



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 10 OF 2019

NICHOLAS MUGO MBINDU.....APPELLANT

VERSUS

CALYSTER MUTHONI IRERI.....RESPONDENT

JUDGMENT

1. The appellant herein was the defendant in CMCC No. 10 of 2016 at Runyenjes in which he was sued by the respondent following an accident which occurred on the 6th day of December 2015 at Karurumo along the Kwanjara – Ishiara road involving the appellant’s motor vehicle registration No. KBX 693P and the deceased namely Duncan Njoka Njeru. In the said suit, the respondent claimed general and special damages plus the cost of the suit.
2. In the plaint dated the 25th day of April, 2016, the respondent averred that on the 6th December, 2015 along the aforesaid road, the appellant’s motor vehicle was driven carelessly, negligently and at a high speed and on the wrong side of the road that it hit the deceased herein who was by the road side as a result of which he sustained fatal injuries and the estate suffered loss and damage. The particulars of negligence, those of damages and loss are set out in paragraphs 8, 10 and 11 of the plaint.
3. The matter proceeded *ex parte* in the first instance but the appellant moved the court with an application to set aside the *ex parte* proceedings and the judgment which application the court granted after hearing the parties, but even then, the appellant did not call any evidence during the hearing but he filed a defence denying the respondent’s claim.
4. The appellant denied being the owner of motor vehicle registration No. KBX 693P as alleged or at all and put the respondent to strict proof thereof. He further denied the occurrence of the accident on the material day or that the deceased suffered fatal injuries as a result of the alleged accident. The particulars of negligence were also denied.
5. In the alternative and without prejudice, the appellant stated that if any accident occurred as alleged and which was denied, the same was wholly caused and/or substantially contributed to, by negligence on the part of the owner and/or rider of motor cycle registration No. KMDL 123R on which the deceased was a pillion passenger. He also denied that the deceased was hit while standing on the road side.
6. The appellant listed the particulars of negligence of the owner and rider of motor cycle KMDL 123, in paragraph 6 of the defence and stated that at the opportune time, he shall seek leave of the court to enjoin the rider of the aforesaid motor cycle as a third party to the proceedings and further averred that he would seek contributory negligence against the deceased herein for failing to wear reflective clothing and head gear while being a pillion passenger on the motor cycle.
7. The appellant denied the respondent’s claim for any special or general damages or any other prayers sought in the plaint and averred that the respondent does not have any *locus standi* to institute the proceedings before the trial court and thus the suit is incompetent, bad in law and improperly before the court. He prayed that the respondent’s suit be dismissed with costs.
8. The court delivered its judgment on the 7th day of February, 2019 wherein it entered judgment for the respondent against the appellant, on liability and awarded damages totaling to Kshs. 3,165,950/=, which judgment is the subject of the appeal herein.
9. The appellant in his memorandum of appeal dated the 4th day of March, 2019 has listed 5 grounds of appeal. Looking at the memorandum, the appeal is both on liability and the quantum of damages awarded by the learned magistrate.
10. The appeal was disposed off by way of written submissions which both parties duly filed and which this Hon. Court has considered together with the evidence on record as adduced before the trial court and the cited authorities.

11. This being the first appellate court, the duty of the court is to consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen or heard the witnesses and should make an allowance in this respect. See the case of **Selle & Another Vs Associated Motor Boat Co. Limited & Others [1968] EA 123.**

12. In his submissions, the appellant has challenged the trial court's finding on liability at 100% and contended that the trial court ought to have examined all the evidence tendered by the respondent before reaching a finding on the issue of liability. He urged the court to apportion liability at 50% between the appellant and the respondent.

13. On the part of the respondent, it was submitted that the evidence adduced was uncontroverted and that the appellant was driving motor vehicle KBX 693P at a very high speed and indeed hit motor cycle KMDL 123R from behind and thus the learned magistrate's finding on liability was well founded.

14. It is trite that the respondent's case is based on the tort of negligence. The respondent had the burden to prove his case on a balance of probability as required under **Section 109 of the Evidence Act** which states: -

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact lie on any particular person.

15. **Section 107**

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

16. The court has carefully gone through the evidence on record. The respondent called an eye witness one Peter Muriithi Gikuyu who testified as PW2. He stated that on the material day he was with the deceased whom he met at Karurumo market where he had gone to refuel motor cycle KMDL 123R. He told him he was heading home to get ready for church and he suggested that they go home together to which he agreed. They traveled for a short distance and stopped by the road side and it was while there that a vehicle came from behind using the wrong side of the road and hit them. That they were stationary and not moving.

