



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCA NO. 254 OF 2017

NZIOKA DAVID.....1ST APPELLANT

CHRISTINA MUTINDI NYALA.....2ND APPELLANT

-VERSUS-

JACINTA NDUKU MUSYOKI.....1ST RESPONDENT

ESTHER KASUSU KIMUYU (Suing as the legal representative of the estate of

TITUS MUSYOKI NDILI.....2ND RESPONDENT

(Being an Appeal from the Judgment of Hon. R.Koech (PM) in the Principal Magistrate's Court at Makueni Civil Case No.112 of 2015, delivered on 25th April 2017).

JUDGEMENT

INTRODUCTION

1. The Respondents filed a suit in the lower Court against the Appellants seeking special damages, general damages, cost of the suit and interest following a fatal road accident on 2nd June 2014 (*herein after 'the material day'*) along the Wote-Makindu road.
2. The Appellants filed a joint statement of defence and after the preliminaries; the matter was eventually slated for hearing.
3. Judgment was eventually delivered and the Appellants were found 100% liable for the accident. The Respondents received a total award of Kshs. 2,102,190/= as well as costs and interest.
4. Aggrieved by the entire judgment, the Appellants filed this appeal and listed 5 grounds stating that the Learned Trial Magistrate erred in law and fact by;
 - a) *Holding the Appellants wholly liable, which finding was not supported by evidence.*
 - b) *Awarding damages for loss of dependency which were so manifestly excessive in the circumstances as to amount to an erroneous estimate of the loss suffered by the Respondents and other dependants of the deceased.*
 - c) *Adopting an exaggerated multiplier of 24 years in assessing damages for loss of dependency*
 - d) *Ignoring the authorities cited in the defendants' written submissions and all the authorities cited therein in assessing damages.*
 - e) *Failing to take into account damages awarded under the Law Reform Act in assessing damages for loss of dependency.*
5. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the parties filed their respective submissions.
6. The duty of a first Appellate Court as was held in the cases of **Mwana Sokoni –Vs- Kenya Bus Service Ltd (1985) KLR 931** and **Selle – Vs- Associated Motor Boat company ltd (1968) EA 123** is to analyze and re-evaluate the evidence on record in order to reach it's own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses.

7. Having looked at the grounds of appeal and the rival submissions, the following issues arise for determination;

a) Who was liable for the accident and to what extent?

b) What is the quantum of damages payable, if any?

8. I will proceed to deal with the issues under the distinct heads.

LIABILITY

9. The Appellants submit that the only witness who testified (PW1) admitted that he was not at the scene of the accident at the material time and did not see the accident occur. That he could therefore not testify on causation let alone prove the particulars of negligence alleged in the plaint.

10. Further, they submit that because the particulars of negligence were denied, the Respondents were under a legal obligation to prove them for their claim to succeed.

11. The Appellants also submit that the particulars of negligence and the witness statement contradict the evidence tendered at trial which is an indication that PW1 was not at the scene. They contend that her evidence should be regarded as hearsay with no probative value.

12. The Appellants submit that the trial magistrate did not show how the evidence tendered proved the pleaded particulars of negligence and relied on the case of **Yussuf Abdalla –Vs- Mombasa Liners Ltd (2004) eKLR** where the High Court in Nairobi expressed itself as follows;

“This is a civil suit in tort. The basis of such a case is that the defendants by the negligent acts caused a wrong to occur, to which the said wrong has caused injuries to a claimant. There would therefore be a need by a claimant to prove such negligence on the part of the defendant. In this case, the plaintiff required to bring an eyewitness to describe what actually occurred during the said accident. Such eye witness could be fellow passengers in the bus or the persons in the lorry vehicle which was said allegedly to have collided into. If the plaintiff could have shown, through that evidence, that the defendants agent and or driver was reckless and careless in his driving inspite there being an obstruction allegedly on the road, this is the evidence the Court would require. The investigating officer, who investigated the case, did not attend Court. The witness who did, claimed that there was a recommendation that inquest be held, which inquest had not been done.

If the investigating officer had attended, he would have reconstituted the scene of the accident and confirmed to this Court whether indeed there had been an obstruction on the road for the defendant to have avoided...

13. The Appellants also submit that failure to call a witness at trial cannot be used as a basis to find them liable. They urge this Court to disturb the finding on liability and substitute it with an order dismissing the Respondents' suit.

