



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO.112 OF 2015

CROWN BUS SERVICES LIMITED.....APPELLANT

-VERSUS-

JUDITH WERE MUKANI (Suing as administrator of

the estate of PAUL ODONGO (deceased)).....RESPONDENT

(Being an appeal from judgment and Decree delivered by Hon.J.NGENO, Chief Magistrate on 8th September 2015 in Nakuru CMCC No.91 of 2013)

JUDGMENT

INTRODUCTION

1. This a judgment on four consolidated appeals numbers 112,113,114 and 116 all of 2015. All the appeals arise from an accident which occurred on 11th June 2011 involving motor vehicle registration number KBF 992B Mitsubishi Saloon and the appellant's motor vehicle registration number KAW 938G Nissan bus. The respondent herein **Judith Were Mukani** who was the plaintiff in all the 5 civil suits numbers 91,92,90, 88 and 89 all of 2013 of 5 deceased persons who were all passengers in bus registration number KBF 992B Mitsubishi Saloon. All the 5 passengers the saloon car died in the accident.

2. The trial court determined liability in Nakuru CMCC No.89 of 2013 where the plaintiff/respondent filed claim on behalf of her late husband **Moses Oganga** who was the driver of the saloon car. The trial magistrate found the appellant 100%. He concluded that the bus was being driven in high speed as it pushed the saloon car to a distance of 80 meters and further the bus driver failed to swerve to the right to avoid a collision.

3. In files numbers Nakuru 91,92,90 and 88, the trial magistrate adopted determination on liability in file number 89 of 2013 and assessed damages as follows:-

1. Nakuru CMCC No. 91(HCCA No.112 of 2015)...Kshs 1,265,000
2. Nakuru CMCC No. 92(HCCA No.113 of 2015)...Kshs 1,225,000
3. Nakuru CMCC No. 90(HCCA No.114 of 2015).....Kshs 735,000
4. Nakuru CMCC No. 88 (HCCA No.116 of 2015).....Kshs 335,000

4. The appeal is in respect of the above 4 files. Grounds set out in the memorandum of appeal are as follows:-

- i. That the learned magistrate erred in finding the appellant 100% liable against the weight of evidence on record; that he erred in finding that the appellants driver was driving at excessive speed yet no such evidence was placed before court
- ii. That the trial magistrate erred by failing to give weight to evidence of DW1 and DW2 and casually held that the appellant's driver pushed the saloon vehicle 80 meters away and was therefore driving at excessive speed; that he erred in holding that the driver failed to swerve to the right yet it was clear from the nature of the road that he would have exposed himself to further accident with oncoming vehicle.
- iii. That the trial magistrate erred in awarding damages of kshs 1,250,000, which is excessive and against conventional awards for minors aged 7 years.
- iv. That the trial magistrate failed to give due consideration to the appellants submissions
- v. That the trial magistrate erred in awarding future medical treatment when it had not been proved to the required standard in law.

5. The respondent in HCCA No.114 of 2015 filed cross appeal on quantum specifically on damages on lost years where the plaintiff was awarded kshs 200,000. Ground of the appeal is that the award is inordinately low; she prayed for enhancement of award under that heading. Parties agreed to prosecute the appeal by way of written submissions.

APPELLANT'S SUBMISSIONS

6. On liability, the appellant submitted that the accident occurred on the appellant's lane after the deceased driver of saloon vehicle had veered off his lane and suddenly joined the appellant's lawful lane. Appellant submitted that police concluded that the deceased driver was driving at high speed. He submitted that from evidence on record, motor vehicle KAW 936G owned by the appellant was not to blame; that the defendant's witness exonerated the driver from any blame.

7. The appellant urged court that this being the first appellate court, it reevaluate evidence adduced and make independent decision. He cited the case of **Oluch Eric Gogo Vs Universal Corporation Limited [2015]eKLR** where the role of first appellate court was re-stated.

