REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CIVIL APPEAL NO. 7 OF 2018

FELIX KIMANTHI MUSYOKA.....1ST APPELLANT

CAR LINK TOURS & TRAVEL LIMITED.....2ND APPELLANT

VERSUS

ALICE CHEBET CHEPKWONY

(SUING AS A LEGAL REPRESENTATIVE OF THE ESTATE OF THE

DECEASED, THOMAS KIPRONO CHEPKWONY).....RESPONDENT

(Being an appeal from the judgement and decree of Hon. Gesora, SPM, delivered on 20/02/2018, in the Chief Magistrate's Court at Narok in Civil Case No. 135 of 2015, Alice Chebet Chepkwony v Felix Kimanthi Musyoka 2. Car Link Tours & Travel Limited)

JUDGEMENT

INTRODUCTION

1. The appellant has appealed against being found one hundred per cent (100%) liable in negligence arising out of a motor vehicular fatal accident. He also has appealed against the quantum of damages in the sum of shillings two million one hundred thirty-four thousand and eight hundred shillings (Kshs 2,134,800/=) that was awarded to the plaintiff/respondent as damages.

2. The defendant/respondent has supported the judgement and decree both in respect of liability and quantum of damages.

3. I will deal with the issue of liability first followed by quantum of damages.

ON LIABILITY

4. In ground 1 the appellant has faulted the trial court in law and fact in finding that the defendant/respondent had proved her case on a balance of probability and in holding that the appellants were 100% liable in negligence in respect of the motor vehicular fatal accident involving the deceased and motor vehicle registration No. KAW 222U.

5. In ground 2 the appellants have faulted the trial court in failing to apportion liability when the evidence on record was that the deceased was hit while crossing the road having failed to exercise due care for himself and other road users.

6. The evidence of the respondent through an eyewitness (Pw 3 Godfrey Mandila Walela) was that on 2/12/2013, he was walking to his house. The deceased was standing on the right side of the road as he faced Bomet. A lorry came from Bomet. The deceased wanted to cross the road. He did not get to the yellow line. A small saloon motor vehicle registration No. KAW 222U came from Nairobi and knocked him on the right side. This vehicle was in high speed.

7. The motor vehicle stopped and took the victim.

8. Furthermore, Pw 3 testified that:

> "*After the lorry passed the deceased the vehicle got off its lane and came to the opposite lane and knocked the deceased on the other lane. He was behaving like someone who wants to overtake. I don't know why he left his lane. The accused (sic) had just began crossing he had not reached the yellow line say in the middle of the other lane. He landed off the road. After he was hit he landed on the bonnet on the front screen and then he went off and landed on the side. The vehicle stopped on the side of the road. I saw the*

accident."

9. The defendant/respondent called No. 235617 IP Moses Onyango (Pw 1) who produced a police abstract dated 25/5/2014, which was in respect of the accident, which occurred on 2/12/2013 at about 8.00 pm along Mulot-Bomet road at Korara. The case is still under investigation. Pw 1 testified that no one has been blamed for the accident.

10. The appellants through Godfrey Mandila Walela (Dw. 1), testified on behalf of the appellants. It was the evidence of DW 1 that on 2/12/2013 he was driving the offending Subaru motor vehicle registration No. KAW 222U station wagon along Narok/Bomet road, past Narok.

11. He further testified that after by-passing a lorry that was moving from Bomet towards Narok, Dw 1 saw a person on the road. Dw 1 tried to apply brakes, but the motor vehicle swerved to the right. That person was very close. He was running towards the middle of the road. The right side of the car near the tyre hit him. He landed on the windscreen on the side mirror side and he fell on the road. Dw 1 stopped and took the deceased to hospital. He was alive.

12. Dw 1 continued to testify that there was not much traffic and there was no car in front of Dw 1. The accident occurred immediately after the lorry passed. Dw 1 testified that he wanted to avoid hitting the deceased, but there was a ditch on his side of the road. He then applied emergency brakes as a result of which the car went to the right side, where it was not intended to go. He also testified that he was not charged.

13. While under cross examination, Dw 1 testified as follows. He admitted that he swerved to the right according to his statement, but in his evidence he testified that he swerved because of applying emergency brakes. He also testified that there was a ditch on both sides of the road. It was also his evidence that he had very limited time to decide, so he slammed the brakes. He also admitted that the vehicle swerved because of the brakes. Finally, Dw 1 testified that he could say whether the deceased was intoxicated or not.

14. A report of investigation was by consent put in evidence as a defence exhibit D Eexh. 1.

15. This is a first appeal. As an appeal court I am required to re-assess the entire evidence produced at trial and proceed to make my own independent findings. At the same time, I am required to defer to findings of fact of the trial court based on credibility. *See Peters v Sunday Post Ltd [1957] EA 24*. I have done so. As a result, I find that the first appellant was driving towards Bomet along Narok-Bomet road. There was a lorry driven from the opposite direction towards Narok. I find that after the lorry passed the deceased, the vehicle of the first appellant got off its lane and came to the opposite lane and knocked the deceased on the other lane. As at that time, the deceased had just begun crossing the road and had not reached the yellow line, which was in the middle of the road. While under cross examination, the appellant admitted that he swerved to the right side according to his statement. But in his evidence the appellant testified that he swerved because of applying emergency brakes.

