



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT BUNGOMA.**

**CIVIL APPEAL NO. 85 OF 2015.**

**MAWINDER SINGH BRAH.....APPELLANT**

**VERSUS.**

**MARAUNI PATRICK JOHN (Suing as the brother and**

Legal representative of the estate of

Andrew Wanjala Marauni – Deceased).....**RESPONDENT**

***(Being an Appeal from the Judgment and decree in original Bungoma CMCC No. 450/2013 delivered on 10.11.2015 by Hon. J. King'ori – Chief Magistrate)***

**JUDGMENT.**

Marauni Patrick John [suing as brother and Legal Representative of the estate of Andrew Wanjala Marauni – deceased] filed a suit in the Magistrate's Court against the appellant (defendant) seeking Judgment for general damages under Law Reform Act and Fatal Accident Act. Special damages and Costs of the suit.

The Appellants claim was that on 18<sup>th</sup> November 2012 the deceased who was an employee of the Respondent was driving the Respondents Motor Tractor No. KAN 648E pulling Trailer ZC 783, Ford along Kitale – Webuye road when the same lost control, veered off the road and involved in an accident where the deceased driver sustained injuries from which he died. He blamed the Respondent for permitting the defective tractor on the road instructing the deceased to drive a defective tractor and failure to regularly and periodically service the said tractor.

The Respondent/Defendant filed statement of defence denying employing the deceased as a driver, owing the said tractor on in any was being party to the particulars of negligence alleged. In the alternative the defendant/respondent averred that if an accident occurred in was due to the negligence of the deceased driver. The particulars of deceased driver's contributory negligence was driving at excessive speed and causing the accident.

After the hearing where the plaintiff called 4 witnesses and Respondent called the witnesses, the trial court after evaluating the evidence found the appellant/defendant liable and awarded a total of Kshs.1,375,925/= as damages.

Aggrieved by the Judgment and decree the appellant filed this appeal on the following grounds;

- 1.The Learned Trial Magistrate grossly misdirected himself in treating the evidence and submission on liability before him superficially and consequently coming to a wrong conclusion on the same.*
- 2. The Learned Trial Magistrate did not in the alternative consider the demand of contributory negligence based on the evidence adduced and the submissions filed by the Appellant.*
- 3. The Learned Trial Magistrate grossly misdirected himself in treating the evidence and submissions on quantum before him superficially and consequently coming to a wrong conclusion on the same.*
- 5. The Learned Trial Magistrate erred in no sufficiently taking into account all the evidence presented before him in totality and in particular the evidence presented on behalf of the Appellant.*
- 6. The Learned Trial Magistrate erred in failing to hold that the Respondent had failed to prove negligence on the part of the Appellant while on onus of proof lay with the Respondent.*

8. *The Learned Trial Magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstance that it represented an entirely erroneous estimate vis-a'-vis the respondent's claim.*

By Consent of Counsel for both parties this appeal was canvassed by way of within submissions. From the submissions this court determines that the appeal revolves around this two issues;

1. *Is the appellant liable to the Respondent at 100%.*
2. *If (a) is in the affirmative is the quantum of damages excessive?*

This being the first appellate court to reevaluate the evidence before the trial court and arrive at its own independent conclusion (***See Selle & Another Vs. Association Motor Boat Co. 1968 E.A. 123***).

The evidence before the trial court was that the deceased was employed by the Respondent as a driver. On 18.11.2012 the deceased was driving the Respondent's tractor Reg. No. KAN 648E Trailer ZC 783 along Kitale-Webuye road loaded with Sugarcane. Pw2 Robert Makokha Wanjala saw the tractor which was not at high speed move in a zig-zag manner and it fell on left side of road. He ran there and found the deceased bleeding. He sought for help and he was taken to Hospital. He however did not know why the tractor was moving in a zig-zag manner nor did he know the exact speed it was being driven.

Pw3 P.C. Jane Bala a Police officer who produced the Police file on behalf of the Investigating Officer testified that from the investigation the tractor was descending on a slope and the driver lost control and the tractor veered off the road and overturned. The impact was so great that the tractor split into two parts. The tractor was taken for inspection but no pre-accident defects were found. Pw1 the appellant was only called to the Hospital where the deceased had been rushed to and found he had died. He never witnessed the accident. Dw1 Andrew Ogolla Komiti a Mechanic at the Appellant firm produced an Inspection report which showed the Motor vehicle had no pre-accident defect and also produced monthly service form for the tractor. The Learned trial magistrate after analyzing the above evidence stated;

**“As it is the evidence of Pw2 that it was not moving in high speed, the loss of control could not have been due to speeding and would point to a mechanical defect. Though Dw1 testified that the tractor was inspected and found not to have a pre-accident defect to the effect produced a certificate of inspection DExh.1 and that the tractor was subjected to daily servicing nuts and greasing, the next document he produced infact shows that the tractor had not been taken for monthly service as at 18/11/2013. The defendant in my view was negligent in maintaining the tractor. The defendant on liability submitted that the deceased jumped off the tractor and the suit vehicle fell on him but that with due respect was not the evidence of Pw2. I do not accept the submissions that the deceased was the author of his own death. I do find the defendant liable to the plaintiff.”**

Mr. Wangonda for the appellant submitted that there was no evidence tendered by the Respondent to show that the motor vehicle had mechanical defects. He submitted that it is only Pw2 a pedestrian who claimed without basis that the tractor had a mechanical defect. The Inspection report produced showed no pre-accident defects. Counsel therefore submits that the trial court was in error in finding the appellant wholly liable.