8. Appellant submitted that in **East Produce (K) Limited Vs Christopher Astiado Osiro in Civil Appeal No.43 of 2001** the court held that it is trite law that the onus of proof is on he who alleges and in where negligence is alleged the position was laid in the case of **Kiema Mutuku Vs Kenya Cargo Hauling Services Ltd 1991** where the court held that, "**there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some fault against the defendant where the claim is based on negligence.**"

9. Appellant submitted that causation of the accident was established by the respondent at all and equally negligence of the driver of the subject vehicle was not established and/or demonstrated by the respondent; and as such conclusion that driver of motor vehicle registration number KAW 938G was wrong and erroneous.

10. On quantum, the appellant submitted the birth certificate produced by the plaintiff who was the mother to the deceased confirmed that he was 7 years old. Award was kshs 1,000,000 under loss of dependency. Appellants urged court to look at awards in authorities cited and award comparable awards. He cited the case of **Chen Wembo & 2 Others Vs I.K.K & Another [2017]eKLR** where the deceased was 12 years and kshs 1,680,000 for loss of dependency was awarded but upon appeal to the High Court the amount was reduced to kshs 600,000 and **S.H.K.M Vs Francis Mwongela Nchebere [2017]eKLR** where upon setting aside dismissal of suit by lower court Judge Gikonyo awarded kshs 200,000 for a child aged 7 years. He urged the court to reduce kshs 1,000,000 to kshs 200,000.

RESPONDENTS SUBMISSIONS

11. Respondent's Advocate submitted that as set out in the case of **Selle & Another vs Associated Motor Boat Co.Ltd & Another [1968] EA 123** the appellate court will not normally interfere with trial court's finding of fact unless it is based on no evidence or on a misapprehension of evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching conclusions.

12. On the issue of liability counsel submitted that the driver of the bus was over speeding. He stated that this is shown by the fact that after seeing the saloon car, the bus driver applied breaks but still covered 20 meters before the point of impact which logically mean he was over speeding. He further submitted that the bus driver (DW1) stated that he had put on full lights and full light affect sight of driver of an oncoming vehicle. He blamed DW1 for failing to dim.

13. He submitted since all occupants of the saloon car died none on their side was available to give their side of the story. He urged the court to uphold the finding on liability by the trial court. He further submitted that the appellant did not enjoin any 3rd party and the plaintiff being a passenger he never contributed to the accident.

14. Counsel further submitted that in a related case **HCA No.115 of 2015** where the same plaintiff herein sued on behalf of her husband **Moses Oganga** who was the driver of saloon car and the deceased was held 30% liable.

ANALYSIS AND DETERMINATION

15. There is no dispute that an accident occurred involving saloon motor vehicle registration number and the appellant's motor vehicle registration KAW 938G Nissan bus on 11th June 2011. There is also no doubt that all occupants of salon car died in the accident.

16. From annexures, I also confirm that **Nakuru CMCC No.89 of 2015** was selected as test suit on liability. The deceased in that file was **Moses Oganga** who was the driver of saloon car and husband to plaintiff in all the 5 cases.

17. On issue of liability, I have made determination on appeal on liability in respect of Nakuru CMCC No 89 of 2015 in HCCA No.115 of 2015. Since the lower court had adopted determination liability in CMCC No.89 of 2015 in all the 4 files herein, I will adopt the same determination in this appeals and proceed to make determination on assessment of damages.

18. I therefore set aside determination of liability by trial magistrate and apportion liability at 30:70. Appellant to shoulder 30% liability and respondent 30% liability.

