



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 81 OF 2015

KEAN TRANSPORTERS LIMITED.....1ST APPELLANT

KENNETH GIKONYO MUNGAI2ND APPELLANT

VERSUS

ANASTASIA WANGECI NJOGU..... RESPONDENT

(Being an appeal from the judgment of Hon. T.S. Nchoe (Ag. SRM) in CMCC No. 4397 of 2011 delivered on 27th August 2014)

JUDGMENT

1. This appeal challenges the judgment and decree of the lower court in Nairobi CMCC No. 4397 of 2011, a suit in which the respondent was the plaintiff while the appellants were the defendants.
2. The respondent, *Anastasia Wangeci Njogu* had sued the appellants in her capacity as the administratrix of the estate of her late husband *Charles Njogu Ngugi* (hereinafter the deceased) who lost his life owing to fatal injuries sustained in a road traffic accident on 12th September 2010. She instituted the suit seeking special and general damages on behalf of the deceased's estate under the *Law Reform Act* and on behalf of his dependants under the *Fatal Accidents Act*.
3. In her plaint date 22nd September 2011, the respondent pleaded that on the material date, the deceased was travelling as a passenger in motor vehicle registration number KBG 669F along Thika Road when a vehicle owned by the 1st appellant registration number KBA 899E was so carelessly and negligently driven by the 2nd appellant who was the 1st appellant's driver or authorized agent that it rammed into the rear of motor vehicle registration number KBG 669F causing fatal injuries to the deceased. The particulars of the 2nd defendant's negligence were pleaded in paragraph 5 of the plaint.
4. In their joint statement of defence dated 15th June 2012, the appellants denied liability *in toto* and put the respondent to strict proof thereof. In the alternative, they averred that the accident was solely caused or substantially contributed to by the negligence of the driver of the other motor vehicle involved in the accident registration number KBG 669G.
5. After a full trial, the learned trial magistrate, *Hon. T.S. Nchoe*, (Ag. SRM) rendered his decision and entered judgment in favour of the respondent against both appellants jointly and severally on the following terms:
 - i. General damages for pain and suffering - KShs.60,000
 - ii. Loss of expectation of life - KShs.100,000
 - iii. Loss of dependency - Kshs.1,080,000
 - iv. Special damages - KShs.31,300
6. The respondent was also awarded costs of the suit and interest on the total sum awarded from the date of judgment until payment in full.
7. The appellants were aggrieved by the trial court's decision on both liability and quantum. They proffered this appeal relying on the following three grounds:

- i. That the learned trial magistrate erred in law and fact in failing to properly evaluate the evidence on record thereby reaching a wrong decision on liability.
- ii. That the learned trial magistrate erred in law by awarding an amount which was inordinately too high as to represent an erroneous estimate of the damages payable.
- iii. That the learned trial magistrate erred in law and in fact in failing to appreciate the appellants submissions in the suit and placing undue reliance on the respondent's submissions.

8. On the hearing date, the parties consented to having the appeal prosecuted by way of written submissions. Those of the appellants were filed on 8th April 2019 while the respondent filed her submissions on 26th April 2019. The submissions were highlighted before me on 3rd October 2019.

9. This is a first appeal to the High Court. I am fully conscious of my duty as the first appellate court which as concisely captured by the Court of Appeal in *Selle & Another V Associated Motor Boat Company & Others, [1968] EA 123* is to:

".... reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...."

10. It is however important to point out at this juncture that though an appellate court has power to disturb findings of fact made by the trial court, that power is not unlimited and must be exercised cautiously within some set parameters. It is settled law that an appellate court will only interfere with findings of fact made by a trial court if it is satisfied that the finding was not based on any evidence or it was based on a misrepresentation of the evidence or that in arriving at its decision, the trial court relied on the wrong legal principles. See - *Sumaria & Another V Allied Industrial Limited, (2007) 2 KLR 1* and *Jabane V Olenja, [1986] KLR 661*.

11. That said, I now turn to consider the merits or otherwise of the appeal. I have carefully considered the grounds of appeal, the rival written and oral submissions made on behalf of the parties as well as the authorities cited. I have also considered the evidence on record and the judgment of the learned trial magistrate.

