REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CIVIL APPEAL NO. E4 OF 2020

CIVISCOPE LIMITED.....APPELLANT

VERSUS

GILBERT KIMATARE NAIRI &

LILIAN NAPUDOI NAIRI (Suing as personal Representatives of the Estate of

GILBERT NAIRI LEMAYIAN (DECEASED).....RESPONDENT

(An appeal from the judgment and decree (Hon. Nthuku, SRM) dated 25th February 2020 in SRMCC No. 20 of 2019 at the Senior Resident Magistrate's Court, Loitokitok).

JUDGMENT

1. **Gilbert Nairi Lemayian** (Deceased), a two-year-old boy**,** was a pillion passenger on motor cycle registration No. KMCT 263V. He was travelling along Loitokitok-Emali road when the motor cycle was involved in a road accident with motor vehicle registration No. KCN 504C. He sustained fatal injuries and died on the spot.

2. The respondents, personal representatives of the deceased's estate, filed a suit at the Senior Resident Magistrate's Court, Loitokitok against the appellant, the registered owner of the vehicle, attributing negligence to the driver of the motor vehicle. The suit was brought under both the Fatal Accidents Act and the Law Reform Act for general and special damages arising from that accident

3. The appellant filed a defence dated 9th September 2019, denying the respondents' claim, particulars of negligence and loss. The appellant on its part, attributed negligence to the rider of the motor cycle.

4. The suit fell for hearing before **Hon. N. Nthuku, SRM** and in a judgment delivered on 25th February 2020, the trial magistrate found in favour of the respondents. She held the driver of the motor vehicle liable for the deceased's death. The court awarded Kshs. 20,000 for pain and suffering, Kshs. 100,000 for loss of expectation of life and global figure of Kshs. 400,000 for loss of dependency. The court also awarded Kshs. 50,000 for special damages.

5. The appellant was aggrieved with the trial court's finding on both liability and quantum and lodged an appeal through a memorandum of appeal dated 19th October 2020, and raised the following grounds:

> ***1. The learned trial magistrate erred in law and fact by failing to appreciate the guiding principles in computation of quantum of damages and proceeded to compute damages both under the multiplier method and the global assessment method with the result that the award of damages was manifestly excessive.***
>
> ***2. The learned magistrate erred in law and in fact by failing to appreciate the guiding principles in determining quantum of damages thereby importing her own standards which guided her judgement in error.***
>
> ***3. In arriving at his decision, the trial magistrate did so in a speculative and cursory manner not guided by any set of principles and failed to exercise her discretion within the applicable principles of assessment of damages and her failure to adhere to the foregoing has occasioned a serious miscarriage of justice and ought to be reverse.***
>
> ***4. The learned magistrate erred in law and fact in holding that the appellant was 100% liable for the accident when there was clear and overriding evidence to the contrary.***

6. Parties agreed to dispose of this appeal by way of written submissions.

Appellant's submissions

7. The appellant filed written submissions dated 4th January 2020. It submitted that the deceased (minor) a pillion passenger on the motor vehicle and who died on the spot following the accident was awarded Kshs. 20,000/= for pain and suffering which was inordinately high. The appellant relied on ***Harjeet Singh Pandal v Hellen Aketch Okudho*** [2018] eKLR, where Kshs. 10,000/= was awarded given that there was no evidence on the lapse of time between the time of the accident and when the deceased died. It cited ***Florence Awour Owuoth v Paul Jackton Ombayo*** [2020] eKLR where a similar award of Kshs. 10,000 was made.

8. On loss of expectation of life where an award of Kshs. 100,000/= was made, the appellant argued that the award was also inordinately high. It relied on ***Fredrick Bundi Ruchia & Another v S.M.M (Suing as legal representative of the Estate of JMM)*** [2019] eKLR, where an award of Kshs. 70,000/= was upheld on appeal for a deceased minor of 5 years.

9. Regarding the award under the Fatal Accidents Act, the appellant argued that the award of Kshs. 400,000 was high given that the court could not speculate on what a minor would end up doing. Reliance was placed on ***Mwanzia v Ngalali Mutua & Kenya Bus Services Limited & Another*** [1999] eKLR quoted in ***Albert Odawa v Gichimu Gichenji*** [2007] eKLR.

