



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 167 OF 2019

(CORAM: F. GIKONYO J.)

M'TUAMKA M'MARAMBEI (*Suing as the Legal Representative of the Estate of*

PETER MIRITI*.....**APPELLANT*

VERSUS

THE BOARD OF MANAGEMENT - MIATHENE HIGH SCHOOL Alias

MIATHENE SECONDARY SCHOOL Alias MIATHENE BOYS

HIGH SCHOOL.....RESPONDENT****

JUDGMENT

1. This appeal is on liability and quantum on damages. The sum total of the 9 grounds stated in the memorandum of appeal dated 27/12/2019 is that, the trial court:

- a. Did not take into consideration contradiction and inconsistency in the Respondent's defence, written statements, oral testimony in both the civil and traffic case.**
- b. Did not consider the sufficiency of evidence and submissions by the appellant.**
- c. Made an award of damages that was manifestly low especially on dependency.**

Duty of Court

2. First appellate court should evaluate the evidence and come to own conclusions except I am reminded that I neither saw nor heard the witnesses. See: **SELLE & ANOTHER vs. ASSOCIATED MOTOR BOARD COMPANY LTD. [1968] EA 123**. In this exercise, the court is not beholden or compelled to adopt any particular style. What must be avoided however is mere rehashing of evidence as was recorded or trying to look for a point or two which may or may not support the finding of the trial court. Of greater concern should be to employ judicious emphasis and alertness, have an eye for symmetry or balance (where legally permitted) and an ear for subtleties of evidence adduced so as not to miss the grace and power of the testimony of witnesses and the applicable law. Such is a style that insists on simplicity in writing and keeping as close as possible to the words used in the testimony recorded. Ultimately, little difficulty or none at all will be experienced in making the overall impression of the evidence, facts and the law applicable in sheer clarity and directness. I shall so proceed.

Liability

3. The Plaintiff in her evidence (statement and oral testimony) alleged that on 26th May, 2012 the deceased was lawfully walking on the verge of the Kianyai- Mathene road at Amafu area when the driver of motor vehicle Registration No. KAT 698X ISUZU Bus so negligently drove the said vehicle thereby causing it to veer off the road and knock the deceased. As a consequence, the deceased sustained fatal injuries. He also produced police abstract and criminal proceedings in Traffic case No. 96/2014 at Tigania court. He however stated during cross examination that he did not witness the accident. He was only informed of the accident by Jeremiah Mwenda. Mwenda did not also witness the accident happen as he too was told about it. It is really obscure as to whether the so called witness i.e. Jeremiah or Jeremy actually witnessed the accident happening. Surprising turns of events surround this witness. PW 4, the police officer who produced the Traffic case proceedings as well as the investigation file termed this witness as a fake witness, and that he had been brought by the driver of the bus herein vehicle herein to record statement at the police station. The said investigating officer stated that the statement by Jeremy was produced by consent of the prosecution without call the witness: something he found to be strange and which he said, infuriated the trial court. This kind of adduction of evidence in a criminal case is problematic and has the potential of affecting rights of victims of crime. I

should think that little weight or not at all should be given to such evidence.

4. Be that as it may, the plaintiff's witnesses PW 2, Esther Karimi and PW 3, David Kanake witnessed the accident. According to them, the bus overtook them at high speed. PW 2 was barely 10 steps behind the deceased. She told the court during cross examination that there were people where the body- this was before the bus reached there. She said that people pelted the bus with stones because it sped off after hitting the deceased. She stated that it was not dark as it was between 6.30 and 7.00 p.m. And, despite its dust on the road, she was able to see what was happening.

5. PW 3, corroborated the evidence by PW 2. He specifically stated that after the bus passed them by he heard a knock sound about 30 – 40 m away. He went to the scene and found the deceased had been hit by the bus and blood was oozing out from his ears, mouth and back. The bus did not stop after the accident. It sped off only to come back later following the police vehicle. He was able to identify it as the one that hit the deceased.

6. PW 4, Sgt. Robert Biganda testified to the effect that investigations show that the deceased was run over by the bus in question. It confirmed the account of the accident narrated by PW 2 and PW 3 who also testified in the traffic trial.

7. But DW 1 seems to allege that the deceased had been lying on the road drunk and may have been ran over by other vehicles as he found him already in the ditch. He however stated that he had stopped to see what was happening and that when he started off, the people who had gathered there started to pelt the bus with stones forcing him to stop again. He kept on changing his story: at other times he stated that his bus was not pelted with stones. He also was not clear how and why police took custody of the bus. He simply stated that when the police came to take the body, they asked him to drop the students and return the vehicle to the station. On this see the case of *LARKIN VS. NASSAU ELECTRIC R. R. Co. 98 N. E 465 (N. Y., 1912)* it was stated that:

“Repugnant statements or contraries cannot be true and the fact that the witness has made them tends to show that his is untrustworthy through carelessness, an uncertain memory or dishonesty. Nor need there be a direct and positive contradiction. It is enough that the testimony and the statements are inconsistent and tend to prove differing facts.”

