



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CORAM; R. MWONGO, J.

CIVIL APPEAL NO. 27 OF 2017

LOCHAB TRANSPORTERS LIMITED.....APPELLANT

VERSUS

CAROLINE NDUTA MWAMBURI.....RESPONDENT

(Being an appeal from the judgment and/or decree of Resident Magistrate, Hon S Muchungi in Naivasha in CMCC Civil Suit No. 860 of 2017, delivered on 31st January, 2014.)

JUDGMENT

Background

1. This appeal emanates from the judgment of the lower court that found the Appellant's driver "largely to blame" and apportioned 90% of the liability against him for a fatal accident that occurred 3rd January, 2009. The Respondent's father was killed in the accident after the Respondent's truck KAV 265F/ ZC 3822 collided with vehicle Chassis No ST 1901008254 in which the deceased was a passenger. The trial court awarded damages as follows:

a. Pain and suffering	Kshs 100,000.00
b. Loss of expectation of life	Kshs 100,000.00
c. Loss of dependency	Kshs 480,000.00
<i>Kshs 680,000.00 Less 10% Contribution</i>	
Sub-total	Kshs 612,000.00
d. Add Special damages	Kshs <u>19,199.00</u>
Total	Kshs 631,199.00

2. The appeal challenges both the liability and quantum of damages awarded.

Liability

3. The crux of the appeal on liability concerns the fact that the only eyewitness, DW1 the respondent's driver, stated that he was travelling from Kampala to Mombasa – thus was between Naivasha and Maai Mahiu on the way to Mombasa – when the accident occurred. On the other hand, PW2 PC David Kiregi, the Police officer testifying on behalf of the Investigating Officer, relied on sketch plans drawn by the Investigating Officer. In his evidence he interpreted the sketch plans as follows:

"I have the rough sketch plan drawn by PC Biwott. It shows motor vehicle AV 265F Scania prime mover was heading from Maai Mahiu to Naivasha. As per the sketch plan, the saloon car collided with the trailer at the point of accident. The sketch plan shows the saloon car left its lane and went in to opposite lane and collided with the prime mover" (underlining added for emphasis).

4. In cross examination PW2 confirmed that: ***“the saloon car left its lane”***. In the circumstances, the witness was asserting that the vehicle the respondent was being driven in was responsible for the accident.

5. According to the driver, DW1, he was carrying a load from Kampala to Mombasa. He had driven past Naivasha when:

“I checked the side mirror and saw a motor vehicle knock me from in front. It had no lights. He came from his lane to my lane.... The motor vehicle wasn’t registered....”

He was unequivocal that he was driving towards Maai Mahiu. There is no reason to doubt this assertion.

6. The trial magistrate on reviewing the sketch plan and evidence on record for the parties determined as follows:

“On liability, I have come to the conclusion that the interpretation of the sketch plans by the police officer was inaccurate. The driver of the trailer was not travelling from Maai Mahiu to Naivasha but from Naivasha to Maai Mahiu”

7. I have considered the evidence and perused the said sketch plans. I note that the evidence of the Police Officer was not direct eyewitness evidence. Instead, it was evidence concerning events after the fact had occurred. It is indeed opinion based entirely on the police officer’s interpretation of the sketch plans made by the Investigating Officer. He said what the sketch plans show, as understood by him. He used words such as: ***“it (sketch plan) shows”*** and ***“as per the sketch plan”***.

8. With regard to the value of police sketch plans, the respondent cited **Equator Distributors v Joel Muriu [2018] eKLR** where the Court of Appeal held as follows:

“On probative value to be given to a police sketch map, we are aware that a police sketch map for a road traffic accident is prepared after the event, it is not an eyewitness account. However, it carries some probative value. The sketch map is not binding on the trial court and it is for the trial court to establish facts from all the evidence on record. A police sketch map is just but an item of evidence to be considered. In this appeal the appellant has not demonstrated to us that the trial court acted on wrong material in giving credence to and weight to the police sketch map. In our view the map has a probative value as it shows the relative positions of the two motor vehicles immediately after the accident. We find no reason to fault the judge for giving weight to the police sketch map.”

