



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CIVIL APPEAL NO. 15 OF 2018

ELIJAH MAINA.....APPELLANT

VERSUS

ADLINE WAMBUI WANJIRU & ANOTHER.....RESPONDENTS

[An appeal from the judgment of A. K. Mwachigi, Principal Magistrate, in Murang'a CMCC No. 107 of 2014 delivered on 29th August 2017]

JUDGMENT

1. The appellant challenged the findings of the lower court on the twin issues of liability for negligence and quantum of damages.
2. On 24th February 2020, I directed that the appeal be canvassed via written submissions. The appellant's submissions were filed on 9th July 2020 while those by the respondents were lodged on 20th July 2020.
3. Being a first appeal to the High Court, it is on both facts and the law. *Peters v Sunday Post Limited* [1958] E.A 424, *Selle v Associated Motor Boat Company Ltd* [1968] E.A 123.
4. It was pleaded in the *amended plaint* filed on 5th June 2014 as follows: That on 22nd September 2013, Stephen Mwangi Waweru (hereafter *the deceased*) was riding a motorcycle registration KMCZ 066L along the Murangá - Kenol Road when the appellant's motor vehicle KAQ 447X sped from the opposite direction, veered off the road and knocked him down.
5. The deceased sustained serious injuries and died five days later at Kenyatta National Hospital. The deceased's wife (the 1st respondent) brought an action on her behalf, her daughter AM and the estate. She blamed the appellant for the accident.
6. By a statement of defence dated 28th July 2014, the appellant denied the claim *in toto*. In the alternative, he blamed the deceased for contributory negligence including entering the road when it was unsafe to do so; failing to give way to the appellant's vehicle; and, disregarding traffic rules.
7. The learned trial magistrate found that the appellant was 90% liable in negligence. The respondents were awarded Kshs 4,043,407 (less 10%) as damages together with costs and interest.
8. The appellant has lodged a memorandum of appeal dated 24th April 2018 and amended on 13th March 2019. It raises *fourteen* grounds but they can be compressed into three. Firstly, that the finding on liability was *not* borne out by the evidence; secondly, that the general damages were *exorbitant*; and, thirdly, that the special damages were *neither* pleaded *nor* strictly proved.
9. The appeal is contested by the respondents. The respondents' submissions are on a two-strand. Firstly, that the appellant was overtaking and speeding when he knocked down the deceased. Secondly, that the deceased was aged 25 and earning Kshs 500 daily. Accordingly, the award on all the heads of damages was reasonable. The respondents' case is that there is no basis to interfere with the discretion of the learned trial magistrate.
10. I have *re-evaluated* the evidence. The respondents called four witnesses. The *eye witness* was Samuel Mbogo (PW2). He was a pillion passenger on the deceased's two-wheeler. He testified that they were heading out of Murang'a town towards Kenol. He added:

I saw a vehicle ahead of me overtaking others. It was moving very fast. The vehicle hit the motorcycle I was in [sic]. I lost consciousness. I found myself in hospital. The vehicle moved into our lane and hit us. The vehicle was registration No. KAQ 447X, a personal vehicle

11. The other three witnesses for the respondents were not present when the accident occurred. However, PW4 (Police Corporal Kiprono) produced the police abstract. He said the accident was investigated by another officer, Simiyu, who charged the appellant with the offence of causing death by dangerous driving in *Murang'a Traffic Case No. 1014 of 2013*.

12. It is instructive that at the time of PW4's testimony, judgment had not been rendered in the traffic case. But by the time the appellant took to the stand, the decision in the traffic case had been made: He was acquitted.

13. The appellant relied on his statement at page 37 of the record. He stated that as he approached Jambo Hotel, he "*heard a bang on the left rear side. [he] lost control and the vehicle drove [sic] to the right side of the road. It stopped in a ditch*". In the cross, he said that he could not tell what had hit his vehicle.

14. From the eye witness account, the appellant's vehicle had left its side of the road. Doubt is removed by the appellant's evidence that the vehicle ended up in a ditch on the right side of the road towards Murang'a town. If as alleged by the appellant "something" hit the *left* side of his vehicle, it can only mean that the object was either on the left or in the middle of the road. The appellant did not deny that he was overtaking.

15. I readily find that the appellant was largely to blame for the accident for leaving his side of the road. However, the deceased clearly saw the appellant's vehicle in good time. No evidence was led that he tried to take any evasive action. Considering the totality of the evidence and the judgment in the traffic proceedings, I find that the learned trial magistrate was correct in assigning liability at 90% to 10%. In any case, the respondents did not file a cross appeal on liability.

16. I will now turn to the quantum of damages. As a general rule, an appellate court will *not* interfere with quantum of damages unless the award is *so high or inordinately low*; or, founded on *wrong* principles. **Butt v Khan** [1982-88] KAR 1, **Arkay Industries Ltd v Amani** [1990] KLR 309.

