



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CIVIL APPEAL NO. 16 OF 2018

(CORAM: F.M. GIKONYO J.)

(Being an appeal from the judgment of Hon. T. Gesora (S.P. M) Delivered on 19th December 2017

in Narok CMCC No. 81 of 2016)

WILSON KARUTA GATANA.....APPELLANT

VERSUS

BETH NYARUIRU KAREGA (Suing as the legal representative of the estate

of James Kahiga Kahiu (Deceased).....RESPONDENT

JUDGMENT

Impugned judgment

[1]. This appeal challenges the judgment of the Senior Principal Magistrate's Court at Narok in Civil Suit No. 81 of 2016 delivered on the 19th December 2017 in which the trial court made awards as follows: -

a) Pain and suffering Kshs. 50,000/=

b) Loss of expectation of life Kshs. 100,000/=

c) Dependency

$10,200 \times 12 \times 20 \times \frac{2}{3} = 1,632,000/=$

Total General Damages = **1,782,000/=**

Add special damages = 73,719/=

Total C/F = 1,855,719/=

Total B/F 1,855,719/=

d) less 10% contribution 185,572/=

Grand Total 1,670,147/=

e) plus, cost and interest

[2]. The memorandum of appeal dated 10th July 2018 cited six (6) grounds of appeal which relate to; i) liability and ii) quantum of damages.

Background

[3]. The suit arose from a road traffic accident, which occurred in Narok town on 20/07/2015 involving a motorcycle registration no. KMDG 693R and a motor vehicle registration no. KBM 878V Isuzu lorry. The motorcycle rider was riding heading to Mai Mahiu from Narok while Isuzu lorry was driven towards Narok Town direction. The motor cycle collided with the lorry and the rider sustained fatal injuries.

APPELLANT'S CASE

[4]. The Appellant testified and called two witnesses.

[5]. The appellant submitted in support of the appeal, that the respondent's witnesses did not witness the occurrence of the accident. according to the appellant, the trial magistrate ought to have disregarded the evidence of PW3 to the extent that he stated that he witnessed the accident, yet his statement at page 12 of the record, states that he did not witness the accident. The appellant argued that PW3 was not a credible witness. He relied on the case easy **Coach Limited & Another V Gideon Otieno Oulu & Another [2021] eKLR** and **Charles & Another V Bonface Kamunzyu Uvyu (Suing As Personal Representative Of The Estate Of Thomas Kilonzo Kamuzyu (Deceased) [2019] eKLR.**

[6]. The appellant submitted that the trial magistrate failed to consider the evidence of DW2 and DW3 in his judgment which were consorted by the evidence of PW2, DW2 and DW3. The trial magistrate disregarded the evidence of DW1 as part of police records regarding the accident without any legal basis and yet the Existence of the concerned police officer was not disputed including his findings with regard to the accident. DW1 corroborated the evidence of DW2 and DW3 and stated that the deceased was the one who caused the accident through dangerous overtaking.

[7]. The appellant submitted that the trial magistrate ought to have dismissed the primary suit however on a without prejudice basis the appellant submitted that Narok town was not a municipality hence the scale for the same was not applicable. the appellant argued that according to the regulation of wages (general amendment) order 2013, minimum wage for general worker at the time was Kshs. 6,896.00/= per month which ought to have been applied.

[8]. The appellant submitted that a multiplier of 20 years awarded by the trial magistrate exceeded the current retirement age by 4 years. He argued that the retirement prior to 2013 was 55 years but was increased to 60 years. The deceased was 44 years at the time of his death. That life expectancy for men in Kenya is about 45 years. Taking into account the regularities of life the appellant proposed a multiplier of 10 years. he relied in the case of **Odoyo Oburu V Callen Kwamboka Okemwa & Another (Suing As The Legal Representatives Of Obed Okemwa Obwoye) (Deceased) [2018]** and **Logistics Limited V Susan Kavogoi (Suing As The Administrato, A Dependant And On Behalf Of The Dependants Of Evans Imbalia Andiva) [2021]**

[9]. on loss of dependency, the appellant proposed the computation as follows; $6,892 \times 12 \times 10 \times 2/3 = 551,680/=$

[10]. In the alternative the appellant submitted that liability be apportioned in the ratio of 30; 70 between the appellant and the respondent.

[11]. In conclusion, the appellant prayed that the appeal be allowed, the judgment of the lower court be set aside and be substituted with an order dismissing the primary suit with costs.

RESPONDENT'S CASE

[12]. The Respondent testified and called two witnesses in support of her case.

[13]. The respondent submitted that on a balance of probabilities she was able to prove that the collision was on the deceased's lane and therefore the appellants should be held liable 100% for the accident.

[14]. The respondent submitted that the trial court was right in adopting a minimum wage of Kshs. 10,200/= proposed for municipalities in the absence of proof of earnings as there was evidence by PW3 that the deceased was engage in a business.