12. Having done so, I find that though in their written submissions the appellants faulted the learned trial magistrate's decision on liability claiming that it was erroneous as no evidence was adduced during the trial to prove negligence on the 2nd appellant, in her oral submissions, learned counsel for the appellants *Ms Ochieng* conceded that the appellants' motor vehicle registration number KBA 899E caused the accident by ramming into the rear of the motor vehicle in which the deceased was travelling as a passenger.

13. The above admission coupled with the evidence of PW1 who was travelling in the same vehicle as the deceased when the accident occurred leaves no doubt that the accident in which the deceased sustained fatal injuries was solely caused by the negligence of the driver of motor vehicle registration number KBA 899E. In her pleadings and in her evidence, the respondent who testified as PW2 claimed that the 2nd appellant was the driver of the 1st appellant's aforesaid vehicle at the material time. This averment was not controverted by any evidence to the contrary since the appellants did not offer any evidence to discount the respondent's case.

14. With due respect, the appellants submission that the learned trial magistrate erred by not apportioning liability in the ratio of 50:50 allegedly because there was no evidence showing who was to blame for the accident is totally misplaced because having been a passenger in a vehicle which was hit from the rear, the deceased could not have contributed in any way to the occurrence of the accident. The evidence on record clearly proves that the 2nd appellant was solely to blame for the accident and the learned trial magistrate was therefore correct in his finding that the appellants were jointly and severally liable for the accident at 100%. The trial magistrate's finding on liability is thus upheld.

15. Turning to the appeal on quantum, I wish to start by observing that the award of damages is always at the discretion of the trial court. That discretion must however be exercised judiciously in accordance with the law taking into account the circumstances and facts of each case.

16. The principles that guide an appellate court in deciding whether or not to interfere with an award of damages by a trial court have been restated in many authorities. They were well captured in *Kemfro Africa Limited T/A Meru Express Services [1976] & Another V Lubia & Another, [1987] KLR 30* where the Court of Appeal stated thus:

"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held to be that; it must be satisfied that either the judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or that short of this the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage..."

17. Similarly, the same court in *Mariga V Musila, (1984) KLR 251*, emphasized that the appellate court should not substitute its own discretion with that of the trial court and should only interfere with a trial court's award only if it was satisfied that it was erroneous. The court stated as follows:

"The assessment of damages is more like an exercise of discretion and an appellate court is slow to reverse a lower court on the question of the amount of damages unless it is satisfied that the judge acted on a wrong principle of law or has for these or other reasons made a wholly erroneous estimate of the damage suffered. The question is not what the appellate court would award but whether the lower court judge acted on the wrong principles."

18. Guided by the above principles, I now turn to consider the trial court's awards which are contested by the appellants. These are the awards on pain and suffering and loss of dependency. The appellants did not challenge the award of KShs.100,000 for loss of expectation of life save for their submission that this amount should have been deducted from the award made for loss of dependency. The award of special damages was also not challenged on appeal.

19. Under the head of pain and suffering, the respondent was awarded a sum of KShs.60,000. The appellants have argued that this amount was inordinately high considering that the deceased died on the spot. Relying on the cases of George Ogeto Menge V Linear Coach Co Ltd, [2010] eKLR and Ednar Gesare Ogega V Aiko Kebiba (Suing as father and legal representative of the estate of Alice Bochere Aiko – Deceased), [2015] eKLR, where the personal representatives of the deceased's estates were awarded KShs.10,000 and KShs.20,000 for pain and suffering where the deceased had died on the same day of the accident, the appellants urged the court to set aside the award of KShs.60,000 awarded by the trial court in this case and substitute it with an award of KShs.10,000.

20. The award of damages under the head of pain and suffering in fatal accident claims is meant to compensate the deceased's estate for the pain and suffering the deceased endured before succumbing to his or her injuries. In this case, though the death certificate produced in evidence by the respondent shows that the deceased died on 13th September 2010, it is evident from the testimonies of PW1 and PW2 that the deceased died on the same day of the accident. PW1 went further to add that the deceased actually died on the spot.

21. In the premises, it is reasonable to conclude that the deceased did not suffer prolonged pain before his death and I therefore agree with the appellants that an award of KShs.60,000 for pain and suffering under those circumstances was inordinately high. It was not in tandem with the previous awards made under the same head of damages in comparable circumstances.

