



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

HCCA NO. 66 OF 2017

MEGA INDUSTRIES LIMITED..... APPELLANT

VERSUS

JANE JEROTICH.....RESPONDENT

JUDGMENT

(Being an appeal from the judgment in Eldoret CMCC No. 500 of 2017 delivered by Chief Magistrate Honorable M. WAMBANI on 9th May, 2017).

The appellant filed the present appeal being dissatisfied with the decision of the trial court's judgment delivered on 9th May 2017 in Eldoret CMCC No. 500 of 2017.

The respondent instituted a suit vide a plaint dated 18th July 2013 in which she claimed that the defendant, his agents, servants and/or driver were responsible for an accident that occurred on 16th May 2012. The trial court in its judgment found the defendant 100% liable and awarded quantum of kshs. 2,020,000/- broken down as follows;

- i) Loss of expectation of life – kshs. 150,000/-
- ii) Pain and suffering kshs. 50,000/-
- iii) Under the Fatal Accident Act kshs. 6,500

Lost years $6500 \times 35 \times 12 \times 2/3 =$ kshs. 1,820,000/-

The appellant being aggrieved with this decision filed the present appeal.

APPELLANT'S CASE

The appellant filed submissions on 20th May 2020. It submitted that the respondents were bound by their pleadings and so is the court. The plaintiff pleaded that the appellant was the registered owner of motor vehicle registration No. KAW 859Y ZC 816S whose driver was negligent hence the accident. PW1 testified and produced a police abstract to that effect. The production of a defective police abstract is fatal and the case ought to have been dismissed on that basis hence the appeal should be allowed. Despite the abstract being defective the respondent did not carry out an official search to establish ownership of the vehicle. The appellant cited the case of *Thuranira Karauri v Agnes Ncheche Njeri, Civil Appeal No. 192 of 1996* where the court of appeal rejected the submission that a police abstract was sufficient proof of ownership of the vehicle in question.

The appellant submitted that the trial court erred by proceeding to assess damages in the sum of kshs. 2,020,000/- which is excessive and not supported by case law and evidence in relation to a minor victim of a fatal accident. It submitted that the deceased was an abandoned child who lived with her grandmother as per page 126 of the record of appeal. The second last paragraph on the same page contains a statement by the plaintiff about not producing anything to show that she was helping the deceased. The appellant's position is that the mother only resurfaced to file the instant case. It urged the court to consider an award of kshs. 200,000 as global compensation noting that the child was neglected and the respondent did not know where the father was.

The trial court erred in awarding damages under the Law Reform Act when the same was never pleaded and there was no grant of letters of administration, no chief's letter, no birth certificate and therefore no proof of dependence.

It urged the appeal be allowed.

RESPONDENT'S CASE

The respondent filed submissions on 26th June 2020.

The respondent submitted that it was undisputed that the deceased was involved in an accident involving the motor vehicle KAW 895Y. The accident was reported at Eldoret Police station and the abstract produced as PEXH1 shows the particulars of the offending motor vehicle as KAW 895Y whose owner is Mega Industries Limited. The post mortem report captures the same vehicle as the offending motor vehicle.

This position was affirmed by PW1, constable Edward Obuka who confirmed from investigations that the vehicle belonged to the appellant herein. She cited the case of Wellington Ng'ang'a Njeri vs Akamba Public Road Services and Another CA Kisumu (2010) eKLR and submitted that the appellants never adduced any evidence during the trial to challenge the respondents' assertion. On cross examination of PW1 the appellant did not challenge the issue of ownership of the said motor vehicle. PW2 was not put to task to explain the issue of ownership. The trial magistrate was in order to find that the motor vehicle was owned by the appellant.

The abstract produced in court and the testimony of PW1 clearly indicate that the accident occurred at 5pm along the Eldoret Webuye road and the deceased died on the spot. PW3's evidence was corroborated by PW1. PW3 witnessed the entire accident and testified in court over the same. The appellant's driver knew the area where the accident occurred was busy and should have exercised caution. The appellant never adduced any evidence showing that the deceased was at fault.

The suit in the lower court was filed pursuant to the provisions of the Fatal Accidents Act only and therefore the award by the trial court under this head is erroneous as there were no letters of administration issued to the plaintiff. The respondent concedes partly to the appeal and on award under this head only.