[15]. The respondent submitted that the trial court made no error on the assessment of damages. That there is no compelling evidence why this court should interfere with the same. She cited the case of **Butt V Khan [1977] 1 KAR.**

[16]. In conclusion, the respondent prayed that the appeal be dismissed with costs to the respondent together with interest from the date of judgment as it lacks merit. She cited the case of **Kemfro Africa Limited T/A Meru Express Services & Another Versus A.M. Lubia & Another (1985) eKLR.**

ANALYSIS AND DETERMINATION

Duty of court

[17]. Section 78(2) provides that the appellate court shall have the same powers and shall perform nearly the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted herein.

[18]. The first Appellate Court should therefore, evaluate the evidence afresh and make any of its own conclusions albeit it must bear in mind that it did not have the opportunity of seeing or hearing the witnesses first hand. See the case of **Selle & Anor -Vs- Associate Motor Boat Co. Ltd 1968 EA 123.**

Issues

[19]. Directions were given that the appeal be disposed of by way of written submissions. The appellant and the respondent filed their respective written submissions, which I have considered. I have also considered the pleadings. Arising therefrom, are two issues, namely: liability and quantum of damages.

[20].

Liability

[21]. The accident herein involved a motor vehicle and a motorcycle. The parties and witnesses gave quite varied accounts as to how the accident occurred. On the one hand, the appellant blames the deceased for the accident. whilst on the other hand, the respondent blames the lorry driver for the accident. How do courts resolve such tension in evidence?

[22]. The established judicial method, which rests on the singular dependability of the *fact-base*, and which vindicates the principles of fairness, objectivity and legitimacy – is to entertain the *account from the other side*; and thereafter, to weigh, check and balance the two streams of evidence, thereby arriving at a valid and just result.

[23]. The court will draw upon the evidence to determine where liability lies.

[24]. The account narrated by the appellants is that the deceased was overtaking another vehicle and came to the lane of the lorry, thereby, colliding head on with the lorry. This was at night at about 10.00pm.

[25]. The appellant lays great proportion of weight on the evidence of **DW1**- Corporal Florence Mwai. She testified that she was appearing in court on behalf of the investigating officer in the matter. She stated that the accident occurred on 20/7/2015 at Oletipis area along Mai Mahiu - Narok Road. Motor vehicle KBM 878V Isuzu and motor cycle KMDG 693R at around 10; 30 p.m. the driver of the lorry Joseph Wachira Kibe drove the lorry towards Narok Town.

[26]. It was her testimony that at the point of impact a motor cycle rider, the deceased emerged from the opposite direction as he overtook another vehicle. The rider collided head on with the lorry killing him instantly. She blamed the deceased claiming that he overtook dangerously the point of impact according to her was on the lorry's lane.

[27]. On cross examination, she admitted that she relied on undated and unsigned report. She further stated that, as per sketch plan in the file the point of impact was on the lane going to Mai Mahiu and not going to Narok. The activity and the pool of blood was on the side going to Mai Mahiu.

[28]. **DW2** and **DW3** blamed the deceased rider for the accident. **DW3** stated that he witnessed the accident in which the driver was Joseph Kibe. He adopted his statement dated 29/6/2016 as his evidence in chief.

[29]. On cross examination he stated that he was in the vehicle and he witnessed the incident. It was 10;00 p.m. They saw the head light of the motorcycle the next thing he heard was the sound of impact. The motor cycle was thrown and landed on their left near the middle yellow line on the rider's correct side of the road and on the lane heading to Mai Mahiu.

[30]. On re-examination, he stated that the motor cycle hit their lorry head on and it was thrown back and landed on the right side of the lorry near yellow line. The lorry remained on the lane heading to Narok.

[31]. The account by the respondent blamed the lorry driver for overtaking dangerously. **PW3** an eye witness stated that the lorry was overtaking when it knocked down the deceased. They relied on the evidence **PW3**- an eye witness. They also relied on the sketch plan in the police file which showed that the point of impact was on the lane going to Mai Mahiu and not going to Narok. The pool of blood was on the side going to Mai Mahiu.

Of police file

[32]. Notably, important evidence which would substantiate these allegations by the appellant and the respondent is the result of the police investigations. But, **PW2** merely stated that the file is pending investigations. And, **DW1** relied on an undated and unsigned report which was purportedly drawn by the investigating officer. I also do note that the sketch plan therein paints a very different picture from what the purported report carries. It is lamentable that the police file does not have the report on results of investigations as the report there is undated and unsigned; it only helps in adding to the obscurity herein. **DW1** did not offer any explanation or reconciliation of the variance between the report and the sketch plan.

[33]. The rival parties claim that the other was overtaking another vehicle thereby causing the collision. As I have observed, the police file contains unsatisfactory and contradictory evidence on how the accident occurred. Nonetheless, the sketch plan which is normally an initial picking of the scene by investigation officers was not challenged or discredited. In the circumstances of the case, it is more probable than not to represent the truth of things as they lay on the ground at the time of the accident. The evidence by the eye witness **PW3** called by the respondent supports the sketch plan. When I place the evidence on legal scale of balance of probabilities, it is more probable than not that the lorry driver was overtaking and hit the rider on the rider's correct lane. Despite denial by the appellant, I do not find evidence to disapprove the account of the **PW3** on the presence of another vehicle at the time of the accident. Overtaking without confirming that the road is clear is dangerous and depicts not careful driving. Therefore, the lorry driver bears the bigger proportion of liability.

