



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 25 OF 2017

ROSELINE AYUMA KHISA

EMILY NALIKA OPUKA (Suing as widows and dependents of the estate of
ISAAC KHISA KHANG'ATI (Deceased).....**APPELLANTS**

VERSUS

WEST KENYA SUGAR COMPANY LIMITED.....**RESPONDENT**

(from the judgment and decree of T.K. Kwambai, R.M in Butali SRMC Civil case No. 25 of 2013 dated 29/9/2016)

J U D G M E N T

1. The appellants herein who are co – wives had sued the respondent at the lower court in their capacity as widows and dependants of the estate of their late husband Isaack Khisa Khangati wherein they were seeking general and special damages under the Fatal Accidents Act after the deceased was fatally knocked down by a vehicle registration number KBK 732X belonging to the respondent. The trial court entered judgment against the appellant as follows:

- (a) liability at 100%
- (b) General damages Kshs. 420,000/=
- (c) Costs and interest.

2. The appellants were aggrieved by the amount of quantum and filed an appeal in Kakamega High Court Civil Appeal No. 25 of 2017 on the grounds that:-

- 1. The learned trial magistrate erred in law and fact in awarding general damages that were too low.
- 2. The learned trial magistrate erred in law and fact in using wrong principles to assess damages.
- 3. The learned trial magistrate erred in law and fact in basing the deceased's salary at Kshs. 10,500 instead of Kshs. 28,400/-
- 4. The learned trial magistrate erred in law and fact in failing to consider the appellant's submission.

3. The respondent on the other hand filed a separate appeal in Kakamega High Court Civil Appeal No. 94 of 2016 in which they raised the following grounds:-

- 1. The learned trial magistrate erred in law and fact and in arriving at a finding that the appellant was liable for the accident without any proof linking the appellant to the accident or proof that the appellant was the owner of the suit motor vehicle that caused the accident.
- 2. The learned trial magistrate erred in law and fact in arriving at a finding that the appellant was 100% liable for the accident when there was no evidence of negligence at all on the part of the appellant.
- 3. The learned trial magistrate erred in law and in fact in shifting the burden of proof to the defendant contrary to the law.
- 4. The learned trial magistrate failed to appreciate sufficiently or at all that the evidence tendered in favor of the defendant

controverted and rebutted the plaintiff's evidence thus lowering the plaintiff's probative evidentiary value.

4. The advocates for the parties did not make an application for the two appeals to be consolidated. I will determine the two appeals together and for the purposes of this judgment consider the appellants in Civil Appeal No. 25 of 2017 as the appellant and appellants in Civil Appeal No. 94 of 2016 as the respondents.

The case for appellants

5. The case for the appellants was that on the 31/12/2012 the deceased who was their husband was involved in an accident along Kakamega-Webuye road while riding a motor cycle. His widow Roseline Ayuma PW2 received a report of the accident. She went to the scene of the accident and found the deceased having been taken to hospital. She went to Kakamega Provincial General Hospital and found him having died. They later sued the respondent seeking general damages.

6. PW2 testified that the deceased was working at Kakamega Municipal Council (as it was then). That she had 5 children with the deceased. The other widow PW3 said that she and the co- wive had a total of 5 children with the deceased.

7. The appellants called one witness Samuel Shitemi PW4 who is said to have witnessed the accident. The evidence of the witness was that he is a motor cycle taxi (boda boda) operator. That on the material day at about 6 pm he was at Okumu stage a long Kakamega – Webuye road when he saw a motor vehicle coming from Kakamega direction going towards Webuye direction. He also saw a motor cycle coming from the opposite direction. That the motor vehicle was going in a zig – zag. That as they by passed each other the motor vehicle hit the motorcycle. The motor cycle was on its correct lane when it was hit. The driver of the motor vehicle stopped a distance ahead after the point of the accident. He and other people told the driver to take the victim to hospital. He and the driver took him to Kakamega Provincial General Hospital. The victim died at the casualty of the hospital.

8. The appellants called one other witness, PC Owino PW1 whose evidence was that the driver of the motor vehicle one Tom Otari was charged at Kakamega Law Courts with causing death by dangerous driving. That the case was pending hearing in court when he testified. That he had already testified in the traffic case.

Case for respondent

9. The respondent called one witness in the case, Hyslop Akhonya DW1. The evidence of the witness was that he was a transport superintendent with the respondent. That according to the copy of records of motor vehicle registration number KBK 732 dated 10/4/2015 the motor vehicle belonged to Equator Bottlers Limited. The same record indicated that the vehicle was a Mitsubishi lorry truck. The witness produced a copy of record of the said of motor vehicle as exhibit, DEX-1.

