



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 168 OF 2018

IMA HAULIERS LIMITED.....APPELLANT

VERSUS

FREDRICK OTEMBO AND AZIZA MUSA

(suing as the administrators and personal representatives of the estate of

VICTOR OTEMBO (DECEASED).....RESPONDENTS

(An appeal arising from the judgment and decree of the Hon. B. Ochieng, Chief Magistrate (CM),

in Kakamega CMCCC No. 452 of 2015, of 5th December 2018)

JUDGMENT

1. The suit at the trial court was initiated by the respondents herein, as administrators and personal representatives of the deceased, Victor Otembo, against the appellant, for general and special damages under the Law Reform Act, Cap 26, Laws of Kenya, and the Fatal Accidents Act, Cap 32, Laws of Kenya, arising from a motor traffic accident, involving a motor cycle on which the deceased was a pillion passenger and a motor vehicle owned and controlled by the appellant. The appellant entered appearance and filed defence, essentially comprising of denials and an averment that the subject accident had been caused solely by the negligence of the deceased, or it was caused by factors beyond the control of the appellant.
2. The trial court took oral evidence. The respondents presented three witnesses, two of whom claimed to have been eyewitnesses to the accident, the appellant did not adduce any evidence. In the end, the trial court held the appellant to have been fully liable for the accident, and proceeded to assess the compensation payable. The court awarded Kshs. 100, 000.00 for loss of expectation of life, Kshs. 10, 000.00 for pain and suffering, Kshs. 3, 085, 152.00 for loss of dependency and Kshs. 198, 000.00 special damages. After deducting a sum of Kshs. 110, 000.00 from the total of Kshs 3, 283, 152.00, being the amount under the Law Reform Act, the amount awarded came down to Kshs. 2, 173, 152. 00..
3. The appellant was aggrieved by the outcome, and lodged this appeal, arguing that the trial court erred in finding it to have been wholly liable for the accident without proper evidence, that the trial court erred in finding that the deceased was a married man with a child, that the trial court miscalculated the special damages, that the court relied on hearsay, and that the court disregarded the submissions and authorities presented and cited by the appellant.
4. On liability, I note from the trial record, that the respondents called two persons who claimed to have been at the scene when the accident happened. One witness said he saw the collision between the motorcycle and the tractor happen, while the other said that he did not witness the collision, but that he chased after the tractor and took down its registration details. The cross-examination of the two was perfunctory. It inflicted no damage to the case of the respondents. The appellant did not call any evidence to counter the story from the respondents. In the absence of contrary evidence, it cannot be said that the trial court made any error in finding the appellant wholly liable for the accident.
5. On whether the deceased was married, I note that it was the first respondent who testified. He stated that the deceased was, indeed, married, and that his widow was the second respondent. He was not cross-examined on the matter of the marriage. The first respondent was the father of the deceased, and I cannot imagine any better witness, on the matter of the marriage of the deceased, than his own father. The appellant did not call any evidence, least of all touching on the fact of the marriage of the deceased or lack of it.
6. On special damages, I note that the respondents had pleaded Kshs. 177, 000.00, but the receipts put in evidence amounted to Kshs. 199, 000.00. The general principle is that special damages must not only be specifically proved; they must also be specifically pleaded. What is pleaded was Kshs. 177, 000.00, and that is what ought to have been awarded. If the respondents desired to recover Kshs. 199, 000.00, they

should have sought to have their pleadings amended to reflect that figure.

7. On whether the trial court relied on hearsay evidence, I have looked at the record, and I noted that the court relied on evidence of persons who were present at the scene. One witnessed the collision, while the other followed the tractor shortly after the event. I have gone through the written submissions filed herein by the appellant, and noted that the appellant has not submitted on this ground. I shall treat it as abandoned.

8. On whether the submissions by the appellant were not considered, I have gone through the judgment of the trial court. At page three thereof, where the trial court began its analysis and determination, says "I have carefully considered the evidence on record as well as the submissions by learnt counsel for both sides." In the face that statement, I doubt whether the appellant can have any justification to submit that its submissions and the authorities cited were not considered. In its assessment of damages, the trial court did consider a number of authorities which are stated in the judgment. The trial court was not bound to mention the authority cited by the appellant, so long as it was stated, in the judgment, that the submissions made by the parties were considered, which included the authorities cited in those submissions.

9. Overall, I find that the appeal before me is not wholly merited, save for the little matter of the award of special damages. I shall, therefore, not interfere with the judgment of the trial court, save to the extent the limited order that the special damages be adjusted from Kshs. 199, 000.00 to Kshs. 177, 000.00. The appeal herein is determined in those terms. Let each party bear their own costs. It is so ordered

DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 30th DAY OF October, 2020

W. MUSYOKA

JUDGE