16. After re-assessing the entire evidence I find that the appellant's version of events was disbelieved by the trial court. There was evidence which supported the findings of the trial court. It has not been demonstrated that the findings were erroneous. The court rightly found that the truth lay with the respondent's witnesses and not the appellant.

17. I also find that the first appellant applied emergency brakes upon seeing the deceased. I find that his vehicle swerved to the right as a result of applying the emergency brakes. I also find that the reason for applying the emergency brakes was because he was trying to avoid hitting the deceased. In the circumstances, I find that the first appellant was over speeding to the extent that he was unable to control his vehicle. He also was unable to stop his vehicle.

18. The first appellant while under cross examination testified that there was a big ditch on both sides of the road. In view of this condition of the road, the first appellant ought to have driven at such a speed as to enable him to stop the vehicle bearing in mind his own evidence which was a follows. First, in view of his evidence that there was not much traffic on that stretch of the road. Second, there was no car in front of him. Third, by his own admission the first appellant testified that: "***I had no reason to go to the right***." The appellant went to the right side because he was unable to control his vehicle due to over speeding.

19. In view of the foregoing evidence of the respondent and the appellant, I find that the submission of counsel for the appellant that the trial court misapprehended the evidence is not correct and is not supported by the evidence on record. I further find that it is the appellant who caused the accident by hitting the deceased on the other lane, after the appellant had crossed the yellow line to the other side. If the appellant had remained on his lane, this accident would not have occurred.

20. Based on the Court of Appeal decision in *Patrick Mutie Kimau & Another v Judy Wambui Ndurumo, Civil Appeal No. 254 of 1996*, which in turn cited with approval paragraph 186 of Charles on Negligence, counsel submitted that the deceased owed a duty of care to other highway users to move with due care. This principle of law cannot be contradicted. I find on the totality of the evidence that the deceased is not to blame for the accident, since the appellant hit him on the other side of the lane after he (the appellant) veered to the right. It is clear therefore that it was the appellant who breached his duty of care to other road users.

21. Counsel for the appellant has submitted that they had pleaded and proved contributory negligence. Counsel has blamed the deceased for crossing the road near a bend and at night and he says this constitutes negligence. The evidence of Pw 3 has exonerated the deceased. The evidence of Pw 3 which the court rightly believed totally blamed the appellant as the person who caused the accident.

22. Counsel has submitted that Pw 3 was a trumped up witness, whose evidence was tailored from the investigation report. Questions as to whether pw 3 was a trumped witness should have been put to Pw 3 when he testified. Pw 3 was able to see how the accident occurred since the appellant's motor had head lights, although it was at night. The submission that Pw 3 was not in a position to witness the accident is not based on the evidence on record and I therefore find no merit in this submission, which I hereby dismiss.

23. Counsel for the appellant submitted based on the evidence of the IP Moses Onyango (Pw 1), the base commander at Narok traffic department, that no one was to blame for the accident; including the appellant. The evidence of Pw 1 was that the accident was still under investigation. He merely produced the police abstract report as exhibit 1. He did not visit the scene of the accident to ascertain the point of impact. He did not testify that he was the investigating officer. How could the police blame anyone for the accident in respect of an investigation that had not been completed? It therefore follows that the weight to be attached to his evidence is very minimal. After re-assessing his evidence in the context of the entire evidence, I find that the weight to be attached to his evidence is very minimal and it does not affect the finding that the appellant was entirely to blame for the accident. I therefore reject the submission that the appellant was not to blame for the accident.

24. Finally, counsel for the appellant submitted that the report prepared by Limpid Insurance Investigators Limited was admitted into evidence by consent without the maker being called as a witness. Counsel therefore submitted that the findings of the said report were not open to challenge. The photographs in that report show that the areas of damage include the motor vehicle's windscreen and the right front panel. This evidence supports the evidence of PW 3 that the motor vehicle hit the deceased after it veered towards its right hand side into the lane wherein the deceased was. After re-assessing the findings of the said report in the context of the entire evidence, I find that it did not exonerate the appellant as the person who is to be totally blamed for the accident.

25. I therefore reject the submission of counsel that the said report exonerated the appellant from the blame that he caused the accident.

26. Upon my own re-assessment of the entire evidence, I find that the findings of the trial court were supported by the evidence on record.

27. In view of the foregoing findings, I find that the first appellant was totally to blame for the accident to the extent of one hundred per cent (100%).

28. Furthermore, I also find that the plaintiff/respondent proved her case on a balance of probability.

29. The evidence of the first appellant was found to be incredible. For instant, the submission of counsel for the appellants in the lower court that the police after investigating the case did not charge the first appellant was a basis for the trial court to make a finding that the appellants were not negligent. The fact that the first appellant was not charged was not in itself evidence of driving non-negligently. For example, in a case where a driver is charged, the charging itself is an allegation that is subject to proof beyond reasonable doubt.

