



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei – J

CIVIL APPEAL NO. 38 OF 2017

MBITHUKA BENSON.....APPELLANT

VERSUS

NZUKI MUTHAMA *alias* CHARLES NZUKI MUTHAMA.....1ST RESPONDENT

WINFRED NGUNA KIMULI *alias* WINFRED NGUNA KIOKO

(Suing as the personal representative of the estate of

SHARON MUENI-deceased).....2ND RESPONDENT

(Being an Appeal from the Judgement of Honourable A. Lorot, (SPM) at Machakos Chief Magistrate’s Court in CMCC 337 of 2014 delivered on the 16.3.2017)

BETWEEN

NZUKI MUTHAMA *alias* CHARLES NZUKI MUTHAMA.....1ST PLAINTIFF

WINFRED NGUNA KIMULI *alias* WINFRED NGUNA KIOKO (Suing as the

personal representative of the estate of

SHARON MUENI-deceased) 2ND PLAINTIFF

VERSUS

MBITHUKA BENSON.....DEFENDANT

JUDGEMENT

1. Vide pleadings filed in the trial court on 13.5.2014, the respondents filed a plaint as the legal representatives of the Estate of the deceased who was said to have died from a road traffic accident that occurred on the 12.7.2013 in which the deceased was driving vehicle KBD 567W along Machakos- Wote Road when he was involved in a head on collision with motor vehicle KBQ 569P that had veered off its lane. The respondents pleaded negligence and averred that the deceased’s estate suffered special damages of Kshs 123,330/-. It was pleaded that at the time of the death of the deceased, he was a 26-year-old driver and mechanic who used to earn Kshs 30,000/- per month; that he had seven dependants, being the wife, 2 daughters, 2 sons, father and mother. The respondents prayed for damages under the Law Reform Act and the Fatal Accidents Act. The respondent also prayed for costs of the suit plus interest.

2. In his defence, the appellant denied negligence; denied the applicability of *res ipsa loquitur*, loss and damages and pleaded that the accident was wholly caused and or contributed to by the negligence of the driver of motor vehicle KBD 576W. It was pleaded that the Appellant would seek indemnity and or contribution against the registered owner of motor vehicle KBD 576W.

3. The matter proceeded for hearing where Charles Nzuki Muthama testified as Pw1. He sought to rely on his witness statement and testified

that he filed an ad litem grant (Pexh 1); that the accident was reported at Makueni Police Station and an abstract issued (PMFI-2); that he was issued with a death certificate (Pexh 3) and that he incurred burial expenses (Pexh 7 and 8). He told the court that the deceased was a driver and mechanic. On cross examination, he testified that the deceased had four children and that he did not have evidence that the deceased was earning Kshs 30,000/- per month.

4. On 23.2.2017, a consent was recorded wherein liability was apportioned in the ratio of 80:20 as against the appellant. There was no finding as to the close of the respective cases of the parties, and none of the appellant's witnesses testified. There is no indication that the suit was set down for proof of damages.

5. Vide a judgement dated and delivered by the trial court on the **16.3.2014**, the learned magistrate took issue with the age of the deceased as 26 years and yet he had a child of 13 years. However, he noted that the appellant did not dispute the same. He awarded the respondent total damages of **Kshs. 4,152,700.00** that was subject to 20% contribution giving an amount of **Kshs 3,322,060/-** consisted of **Kshs. 50,000.00** for pain and suffering, **Kshs. 150,000.00** for loss of expectation of life and a sum of **Kshs. 3,840,000.00** for loss of dependency (after using a dependency ratio of 2/3, a multiplier of 24 and an earning capacity of Kshs 20,000/-) and **Kshs. 112,700.00** for special damages. The Appellant was dissatisfied with the award on quantum and as such preferred this Appeal vide a Memorandum of Appeal dated 4.4.2017 and filed in Court on 5.4.2017.

6. It was counsel's position that the quantum under the Fatal Accidents Act namely dependency as well as the multiplicand was too high and erroneous. Further, that the statutory minimum wage was not considered; that there was an error in awarding damages under both the Law Reform Act and the Fatal Accidents Act and hence he sought that the judgement that was given by the trial court be set aside and that damages be reassessed.

7. Further, the appellant's counsel took no issue with the **KShs. 50,000.00** awarded for pain and suffering. However, counsel submitted that the award made under the Fatal Accidents Act be set aside and substituted with an award of Kshs 720,000/- using the minimum wage of Kshs 10,000/- as at the time of death multiplied by 18 years being the difference to retirement and 1/3 ratio. It was submitted that there was no evidence of the relationship of the named dependents to the deceased as there was no letter from the chief or birth certificates of the named children.