[34]. Accordingly, the trial court did not err in apportioning liability at 90:10% against the appellant and the respondent, respectively. The appeal on liability fails and is dismissed.

Quantum

[35]. According to the Court of Appeal in *Bashir Ahmed Butt vs. Uwais Ahmed Khan (1982-88) KAR* : -

‘An appellate court will not disturb an award for general 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 so arrived at a figure which was either inordinately high or low...’

[36]. No challenge was made to the award of Ksh.100, 000/- for loss of expectation of life and pain and suffering at Ksh.50, 000/-. Death occurred shortly after the accident. These awards are reasonable. I uphold the awards.

[37]. The two concerns in the matter were the award of the dependency and particularly the multiplier and multiplicand. The dependency ratio was not however disputed, and I uphold it.

Calculation of dependency

[38]. Simply put; the formula for dependency, is the multiplicand, that is the annual net income multiplied by a suitable multiplier of expected working life lost by the deceased by the premature death, and further by a factor of the dependency ratio, that is the ratio of the deceased’s income utilized on her dependants. See *Beatrice Wangui Thairu -Vs- Hon. Ezekiel Barngetuny & Another Nairobi HCCC No. 1638 Of 1988* (UR)

Multiplicand

[39]. The Appellant submitted that Narok was not a municipality hence the trial court erred in applying the minimum wage of Kshs. 10,200/=. The appellant argued that according to the regulation of wages (general amendment) order 2013, minimum wage for general worker at the time was Kshs. 6,896.00/= per month which ought to have been applied. The respondent submitted that the trial court was right in adopting a minimum wage of Kshs. 10,200/= proposed for municipalities in the absence of proof of earnings as there was evidence by PW3 that the deceased was engaged in a business.

[40]. I have looked at the oral testimony of PW1. Indeed there is no proof of earnings. However, it is my considered view that it is possible for one to hold a paid job without documentation particularly in informal employment .see *Jacob Ayiga Maruya & Another V. Simeon Obaya [2005] eKLR*

[41]. In this case, there was proof that the deceased was a business man dealing with French beans as stated by PW3 and earned therefrom. This fact was not disputed. Practice is that minimum wage can be adopted in the circumstances. The trial magistrate adopted the minimum wage of Kshs. 10,200/= as per the regulation of wages Order (General Amendment) 2013. In light of the evidence adduced, the trial court was justified in adopting minimum wage for a general worker at Kshs. 10,200 per month.

Multiplier and dependency ratio

[42]. The Appellant has not challenged the dependency ratio but was dissatisfied with the multiplier applied by the trial court. I have considered the opposing submissions in this respect.

[43]. The appellant submitted that a multiplier of 20 years awarded by the trial magistrate exceeded the current retirement age by 4 years. He argued that the retirement prior to 2013 was 55 years but was increased to 60 years. The deceased was 44 years at the time of his death. That life expectancy for men in Kenya is about 45 years. Taking into account the regularities of life the appellant proposed a multiplier of 10 years.

[44]. Nothing guarantees employment up to 70 years of age. Frailty of human body or ill health or other eventualities may curtail a person’s employment. Similarly, private companies are known to retire employees at an early age or the statutory age provided for civil servants. Therefore, ascertainment of the appropriate multiplier remains at the discretion of the court. Did the trial court, therefore, commit an error in the assessment of the appropriate multiplier as to justify interference by this court?

[45]. In so far as the multiplier is concerned, there are chances that the deceased would not work up to the official retirement age of sixty due to uncertainties of life. Unskilled workers tend to engage in heavy work which may contribute in reducing their life span. In respect of the deceased herein, a multiplier of 16 years is reasonable.

[46]. I therefore, set aside the award on dependency made by the trial court. Accordingly, I award loss of dependency calculated as follows:

a. Kshs. $10,200 \times 12 \times 16 \times 2/3 = 1,305,600/=$

[47]. The award on special damages was not challenged and therefore, the same is upheld.

[48]. All the other awards not specifically set aside remain as awarded by the trial court.

[49]. The awards are however subject to 10% contribution by the respondent. Judgment accordingly.

[50]. The appeal on quantum succeeds to the extent stated.

[51]. The respondent shall have costs and interest on the award.

[52]. But, given the result of the appeal, each party to bear own costs of the appeal. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 27TH DAY OF OCTOBER, 2021

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F. GIKONYO M.

JUDGE

In the presence of:

1. Waithaka for Keboingi for Respondent
2. Mr. Kasaso – CA
3. Modi for the appellant - absent

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F. GIKONYO M.

JUDGE