In making the award, the learned trial magistrate did not give any reason to justify the same. Given that the deceased died on the spot, I find that an award of KShs.30,000 would have been fair and sufficient compensation for the deceased's estate for his pain and suffering before death. The trial court's award of KShs.60,000 is therefore set aside and is substituted with an award of KShs.30,000.

22. On the award of KShs.1,080,000 for loss of dependency, the appellants contend that the award was erroneous as the respondent did not adduce any evidence to prove the deceased's income to justify the multiplicand of KShs.5,000 used by the trial court; that PW2 did not adduce evidence to confirm that she was indeed the deceased's wife and the number of children who survived the deceased and lastly that the trial court did not indicate which dependency ratio it applied to arrive at the award.

23. My analysis of the evidence on record shows that the evidence tendered by PW1 and PW2 regarding the occupation of the deceased prior to his death and PW2's evidence that the deceased used to be the breadwinner of a family of six made up of PW2, his widow and five children was not contradicted by any evidence to the contrary. In fact, PW2'S evidence was not shaken under cross-examination. Given that there was evidence in the form of PW1 and PW2's testimony to prove that the deceased was a businessman running a general shop prior to his death, I find that the multiplicand of KShs.5,000 used by the trial court was very modest and I see no reason to disturb it.

24. It is also not disputed that at the time of his death, the deceased was only 34 years old – see death certificate. In calculating loss of dependency, the learned trial magistrate used a multiplier of 18 years but did not use any dependency ratio.

Given that the deceased was not in formal employment and was not subject to the mandatory retirement age of 60 years, it is possible that he could have worked for over 60 years had his life not been cut short by the negligence of the 2nd appellant. However, the trial magistrate in his discretion used a multiplier of 18 years probably having taken into account the vicissitudes of life.

25. On my part, if it was upto me, I would have used a higher multiplier given the age at which the deceased lost his life and the evidence of his occupation prior to his demise. However, I cannot disturb the trial court's decision simply because in my opinion, a higher multiplier would have been more appropriate in this case. I therefore uphold the multiplier that was used by the trial court.

26. The only fault I find in the approach taken by the learned trial magistrate in calculating loss of dependency is failure on his part to employ a dependency ratio.

Given the evidence by PW2 that the deceased used to be the sole breadwinner of a family of four or five people two of whom were in school, the trial magistrate ought to have subjected the multiplicand and multiplier to a dependency ratio of $\frac{2}{3}$'s in calculating damages for loss of dependency. The award should have been calculated as follows:

$$5,000 \times 12 \times 18 \times \frac{2}{3} = 720,000.$$

I thus set aside the award of of KShs.1,080,000 for loss of dependency and substitute it with an award of KShs.720,000.

27. Lastly, as I stated earlier, the award for loss of expectation of life in the sum of KShs.100,000 was not disputed but the learned trial magistrate failed to take into account the appellants submissions that where persons entitled to the deceased's estate are the same people for whose benefit an action for loss of dependency is instituted under the Fatal Accidents Act, the amount awarded for loss of expectation of life should be deducted from the award for loss of dependency to avoid over compensating the same people for the deceased's death. The learned trial magistrate therefore erred in failing to deduct KShs.100,000 from the amount he awarded for loss of dependency.

28. For the foregoing reasons, the appellants' appeal partially succeeds to the extent specified above. The trial court's judgment is consequently set aside and is substituted with a judgment in favour of the respondent against the appellants jointly and severally as follows:

- i. General damages for pain and suffering - KShs.30,000

ii. General damages for loss	
of expectation of life	- KShs.100,000
iii. Loss of dependency	- Kshs.720,000
iv. Less KShs.100,000 damages for	
loss of expectation of life	- KShs.100,000
v. Special damages	- KShs.31,300
Total	- <u>KShs.781,300</u>

29. The amount awarded as general damages will attract interest from the date of judgment of the trial court while the award of special damages will earn interest from the date of filing of the suit in the trial court until final payment.

30. The respondent is awarded costs in the lower court but since the appeal has partially succeeded, the order that best commends itself to me is that each party shall bear its own costs of the appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 19th day December, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Ochieng for the appellants

Mr. Kimani holding brief for Mr. Gichache the respondent

Mr. Kibet: Court Assistant