undisturbed.

34. For the foregoing reasons, the appeal partially succeeds to the extent specified above. For the avoidance of doubt, all the awards made by the trial court are confirmed except the award for loss of dependency which is substituted with an award of KShs.3,520,000. Damages payable to the respondents will therefore be as follows:

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|-------------------------------|-----------------------|
| Pain and suffering - | KShs.50,000 |
| Loss of expectation of life - | KShs.100,000 |
| Loss of dependency - | KShs.3,520,000 |
| Special damages - | KShs.1,595 |
| <u>Total</u> | <u>KShs.3,671,595</u> |

35. The award of general damages will attract interest from date of judgment of the trial court until payment in full. The award of special damages will earn interest from date of filing suit until payment in full.

36. Costs follow the event and are at the discretion of the court. As the appeal has partially succeeded, the respondents are awarded costs of the suit at the trial court but each party shall bear own costs of the appeal.

It is so ordered.

DATED and SIGNED at **NAIROBI** this 9th day of March 2021.

C. W. GITHUA

JUDGE

DATED, SIGNED and DELIVERED at **EMBU** this 18th day of March 2021.

L. NJUGUNA

JUDGE

In the presence of:

Mr. Mbwire for the appellants

Mr. Ndolo for the respondents

Esterina: Court Assistant