REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 72 OF 2019

ANTONY KAMAU KUNGU.....APPELLANT

=VRS=

LEAH WANJIKU MACHARIA {Suing as the administrator of the

Estate of STEPHEN IRUNGU MUNYIRI (Deceased)}.....RESPONDENT

{Being an appeal against the Judgement of Hon. C. Kutwa (Mr.) – SPM Gatundu dated and delivered on the 25th day of April 2019 in the original Gatundu Chief Magistrate's Court Civil Case No. 63 of 2017}

JUDGEMENT

The respondent sued the appellant for general and special damages under the Law Reform Act and the Fatal Accidents Act arising from the death of their kin who was run over by the appellant's motor vehicle Registration No. KBB 278 on 7th May 2019. After considering evidence from both sides the trial Magistrate found the appellant wholly to blame for the accident and awarded damages to the respondents as follows: -

(a) Pain and suffering – Kshs. 100,000/=

(b) Loss of dependancy – Kshs. 3,200,000/=

(c) Special damages – Kshs. 26,500/=

(d) Loss of expectation of life – Kshs. 100,000/=

The appellant being aggrieved by the trial Magistrate's finding on liability and the quantum of damages preferred this appeal. The grounds of appeal are: -

"1. That the learned Senior Principal magistrate erred in law and in fact in awarding liability at 100% in favour of the Respondent as against the Appellant despite all the evidence that was tendered in court by the Appellant during hearing to prove that the deceased was fully to blame for the accident.

2. That the learned Senior Principal Magistrate erred in law and in fact in awarding the Respondent excessive general damages of Kshs. 3,336,500/=.

3. That the Learned Magistrate erred in law and fact in awarding general damages to the Respondent which were so inordinately high as to represent an entire erroneous estimate.

4. That the learned Senior Principal Magistrate erred in law and in fact in awarding the Respondent general damages without considering the Appellant's defense and written submissions.

5. That the learned Senior Principal Magistrate erred in law and in fact by disregarding a consent signed by both parties allowing the Appellant to file his written submissions before delivery of the judgement.

6. That the learned magistrate erred in fact and in law in the way he weighed the evidence tendered in court."

The advocates for the parties preferred to canvass the appeal by way of written submissions. The appeal is vehemently resisted. From the

record and the submissions before me it is not denied that the accident occurred at the time and place alleged. It is also not disputed that the deceased died as a result of that accident. The negligence attributed to the appellant is however vehemently disputed.

The brief background of the case is that the appellant had gone to a certain home to deliver manure and had to enter the homestead and the place where the heap of manure was by reversing. Unbeknown to him the deceased who the appellant alleged to have been drunk was lying on the heap covered with a polythene bag and as the vehicle reversed he was run over thereby sustaining injuries which led to his death. The respondent called a witness who alleged to have been present when the accident occurred. The witness alleged to have shouted to the driver of the appellant's motor vehicle to alert him of the deceased's presence but the driver did not heed his warning. He also claimed that the driver did not have a turn boy to direct him as he should have. This was denied by the appellant's driver. He stated that he had a turn boy and called the turn boy to testify. He (the driver) testified that the only way he could approach the yard where they were to offload the manure was to reverse. He stated that in the yard there was another heap of manure that was covered with a polythene paper and that as he reversed he felt an obstruction which he requested the turn boy to remove and it was then that the turn boy stumbled on the deceased. He stated that the deceased was totally drunk and unconscious and that was the reason he could not hear the vehicle. He stated that after the accident the police were notified and the deceased was taken to Kiambu County Hospital where he later died.

Counsel for the appellant submitted that the deceased negligently exposed himself to harm by being intoxicated and sleeping in a heap of manure that was covered with a polythene bag. Counsel urged this court to find the deceased was the author of his own misfortune and hence wholly liable. Counsel urged this court to dismiss the suit but submitted that should the court be inclined to apportion liability then the deceased should bear 90% and the appellant 10%.

On the quantum of damages Counsel challenged the awards for pain and suffering, loss of expectation of life, special damages and loss of dependancy. She submitted that the court should not have awarded any damages for pain and suffering and should have awarded Kshs. 60,000/= but not Kshs. 100,000/= for loss of expectation of life. Counsel contended that the deceased died instantaneously and so was not entitled to damages for pain and suffering. In support of her submission she cited the case of **Jemimah Wambui Njoroge v Phillip Mwangi [2001] eKLR** and the case of **Kenya Power & Lighting Company Ltd v Eko & another [2018] eKLR.**

On loss of dependancy Counsel contended that because the respondent did not adduce evidence of the deceased's income the trial court erred in relying on a multiplicand of Kshs. 20,000/= instead of adopting the applicable monthly minimum wage which was Kshs. 5,436.90. On this Counsel relied on the case of **Beatrice W Murage v Consumer Transport Ltd & another [2014] eKLR.** It was also Counsel's submission that the deceased who died aged 37 years had an expected life span of 50 years and taking the vagaries of life into account a multiplier of 13 years would have sufficed.