9. I therefore treat the sketch plans as having probative value. On perusal of the sketch plans, I note that the bonnets or front sides of both of the vehicles involved in the accident appear, after the accident occurred, to be oriented facing the direction of the road (marked “M” on the sketch plan) indicated as heading towards Maai Mahiu. This is consistent with the evidence of DW1 who said he was driving the lorry towards Maai Mahiu headed for Mombasa.

10. Further, both vehicles ended up on the right hand lane of the road, heading towards Maai Mahiu. Therefore, if both vehicles were moving in the direction of Maai Mahiu, both vehicles would be, and were, on the wrong side of the road. There is no explanation as to what both vehicles doing on the wrong side of the road headed towards Maai Mahiu. DW1 was not questioned on that aspect as an eye witness. He testified however that ***“a police officer came by and took sketches”***. He insisted he was heading to Maai Mahiu and that the other car came into his lane. The sketch plans were admitted by consent of the parties.

11. The reasonable conclusion I draw from the sketches, is that there is nothing unusual about the lorry facing Maai Mahiu. That is expected in light of DW1s testimony that he was driving towards to Maai Mahiu. However, the lorry is definitely on the wrong side of the road heading in that direction. There is no explanation for this. As for the other car facing the Maai Mahiu direction, the reasonable explanation for that is that the force of the collision spun it around and left it facing Maai Mahiu direction, the saloon car being a lighter vehicle. There is separate evidence that the force of the collision was such that there were fatalities in the saloon vehicle.

12. In the plaint, however, there is no indication of the direction in which the saloon car was driving. I am therefore not prepared to make a conclusive finding adopting my above reasonable explanation that it was hit and spun. Accordingly, in the absence of any proof one way or the other, but being satisfied that the lorry was on the wrong side of the road based on the sketch plans, I would not disturb the finding of the trial court on liability. I am however satisfied that there is no concrete evidence that the respondent was wholly liable as argued by the appellant, and I see no wrongly applied principle of law by the trial court.

Quantum

13. The central argument against the quantum of damages awarded is in respect of the award on loss of expectation of life and loss of dependency given that the deceased was 68 years old at the time of his death. In their submissions the appellants also state that the respondent siblings as dependants were aged 23- 27 at the time of the accident and some were employed. Thus, that none of the siblings depended on the deceased for education or other sustenance.

14. The appellants relied on the case of **Lilian Birir & Another v Ambrose Leamon [2016] eKLR** where the deceased was aged 63 but the issue there turned upon the fact that there was no evidence as to how the accident occurred, hence the burden of proof was not discharged. This case, however, has no bearing on quantum of damages.

15. The evidence was that the deceased was 68 years old at the time of death, and was working with Bolpak Motors earning Shs 15,000/= per month. The trial court awarded loss of dependency on the ground that the deceased’s daughters lived with him according to the evidence of PW1. I have confirmed that evidence of PW1. She said the deceased was the breadwinner; that life changed dramatically after the accident

and financially they had to struggle. In cross examination, PW1 confirmed that they lived with the deceased, although she was working. The trial court used a multiplier of 4 years meaning that the deceased would be deemed to have worked until he was 70.

16. In my view the multiplier ought to have been 2 years. A driver driving heavy commercial vehicles for long distances after age 70 could potentially be a danger to society. I would reduce the multiplier to 2 years. Even Judges retire at 70 by law and their work is not as physically intensive. I would reduce the award on loss of dependency by half to 240,000/=. I must deduct 10% for contribution resulting in total award of 415,199/=-.

17. In the result, I set aside the trial court's award and substitute the award as follows:

a. Pain and suffering	Kshs 100,000.00
b. Loss of expectation of life	Kshs 100,000.00
c. Loss of dependency	Kshs 240,000.00
<i>Kshs 440,000.00 Less 10% Contribution</i>	
Sub-total	Kshs 396,000.00
d. Add Special damages	Kshs <u>19,199.00</u>
Total	Kshs 415,199.00

18. Each party to bear own costs.

19. Orders accordingly.

Dated and Delivered at Naivasha this 10th Day of March, 2020

RICHARD MWONGO

JUDGE

Delivered in the presence of:

- 1. Muchela holding brief for Cheloti for the Appellant**
- 2. Gichuki holding brief for Gathu for the Respondent**
- 3. Court Clerk - Quinter Ogotu**