30. Furthermore, it is only where a suspect has been convicted of an offence of negligence driving that is conclusive proof of evidence of negligence. See *Ahmed Bashir Gele & Others v Mohamed Hassan Yunis & Others, Civil Appeal No. 6 of 2019, High Court at Narok*. I find no merit in ground 4 and I hereby dismiss it for lacking in merit.

31. In ground 5 the appellants have faulted the trial court both in law and fact in finding that the first appellant veered off to the right and hit the deceased for no reason; when the first appellant explained that he veered off to the right to avoid hitting the deceased who had dashed onto the road. In this regard, I have already found that the first appellant was in high speed and for that reason he was unable to control his vehicle. In his own evidence, the first appellant testified that he swerved because of applying the brakes to avoid hitting the deceased. Furthermore, the first appellant also testified that the deceased landed on the windscreen after being hit. There is evidence of overspeeding. This evidence of over speeding is supported by that of Pw 3, who testified that the vehicle of the deceased was in high speed. The first appellant was unable to avoid the ditch in front of him due to speeding and as a result he hit the deceased on the right side of the lane of that road.

32. In the premises, I find that the appeal of the appellants fails on liability and is hereby dismissed.

On quantum of damages

33. In ground 5 the appellants have faulted the trial court both in law and fact in adopting a multiplier of 25 years in respect of the deceased who was aged 40 years old; which multiplier was high and resulted in damages under loss of dependency that was excessive in the circumstances.

34. The trial court made the following awards.

For pain and suffering…….....……..Kshs 150,000/=

Loss of expectation of life…….....……..Kshs 100,000/=

Special damages……..Kshs 80,000/=

Loss of dependency

9024 x 12 x 25 x 2/3……..Kshs 2,134,800/=

35. In adopting a multiplier of 25 years the trial court took into account that the people in formal employment retire at 60 years old and after retirement they go into business and work well beyond 60s and well into 70s. The trial court then concluded that due to the vagaries and imponderables of life, the court adopted a multiplier of 25 years.

36. I find that people in formal employment retire at 60 years. The issue as to whether they go into business and work well beyond 60 years

and well into 70 years is speculative in nature and is not borne by evidence.

37. In respect of the proper multiplier, the court in *Erickson Rover Safaris v Penanah Nduku Muli (suing as legal representative of the estate of Michael Kyalo Wambua (deceased), Civil Appeal No 56 of 2017, (High Court at Narok*) pronounced itself in that regard as follows:

> "*I have considered the rival submissions in respect of the proper multiplier. At the outset, I must admit that it is a difficult exercise and is contentious. I find that the trial court did not give reasons for adopting a multiplier of 12 years. I find after anxious consideration that it is proper to use 60 years as the age of retirement which produces a multiplier of 7 years (60 subtract 53 years). The usage of 60 years as the retirement age provides for certainty and uniformity in assessing damages. This is the position where no age of retirement is provided for in respect of the employee."*

38. For the reasons stated in the foregoing authority, I find that the proper age of retirement is 60 years. I further find that it provides a check against arbitrariness in this area of assessing damages.

39. It therefore follows that the proper multiplier in the instant appeal is 20 years (60 subtract 40 years).

40. Furthermore, I find as did the trial court that the deceased was in ICU for 14 days and he must have undergone a lot of pain and suffering during that period. An award of Kshs 150,000/= for pain and suffering was proper. I also find that the conventional figure for loss of expectation of life is Kshs 100,000/=, which award I also uphold. I also find that special damages in the sum of Kshs. 80,000/= were proved.

41. The final assessed damages are as follows.

Pain and suffering…….....……Kshs 150,000/=

Loss of expectation of life…….....…….....…Kshs 100,000/=

Loss of dependency (Kshs 9,024/= being the minimum wage x 20 years being the

multiplier x 12 months x 2/3 being the dependency ratio…..…….Kshs 1,443,840/=

Add special damages…….....……..Kshs 80,000/=

Grand total…….....….Kshs 1,773,840/=

42. In the light of the foregoing, the magisterial judgement and decree are hereby set aside.

43. Judgement is hereby entered for the plaintiff/respondent in the sum of Kshs 1,773,840/= together with interest at 12% per annum from the date of judgement until payment of the decretal sum of money. Judgement is also entered for the plaintiff/ respondent on interest on special damages (Shs 80,000/-) at the rate of 12% per annum until payment of the decretal sum from date of filing the suit.

On issue of costs.

44. I find that the appellants have substantially succeeded on quantum but they have failed totally in respect of liability.

45. On the other hand, I find that the plaintiff/respondent has succeeded in respect of liability but has failed in respect of quantum of damages.

46. In the circumstances, I make no order as to costs.

Judgment signed, dated and delivered at Narok this 22nd day of October, 2020 in the presence of Mr. Ndolo holding brief for Ms. Wachira for the Appellant and Ms. Karia holding brief for Ms. Maritim for the Respondent.

J. M. BWONWONG'A

J U D G E

22/10/2020