The judgment of the trial court

10. The learned trial magistrate found that the accident vehicle belonged to the respondent. That this was proved by the police abstract which recorded the respondent as the owner of the vehicle. That though one Tom Otari did not testify in the case he had recorded a statement in the case stating that the vehicle belonged to the respondent. That the copy of records produced by the respondent did not indicate the owner of the vehicle as at the time of the accident on 31/12/2012.

11. The learned trial magistrate held that the evidence of the eye witness Pw4 proved that the driver of the respondent is the one who was to blame for occasioning accident. That the driver of the vehicle failed to turn up in court to testify on the causation of the accident. That in the absence of the evidence of the said driver the evidence of PW4 remained unchallenged and that there was thereby no evidence that the motorcyclist had contributed to the causation of the accident. The magistrate accordingly found the driver of the motor vehicle 100% liable for causing the accident.

12. On loss of dependency the learned magistrate found that the 5 children of the deceased were dependent on him. He found that according to the payslip placed before the court the deceased had a pay of Kshs. 28,400/-. That his take home pay was Sh. 10,155/-. He took that as the multiplier. The deceased had died at the age of 52. He was to retire at the age of 60. The magistrate adopted a multiplier of 5 years and a multiplicand of Ksh. 10,500/=. The loss of dependency came to $10,500 \times 12 \times \frac{2}{3} = 420,000/=$.

Submissions

13. The advocates for the respondent, **Ogejo Olendo & Co. Advocates**, submitted that the appellants did not prove that the respondent was liable for and caused the accident. That the appellants did not prove that the motor vehicle belonged to the respondent. That the witness statement of Tom Otari that the magistrate relied on to hold so was not signed and the witness did not testify in the case. The advocates contended that a police abstract is not a conclusive proof of ownership of motor vehicle especially when there is contrary evidence by way of copy of records of motor vehicle from the registrar of motor vehicles. The advocates cited the case of **Muhambi Koja Vs Said Mbwana Abdi (2015) eKLR** where the court of Appeal cited **Joel Muga Opija VS East African Seaford Limited Civil Appeal No. 309 of 2010**.

14. The advocates submitted that the ownership of the motor vehicle as shown in the police abstract was in the instant case challenged by the copy of records which also challenged the make of the vehicle. While the police abstract stated that the vehicle was a Toyota Hilux the copy of record indicated that it was a Mitshubish lorry truck. The advocates cited the case of **Ruth Wanjiku Muthee Vs Kenya Sugar Board** cited in **Petrocity Enterprises (u) Limited Vs Roseline Sikundi & 2 others (2017) eKLR** where it was held that where it is not proved that the accident causing Motor vehicle belonged to the defendant there was no basis upon which to find the defendant liable for the accident either directly or vicariously. That in **Ruth Wanjiku Muthee** case (supra) the Court of Appeal found that the police abstract could not in the circumstances of the case be taken to be conclusive proof that the respondent was the owner of the motor vehicle as that piece of the evidence was rebutted and controverted and that it was upon the appellant to present something more than a police abstract to prove that the

respondent was the owner of the motor vehicle at the material time.

15. The advocates submitted that there was no credible explanation as to how the accident occurred. That the appellant's evidence was marred with contradictions as to the cause of the accident. That the police abstract indicated that the accident occurred of 7:30 pm while the appellant's eye witness PW4 stated that was at 6 pm. That PW4 stated that he was about 100m away when he witnessed the occurrence of the accident. The advocate's questioned how he was able to see at that distance. The advocates submitted that it was not possible to know from the evidence as who intruded into the others lane. That in such circumstances the best the trial magistrate ought to have done was to apportion liability equally at 50% between the driver and the motorist. On this proposition they were guided by the Court of Appeal decision in **Hussein Omar Farah Vs Lento Agencies (2006) eKLR** cited in **Commercial Transporters Ltd vs Registered Trustees of the Catholic Diocese of Mombasa (2015) eKLR** where the court held that :

“ In our view , it is not reasonably possible to decide on the evidence of the witnesses who testified... who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdiction that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.”

