



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 70 OF 2020

CARREN VERRAH AKOTH (suing as legal representative of
PAUL ODUOR OHULA(Deceased).....APPELLANT
VERSUS
YALFA CARGO HANDLING CO. LTD1ST RESPONDENT
STARWAYS BUS COMPANY LTD2ND RESPONDENT
A TO Z TRANSPORTERS COMPANY LTDTHIRD PARTY

J U D G E M E N T

1. This appeal arises from the **Judgment** of Hon. F. Kyambai dated **15th May, 2020**. The impugned judgment was delivered in a suit instituted by the respondent in her capacity as the Legal Representative and Administratrix of the estate of the late **Paul Oduor Ohula** who lost his life after being involved in a road accident on **17th February 2013** along Mombasa- Nairobi Road.
2. According to the averments made in the **Plaint** dated **19th February, 2014**, the accident was allegedly caused by the negligence of the defendants authorized drivers. The plaintiff prayed for general and special damages under the *Law Reform Act* and the *Fatal Accidents Act* as well as costs of the suit and interest.
3. The record of the trial court shows that there were a series of matters in relation to the accident, one being **CMCC No.2281/14** (test suit) where an application dated **19th July, 2017** was filed before Hon. Nang'ea and heard on **28th July, 2017** whose effect was that, pending the hearing of that application all the other suits be stayed. Judgment was entered, the suit against the 3rd party withdrawn and the 2st Respondent herein found liable at 100%.
4. The parties agreed to adopt the findings of the test suit on liability. Thereafter, the hearing proceeded for the assessment of damages after which the trial court rendered its judgment on **15th May, 2020** wherein the suit was dismissed.
5. The Appellant was aggrieved by the trial court's decision on quantum hence filed this appeal. In her **Memorandum of Appeal** dated **11th June, 2020**, the appellant advanced seven grounds of appeal which are reproduced hereunder:
 - a. **The learned trial magistrate erred in fact and law by disregarding the parties agreement to await the decision in Mombasa CMCC No.2281 of 2014 and liability in the case before him;**
 - b. **The learned trial magistrate failed to appreciate the facts of the case before him by proceeding to determine the issue of liability even against the 3rd party who was withdrawn from the proceedings by consent of the parties;**
 - c. **The learned trial magistrate erred in law and fact in failing to make a finding that the deceased was a passenger in the 2nd respondent's motor vehicle and could not have contributed to the accident;**
 - d. **The learned trial magistrate erred in law and fact in failing to appreciate that the standard of proof in civil cases is on a balance of probability and not beyond reasonable doubt;**
 - e. **The learned trial magistrate entered into the arena by considering irrelevant issues which were not contested and thereby**

arriving at a wrong decision;

f. The learned trial magistrate erred in law and fact by failing to consider or refer to the appellant's submissions lodged in court and in the premises rendered an incomplete decision;

g. The learned trial magistrate proceeded on wrong principles and misapprehended the evidence in some material aspects and thereby arriving at a wrong conclusion on liability.

6. By consent of the parties, the appeal was prosecuted by way of written submissions. The Appellant's submissions were filed on 22nd February, 2021 while those of the respondents were filed on 30th June, 2021 and 23rd April, 2021 respectively.

7. This is a first appeal to the High Court and I am well aware of my duty as the first appellate court which is to subject the evidence and all the material presented before the trial court to a fresh and exhaustive re-evaluation so as to draw my own independent conclusion regarding the soundness or otherwise of the trial court's decision, while being alive to the fact that I did not see or hear the witnesses testify. This was the finding in the case of Selle –vs- Associated Motor Boat Co. & Others [1968] E.A. 123 where it was stated as follows:-

“An 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 allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)”.

8. However in the case of Peters –vs- Sunday Post Ltd [1958]EA 424, the Court held that:-

“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”.

9. The court is therefore also called upon to exercise its appellate mandate with caution. It has to bear in mind that it did not have the benefit of seeing and hearing the witness testify unlike the trial court which had that opportunity.

10. In the instant appeal, the Honourable Magistrate dismissed the suit against the Appellant because she did not prove negligence on the part of the Defendant.

11. In the case Nandwa -vs- Kenya Kazi Ltd (1988)eKLR, the Court of Appeal observed:

“In an action for negligence, the burden is always on the Plaintiffs to prove that the accident was caused by the negligence of the Defendant. However, if in the cause of trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the Defendant the issue will be decided in the Plaintiffs favour unless the Defendants evidence provides some answer adequate to displace that inference.”

12. In re-evaluating the trial courts record, I found that the Honourable Magistrate dismissed the suit against the Appellant on the ground that negligence on the part of the Defendant. In my view, this was an error on the part of the learned Magistrate since the parties had already agreed on adoption of liability from the test suit where the 2nd Respondent was found 100% liable for the accident.

13. A test case is a suit brought specifically for the establishment of an important legal right or principle. It can also be a term that describes a case that tests the validity of a particular law. Test cases are useful because they establish legal rights or principles and thereby serve as precedent for future similar cases. Test cases are also a means of saving precious judicial system time and expenses of conducting proceedings for each and every case that involves the same issue or issues.

14. In my view, the learned magistrate was to determine liability in the test case on the basis evidence adduced in the said case because admittedly the cases arose from the same accident, same facts, same evidence and same witnesses were to be used to determine liability. The learned Magistrate was then to proceed and assess damages on the basis of the evidence that was adduced in the case in respect of the Appellant and Respondent.

15. In respect of damages, the trial Magistrate did not award damages. However, he assessed the same. Assessment of damages is discretionary as was held by the Court of Appeal in Catholic Diocese of Kisumu –vs- Sophia Achieng Tete Civil Appeal No.284 of 2001 [2004]2 KLR 55. In setting out the circumstances under which an appellate court can interfere with an award of damages, the court held that assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own from that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance.

16. Additionally, in the case of Kemfro Africa Limited T/A Meru Express Service, Gathogo Kanini -vs- A.M. Lubia and Olive Lubia(1982 88) 1 KAR 727 at p. 730 Kneller, JA. said: -

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. .”

17. From the above decisions, since the trial Magistrate already assessed the damages that the Plaintiff would have been awarded if the case had succeeded, I have gone through the same and find no reason to interfere with the trial Magistrate’s assessment. I therefore proceed to adopt the said assessment and enter Judgment for the Appellant as follows:-

- a. Kshs.20,000/= for pain and suffering;**
- b. Kshs.400,000/= for loss of expectation of life;**
- c. Kshs.3,000,000/= for loss of dependency;**
- d. The special damages were pleaded but none was specifically proved.**

18. In the resultant, the appeal is allowed with costs to the Appellant.

Orders accordingly.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF NOVEMBER, 2021

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Ajingo counsel holding brief for Mr. Otwere for Appellant

Mr. Mangi’eka counsel holding brief for Mr. Omwenga counsel for the 3rd Party.

Court Assistant – Gitonga