



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO. 46 OF 2017
H. YOUNG & CO. E.A LIMITED.....APPELLANT
VERSUS

LAWRENCE AYAKO ORERO legal representative of the estate of
DOMINIC CORNEL MOEMI (DECEASED) 1ST RESPONDENT
DENNIS MUGENDI STANLEY..... 2ND RESPONDENT

(Being an appeal from the judgment of Hon. Njoroge (CM) delivered on 17th May, 2017 in Kisii Civil Suit No. 600 of 2010)

JUDGMENT

1. The 1st respondent herein sued the appellant in his capacity as the legal representative of the estate of the deceased for special and general damages after a fatal accident that occurred along Nyamache – Igare road on 18th April, 2010. He alleged that the 2nd respondent who was the beneficial user of the appellant’s vehicle registration number KAQ 645L, drove the excavator negligently and caused an accident from which the deceased sustained fatal injuries. The trial court found for the 1st respondent and awarded special and general damages as follows:
 - i. Liability-100%
 - ii. Pain and suffering- Kshs. 10,000/=
 - iii. Loss of expectation - Kshs. 100,000/=
 - iv. Loss of dependency- Kshs. 1,200,000/=
 - v. Special damages- Kshs. 80,200/=Less double entitlement – Kshs. 100,000/=
Total Kshs. 1,290,200/=
2. The appellant being dissatisfied with that decision has filed this appeal on three grounds to wit:
 - i. That the learned trial magistrate erred in law and in fact and misdirected himself in finding the appellant 100% liable notwithstanding the evidence on record to the contrary;
 - ii. That the learned magistrate erred in law and in fact and misdirected himself in awarding Kshs. 1,200,000/= as general damages; and
 - iii. That the learned trial magistrate erred in law and fact in adopting the dependency ratio of 2/3 despite the fact that the respondents had only pleaded the father and mother of the deceased as the only dependants.
3. As the first appellate court, I am to examine the entire evidence afresh and reach my own findings making allowance for the fact that I did not have the advantage of hearing and seeing the witnesses. **(Selle & Another vs. Associated Motor Boat Co. Ltd & Others (1968) EA 123.**
4. The 1st respondent PW1 testified that on 18th April, 2010, he was at home when he heard a loud bang from the road. On reaching the scene, he was informed that the appellant’s vehicle had hit some people and among them was his son the deceased. The deceased was aged 22 years and worked as a casual earning Kshs. 5,000/= and would support him from his earnings. He further testified that the deceased had two elder brothers who also took care of him. The deceased was travelling in a smaller vehicle when it collided and was crashed by the appellant’s earth mover. He reported the matter to the police and was issued with a police abstract and the post mortem done at Hema Hospital.
5. Zablun Orange Gitonye (PW2), testified that he was in the vicinity at the material time when he saw the respondent’s excavator moving in the middle of the road towards Nyamache. He then saw a white saloon car going down the opposite direction. He testified that he could see the excavator’s fork moving loosely from one side to the other then it hit the saloon car on the rear part and crash it. Some passengers emerged from the front but the rear was completely wrecked. He helped take the injured to hospital but learnt that the deceased had died due to the accident.
6. PC Leonard Kabarur (PW3), a traffic police officer also testified and presented a police abstract prepared by his colleague. He stated that the accident had involved two motor vehicles a Toyota and the appellant’s excavator. He told the court that initial investigations had implicated

the 2nd respondent for the accident. PW3 did not complete his evidence, he was not recalled nor was he cross-examined by the appellant's advocate.

7. The Appellant/ defendant did not adduce any evidence.

8. The parties disposed of the appeal by way of written submissions, which I have considered alongside the evidence and the record of appeal. The issues arising relate to apportionment of liability and the award for loss of dependency under the Fatal Accidents Act.

LIABILITY

9. The appellant submits that from the evidence it was impossible to tell which of the parties was to blame for the accident. That the motor vehicle in which the deceased was in was being driven at a high speed and the driver of that vehicle ought to have exercised due attention to other vehicles on the road. The appellant argues that the totality of the evidence before the court was insufficient to hold the appellant liable. It is also the appellant's case that there was no clear nexus between the appellant's negligence and the accident that occurred.

10. The 2nd respondent did not participate in these proceedings. The 1st respondent on his part argued that the appellant was vicariously liable for the actions of its driver. He also stressed that the appellant had not called any witnesses or produced documents before the court to suggest that it was not liable.

11. To prove his case against the appellant, the 1st respondent called 3 witnesses. PW 1 and PW 2 testified that the accident had involved the appellant's excavator and a smaller vehicle in which the deceased was travelling. PW 2 witnessed the accident occur. He described how the appellant's excavator was moving down the middle of the road with its fork swaying loosely and that the vehicle in which the deceased was travelling tried to evade the appellant's vehicle only for it to be crashed in the rear by the excavator's fork. From PW 2's testimony, the culpable party could not be any clearer. The 2nd respondent was who was driving the appellant's vehicle controlled it in such a manner that it caused the accident to occur making the appellant vicariously liable.

12. The appellant did not deny ownership of excavator nor deny that the 2nd respondent was its driver. The appellant also failed to call witnesses to disprove the 1st respondent's account. Additionally, the appellant did not take out third party proceedings against the driver of the deceased's vehicle if it was convinced that he was to blame. The deceased was a passenger and could not have contributed to the accident. The negligence of the driver of the excavator was described by PW2, he saw it being driven in the middle of the road it was swerving as it approached the salon car. I therefore find no reason to depart from the trial court's finding that the appellant was liable vicariously at 100%.