17. The respondents claimed that the deceased was employed as a motor cycle rider. His employer, Magochi Kanyonyo (PW3), conceded that he did not maintain any employment records. In his witness statement, he said that he paid the deceased "*an average of Kshs 500 per day*". The deceased's widow, PW1, claimed that she received *Kshs 400* every day from him. The evidence was self-serving and I think it was a misdirection to accept it whole heartedly. It is not lost on me either that in the amended pleadings, it is pleaded that the deceased earned "*around Kshs 15,000 per month*".

18. In the absence of clear cut evidence on the earnings, the better and just course would have been to adopt the applicable minimum monthly wage. The appellant's learned counsel had submitted in the lower court that the minimum wage of Kshs 9,000 per month should have applied.

19. That figure was erroneous. I have taken *judicial notice* of the applicable *Regulation of Wages (General) (Amendment) Order 2013* published in the Kenya Gazette as Legal Notice Number 197 of 2013. That is the year the deceased died. The minimum wage in category (d) for was Kshs 10,315.95 for former municipalities. I thus set aside the multiplicand of Kshs 15,000 and substitute it with Kshs 10,315.95 per month.

20. Regarding the multiplier, it is common ground that the deceased was 25 years. The court below adopted a multiplier of 30 years. I think that was too speculative and generous in the circumstances. In assessing damages under the **Fatal Accidents Act**, the court must be guided by the age of the deceased, life expected, vicissitudes of life and the acceleration of the lump sum payment. See **Kemfro v Lubia** [1982-88] KAR 727.

21. Taking into account the age of the deceased, his employment as a motorcyclist and the vicissitudes of life, I find that a multiplier of 20 years is more reasonable.

22. The deceased was married and had a young daughter. I agree that the dependency ratio of 2/3 was reasonable. The arithmetic on this head of damages thus ends up as follows: $Kshs\ 10,315.95 \times 12 \times 20 \times \frac{2}{3} = Kshs\ 1,650,552$ less 10% liability.

23. I will now turn to the other heads of damages. The deceased suffered severe injuries and died five days later. He obviously experienced gruesome pain. I find no reason to disturb the award of Kshs 50,000 for pain and suffering. I also find no grounds to interfere with the award of Kshs 70,000 for loss of expectation of life.

24. The appellant had attacked the judgment for failing to deduct the award for loss of expectation of life against the one for loss of dependency. That submission falls flat on its face. There is nothing in the impugned decision to show that the learned trial magistrate did not take into account the effect of the overall award. Paraphrased, he was not required to do a *mathematical deduction*; all that he was called upon to do was to *take into account* the award for loss of expectation of life in arriving at the overall damages.

25. This was succinctly captured by *Chesoni Ag. JA* (as he then was) in **Kemfro v Lubia** [supra]-

To be taken into account and to be deducted are two different things. The words used in s. 4(2) of the Fatal Accidents Act are "taken into account". The section says what should be taken into account and not necessarily deducted. For me it is enough if the judgment of the lower Court shows that in reaching the figure awarded under the Fatal Accidents Act the trial judge bore in mind or considered what he had awarded under the Law Reform Act for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction as suggested.....

26. Lastly, the respondents had specifically pleaded in paragraph 9 of the amended pleadings for special damages of Kshs 323,407. The 1st

respondent produced a bundle of receipts for Kshs 230,057 as medical expenses; separate receipts for procuring a limited grant (Kshs 30,000); and, a further Kshs 24,850 for the copy of records, mortuary fees, hearse and coffin. I thus find that the respondents strictly proved the sum of Kshs 284,907 only. The learned trial magistrate fell into error by awarding a further sum of Kshs 50,000 as *funeral expenses*.

27. The upshot is that this appeal *partly* succeeds. The decree of the lower court is *set aside*. There shall now be judgment in the following terms:

General damages for pain and suffering.....Kshs 50,000.

Loss of expectation of life.....Kshs 70,000.

Loss of dependency.....Kshs 1,650,552.

Special damages.....Kshs 284,907.

Subtotal.....Kshs 2,055,459.

Less 10% contributory negligence.....Kshs 205,545.90.

Net Award.....Kshs 1,849,913.10.

28. The upshot is that the appellant shall pay to the respondents Kshs 1,849,913.10. I grant the respondents interest on the sum from 29th August 2017, the date of the original decree.

29. Costs follow the event and are at the discretion of the court. I award the respondents costs in the *lower court*. Each party shall however bear its own costs in this *appeal*.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 24th day of September 2020.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:

No appearance by counsel for the appellant.

No appearance by counsel for the respondent.

Ms. Dorcas Waichuhi & Ms. Susan Waiganjo, Court Assistants.