16. On quantum the advocates submitted that the net income for the deceased was Kshs. 10,155/=. That it is the net income that is available for the dependents which the court ought to use as a multiplicand as was held in **Chunibhai J. Patel & Another Vs P.F. Hayes & Others (1957) EA 748,749** cited in **James Gakinya Karienyé & Another vs Perminus Kariuki Githinsi (2015) eKLR**. That the trial magistrate's findings were informed by reason and thus was neither too high nor too low to warrant the court varying it.

17. On multiplier the advocates supported the multiplier of 5 years and dependency ratio of 2/3 adopted by the trial court. They submitted that only two of the deceased's children had not reached the age of majority. That the multiplier of 5 years was tenable. Their calculations for loss of dependency was $10,000 \times 5 \times 12 \times \frac{2}{3} = 500,000/=$

18. The advocates for the appellants **Kitwa & Co. Advocates** on the other hand submitted on quantum that the trial court used the wrong principles on assessment of damages. That it is the net pay that constitutes the multiplicand. That this is calculated as the gross income less tax element as was held by Dulu J in **Leonard O. Ekisa & another Vs Major K. Birgen (2005) eKLR**. That in the instant case the gross salary was Kshs. 28,400/= per month. The tax element in the case was pay as you earn (P.A. Y. E) which was Kshs. 2,889/= thereby leaving Kshs. 25,511 as the net pay. That this is the amount the learned magistrate ought to have used as the multiplicand and not Kshs. 10,155/=. The award was therefore low as it was based on the wrong principles of assessment.

19. The advocates further submitted that the learned magistrate erred in using 5 years instead of 8 years as the multiplier. That the deceased as a civil servant was set to retire at the age of 60. That no evidence of any vicissitudes of life or other imponderables or illness which would have shortened the deceased's working life was laid forward. Therefore that it was a fundamental mistake for the trial magistrate to adopt a multiplier of 5 years instead of 8 years.

The advocates asked the court to compute the award as follows $25,511 \times 12 \times 8 \times \frac{2}{3} = 1,632,704/=$

Analysis and Determination

20. This is a first appeal. It is the duty of a first appellate court to evaluate afresh the evidence adduced at the lower court and draw its own conclusions albeit always bearing in mind that it has neither seen nor heard the witnesses and should therefore make due allowance in that respect – see **Selle & Another Vs Associated Motor Boat Co. Limited & Others (1968) EA 123**. It is also the position of the law that an appellate court will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the trial court is shown, demonstrably, to have acted on wrong principles in reaching its findings – See A.R.W. Hanox **JA in Ephantus Mwangi & another Vs Duncan Wambugu (1983) 2 KCA 100** (also reported in (1982=88) 1 KAR 278.

21. The appeal is both on liability and on quantum.

Liability

22. The questions before the lower court were first whether appellants had proved that the accident motor vehicle belonged to the respondent and secondly if this was proved whether it was proved that the respondent was liable for the accident.

23. On the first issue the police abstract indicated that motor vehicle reg. No. KBK 732 X toyota Hilux belonged to the respondent while the copy of records from the Registrar of motor vehicles indicated that as of 10/4/2015 the motor vehicle with the said registration number belonged to Equator Bottles Limited and that the vehicle was a Mitsubishi lorry truck.

24. The question is whether a police abstract does prove ownership of a motor vehicle. The trial court cited the case of **Samuel Mukunya Karunga Vs John Mwangi Kamairu Nyeri HCCA No. 34 of 2002** (unreported) where it was held that-

“ A police abstract having been produced showing the respondent as the owner of the motor vehicle and evidence having been adduced that the letters of demand sent to the respondent elicited no response then the appellant had established on a balance of probability motor vehicle reg. No.... was owned by the respondent.”

25. Section 8 of the Traffic Act provides that, “The person in whose name a vehicle is registered shall unless the contrary is proved, be deemed to be owner of the vehicle”. In **Muhambi Koja Vs Said Mbwana Abdi (2015) eKLR**, the Court of Appeal cited **Joel Muga Opija Vs East African Sea Food Limited**, Civil Appeal No. 309 of 2010 and held that:

“ We agree that the best way to prove ownership would be to produce to the court a document from the Registrar of motor vehicles showing who the registered owner is , but when the abstract is not challenged is and is produced in court without any objection , its contents cannot be later denied.

In Joel Muga Opija case the court stated that

“ in a nutshell, a police abstract report or any other form of evidence will be proof of ownership of a vehicle and will displace the registration(log) book if it is demonstrated that the person named in the registration (log) book has since transferred and divested himself of its ownership to the person named in the abstract report or in that other form of evidence.”

