



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 65 OF 2017

JOSEPH KARURA.....1ST APPELLANT

GROFIN (K) LTD.....2ND APPELLANT

VERSUS

JUDITH ADHIAMBO (suing as legal representative

of the estate Samuel David Alusaba Anduro).....RESPONDENT

(Being an Appeal from the Judgment and decree of Hon. C.Yalwala (PM) delivered on 4th August 2017 in Kisumu CMCC NO. 87 of 2016)

JUDGMENT

1. JUDITH ADHIAMBO sued (hereinafter referred to as respondent) sued JOSEPH KARURA and GROFIN (K) LTD(hereinafter referred to as appellants) in the lower court claiming damages for fatal injuries suffered by her husband Samuel David Alusaba Anduro (Deceased) on 5th February, 2014 when 2nd appellant's motor vehicle KBB824F/2C 8121 was negligently driven by the 1st appellant as a result of which it collided with motor cycle GK B 675 in which the deceased was riding as a pillion passenger.

2. The defendants/ appellants filed a joint statement of Defence and denied the claim and urged the court to dismiss it with costs.

3. In a judgment delivered on 4th August 2017, the learned trial Magistrate awarded the respondent Kshs. 4,073,252/- which was subject reduction by the agreed 20% contributory liability ratio.

The Appeal

4. The Appellants being dissatisfied with the lower court's decision preferred this appeal and on 27th September, 2017 filed a Memorandum of Appeal dated 5th September, 2017 which sets out 3 grounds of appeal to wit:-

1) That the Honourable Learned Magistrate erred in law and in failing to consider the appellant's submission in the primary suit

2) That the Honourable Learned Magistrate erred in awarding excessive damages

3) That in arriving at the judgment, the Honourable Learned Magistrate misdirected himself by relying on extraneous and irrelevant evidence while ignoring binding authorities

SUBMISSIONS BY THE PARTIES

5. When the appeal came up for mention on 23.1.18; the parties' advocates made oral submissions.

Appellants' submissions

6. Mr. Opondo for the appellants was of the view that the court ought to have awarded the sums proposed by the appellants in their submission.

Respondent's submissions

7. Mr. Munuang'o for the respondent urged the court not to interfere with the findings in the trial court's judgment which was well reasoned.

The evidence

11. I have perused the entire record of appeal and I notice that the appeal revolves around quantum since the parties had a consent on liability at 80:20% in favor of the respondent. .

12. This being the first appeal, it is my duty under section 78 of the Civil Procedure Act to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion taking into account the fact that I did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of **Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini .v. A.M. Lubia and Olive Lubia (1985) 1KAR 727 . At P. 730 Kneller J.A. said:-**

“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 by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that 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”.

Quantum

13. Pain and suffering

The record shows that deceased did not die on collision but was pronounced dead on arrival in hospital. The learned trial magistrate's reasoning in awarding Kshs. 50,000/- was supported by the case of **NBI HCCC 754/05 Cornelia Elaine Wamba v Shireeji Enterprises Ltd & Others** which is over 12 years old

Loss of expectation of life

14. Deceased died at the age of 41 years which was the same age as that of deceased in **PBS & Anor v Archdiocese of Nairobi Kenya Registered Trustees & 2 Others [2016]eKLR**. There is however no evidence that the trial court in assessing the damages under this heading, took into account an irrelevant factor, or left out of account a relevant one, or that; the amount awarded is so inordinately high that it must be a wholly erroneous estimate of the damage.

Loss of dependency

15. Evidence of the deceased's earnings was tendered by way of a payslip. The learned trial magistrate considered that the deceased who was 41 years still had 19 years more before retirement. The learned trial magistrate rightfully considered eventualities of life and used a multiplier of 16 years. Deceased was married and a dependency ratio of 2/3 was properly applied.

16. Special damages

The award under this heading is not disputed

Orders

17. In my considered view, the trial magistrate's decision cannot be erroneous only for the reason that the court did not adopt the proposals by the appellants. The decision was in tandem with the previous decided cases of similar nature and was therefore exercised judicially.

18. As a result, this court finds no reason to interfere with the decision of the learned trial magistrate on quantum generally. For the reasons given on the assessment above, the appeal is dismissed in its entirety. The lower court's decision is confirmed. The respondent will have costs of the appeal and the proceedings in the lower court.

DATED AND DELIVERED THIS 8th DAY OF March 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistants - Felix & Carolyne

Appellants - N/A

Respondent - Mr Ondogo/Omondi