8. The ever dependable method of resolution of disputes is to consider both accounts and come to a just decision. But, the trial magistrate seems to have been too abrupt in reaching the penultimate decision on liability without analysis of the evidence, facts of the case and the law as applied to the facts. After merely setting out the evidence, he simply stated: -

“Defendant and the deceased were equally at fault thus this court shall appoint liability equally at the ratio of 50%: 50% between the deceased represented by the plaintiff and the Defendant.”

9. Mere restating what witnesses stated is not analysis of evidence as required in law. Conclusions and findings made must be clearly linked to the evidence, the facts of the case and the law as applied to those facts.

10. It was claimed that the deceased was walking on the road. This was a marram road. Again, it was not clear whether the deceased was walking on the right or left side of the road. It is ordinary traffic recommendation that pedestrians should walk on the right side of the road so that they are able to clearly see oncoming vehicles as well as be further from vehicles coming from behind you. I am stating these things because this is not a clear case where blame should be 100% on one party. Such cases are not determined on mathematical precision; but on the basis of courts good judgment as dictated by the circumstances of the case.

11. The evidence shows that the bus hit the deceased and he died as a result of injuries sustained. The driver of the bus did not have due regard of the condition of the road and presence of other road users including the deceased. In light of these circumstances, I am inclined at appointing liability at 50%: 50%. At least I have analyzed the evidence and the facts that emerge therefrom in making an finding on apportionment of liability.

Quantum

12. Assessment of damages is at the discretion of the trial court. And appellate court will only interfere with the exercise of the discretion only where the trial court acted on wrong principle of law or made inordinately high or low award of damages which represents a wholly erroneous estimate of damages. See the case of **Kenya Bus Services Limited vs. Jane Karambu Gituma Civil Appeal Case No. 241 of 2000** by the Court of Appeal as follows:

“...in this regard, both the East African Court of Appeal (the predecessor of this Court) and this court itself have consistently maintained that an appellate court will not interfere with the quantum of damages awarded by a trial court unless it is satisfied either that the trial court acted on a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account of some relevant one or adopting the wrong approach), or it has misapprehended the facts, or for those or any other reasons the award was so inordinately high or low so as to represent a wholly erroneous estimate of the damages.”

13. The trial magistrate awarded a sum of Kshs. 720,000/- for loss of dependency. The plaintiff was the father of the deceased; old and sickly; and depended upon his son, the deceased. The plaintiff further testified that the deceased was not married and had no children. The plaintiff therefore proved dependency.

14. In his submissions the plaintiff urged that recent cases, for instance Kiambu HCCC No. 16 of 2016 Henry Waweru Karanja & Another, vs. Teresia Nduta Kagiri adopted a ratio of 1/2. Yet the trial court departed and adopted a lower ratio of 1/3 without good reason. He argued that Kenya's jurisprudence is growing and courts are now departing from previously hold position on dependency. He cited cases to support this position. According to the plaintiff, the deceased was aged 56 years old and working as a watchman earning a sum of Kshs.

45,000 per month prior to his demise. In his circumstances, a multiplier of ½ should be applied. He argued that the deceased was also a miraa trader earning at least Kshs. 100,000/- He alleges that this fact was overlooked by the trial court.

Although counsel submitted that earning from miraa was proved, I see no such evidence. I however see confirmation from his employer that the deceased was working as a watchman earning Kshs. 45,000/ per month. This does not however, mean he could not have engaged in miraa business. For this reason, I should think that insisting on a multiplier would be groping in the dark or at best, engaging the discipline of speculation on his total earnings. See what Ringera J (as he then was) said of use of multiplier in the case of **Kwanzia Vs Ngalali Mutua & another** that:

“The Multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency are known or are knowable without undue speculation, where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do.”

15. Accordingly, a global sum should be the appropriate award on dependence. The trial court labored to use a multiplier in this case, thereby, falling into an error in principle. I set aside the award on dependency and or lost years. Taking all factors into consideration that; he was aged 56 years, was a watchman, and was supporting his elderly father, I award a sum of Kshs. 800,000/- for lost years and dependency.

Loss of expectation of life

16. The death certificate shows that the deceased died at the age of 56 years. The trial court awarded a sum of Kshs. 150,000/=. Ordinarily, this head attracts a sum of Kshs. 100,000 – 200,000/=. I find Kshs. 150,000/- to be reasonable. I award it.

Pain and suffering

17. The certificate of date of death to be 26/5/2012. Evidence from witnesses account shows that this was the date of the accident. Accordingly, the deceased died on the same day. A conventional figure of Kshs. 10,000/= is reasonable. I so award.

Special damages

18. A sum of Kshs. 85,000 was specifically proved. I so award.

19. However, it was wrong for the trial court to have subtracted the damages under Law Reform.

20. Ultimately I award:

- a) lost years/dependence - Kshs. 800,000/=
- b) Pain and suffering - Kshs. 10,000/=
- c) Loss of expectation of life - Kshs. 150,000/=
- d) Special damages - Kshs. 85,000/=

Total Kshs. 1,045,000/=

Less 50% Kshs. 522,500/=

NET Kshs. 522,500/=

With cost and interest on the award

21. Given the results of the appeal each party shall bear costs of the appeal. It is so ordered.

Dated, signed and delivered at Narok through Teams Application this 23rd day November, 2020

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F. GIKONYO

JUDGE