10. The appellant urged the court to award Kshs. 200,000/= under this lead. It relied on ***Palm Oil Transporters & Another v Mary Mose*** [2017] eKLR where a minor aged 13 years was awarded Kshs. 400,000/= and ***Kwamboka Grace v Mary Mose*** [2017] eKLR where Kshs. 300,000/= was awarded to a deceased minor aged 4 years.

11. The appellant argued, relying on ***Mbogo & Another v Shah*** [1968] EA 93, that this court should interfere with exercise of discretion by a lower court because the discretion was wrongly exercised. It also cited ***Butt v Khan*** [1977] eKLR for a similar proposition. The appellant urged this court to interfere with exercise of the trial court's discretion on grounds that the trial court wrongly exercised its discretion in assessing damages and allowed inordinately high awards.

Respondents submissions

12. The respondents relied on their submissions in Civil Appeal No. 12 of 2020 where they are the appellants. Those submissions are dated 10th September 2020 and were filed by the firm of Kulecho & Co. Advocates. The respondents argued that there were 3 suits before the trial court arising from the same accident and one suit (SPMCC No. 19 of 2019) was to be the test suit on liability and the decision on liability was to apply to the rest of the suits. According to the respondents, the trial court found in SRMCC No. 21 of 2019, that both the driver of the motor vehicle and the rider of the motor cycle were equally to blame for the accident.

13. The respondents submitted mainly on quantum for pain and suffering, loss of expectation of life and loss of dependency. They relied on their submissions before the trial court where they had urged for Kshs. 50,000 for pain and suffering and Kshs. 150,000 for loss of expectation of life.

14. They also submitted that the trial court erred in awarding a lump sum of Kshs. 400,000 for loss of dependency in respect of the deceased aged 2 years. They urged for a global figure of Kshs. 1,000,000 under this head. They had relied on ***Daniel Mwangi Kimemi & 2 Others v G. M & Another*** [2016] eKLR where a sum of Kshs. 1,000,000 was awarded for loss of dependency to a deceased who died aged 6 years. They urged this court to set aside the trial court's awards and re-assess damages afresh.

15. I have considered this appeal, submissions and the decisions relied on. I have also perused the trial court's record and the impugned decision. This being a first appeal, it is the duty of this court as the first appellate court, to reevaluate, reconsider and reanalyze the evidence and come to its own conclusion on it. The court should however bear in mind that it did not see the witnesses testify and give due allowance for that.

16. In ***Gitobu Imanyara & 2 others v Attorney General*** [2016] e KLR, the Court of Appeal held:

> ***[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.***

17. In ***Peters v Sunday Post Ltd*** [1958] EA 424, the Court stated:

> ***Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide.***

18. The 1st respondent testified, adopting his witness statement dated 8th April 2019 and filed together with the plaint dated the same day. In that statement, the witness stated that the deceased, a two-year-old boy, was a pillion passenger on motor cycle registration No. KMCT 263V. The deceased's father was riding the motor cycle when it was involved in an accident with motor vehicle registration No. KCN504G. The deceased died as a result of injuries sustained in that accident. The deceased left behind his two sisters and the appellant (his grandfather). According to the witness, the deceased used to assist him with domestic work. He produced a grant of letters of administration, death certificate, statutory notice, copy of records and receipts for expenses as exhibits.

19. **PW2 David Mungai Mundia** testified also adopting his witness statement dated 26th September 2019, that on 13th March 2019 at about 7.15 Pm, the lorry was being driven at a high speed from Loitokitok towards Kimana direction. It tried to overtake another lorry but it did not manage. It collided with the motor cycle which was on the last lane being ridden by the deceased's father with the deceased as a pillion passenger and was travelling in the opposite direction. The lorry hit the deceased's father (Richard), his mother and the deceased. The deceased's father (Richard) was thrown on to the side of the road while the front wheel of the lorry crushed the deceased and his mother. The driver of the lorry alighted and ran away.