On special damages Counsel faulted the trial Magistrate for awarding funeral expenses of Kshs. 15,000/= and medical expenses of Kshs. 7,800/= which were not pleaded. She urged this court to award only that which was specifically pleaded and strictly proved.

Counsel further faulted the trial Magistrate for writing the judgement without the appellant's submissions and for considering that to be lack of evidence.

Counsel for the respondent however submitted that the evidence of the respondent's eye witness was not controverted and that the trial court was correct in holding the appellant's driver wholly liable.

On the quantum of damages Counsel for the respondent submitted that the awards for pain and suffering and for loss of expectation of life were modest and conventional and so should not be disturbed.

For loss of dependancy Counsel submitted that the deceased earned Kshs. 1,500/= per day and would have worked beyond 60 years as he was not a public servant. He urged this court not to disturb the award. On specials it was Counsel's contention that the same were specifically pleaded and strictly proved with documents which were not challenged at the hearing. On the contention that the court decided the case without the appellant's submissions, Counsel submitted that Counsel was given more than sufficient time to file the submissions and their laxity and disinterest should not be used to punish the respondent in any way. Counsel urged this court to dismiss the appeal with costs to the respondent.

I have considered the evidence in the court below, the rival submissions, the cases cited and the law. On liability it is my finding that the driver of the appellant's motor vehicle bore a greater duty of care given that he was in charge of a motor vehicle as opposed to the deceased who as the appellant told the trial court was dead drunk. The deceased could not reasonably have foreseen that the motor vehicle would arrive as it did and without warning reverse into the heap of manure where he was sleeping and run over him. On the other hand, the driver of the motor vehicle could have reasonably foreseen that he could run over someone at the yard hence the reason he was required to have a turn boy to direct and guide him so that he could safely reverse the motor vehicle not just for his sake or the vehicle's but because he owed a duty to anybody who could foreseeably be there. His turn boy gave evidence in the case and it is evident that he too was negligent. Had he been diligent then he would have heard the people like Pw2 who were shouting that there was someone in the vehicle's path. It was after all his duty to warn the driver that there were obstacles in the vehicle's path. On the other hand, this court heard from Pw2 that the deceased was a casual labourer and was waiting for the vehicle to arrive so that he could be hired to offload the manure. The deceased was therefore cognisant that a motor vehicle would come and he ought not to have gone to the yard drunk or even slept on the heap of manure as he did. For that he too was negligent and must shoulder some negligence albeit to a smaller degree. I shall apportion liability in the ratio 90%:10% in favour of the respondent against the appellant.

On the assessment of damages, I shall uphold the awards for pain and suffering, loss of expectation of life and special damages for the following reasons. First, it is clear from the record that the deceased did not die at the scene but at a hospital where he had been taken. Had I been the one assessing the damages I would have awarded even more than Kshs. 10,000/= but shall uphold the Kshs. 10,000/= awarded by the trial Magistrate. For loss of expectation of life, the sum awarded is conventional and I see no good reason to interfere with it. In regard to the specials, I have looked at the plaint and I find that the Kshs. 15,000/= and Kshs. 7,800= contested by Counsel for the appellant were specifically pleaded in the plaint and were strictly proved and were therefore properly awarded. The award for special damages of Kshs.

26,500/= shall not be disturbed.

As regards the award for loss of dependancy I am persuaded that the trial Magistrate acted on a wrong principle thereby arriving at an award that is inordinately high. This is because there was no evidence to prove the deceased's income and in such a scenario the practice of the courts is to adopt the applicable minimum wage. There is a long line of cases to support this principle ***(see Kenya Catholic Seminary Commission & another v Musa Omumia Rukama [2017] eKLR cited by Counsel for the respondent)***. I take it that the minimum wage applicable at the time for the cadre of workers who did the same work as the deceased was Kshs. 5,436/90 as that was not controverted. The multiplicand is not determined by how long the deceased would have lived (lifespan as per Counsel for the appellant) but by the period the deceased would have worked (retirement age). In this case the deceased would probably have worked past the age of sixty or even up to 70 years as he was not a public servant but for the purpose of this case we shall take 65 years. Since he was 37 years old he still had 28 years left. After taking the vagaries of life into account I find the multiplicand of 20 years adopted by the court reasonable and shall not disturb it. The dependency ratio of $^{2}/_{3}$ is also retained and damages for loss of dependancy shall therefore be calculated as follows: -

5,436.90 x 12 x 20 x 2/3 = 869,904/=

Accordingly, judgement for the respondent shall now be as follows: -

(a) Liability 90%:10%

(b) Pain & suffering – Kshs. 10,000/=

(c) Loss of expectation of life – Kshs. 100,000/=

(d) Loss of dependancy – Kshs. 869,904/=

(e) Special damages – Kshs. 26,500/=

The respondent shall get the costs of the suit in the Magistrate's court but for this appeal the order that best commends itself to me is that parties bear their own costs as the appeal has succeeded only in part. It is so ordered.

Signed and dated in Nyamira this 16th day of December 2020.

E. N. MAINA

JUDGE

Judgement dated and delivered in Kiambu Electronically via Microsoft Teams on this 18th day of December 2020.

MARY KASANGO

JUDGE