8. The respondent's counsel supported the award of the trial court and sought for the dismissal of the appeal.

9. This being a first appeal this court's role as the first appellate court is to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court saw and heard the witnesses and giving allowance for that and to reach an independent conclusion as to whether to uphold the judgment of the trial court. This was observed in the case of **Selle v Associated Motor Boat Co. [1968] EA 123**.

10. Having considered the rival pleadings in the trial court, the evidence therein, the memorandum of appeal and the respective submissions of counsel, the issues for determination relates to the propriety of the procedure in the trial court as against the consent that was recorded and whether there been a case made for disturbing the award of the trial court.

11. I note that there was a consent that was recorded and after the consent was recorded, there was no formal proof hearing and there was nothing much to enable this court conclude that there was evidence in trial that would support the decision that was made. However, I have considered **Order 25 Rule 5 of the Civil Procedure Rules** that states as follows:

“Where it is proved to the satisfaction of the court, and the court after hearing the parties directs, that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall, on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith”

12. This would mean that the procedure had been compromised by the conduct of the parties and as such the issue of liability is deemed closed, failure to conduct formal proof was an infraction whose effect was compromised by the parties and as such the same cannot be said to negatively affect the outcome of the case. In any event the respondent duly presented his evidence and produced exhibits which was sufficient for purposes of determining the question of quantum after a consent on liability was entered. The entry of the consent on liability left no doubt that the conduct of the parties was deemed to imply that their respective cases had been closed at the stage they had reached leaving only the parties to submit on the remaining issue of quantum.

13. The aspect of quantum was canvassed by way of submissions that have been analyzed above. The law is now well settled that an appellate court will not interfere with an award of damages by a trial court unless the trial court has acted upon a wrong principle of law or that the amount is so high or so low as to make it an entirely an erroneous estimate of the damages to which the plaintiff is entitled.

14. The evidence of Pw1 is to the effect that the deceased was aged 26 years and that he was a driver and a mechanic. In line with the multiplier approach, the damages would be by multiplicand and the result reduced by 1/3 because as at the deceased's death I am not satisfied that he was married or had a dependant. No evidence was tendered to prove that the alleged children were sired by the deceased as no birth certificates were produced. The multiplicand would be multiplied by the expected number of years that the deceased would have lived had he not been a victim of wrongful death and multiplied by 12 months.

15. The deceased was aged 26 years when he met his death and the life expectancy as per statistics given by the World Bank was 66.7 years. There was no documentary evidence presented by the respondent as proof of income and as such he will be treated as an ungraded artisan. The deceased was reported to have been a driver cum mechanic and this fits the above grading. The multiplicand would be the expected monthly earnings of an ungraded artisan. In **Fredrick Ochieng Odero v Nakuru Teachers Training College [2018] eKLR**, the court observed that **“Ungraded artisan is defined as one who carries out simple repairs and maintenance work with a reasonable proficiency in a particular trade or trades although not in possession of any Trade Test Certificate”**. I shall take the retirement age that would be 55 years

meaning that the working life of the deceased would be 22 years on average. It is not in dispute that the deceased engaged in risky jobs as a driver and mechanic and thus the mortality rate is expected to be high. In the ungraded artisan field, the average earnings of the deceased as per the Minimum Wage in 2011 as at the time of death was Kshs 10,239/- (See **The Regulation Of Wages (General) (Amendment) Order, 2011**). The calculation for loss of dependency is thus worked out as $22 \times \frac{1}{3} \times 10,239 =$ Kshs 901,032/-.

16. By way of comparison, the award of the trial court was far from my finding herein and hence the appellant's grievance on the award on loss of dependency has merit.

17. I will not interfere with the amount for pain and suffering because counsel took no issue with the same. *A priori*, the rest of the amounts proposed by the trial court remain undisturbed as the appellant's counsel did not have any objection thereto.

18. In the result, the appeal succeeds to the extent that the trial court's award on damages is hereby set aside and substituted with the following awards:

Loss of dependency	Kshs 901,132/-
Pain and suffering	Kshs 50,000/-
Loss of expectation of life	Kshs 150,000/-
<u>Subtotal</u>	Kshs 1,101,132/-
Less 20% contribution	Kshs 220,226/40
Total	<u>Kshs 880,905/60</u>
Add Special damages	Kshs 112,700/-
Net total	<u>Kshs 993,605/60</u>

19. The appellant is awarded 1/3 cost of the appeal while the respondent will have full costs in the lower court.

It is so ordered.

Dated and delivered at **Machakos** this 23rd day of **September, 2020**.

D. K. Kemei

Judge