26. The copy of records produced in court by the respondent was in respect to the ownership of the vehicle as of 10/4/2015 and not as of 31/12/2012. The vehicle could have changed hands in the intervening period of over 2 years. With the appellants producing the police abstract as evidence of ownership, the burden of proof shifted to the respondent to rebut the same with conclusive evidence. Their evidence fell short of this and they therefore did not discharge their burden. In my view, the trial court was right in relying on the police abstract as the document proving ownership of the motor vehicle.

27. The next question is as to who was to blame for occasioning the accident. PW4 was an eye witness to the accident. He blamed the driver of the motor vehicle for leaving his lane and moving into the lane of the motorcycle thereby causing the accident. The witness said that the accident took place at 6 pm and that there was enough light that enabled him to see the occurrence of the accident. There was no evidence offered by the respondent to contradict the evidence of PW4 as to how the accident occurred. A person who has no visual problem can clearly see such an event of an accident taking place at a distance of 100 m. I agree with the trial court that it is the driver of the respondent who was entirely to blame for occasioning the accident. There was no evidence that the deceased contributed to the occurrence of the accident. The issue of apportioning liability does not arise.

28. The driver of the accident vehicle was an agent of the respondent. The respondent was vicariously liable for the negligent acts of their driver.

Quantum

29. The assessment of damages is a discretion of the trial court and an appellate court will interfere with the exercise of that discretion if the court took into account an irrelevant fact or left out of account a relevant fact or the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages – see **Kemfro Africa t/a Meru Express & Another Vs A.M. Lubia & Another (1982-1988) KAR 727**. In **Butt Vs khan (1977) KAR 1**, Law J.A. held that.

“ An appellate court will not disturb an award of damages unless it is so in ordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.”

30. The deceased in the instant case died at the age of 52. He left behind two widows and there were minor children. The deceased thereby left behind some dependents.

The method for assessing general damages under the Fatal Accidents Act was re-stated by the High Court in **James Gakinya Karienyé & Another** (suing as legal Representative of the estate of **David Kevin Gakinya (deceased) Vs Perminus Kariuki Githinji(supra)** where the court cited the case of **Chunibhai J Patel & Another Vs PF Hayes and others (supra)** appeal where the court of appeal stated that ;

“ The court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependant, the net earnings power of the deceased i.e his income and tax and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying a figure representing so many years purchase. The multiplier will bear a relation to the expectation of the earning life of the deceased and the expectation of life and dependency of the widow and children.”

31. I am in agreement with the judgment in the case of **Leonard D.Ekisa & another Vs Major K. Birgen (supra)** eKLR that the net income of a person is the gross income less tax element. A statutory deduction such as National Hospital Insurance Fund is, in my view, not tax but a benefit to the family as it goes towards catering for the health needs of the family. The tax element in the instant case was P.A.Y.E which was Kshs. 2,889/=. The deceased's salary was Kshs. 28,400/=. This minus the P.A.Y.E left a balance of Ksh.25,511/= as the net income . It is then apparent that the trial magistrate proceeded on wrong principles in deducting from the gross income deductions that were not tax thereby arriving at an erroneous estimate. This court has reason to interfere with the award. The correct multiplicand was Kshs. 25,511/=.

32. The trial court used a multiplier of 5 years. The advocates for the appellant had urged the trial court to adopt a multiplier of 8 years. The advocates for the respondent submitted that the multiplier of 5 years was reasonable. I am in agreement with the submission that the multiplier of 5 years was reasonable. It cannot be said that it was an erroneous estimate. The multiplier of 5 years thereby stands.

The deceased was a family man. He left behind wives and children. The dependency ratio of 2/3 used by the trial court was proper.

The loss of dependency therefore comes to $25,511 \times 12 \times 5 \times 2/3 = 1,020,440$.

The upshot is that the finding of the trial court on liability is upheld. However his award in general damages is set aside and replaced with one of Kshs. 1,020,440/=.

Judgment is thereby entered for the appellants, Roseline Ayuma Khisa and Emily Naliaka Opuka against the respondent West Kenya Sugar Company Limited to the sum of Kshs. 1,020,440/= with interest at court rates. The respondent to bear the costs of the appeal and the costs of the suit at the lower court.

Delivered, dated and signed in open court at Kakamega this 28th day of February, 2019.

J. NJAGI

JUDGE

In the presence of :

N/A.....for appellants

Miss Atieno H/B MulamaRespondent

Parties:

Appellants.....absent

Respondent.....absent

Court assistant.....George