



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
HIGH COURT CIVIL APPEAL NO. 111 OF 2013

CHETAN KIRITI MODI.....1ST APPELLANT

METRO PLASTICS LIMITED.....2ND APPELLANT

VERSUS

CATHERINE WANJIRU GIKARU (Suing as an Administratrix

to the estate of the Late NICHOLAS MUCHAI GIKARU.....RESPONDENT

**(Being an appeal from the Judgment delivered on 9th October, 2012 by Hon. Mr. P. Nditika
(Principal Magistrate) Milimani Commercial Courts in CMCC No. 3466 of 2008)**

JUDGMENT

1. The Appellants, Chetan Kiriti Modi and Metro Plastics Limited were sued by the Respondent for damages arising out of a fatal Road Traffic Accident involving the deceased, Nicholas Muchai Gikaru. The Respondent had filed the suit in the Lower Court as the Administratrix of the estate of the deceased. The Respondent blamed the accident on the alleged negligent manner in which motor vehicle KAU 010T owned by the 2nd Respondent was driven at the material time by the 1st Appellant.
2. The Appellants filed a joint statement of defence and denied the claim. The defence blamed the accident on the deceased's negligence.
3. During the hearing of the case in the Lower Court, the parties by consent apportioned liability at 25% against the Respondent and 75% against the Appellants. The parties agreed to file submissions on quantum. The Respondent filed her written submissions but the Appellants failed to file any. The judgment was subsequently entered for the Respondent for the sum of Ksh.1,372,500/= as general damages and Ksh.47,660/= special damages.
4. The Appellants subsequently filed the application dated 14th January, 2013 which sought orders for stay of execution and for extension of time within which to appeal. On the date set for the hearing of the said application, the parties recorded a consent order. In the said consent, the consent orders recorded earlier on the issue of liability were maintained. The Respondent's written submissions together with the attached documents were adopted by consent. The Appellants were allowed to file written submissions. Ksh.50,000/= throw away costs were to be paid to the Respondent.
5. In its ruling on the application dated 14th January, 2013, the trial court agreed with the submissions by

the Respondent's counsel and maintained the earlier judgment entered for the Respondent.

6. The Appellants were dissatisfied with the judgment of the Lower Court and appealed to this court on grounds that can be summarized as follows:

- (a) That the Respondent's case was not proved on a balance of probability.
- (b) That the award of general damages was contrary to the law and without any evidence in support thereof.
- (c) That the special damages were not proved
- (d) That the Appellants' submissions were not considered.

7. During the hearing of the Appeal, the parties opted to file written submissions. The submissions were subsequently highlighted before me. I have considered the said submissions and the authorities cited.

8. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must 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. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)”.

9. The parties recorded a consent on liability. The case therefore proceeded on the assessment of damages. The parties did not adduce any evidence but the Respondent filed documents and both parties filed written submissions.

10. The documents filed by the Respondent were as follows:

- (a) Limited grant *ad litem*
- (b) Death certificate which reflects the age of the deceased as 24 years and occupation as student.
- (c) Police abstract.
- (d) Deceased's college documents which include receipts for payments made and examination results which include Kenya National Accountants and Secretaries National Examinations, Computer Literacy Certificate and Kenya Certificate of Secondary Examination Result slip.
- (e) Deceased's Birth certificate which reflects he was born in the year 1982 and the mother as Catherine Wanjiku Gikaru.
- (f) Receipts for the funeral expenses.

11. The deceased died on 26th July, 2006 according to the death certificate. That is the same date of the accident as reflected in the plaint. The trial magistrate awarded the sum of Ksh.30,000/= for the pain and suffering without any evidence of prolonged suffering, the conventional award of Ksh.10,000/= award under this head is reasonable (See for example

(a) Laban Njogu Wainaina v David Kariuki Kingori & another HCCC No. 4148/1989 where a sum of Ksh.10,000/= was awarded for pain and suffering where the deceased died the same day.

(b)Eva Benta Okembo v Kimotho Kibira Nbi. HCCC No. 2399/1989 where a similar amount was again awarded.

12. The Ksh.200,000/= award for loss of expectation of life. Once again the range of awards in similar cases points to a sum of Ksh.100,000/= under this head and I award the same. See for example:

(a) Marwa R Rwebi v BAT Kenya Limited Kisii HCCC No. 11 of 1992 wherein a sum of Ksh.100,000/= was awarded for loss of expectation of life.

(b) Henry Odima Omolo v James Ngatia mwatha HCCC No. 4696 of 1990 wherein a sum of Ksh.100,000/= was awarded for loss of expectation of life.

(c) Kenya Breweries Limited v Ali Kahindi Saro Civil Appeal No. 144 of 1990. The court awarded Ksh.100,000/= for loss of expectation of life for a six (6) year old child.

13. The trial magistrate made an award of Ksh.1,200,000/= for lost years using a multiplier of ten (15) years and a multiplicand of Ksh.10,000/= and 2/3 ratio. The trial magistrate then made an award for Ksh.400,000/= for loss of dependency using a multiplier of 20 years, a multiplicand of Ksh.5,000/= and a dependency ratio of 1/3. The correct approach is generally accepted as stated in **Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & another Nairobi HCCC No. 1638 of 1988(UR)**

“The principles applicable to an assessment of damages under the Fatal Accidents 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 life of the deceased, the expectation of life and dependency of the dependents and the chances of life of the deceased and dependents. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature.”

14.The death certificate reflects the age of the deceased as 24 years. The Birth Certificate reflects the Respondent, Catherine Wanjiku Gikaru as the mother. There is no evidence of marriage or any children. The deceased had completed his secondary school education with a grade “C-” and was undertaking an accounts course. The application of the figure of Ksh.10,000/= as the multiplicand arrived at by the trial magistrate is reasonable taking into account minimum wages under the Labour Law. Application of 1/3 dependency ratio and a multiplier of 15 years brought the figure awarded by the trial magistrate for lost years to Ksh.1,200,000/=. However, going on to make a further award of Ksh.400,000/= for loss of dependency would mean that the estate of the deceased would benefit twice as the beneficiaries of the deceased’s estate under the Law Reform Act and under the Fatal Accidents Act are the same. I therefore set aside the award of Ksh.400,000/= (See for example in the case of **Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v A M. Lubia and olive Lubia 91985) 1 KAR 727:**)

15. The special damages pleaded in the plaint were Ksh.46,960 for the funeral expenses and Ksh.200/= for the police abstract. The receipts produced in support of the funeral expenses reflect payments made were in excess of what was pleaded. I therefore award the sum of Ksh.46,960/= pleaded. The sum of Ksh.200/= for the payment made for obtaining the police abstract was not supported by any document.

16.The total award reads as follows:

(a) Pain and suffering Ksh.10,000/=

(b) Loss of expectation of Life Ksh.100,000/=

(c) Loss of dependency Ksh.1,200,000/=

(d) Special damages Ksh.46,960/=

Total Ksh.1,356,960/=

Less 25% contribution **Ksh.1,017,720/=**

17. In the upshot, judgment of the Lower Court is set aside and substituted with one for the sum of Ksh,1,017,720/=. The costs in the Lower Court to the Respondent. The appeal has been partially successful. Each party to bear own costs of the appeal.

Dated, signed and delivered at Nairobi this 30th day of Jan., 2018

B. THURANIRA JADEN

JUDGE