QUANTUM

13. On the award of quantum for loss of dependency, the appellant submitted that there had been no proof of the deceased's earnings prior to the accident. The appellant urged the court to apply the Regulation of Wages (General) (Amendment) Order, 2011 as the deceased was a casual labourer. The appellant then proposed a multiplier of 20 and asked the court to adopt the dependency ratio of a quarter as the deceased had no dependants.

14. The 1st respondent urged the court to uphold the trial court's decision, stating that the deceased was a young man aged 22 years and had been the sole provider of his family's needs. He pointed out that the appellant had admitted the dependency ratio and could not deny it on appeal.

15. The court in **Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another Nairobi HCCC No. 1638 of 1988 (UR)** set out the guidelines applicable in assessment of damages under the Fatal Accident's Act as follows:

The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature.

16. In the lower court, the appellant proposed a multiplier of 20 years, a multiplicand of Kshs. 5,000/= and dependency ratio of 2/3. No authorities were relied on by the appellant under this head of damages. On his part, the 1st respondent proposed a multiplier of 58 years, a multiplicand of Kshs. 15,000/= and a dependency ratio of 2/3. He relied on the case of **Richard Chege Nganga vs Solomon Kiromo Mbugua HCCC No. 4049 of 1990** and the case of **Jedida Kemonde vs Isaiah K. Choge HCCC No. 2877 of 1986** in support of this computation.

17. As a principle, an appellate court will not disturb an award of damages unless the same was based on the wrong principles or the trial court misapprehended the evidence in some material respect and so arrived at a figure that was either inordinately high or low.

18. The trial court in this case adopted a multiplier of 30 years, a multiplicand of Kshs. 5,000/= and a dependency ratio of 2/3. In reaching this decision the trial court held as follows:

The deceased was aged 22 years and was a casual worker earning a monthly sum of Kshs. 5,000/=. He would have worked up to the public retirement age of 60 years. However due to the uncertainties of life, I find a multiplier of 30 to be reasonable. The parties are in agreement that a multiplier of 2/3 is adequate as the deceased had dependants.

19. The question of the dependency ratio and multiplicand applicable in any given case is a question of fact. The level of dependency is affected by the number of the deceased's dependants as contemplated under Section 4(1) of the Fatal Accident's Act which includes the deceased's wife, husband, parent and children. In this case, the evidence adduced indicated that the deceased had only one dependant, being his father the 1st respondent. The 1st respondent stated that the deceased was the youngest of his 3 sons and that his elder sons also provided for his needs. I am thus convinced that dependency ratio adopted by the trial court was excessive and a dependency ratio of 1/3 would suffice.
20. The trial court then adopted a sum of Kshs. 5,000/= as the multiplicand based on the testimony of the 1st respondent who told the court that the deceased was a casual worker earning a sum of Kshs. 5,000/=. The appellant has urged this court to apply the Regulation of Wages (General) (Amendment) Order, 2011 which provides the minimum earning for a general labourer as Kshs. 4,047/=. Notwithstanding its proposal for the trial court to award a sum of Kshs. 5,000/=. I find that the 1st respondent's evidence provided sufficient proof of the deceased's earnings and the trial court cannot be faulted for relying on it. In reaching this decision I am guided by the Court of Appeal's decision in the case of **Jacob Ayiga Maruja & Another v Simeon Obayo Civil Appeal No. 167 of 2002 [2005]Eklr** where in grappling with the same issue held as follows:

In our view, there was more than sufficient material on record from which the learned Judge was entitled to, and did draw the conclusion that the deceased was a carpenter and that his monthly earnings were about Shs.4,000/= per month. We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things. In this case, the evidence of the respondent and the widow coupled with the production of school reports was sufficient material to amount to strict proof for the damages claimed.

21. On the applicable multiplier, the deceased was aged 22 when his life was cut short. The trial court surmised that he would have worked to the conventional retirement age of 60 years and took into account the preponderances of life in reaching the multiplier of 30 years. The trial court's adoption of a multiplier of 30 years is found reasonable.
22. Taking all the above into account, I find that the 1st respondent was entitled to an award of **Kshs 600,000/=** for loss of dependency made up as follows:

Kshs. 5,000/= x 30 years x 12 months x 1/3 = Kshs. 600,000/=

23. As there appears to have been no issue regarding the award under the Law Reforms Act, the same is upheld. Save to add that a claimant under the Fatal Accidents Act is also entitled to damages for pain and suffering and loss of expectation of life under the Law Reform Act. The trial court erred in deducting a sum of Kshs. 100,000/= but the same is left at that as there was no cross appeal by the 1st respondent on this point. (See **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited Civil Appeal No. 22 of 2014 [2015] eKLR**).

12. In the end, this appeal is found to have merit. The award made by the trial court is substituted with an award of **Kshs. 690,200/=** made up as follows:

- i. General damages for loss of dependency Kshs. 600,000 /=-
- ii. Special damages Kshs. 80,200/=
- iii. Pain and suffering Kshs. 10,000/=

Total 690,200/=

24. As the appeal has only been partially successful, each party shall bear its costs. Interest shall be at court rates.

Dated, signed and delivered at Kisii this 29th day of **March** 2019.

R.E.OUGO

JUDGE

In the presence of;

Miss Gogi h/b M/s Nasimiyu For the Appellant

Mr. Masese For the 1st Respondent

2nd Respondent Absent

Rael Court clerk