19. In so far as, assessment of damages is concerned, I wish to assess as follows:-

A. HCCA NO.112/205 (NKU CMCC NO.91/2017

Birth certificate filed show that the deceased child **Paul Odongo** was born on 20th December 2003 meaning he was 7 years old at the time he died. The trial magistrate never showed how he arrived at kshs 1,000,000 under lost years. It is not shown whether he went the multiplier way, applied how many years to what amount or whether it was a global figure. My view is that the child being of tender age of 7 years it could have been possible to tell what he would have grown up to be. In my view, a global figure should have been applied. Looking at the cited authorities, I find kshs 600,000 as reasonable amount in the year 2015 when judgment was delivered. I will not interfere with the other awards. Award is as follows:-

a. Pain and suffering.....kshs 50,000

b. Loss of expectation of life.....kshs 200,000

c. Lost years.....kshs 600,000

d. Special damages.....kshs 15,000

GRAND TOTAL.....kshs 865,000

LESS 30 %.....(kshs 259,500)

NET.....**kshs 605,500**

B. HCCA NO.113 OF 2015(NKU CMCC NO.92/2013)

I note that **Pauline Apiyo** the deceased child was born on 20th December 2003. She therefore died at age of 7 years as per death certificate. I will interfere with award under lost years where she was awarded kshs 1, 000,000 for reasons given above. I will not interfere with the rest of the awards. The trial magistrate award of kshs 1,000,000 under lost years is reduced to kshs 600,000.thus award in respect of this is as follows:-

i. Pain and suffering.....kshs 50,000

ii. Loss of expectation of life..... kshs 200,000

iii. Lost years.....kshs 600,000

iv. Special damages.....kshs 15,000

GRAND TOTAL.....kshs 865,000

LESS 30 %.....(kshs 259,500)

NET.....**kshs 605,500**

C. HCCA NO.114 OF 2015(NKU CMCC NO.90 OF 2013)

I note from the birth certificate that the deceased child **Vincent Onyango** was 14 years at the time of death. The trial magistrate awarded kshs 50,000 under lost years. I have not seen academic record of the child but in view of his age I find an award of kshs 50,000 inordinately low, no explanation has been given for the figure. The child would have been expected to offer support to his parents if his life was not cut short by the accidents. It is not however certain what he would have grown up to be but as an African child his parents no doubt expected him to grow to offer support. In view of his age, I find a global award of kshs 800,000 reasonable under lost years. Kshs 50,000 is therefore enhance to kshs 800,000.Damages awarded as follows:-

i. Pain and suffering.....kshs 50,000

ii. Loss of expectation of life.....kshs 200,000

iii. Lost years.....kshs 800,000

iv. Special damages.....kshs 15,000

GRAND TOTAL.....kshs 1,065,000

Less 30 %.....(kshs 319,000)

NET**kshs 746,000**

D. HCCA NO.116 OF 2015

Birth certificate filed show that the deceased child **Gabriel Odhiambo** was born on 24th January 1999 meaning that in the year 2011 when he died, he was 12 years old. The trial magistrate awarded kshs 1,000,000. Following my arguments in HCCA NO.114 of 2015 above, I find an award of kshs 700,000 as global figure comparable to decided cases around the same time. I will therefore interfere only with award under lost years by reducing the amount from kshs 1,000,000 to kshs 700,000. I award as follows:-

- i. Pain and suffering.....kshs 30,000
- ii. Loss of expectation of life.....kshs 200,000
- iii. Lost years.....kshs 700,000
- iv. Special damages.....kshs 15,000
- v. GRAND TOTAL.....kshs 945,000
- vi. Less 30%.....(kshs 283,500)
- vii. NET.....kshs 661,500

E. FINAL ORDERS

1. Appeal on liability is allowed. Finding by trial magistrate is set aside.
2. Liability is apportioned at 30:70 in favour of respondent. Appellants to should 70% liability and respondent in each file 30%
3. In each file, appeal on assessment under the head of lost years is allowed and assessed as set out in each case above.
4. Each party to bear own costs of appeal.

Judgment dated, signed and delivered at Nakuru this 21st day of November, 2019

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RACHEL NGETICH

JUDGE

In the presence of:

Schola Jeniffer – Court Assistant

No appearance counsel for appellant

Geno holding brief for Mukisu counsel the for respondent