20. The witness who was about 50 meters away rushed to the scene and identified the victims. He called police officers at Kimana police station and the accident was reported at Loitokitok police station. The driver of the lorry was arrested and placed in the cells. He told the court that the driver of the lorry caused the accident. In cross examination, the witness admitted that there were other vehicles on the road and that there was darkness at the time of the accident but it was not very dark

21. **DW1 Eric Omondi Ochieng**, the driver of the lorry, testified that on the material day, 13th March 2019 at about 7.30 pm, he was driving motor vehicle KCL 504G from Loitokitok to Nairobi. Before reaching Kimana, he saw lights ahead of his vehicle. He deemed his lights, reduced speed and put on hazard. There was another vehicle with one light on. He also realized that a motor vehicle with both lights on wanted to overtake the vehicle with one light and indeed overtook it. The vehicle with one light on turned out to be a motor cycle. The motorcycle rammed onto his vehicle's tyre while his vehicle was on its lane. In cross examination, he told the court that he tried to avoid the accident by giving way to the other motor vehicle and the motorcycle. He denied that he was overtaking when the accident occurred. He blamed the motorcycle rider for the accident.

22. The trial court considered the evidence and held that the deceased being a pillion passenger had nothing to do with the occurrence of the accident and therefore held the driver of the motor vehicle liable as sued. On quantum, it awarded Kshs. 20,000 for pain and suffering; Kshs. 100,000 for loss of expectation of life and a global figure of Kshs. 400,000 for loss of dependency. The trial court was of the view that it could not use the multiplicand and multiplier in this case.

23. In taking that position, the trial court cited the decisions in ***Mary Khayesi Awalo & Another v Mwilu Mulungi & Another*** [1997] eKLR and ***Albert Odawa v Gichimu Gichenji*** [2007] eKLR for the holding that the multiplier approach is just a method of assessing damages and not a principle of law, and can and should be abandoned where the facts do not favour its application. The trial court then stated:

> ***In the premise, there is no way of knowing what the deceased would have grown to be or hoe (sic) long he would have lived had this accident not claimed his life. Therefore, doing all I can I award a lumpsome (sic) figure of Kshs. 400,000 which I consider reasonable and moderate in the circumstances for loss of dependency.***

24. The appellant faulted the trial court on several grounds captured in their memorandum of appeal. In principle the appellant's concern is that the trial court failed to appreciate the guiding principles in computation of quantum of damages and computed damages under both the multiplier method and the global assessment method leading to an award that was manifestly excessive.

25. I do not think the appellant has reason to complain here. The trial court applied the global approach and awarded a figure of Kshs. 400,000. The court cited relevant and binding decisions on this. According to the trial court, there was no way of knowing what the deceased then two years old would grow up to be. The court did not use both multiplier and global approached in assessing damages as the appellant argued. I therefore find no merit in this ground of appeal. I also do not see how the trial court imported its own standard in assessing damages.

26. Similarly, there is no merit in the appellant's complaint that the trial court did not properly exercise its discretion in assessing damages. As this court pointed in Civil Appeal No E3 of 2020, it is settled law that an appellate court will not interfere with the exercise of discretion by a trial court unless it is satisfied that its decision is clearly wrong, because the trial court has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. (See ***Mbogo v Shah*** [1968] EA 93.

27. Regarding *assessment of damages, it is equally settled law that an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and in doing so arrived at a figure which was either inordinately high or low.* ***(Butt v Khan*** [1981] KLR 349: ***Gitobu Imanyara & 2 others v Attorney General*** [2016] e KLR).

28. The trial court exercised its discretion and this court, sitting on appeal, will not interfere with that court's discretion unless satisfied that the discretion was wrongly exercised and that the award is inordinately low or high as to represent an entirely wrong estimate of the amount the respondents were entitled to. This the appellant has not succeeded in demonstrating to be the cases.

29. The appellant again argued that the trial court erred in law and fact in holding the appellant wholly liable for the deceased's death. The trial court considered the evidence and concluded that the deceased was a pillion passenger and did not in any way contribute to the accident. I agree. The deceased's position is distinguishable from that of the motor cycle rider who contributed to the accident. The When a suit was filed on his behalf, the trial court found him to have contributed to the accident applied his percentage contribution to the award made for his estate. I therefore do not find fault with the trial court's decision in this respect.

30. Having considered the appeal and re-evaluated the evidence, the conclusion I come to is that this appeal has no merit. It is declined and dismissed. Each party shall however bear their own costs of the appeal.

Dated, Signed and Delivered at Kajiado this 25th day of June, 2021.

E. C. MWITA

JUDGE