The court was correct in its analysis at arriving at the award of kshs. 1,820,000/-. The respondent relied on the case of Abdikadir Mohammed & Another vs John Mwangi, HCCA No. 133 of 2003, Nakuru and the case of MMGZA(Deceased) vs Muchemi Teresa (HCCCA No. 519 of 2013(2005) Eklr. Further, she submitted that the deceased was not too young for the expectations of her adult life to be purely speculative as alluded to by the appellant.

The plaintiff indicated that the deceased was her daughter who she would have fully depended on in her old age. She produced the chief's letter as proof (PEXH8). She produced a letter from the school headmaster, PEXH6 and a report card as PEXH7. It was her testimony that the deceased was a fairly bright student and had a bright future.

The appeal should be dismissed with costs save for the award under the Law Reform Act.

ISSUES FOR DETERMINATION

1. Whether ownership of the vehicle was proven.
2. Whether the appellant was 100% liable
3. Quantum under the Law Reform Act
4. Quantum under the Fatal Accidents Act

WHETHER OWNERSHIP OF THE VEHICLE WAS PROVEN

The Court of Appeal held in Wellington Ng'ang'a Muthiora v Akamba Public Road Services and Another CA Kisumu 2010 EKLR that:

"...where a police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even cross examination challenged it, the police abstract being a prima

facie evidence not rebutted could be relied on as proof of ownership in the absence of anything else as proof in civil cases was within the standards of probability and not beyond reasonable doubt as is in criminal cases. However, where it is challenged by evidence or in cross examination, the plaintiff would need to produce certificate from the registrar of motor vehicles or any other proof such as an agreement for sale of the motor vehicle which would only be conclusive evidence in the absence of proof to the contrary."

The appellant did not challenge the contents of the abstract in court during cross examination or by production of evidence to the contrary. Therefore, it is my concise finding that ownership of the vehicle was proven.

WHETHER THE APPELLANT WAS 100% LIABLE

The police abstract indicated that the accident occurred at 5.00pm. The urge for apportionment of blame on the deceased minor on the ground that she was a neglected child allowed to walk at night does not hold any water. The driver was driving through a busy area and ought to have been more cautious. The appellant failed to show that the respondent contributed in any way to the accident. Whether the child was neglected or not does not diminish the value of her life or absolve the driver from liability

thereto. The trial court was right in finding the appellant 100% liable.

QUANTUM UNDER LAW REFORM ACT

The respondent conceded that there was an erroneous award under the head of the Law Reform Act as there were no letters of administration issued.

In the case of ***Roman C Hintz v Mwangombe Mwakima (1988) 1 KAR 482*** decided on the 26th July, 1984. The capacity of a plaintiff to commence an action for the benefit of a deceased's estate under the Law Reform Act was disputed. In a split decision, the Court decided that such an action could be competently set without first obtaining letters of administration.

However, it is evident that the respondents pleaded for damages under the Fatal Accidents Act only.

In the premises the appeal against the award under this head succeeds.

QUANTUM UNDER FATAL ACCIDENTS ACT

The appellant contends that the trial court erred in awarding damages under Fatal Accidents Act as dependency was not proven.

Under *Section (4) (1)* of the *Fatal Accidents Act*, it is clear who a dependant for whose benefit a claim under the said Act can be brought. It provides as follows: -

“Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child(emphasis mine) of the person whose death was so caused, and shall, subject to the provisions of Section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct:

Provided that not more than one action shall lie for and in respect of the same subject matter of complaint, and that every such action shall be commenced within three years after the death of the deceased person.”

The respondent's position is that the production of the chief's letter indicating that the deceased was her daughter was proof of dependency. The letter was produced as PEXH8 and was not challenged by the appellant.

In ***Pamigo Limited v Phelestus Hoka Libulele (Suing as legal representative of the estate of Alex Olindi Opande (Deceased) [2019] eKLR*** the court held;

“On the issue of the dependants, the Respondent produced a letter from the Chief of Emuhaya District confirming that the Respondent was a dependant as well as his child. This letter was not disputed by the Appellant in any way or form. In my view, that was sufficient proof of dependency.”

I do therefore find that dependency was proven and the award under this head should not be disturbed.

The appeal succeeds only to the extent that the award under the Law Reform Act was erroneous and is therefore set aside.

The lower court award is therefore set aside and substituted with an award of kshs. 1,820,000/-.

S.M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 17th day of September, 2020.

In the absence of:-

Miss Wahome for the appellant

Mr. Kwame for respondent

Ms Gladys - Court assistant