17. He identified the motor vehicle as registration No. KBX 693P. He blamed the driver of the motor vehicle because he was driving very fast and lost control of the vehicle and hit them and that he was driving on the wrong side of the road. That they were hit while on the road side, away from the normal path of the vehicle and the road was clear and the visibility was good. That there were no other vehicles in the vicinity of the accident scene.

18. The evidence of PW2 was corroborated by that of PW3, one Julius Murimi Njeru who stated that the accident happened off the road and that the motor vehicle was being driven at a high speed.

19. The evidence of PW2 and PW3 was not controverted as the appellant did not call any witnesses to support his case. Though the appellant blamed the rider and owner of the motor bike, he did not join them as third parties to the suit and he did not adduce any evidence to prove that the respondent herein was negligent in any way.

20. In view of the foregoing, I find that the respondent proved negligence on the part of the appellant and the learned magistrate did not err in finding him 100% liable for the accident.

21. On quantum of damages, the appellant averred that the learned magistrate erred in applying a monthly income of Kshs. 22,000/= which was not proved and the court failed to find that the deceased was a farmer and not in any other form of employment. He also took issue with the learned magistrate finding in adopting a multiplicand of Kshs. 10,000/= and for adopting the multiplier method as opposed to global award.

22. On the issue of quantum PW4, Charles Mutembei Nyaga stated that he is the director of Dimtz Investments Limited which deals with motor vehicle parts and hardware and that the company has employed the deceased as a supervisor at a monthly salary of Kshs. 22,000/=. He produced a letter dated 12th February, 2016 to that effect. He stated that he did not have documents to confirm the said employment.

23. In her evidence, the respondent stated that the deceased would give her Kshs. 10,000/= per month for maintaining the house and for her own use. That he also used to pay for the maintenance of the children since she is a house wife and was wholly dependent on him financially. The deceased was aged 36 years at the time he met his death.

24. In his judgment, the learned magistrate awarded a total of Kshs. 3, 000,000/= as loss of dependency adopting a multiplier of 25 years and a multiplicand of Kshs. 10,000/=.

25. In his submissions, counsel for the appellant submitted that the award was excessive. On the salary of Kshs. 22,000/=, PW4 confirmed that he did not have documents to show that he had employed the deceased and further that he did not produce form CR. 12 to prove that he is a Director of the said company. Additionally, he did not produce a certificate of incorporation to show that the alleged company is in existence. He also did not produce a tax compliance certificate and neither did he produce employees master roll. That, apart from the letter dated 12th February, 2016, no other evidence was adduced as to the employment of the deceased.

26. After considering the evidence on record and the submissions by the appellant, I am of the considered view that the respondent did not prove, on a balance of probability, that the deceased was employed and that he was earning the sum of Kshs. 22,000/= as claimed. In view of the above, I find that the learned magistrate erred in making a finding in his favour and by applying a multiplicand of Kshs. 10,000/= without any basis.

27. However, the court was told that the deceased was a farmer and he used to fend his family and had a source of income. In that regard, the court ought to have awarded a global sum and not apply the multiplier method. In the case of **Eston Mwirigi Ndege & Another Vs Patrick Gitonga, Civil Appeal No. 72 of 2017 (Meru)**, the deceased died at the age of 31 years and was a farmer farming on the family farm but it was not stated what income he used to get from the said economic activity. He was in the prime of his life and his estate must have undergone immense loss and anguish as a result of his death.

28. Taking into account all the circumstances of this case, I find that a global sum of Kshs. 1,500,000/= would be adequate compensation for loss of dependency and I award the same.

29. The appellant has not challenged the awards under the other heads and this court will therefore not interfere with them.

30. In the end, and in view of the fact that the other awards were not contested, I accordingly enter judgment for the respondent as follows: -

- a) General damages for pain and suffering – Kshs. 15,000/=
- b) Loss of expectation of life - Kshs. 100,000/=
- c) Loss of dependency - Kshs. 1,500,000/=
- d) Special damages - Kshs. 50,960/=

Grand Total **Kshs.1,665,960/=**

31. As the appeal has partially succeeded, there will be order as to the costs of the appeal.

32. It is so ordered.

Delivered, dated and signed at Embu this 29th day of September, 2021.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent