



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 44 OF 2016

MENENGAI OIL REFINERIES.....APPELLANT

VERSUS

PETER OMBOKO MIRIKWA

(suing as the administrator and personal representative

of the estate of RICHARD MIRIKAU ANDANJE now deceased).....1ST RESPONDENT

SARAH ANDANJE(suing as the administrator and personal representative of the estate

of RICHARD MIRIKAU ANDANJE – now deceased).....2ND RESPONDENT

(An appeal arising from the judgment and decree of the Hon. J. Ong'ondo, Principal Magistrate (PM), in Kakamega CMCCC No. 199 of 2013 of 5th April 2016)

JUDGMENT

1. The suit at the primary court was initiated by the respondents herein against the appellant for general and special damages arising from a motor traffic accident involving the deceased and a motor vehicle owned and controlled by the appellant. They sought general and special damages. The appellant entered appearance and filed defence, essential comprising largely of denials and an averment that the deceased caused or contributed to the occurrence of the accident the subject of the suit by his own negligence. The matter proceeded to full trial. After taking evidence the trial apportioned liability at 100% against the appellant. On damages, the court awarded Kshs. 20, 000.00 for pain and suffering, Kshs. 300, 000.00 for loss of expectation of life, Kshs. 1, 226, 000.00 for loss of dependency and Kshs. 87, 500.00 special damages, making a total of Kshs. 1, 633, 500.00.

2. The appellant was aggrieved by the award of damages and lodged this appeal, raising the following grounds:

- (a) that the evidence and submissions had treated been superficially;
- (b) that the principles governing assessing of damages had been ignored and so had been the authorities cited and the written submissions filed by the appellant;
- (c) that an erroneous multiplicand of Kshs. 6, 130.00 as minimum age was adopted;
- (d) that the amount awarded under the Law Reform Act had not been discounted;
- (e) that the respondents were erroneously found to have proved their case of balance of probability and in failing to dismiss the suit; and
- (f) that the trial court failed to appreciate that the evidence tendered by the respondents had been controverted.

3. From the written submissions of the appellant, it would appear that the appeal is narrowed to contests on liability, pain and suffering, loss of expectation of life and loss of dependency, and the omission to deduct the award under the Law reform Act while working out the award under the Fatal Accidents Act.

4. On liability, it was pleaded that the deceased was pedaling his cycle along the road when he was knocked down by the motor vehicle of the

appellant. PW3 testified as an eyewitness of the accident. He stated that he was pushing his bicycle while the deceased cycling ahead of him. The accident vehicle passed him and went on to knockdown the deceased. He expressed no opinion on who might have been to blame for the accident. The relevant positions of both the deceased and the accident vehicle were not disclosed. The speed at which the vehicle was being driven was not indicated. A police witness was called, but he did not produce a sketch of the accident scene, nor express opinion as to who might have been to blame for the accident. The driver of the accident vehicle testified. He did not deny the accident, but testified in a manner that suggested that he was unaware of an accident occurring.

5. The question then is whether the appellant was liable for the accident. The eyewitness alleged that he saw the vehicle hit the deceased and he recorded the last bit of the registration details of the vehicle, and gave the information to the police. It would appear the vehicle was traced with that information. The driver admitted being on the road at about that time. The eyewitness was fairly consistent that he saw the accident, and it is quite clear that it was because of his efforts that the appellant's driver was arrested.

6. It is trite law that where there is no concrete evidence to determine who is to blame between two road users, both should be held equally liable. That position was stated in such decisions as *Hussein Omar Farah vs. Lento Agencies* [2006] eKLR, *Matunda Fruits Bus Services Ltd vs. Moses Wangila & another* [2018] eKLR and *Eliud Papoi Papa vs. Jigneshkumar Rameshbai Patel & another* [2017] eKLR.

7. It is my opinion that should be the case here. The eyewitness did not lead evidence that pointed to fault on either side, and the evidence tendered by the police was not helpful either. Under those circumstances, the court should have held the appellant's driver and the deceased equally to blame as it could not tell who the author of the collision was. The trial court did not give any explanation for finding in favour of the deceased as against the appellant. I do find that the trial court fell into any error is so doing. Liability should have been apportioned at 50:50.

8. With regard to pain and suffering, it is argued that Kshs. 20, 000.00 was excessive. The deceased died instantly. What is available for awarding in the circumstances? There is no standard figure and the awards that the courts have awarded over the years range from Kshs. 10, 000.00 to Kshs 80, 000.00 where the deceased person died instantly. In *Charles Masoso Barasa & Another vs. Chepkoech Rotich & Another* [2014] eKLR, the court awarded a sum of Kshs 15,000.00 for pain and suffering where the deceased died a few hours after being involved in a road traffic accident. In *Premier Dairy Limited vs Amarjit Singh Sagoo & Another* [2013] eKLR, the Court of Appeal upheld an award of Kshs 75,000.00 in respect of a deceased person who died on the spot. In *Kenya Power Limited vs James Matata & 2 others (suing as the legal representatives of the Estate of Nyange Masaga (Deceased))* [2016] eKLR, the court declined to interfere with an award of Kshs. 80, 000.00 for pain and suffering made by the trial court, where the deceased person a few hours after the incident. I am, therefore, not persuaded to interfere with the award made by the trial court on this head.

9. The other area of contest is loss of expectation of life. Under this heading the trial court awarded Kshs. 300, 000.00. The figure under this heading tends to be at the discretion of the court, dependent on the circumstances of each case. Like pain and suffering, there is no fixed figure, although it would appear that the courts have been awarding a standard figure. In *Kenya Power Limited vs. James Matata & 2 others (suing as the legal representatives of the Estate of Nyange Masaga (Deceased))* [2016] eKLR the court settled for Kshs. 100, 000.00 up from Kshs. 80, 000.00 awarded by the trial court. In *Hyder Nthenya Musili & another vs. China Wu Yi Limited & another* [2017] eKLR, the court treated Kshs. 100, 000.00 as the conventional amount to award under this head. In *Mombasa Maize Millers Limited v WIM suing as the representative of JAM (Deceased)* [2016] eKLR, the court similarly upheld the sum of Kshs. 100, 000.00 as damages for loss of expectation of life. That too was the case in *Kenya Wildlife Services vs. Geoffrey Gichur Mwaura* [2018] eKLR. See also *Edner Gesare Ogega vs. Aiko Kebiba (Suing as Father and Legal Representative of the Estate of Alice Bochere Aiko – Deceased)* [2015] eKLR. In *Chen Wembo & 2 others vs. IKK & another (suing as the legal representatives and administrators of the estate of CRK (Deceased))* [2017] eKLR, the court settled for Kshs. 80, 000.00. The award of Kshs. 300, 000.00 was unjustifiably high, in the circumstances. The trial court should have awarded no more than Kshs. 100, 000.00 under this head.

10. On the question of the deduction of the sum awarded for loss of expectation of life under the Law Reform Act, on the basis of the principle of duplication of awards, the Court of Appeal in *Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased)) vs. Kiarie Shoe Stores Limited* [2015] eKLR said:

“[20] This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the Law Reform Act and dependants under the Fatal Accidents Act are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the Law Reform Act, hence the issue of duplication does not arise.”

11. I believe the opinion of the Court of Appeal above adequately answers the argument by the appellant that the said award ought to have been discounted.

12. The other issue relates to loss of dependency. It is argued that it was wrong to adopt a multiplicand of Kshs. 6, 130.00 as minimum age. There was no proof of income, the trial court arrived at a figure based on the minimum a monthly income for the year.

13. The Court of Appeal in *Jacob Ayiga Maruja & Another vs. Simeon Obayo* [2005] eKLR, said as follows on the question of failure to adduce proof of income:

“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.”

14. The appellant argues that the minimum wage at the time the deceased was passing on, in 2012, was Kshs. 4, 258.00, based on Legal Notice No. 70 of 2nd July 2012, and asserts that that ought to be the figure that the trial court ought to have worked with. I could not agree more. Loss of dependency should have worked out as follows:

Kshs. 4, 258.00 x 25 years x 12 months x 2/3 = Kshs. 852, 600.00

15. In the end, I hereby set aside the judgment of the trial court, and make the following awards:-

(a) Liability at 50:50

(b) Pain and suffering Kshs. 20, 000.00

(c) Loss of expectation of life Kshs. 100, 000.00

(d) Loss of dependency Kshs. Kshs. 852, 600.00

(e) Special damages Kshs. 87, 500.00

TOTAL KSHS. 1, 060, 100.0

Less 50% contribution

GRAND TOTAL KSHS. 530, 050.00

Plus costs and interest thereon at court rates until payment in full.

16. It is so ordered.

DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 29TH DAY OF NOVEMBER, 2019

W. MUSYOKA

JUDGE