



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

(CORAM: CHERERE-J)

CIVIL APPEAL NO.44 OF 2020

BETWEEN

STANLEY GUANTAI GATOBU (*suing as administrator*)

and legal representative of the

estate of Nicholas Guantai (Deceased).....APPELLANT

AND

DERRICK MUTEMBEI.....1ST RESPONDENT

JANARO NTONGAI.....2ND RESPONDENT

(Being an Appeal from the Judgment and Decree in Nkubu PMCC No. 96 OF 2018 by Hon. E.M.Ayuka (SRM) on 21st May, 2020)

JUDGMENT

1. STANLEY GUANTAI GATOBU (*Appellant*) (*suing as administrator and legal representative of the estate of Nicholas Guantai*) filed suit in the lower court against DERRICK MUTEMBEI and JANARO NTONGAI (*Respondents*) seeking damages for fatal injuries suffered by his son *Nicholas Guantai (Deceased)* on 23.07.2017 when 2nd Respondent's motor vehicle **KCJ 261G TOYOTA MATATU (*Matatu*)** which was being driven negligently by 1st Respondent along Mitunguu-Nkubu Road knocked down the deceased who was lawfully riding motor cycle number **KMDM 512M CAPTAIN** along that road.

2. The Defendants/Appellants in their statement of Defence denied the claim and blamed deceased for the accident.

3. The learned trial magistrate found that the deceased was wholly to blame for the accident and dismissed the Appellant's case with costs to the Respondents.

The Appeal

4. The Appellant being dissatisfied with the lower court's decision preferred this appeal and on 17.06.2020 filed the Memorandum of Appeal of same date which sets grounds of appeal mainly that:

1) The Learned Trial Magistrate erred by failing to find that the Respondents having joined 3rd parties and having failed to tender evidence against them were wholly liable

2) The evidence by SGT DAVID MWANGANGI who testified for both the Appellant and the Respondent was contradictory

3) That the finding that deceased was wholly liable was erroneous

Analysis and Determination

5. This being the first appellate court, its duty is to re-evaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. (See **Selle & Another v Associated Motor Boat Co. Ltd & Another**)

(1968) EA 123.

6. The extent to which an appellate court may interfere with an award of damages is well settled. It must be shown that the trial court in awarding of the damages took into consideration an irrelevant fact or the sum awarded is inordinately low or too high that it must be a wholly erroneous estimate of the damage, or it should be established that a wrong principle of law was applied (See **Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v A.M. Lubia and Olive Lubia (1985) 1KAR**) and **Denshire Muteti Wambua V Kenya Power & Lighting Co. Ltd, Civil Appeal No. 60 of 2004**).

7. I have considered the entire record of appeal and considered the submissions of counsels for both parties. I note that the appeal revolves around the question of both liability and quantum.

Liability

8. According to **PW3 DANCAN MWIRIGI** who was a pillion passenger on the motor cycle that the deceased was riding, the deceased was overtaking the *Matatu* when it swerved to the right and collided with the motor cycle causing the accident.

9. **DERRICK MUTEMBEI (1st Respondent)** stated that the deceased was overtaking the *Matatu* and upon seeing an oncoming motor vehicle suddenly swerved onto the lane of the *Matatu* thereby causing the accident.

10. **PW2 SGT DAVID MWANGANGI** testified for both the Appellant and the Respondents. He attempted to blame the deceased for the accident but a police abstract issued by his colleague CPL Aleka that he tendered as PEXH. 3 demonstrates that the case was pending investigations.

11. The record contains evidence of two eye witnesses. **PW3 DANCAN MWIRIGI** who was a pillion passenger blames 1st Respondent for turning onto the lawful lane of the motorcycle and 1st Respondent on the other hand blames the deceased for swerving onto the lawful lane of the *Matatu*. From the evidence of the two eye witnesses, it is indeed not possible to safely conclude who between the deceased and the 1st Respondent was to blame for the accident.

12. The sketch plans of the scene that **PW2 SGT DAVID MWANGANGI** referred and which would have resolved the issue concerning the point of impact were not tendered in evidence.

13. In **Hussein Omar Farah v Lento Agencies [2006] eKLR**, the Court of Appeal faced with a similar situation as the one subsisting in this case held as follows:

“In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs, the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.”

14. Applying the same principle to this case, I have come to the conclusion that the learned trial magistrate fell into error when he wholely relied on hearsay evidence contained in the police file which was not produced to conclude that the deceased swerved onto the lawful lane of the *Matatu* causing the accident. Accordingly, I apportion liability at 50:50 % as between the Appellant and Respondent.

Quantum

15. Concerning quantum, the trial court assessed damages at Kshs. 50,000/- for pain and suffering deceased having died immediately after the accident; Kshs. 100,000/- for loss of expectation of life considering that deceased was a young man aged 23 years and a global sum of Kshs. 1,500,000/- for loss of dependency ratio for the reason that deceased was a student. I find no reasonable cause to interfere with the general damages assessed by the trial court. Concerning special damages, the Appellant filed a receipt for Kshs. 1,495/- being court fees for Limited Grant and the same is hereby awarded.

16. Accordingly, the appeal succeeds and the trial court's decision is set aside and substituted with the following orders:

1) Liability at 50:50 % as between the Appellant and Respondent

2) Special damages Kshs. 1,495/-

3) Damages for Pain and suffering; Loss of expectation of life and Loss of dependency shall remain as awarded by the trial court

4) Each party shall bear its own costs of this appeal but the Respondent will bear costs of the trial in the magistrate's court.

DATED AT MERU THIS 22ND DAY OF APRIL 2021

T. W. CHERERE

JUDGE

Court Assistant - Morris Kinoti

For Appellant - N/A

For Respondents- N/A