14. On their part, the Respondents submit that the PW1's evidence on how the accident occurred was not controverted. That, pleadings are not evidence and as such, the defence by the Appellants that the accident was inevitable remains a mere statement.

15. That it was incumbent upon the Appellants to tender evidence to convince the Court that the accident could not be avoided despite exercise of due care and diligence.

16. They also submit that it was the responsibility of the Appellants to produce a motor vehicle inspection report to confirm that the vehicle had no pre-accident defects. They contend that tyres do not just burst when a vehicle is being driven on the road. According to them, the trial Court was correct in holding the Appellants 100% liable for the accident.

17. PW1 was Jacinta Nduku Musyoki. She testified that the deceased was her husband and that on the material day she was travelling with her husband to Nairobi in motor vehicle registration No. KBX 499Q. That the vehicle had a front left tyre burst before the accident and it was speeding. The deceased died on the spot.

18. On cross examination, she reiterated that she was inside the motor vehicle but did not get injured. That, five people died in the accident. That, the tyre burst caused the accident. That, Alex Munyao was speeding and she told him to slow down but he didn't.

19. In re-examination, she said that Alex was driving the motor vehicle on behalf of the 2nd defendant and that if the motor vehicle was not speeding, it would not have rolled after the accident.

20. I have keenly looked at the evidence on record and cannot find the basis of the Appellants' submission that '*PW1 was not at the scene of the accident at the material time and did not see the accident occur*'.

21. The record is very clear that PW1 was travelling with her deceased husband in the same vehicle when the accident occurred. In the absence of a rebuttal, the irresistible conclusion is that she was an eye witness.

22. Further, there is an admission in the defence that indeed, an accident occurred on the material day involving the subject motor vehicle causing fatal injuries to the deceased herein who was travelling as a passenger. They went on to plead that the accident occurred when the vehicle's front tyre burst suddenly causing it to go off the road.

23. Further, it was their pleading that the motor vehicle had been regularly serviced, carefully maintained and the tyres were in good condition. Accordingly, they contended that the accident was inevitable and occurred due to reasons beyond the driver's control.

24. As rightly submitted by the Respondents, pleadings are not evidence and the Appellants were under a duty to demonstrate to the Court, by adducing evidence, that indeed the accident was inevitable. It was not enough for them to state in their defence that the vehicle had been properly maintained and the tyres were in good condition.

25. In **Motex Knitwear Mills Limited Milimani HCC 834/2002** Honourable Lessit J citing **Autar Singh Bahra & Another -Vs- Raju Govindji HCC 548 of 1998** stated as follows;

“Although the defendant has denied liability in an amended defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the defendant in his defence and counterclaim are unsubstantiated, in the circumstances the counterclaim must fail.....” Where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.....”

26. I fully associate myself with the sentiments of the learned judge. Failure by the Appellants to adduce evidence meant that the claim of the accident being inevitable remained unsubstantiated.

27. Further, it is my view that vehicles which are properly maintained do not go around having tyre bursts. On the flip side, it is true that a tyre burst does not automatically mean that a vehicle must lose control.

28. The aspect of loss of control connotes the existence of negligence as particularized by the Respondents. Indeed, it was the evidence of PW1 that the driver was speeding and she told him to slow down but he didn't.

29. In **Abdul Halim T/A Tawfique Bus Services -Vs- Justus Thurania** (suing as legal representative of the estate of **Kithinji M'Irura (deceased) Civil appeal Case No. 305 of 2005 (Nyeri)** the Court of Appeal held: -

“In Kenya bus Services Ltd v. Kawira [2003 2 EA 519, this court authoritatively stated of accidents such as this one, as follows;

“Buses, when properly maintained, properly serviced and properly driven, do not just run over bridges and plunge into rivers without any explanation.”

In that case unlike this one, the doctrine of res ipsa loquitor was pleaded. We, however, think that on the facts and circumstances of this case, it does not matter whether the doctrine was pleaded or not. The evidence adduced by PW2 established negligence on the part of the Appellant's driver. If the burst tyre was new, there is no explanation, other than that the tyre burst on hitting the bridge rails, to show why the tyre burst. New tyres do not just burst. It is either they run over a sharp object or surface or upon impact over an obstruction. The Appellant, in effect, wants us to infer that because the bus had a burst rear right side tyre after the accident, then the tyre must have been the cause of the accident.

