



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL APPEAL NO. 28 OF 2018

PERIS MORAA.....APPELLANT

VERSUS

LAWRENCE BUNDI MACHINI {Suing as the Administrator of estate of

SAMUEL MONARI BUNDI (DECEASED)}.....RESPONDENT

{Being an appeal against the Judgement of Hon. B. M. Kimtai – SRM Keroka dated and delivered on the 27th day of November 2018 in the original Keroka Principal Magistrate’s Court Civil Case No. 186 of 2008

JUDGEMENT

The respondent herein sued the appellant for damages under the Law Reform Act and the Fatal Accidents Act following the death of his son Samuel Monari Bundi, deceased, in an accident that occurred along the Sotik – Keroka Road on 14th November 2007. The accident involved a motor vehicle Registration No. KAH 417U belonging to the appellant. The respondent alleged that the deceased was a lawful passenger in the vehicle and attributed the accident to negligence on the part of the driver of the vehicle. The respondent contended that as the owner of the vehicle the appellant was vicariously liable for the negligence of her driver. The respondent sued on his own behalf and on behalf of Peris N. Bundi, the mother of the deceased. After considering the evidence before the court the trial Magistrate found the appellant liable to the extent of 90% and the deceased guilty of contributory negligence to the extent of 10%. The trial court then awarded damages as follows:

- (a) Special damages – Kshs. 10,950/=**
- (b) Loss of expectation of life – Kshs. 100,000/=**
- (c) Loss of dependency – Kshs. 1,752,640/=**

Costs of the suit were awarded to the respondent as was interest on (a) (b) and (c) above.

Being aggrieved by the trial court’s finding on liability and the award of damages the appellant preferred this appeal. The appeal is premised on 14 grounds the gist of which is that the trial Magistrate’s finding on liability and the assessment of damages is based on no evidence and that in any event the damages which are based on a wrong application of the law are excessive. The appeal was canvassed through written submissions.

I have considered those submissions carefully but as the first appellate court I have a duty to reconsider the evidence in the trial court so as to arrive at my own independent conclusion. I am also alive to the principles upon which this court can interfere with the trial magistrate’s award of damages – (see **Kefro Africa Ltd t/a “Meru Express Services (1996)” & Another Vs. A. M. Lubia & Another (No. 2) [1987] KLR 30**).

At the trial the respondent called two witnesses but the appellant did not adduce any evidence. It is my finding that negligence was proved against the appellant on a balance of probabilities. The evidence of Joseph Obare Monda (Pw2) that the driver of the motor vehicle in which the deceased was travelling was speeding as a result of which it lost control and rolled before it hit a pole, was not rebutted. The fact that the appellant was the registered owner of the vehicle and hence vicariously liable for the negligence of his driver, was also not rebutted. I am therefore not persuaded that the finding on liability is based on no evidence or on a wrong principle of the law. Indeed I would have been of the view that negligence was not proved against the deceased but as there is no cross appeal the trial Magistrate’s finding on liability is confirmed.

As regards the damages, the trial Magistrate applied the correct principle in assessing damages under the Law Reform Act. The award of Kshs. 100,000/= for loss of expectation of life is a conventional award and hence not based on a wrong principle. On special damages the

respondent pleaded a sum of Kshs. 32,850/= as funeral expenses but did not strictly prove the same. The trial Magistrate awarded a sum of Kshs. 10,950 which he considered reasonable funeral expenses. This is not an error as it is in line with the Court of Appeal decision in the case of **Premier Dairy Ltd Vs Amarjit Singh Sagoo & Another [2013] eKLR** where the court held: -

“With the above as the material placed before him in respect of the claim for funeral expenses the learned judge addressed the issue thus in the judgement:

“....The plaintiff did not avail any documentary evidence to show the sum of Kshs. 400, 000/= was expended. Nevertheless I think that this court is entitled to conclude that considerable amounts of money is usually used during the burial of a deceased person. Parties cannot be expected to disregard that issue which has assumed public knowledge and notoriety. I think to expect the relatives to keep the receipts of every expenditure incurred is to underestimate the pain and loss of a loved one. Where a party cannot show the amount of expenses incurred the court would weigh the scales of justice in order to address the pertinent issues involved in the matter, From the evidence available, the deceased was a fairly rich businessman and I think the relatives used considerable amount of money to give him a good and decent send off. Such expenses needless to mention includes attending to the needs of mourners and other incidental expenses. I therefore award a sum of Kshs.150, 000/= as funeral expenses as a prudent and reasonable amount to have been used as funeral expenditure”

“We do not think that it is a breach of the general rule that special damages must be pleaded and proved, to hold that families who expend money to bury or otherwise inter their dead relatives should be compensated. In fact we do take judicial notice that it would be “Tong and unfair to expect bereaved families to be concerned with issues of record keeping when the primary concern to a bereaved family is that a close relative has died and the body needs to be interred according to the custom of the particular community involved. The learned judge took what was a practical and pragmatic approach.” (Underlining mine).

For loss of dependency the principles that govern the award of those damages were succinctly put by Ringera J, as he then was, in the case of **Beatrice Wangui Thairu Vs. Hon. Ezekiel Barngetuny & Another Nairobi HCCC No. 1638 of 1988:-**

“The principles applicable to the assessment of damages under the Fatal Accident Act are all too clear. 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 of life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants.”

In the instant case the court heard that the deceased was a farmer and also a driver. In the absence of a payslip or other evidence to prove his earnings, the trial Magistrate correctly resorted to the then minimum wage of Kshs. 10,934/= which is now an accepted practice (**see David Kajogi M’ mugaa Vs. Francis Muthomi [2012] eKLR**).

The trial Magistrate cannot also be faulted for adopting a multiplier of 20 years which in my view was on the lower side as the deceased who was 29 years old would probably have worked for another 41 years but as there is no cross appeal I shall not interfere. The trial Magistrate however erred in adopting a dependency ratio of 2/3 given that the deceased was not married and much of his earnings would be used up by himself. Indeed, it was the respondent’s evidence that the deceased used to give his parents Kshs. 3,000/= per month which was less than 1/3 of his salary. Based on that testimony the trial magistrate ought to have calculated damages under that head as follows: -

3,000 (amount of dependency per month) x 12 (in a year) x 20 (the multiplier = 720,000/=.

The trial Magistrate also misdirected himself in not awarding general damages for pain and suffering but again as there is no cross appeal this court cannot interfere. In the upshot the appeal on liability is not merited and is dismissed. That on damages succeeds only partially as the award on loss of dependency is reduced by a sum of Kshs. 1,032,640/=. Accordingly, judgement for the respondent against appellants shall now be as follows: -

1. Liability 90:10% in favour of the respondent against the appellants.
2. Special damages – Kshs. 10,950/=
3. General damages
 - (a) Loss of expectation of life – Kshs. 100,000/=
 - (b) Loss of dependency – Kshs. 720,000/=
4. Costs of the suit in the lower court be to the respondent.
5. As the appeal has partially succeeded the appellants shall have half the costs of this appeal.
6. Interest on general damages shall be at court rates from the date of judgement in the court below.

It is so ordered.

Dated, signed and delivered in open court this 27th day of august 2019.

E. N. MAINA

JUDGE