Mr. Juma for the Respondent submitted that the Respondent called evidence which showed that the tractor moved in a zig zag manner before it lay on its side. He submitted that the appellants witness did not produce any evidence to show that the tractor had been serviced. He submits that the deceased driver lost control of the tractor due to mechanical defects on the tractor and the appellant as the employer who had a duty to service the tractor was to blame for the accident and therefore liable in damages.

In Civil cases, liability is premised on fault by the defendant. That the defendant had committed a wrong causing injury to the plaintiff and is therefore liable. It is therefore the duty of the plaintiff to adduce evidence to demonstrate the wrong committed by the defendant and/or his employee.

The plaintiff in the plaint listed particulars of negligence on the part of the appellant to per the plaint as allowing a defective tractor to be driven on the road, failure to regularly service the tractor and instructing the deceased driver to drive a defective tractor.

The appellant/defendant while denying any negligence averred that the accident was caused by or substantially contributed to by the negligence of the deceased. They particularized the acts of negligence on the part of the driver to include driving at excessive speed, driving carelessly, exposing himself to risk of damage or injury failing to take evasion action and causing the accident. The Appellant/Respondent also pleaded the doctrine of *volenti non fit injuria*.

From the evidence I find two issues clear; firstly that the tractor was owned by the appellant and that the deceased driver was their driver. Secondly that the only person on the tractor was the deceased. Pw2 Robert Wanjala was not a passenger on the tractor. He only saw the tractor moving in a zig zag manner and it fell on its side. He rushed to the scene and helped deceased to be taken to Hospital. Though he said it was at moderate speed, he stated that the steering cut in the middle and the tractor looked like it had a mechanical problem. Upon cross – examination he readily admitted that he did not know why it was moving in a zig zag manner where an self involving accident occurs, as in this one, where there is no eye witness to determine the real cause, the court should be careful as to the nature of evidence needed to prove negligence. The only person who would have given evidence as to how the accident occurred is the driver who is now deceased. In a case like this, a court should be guided by the fact that accidents don't just occur. Accident would occur due to a defect in the motor vehicle, or being driven without due care and attention or both. In this case the fact that the tractor rolled does not necessarily mean that the tractor was defective. Other factors such as the speed at which the motor vehicle was driven, the care and control exercised by the driver, the state of the road or acts of negligence on the part of the driver would all singly or collectively contribute to this accident. This is more so where it is shown in the inspection report that the tractor did not have any pre-accident defects. Where a court is faced with such evidence, it is in my view prudent to apportion liability as between the owner of the tractor and the driver as the accident would have been

caused by either sudden defect on the motor vehicle or negligence of driver or both. In the circumstances of this case I make a finding that there was negligence on both the Appellant and deceased driver.

**Charlesworth and Percy on Negligence** states at page 1943-04 as follows on contributory negligence:

*“The expression contributory negligence.....applies wholly to conduct of the plaintiff. It means that there has been some act or omission on the plaintiff’s part which has materially contributed to the damage.”*

In the premises I set aside the Judgment entered by the trial Court of 100% liability against the appellant and substitute thereof that the appellant to bear 70% liability and Respondent to shoulder 30% liability.

The second ground of appeal by the appellant is that the trial magistrate awarded damages that were so circumstances. These principles were aptly set out by the C.A. in **Southern Engineer Co. Ltd Vs. Musingi Martin** where it was held that;

*“It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated.... The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion Judgment and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences in view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment. It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award...it need hardly be emphasized that caution has to be exercised when playing heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essential the fact of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably been made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not a say that damages should be standardized or that there should be any attempt to rigid classification. It is but recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measures of uniformity by paying heed to any current trend of considered opinion.”*

This court being the first appellate court can interfere with the award of quantum of damages if it is demonstrated that the trial court acted on wrong principles or that the award is so low or so high as that no reasonable court would so award or that the court took into account factors it ought not to have taken into consideration or left matters it ought to have considered arrived at a wrong decision. None of the above factors have been demonstrated in this appeal. I therefore find no reason to interfere with quantum save that the same would be adjusted to reflect the 30% contributory by the plaintiff.

Inordinately high as to represent an erroneous estimate of the claim. In their submissions the appellant urged the court to adopt a multiplicand of Kshs.4,772/= minimum wage of driver under the Regulation of wages order 2011, as this he submits is because no document of earning was tendered. Counsel for the Respondent submitted that the quantum of damages should not be disturbed as the appellant has not demonstrate any of the grounds upon which an appellate court can disturb the award by the trial magistrate.

It is now settled that the measurement of quantum of damages is a matter for the discretion of the trial court. That discretion must however be exercised judicially. The trial court in assessing quantum should be guided by general principles of assessment of damages and may consider such factors as the facts of the case; comparable injuries should attract comparable awards, but always bearing in mind that no two cases are similar in the result quantum of damages will be as hereunder;

a) Pain and Suffering	Kshs.50,000/=
b) Loss of expectation of life	Kshs.100,000/=
c) Loss of dependency	Kshs.1,374,000/=
<b>TOTAL</b>	<b>KSHS.1,524,000/=</b>
d) Add Special damages	Kshs.1,925/=
<b>KSHS.1,525,925/=</b>	
Less (a) and (b) above	Kshs.150,000/=
<b>GRAND TOTAL</b>	<b>KSHS.1,375,925/=</b>

Less 30%

Kshs.412,777/=

**TOTAL**

**KSHS.963,147.50**

Each party to bear his own costs.

**Dated at Bungoma this 25<sup>th</sup> day of November, 2019.**

**S.N. RIECHI**

**JUDGE.**