With due respect to the Appellant, evidence having been adduced to the effect that the bus was moving fast, it was incumbent upon the defendant to show, by evidence, that it was not the speed and lack of proper control which were the cause of the accident.”

30. The upshot is that there was no error in the Trial Magistrate's finding on liability and I have no reason to disturb it.

QUANTUM

31. The Trial Magistrate used the multiplier approach to calculate loss of dependency. Parties are in agreement that it was reasonable to use the minimum wage of 9,780/= as the multiplicand since the deceased's income was not proved. The point of departure is with regard to the multiplier of 24 years and dependency ratio of $\frac{2}{3}$.

32. The Appellants submit that a multiplier of 10 years should have been used and rely on **Nairobi HCCC 237 of 2013; Lucy Wambui Kihoro -Vs- Elizabeth Njeri Obuong'** where the Court applied a multiplier of 16 for a 30 year old deceased.

33. With regard to the dependency ratio, they submit that dependency was not proved as the Respondents failed to adequately prove that the deceased had children by adducing birth certificates or immunization cards to confirm the deceased's relationship with the children. They submit that a ratio of $\frac{1}{3}$ should have been used.

34. The Respondents submit that the multiplier of 24 years was reasonable as it meant that the deceased would have worked upto the age of 60 years.

35. There is no dispute that the deceased died at the age of 36 years and that he was a businessman selling clothes at Gikomba market. 60 years is the retirement age for public servants in Kenya. Being a businessman, it's possible that he would have worked past the age of 60.

36. In the trial Court, the Appellants relied on **Attorney General & Anor –Vs- Christina Kulola (2009) eKLR** where a multiplier of 14 was used for a deceased who died aged 36 years. I did not have the benefit of the Respondent’s submissions before the trial Court. I however took the liberty of looking at several other authorities.

37. In **Kisumu HCCA 75 of 2015; Mombasa Maize Millers Ltd –Vs- WIM**; a multiplier of 20 was used for a deceased who died aged 34 years and in **Machakos HCCC No. 51 of 2014 Florence Mueni Mbuva & Anor –Vs- China Wu Yi Ltd** a multiplier of 27 was used for a deceased who died aged 30 years.

38. In the circumstances, it is my considered view that a multiplier of 24 is within an acceptable range and will therefore not disturb it.

39. As for the dependency ratio, it was PW1’s evidence that the deceased was survived by three minors and she produced their birth certificates as exhibits 4(a), (b) and (c) which clearly indicate that the deceased was the father. The Appellants’ submission that dependency was not proved has no basis. It was therefore in order for the Trial Magistrate to use a dependency ratio of $\frac{2}{3}$.

40. The Appellants also complained that the trial magistrate erred by failing to take into account the damages awarded under the Law Reform Act. On their part, the Respondents submit that, in assessing damages under the Fatal Accidents Act, the Court is required to intrinsically take into account the damages under the Law Reform Act and not to carry out a mathematical subtraction as implied by the Appellants.

41. In this case, the beneficiaries under both the Fatal Accidents Act and the Law Reform Act are the same. I have looked at the judgment and there is nothing to indicate that the Trial Magistrate considered the award under the Law Reform Act in assessing the damages under the Fatal Accidents Act.

42. To avoid duplication, it is my considered view that the award under the Law Reform Act should be deducted.

43. There was no complaint with regard to the special damages. The award should therefore work out as follows;

$$9,780 \times \frac{2}{3} \times 12 \times 24 = 1,877,760 - 120,000 \text{ (award under LRA)} = 1,757,760 + 104,430 \text{ (Special Damages)} = 1,862,190/=.$$

CONCLUSION

44. The court therefore holds that the appeal succeeds partially and is allowed to that extent.

45. Thus the court makes the following orders;

i. Judgement is entered for the Respondent on liability 100% against Appellant.

ii. On quantum the Respondent is awarded as follows:-

- (Under FAA)Kshs. $9,780 \times 12 \times 24 \times \frac{2}{3} =$ Kshs. 1,877,760/=
- Add (under LRA).....Kshs. 120,000/=
- Special Damages.....Kshs. 104,430/=
- TOTAL.....Kshs. 1,862,190/=**

iii. Costs 20% awarded to the Appellant.

DATED, DELIVERED, SIGNED THIS 23RD DAY OF JANUARY 2019 IN OPEN COURT.

.....

HON. C. KARIUKI

JUDGE