



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL DIVISION

HIGH COURT CIVIL APPEAL CASE NO. 25 OF 2016

MARTIN MBURUGU KARIUKI.....APPELLANT

VERSUS

KANARIO MERCY CHOCHORA & JENIFFER MWARI CHOCHORA(Both suing as legal representatives &

Administrators of the estate of EDWARD MUIRAGUA CHOCHORA – Deceased).....RESPONDENTS

(Being an appeal from the Ruling delivered on 5th April, 2016 by Hon. R. G. Mundia (Resident Magistrate) Chief Magistrate's Court at Isiolo in SRMC No. 47 of 2013).

JUDGMENT

1. The Respondents filed suit as the administrators of the estate of the Late Edward Mwiragua Chochora who died following a fatal Road Traffic Accident on 6th August, 2012. The Respondents attributed the accident to the alleged negligent manner in which motor vehicle KAS 252G Isuzu Lorry was being driver. The Respondents claim was for damages.

2. The Appellant filed a statement of defence and denied the claim. The Appellant blamed the deceased for the accident.

3. The Respondents filed a reply to the defence, joined issues with the defence and reiterated the contents of the plaint.

4. The Respondents' case is that the deceased was a sand loader. It is stated that the deceased asked for a lift from the lorry and was in the process of boarding the lorry when the lorry started moving before the deceased had secured himself and the deceased fell off.

5. The Appellant's case was that the lorry was loaded with sand and it was going towards Isiolo from Archers post and was going over some bumps, when the driver heard some commotion behind. He stopped and inquired what had happened. It turned out that a passenger who had been hanging at the back of the lorry had fallen down.

6. The trial magistrate entered judgment for the Respondent on 100% liability basis as follows:

| | |
|--------------------------------|-----------------|
| a. Pain and suffering | Ksh 40,000/= |
| b. Loss of expectation of life | Ksh.100,000/= |
| c. Loss of dependency | Ksh.1,200,000/= |
| d. Special damages | Ksh.43,000/= |

7. The Appellant was dissatisfied with the said judgment and appealed to this court on the following grounds.

- a. That the trial magistrate arrived at an erroneous finding on liability.
- b. That the trial magistrate erred in adopting a dependency ratio of 2/3
- c. That the trial magistrate erred in applying a multiplier of 25 years.

d. That the trial magistrate erred in adopting a multiplicand of Ksh.6,000/=.

e. That the judgment was against the weight of the evidence.

8. The appeal was canvassed by way of written submissions which I have considered.

9. 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)”.

10. The two witnesses from the scene were PW3 Paul Ekoi a loader and DW1 Geoffrey Mureu Nteere the driver of the lorry. According to PW3, the deceased asked for a lift from the lorry which started moving before the deceased had secured himself.

11. On the other had it was the driver’s evidence that unknown to him, the deceased had been hanging at the back of the lorry. During cross-examination, the driver stated that there were many loaders at the scene. However, none of them was called as a witness to corroborate the drivers version of events. The evidence by the driver fails to reflect at what stage he came to realize that the deceased was hanging on the motor vehicle.

12. The evidence of PW4 PC Joseph Ndungu was that the cause of the accident was not known and the accident is still pending under investigations. Although PW4 stated that the deceased was trying to board a vehicle that was still in motion, he did not give any reason for holding that opinion.

13. The evidence of PW3 was that of an independent witness. PW3’s evidence that he was at the rear of the motor vehicle and seated on top of the sand means that he was in a better position to tell where exactly the deceased was at the time of the accident. There was no contradiction in the evidence of PW3. I am in agreement on the finding of the trial magistrate on liability at 100% against the Appellants.

14. The deceased was 30 years old according to certificate of death which also reflects that the death occurred on the same day of the accident on 6th August, 2012. The multiplier of 25 years applied by the trial magistrate was reasonable, taking into account that the retirement age in Kenya is 60 years and one can work beyond age 60 years in the private sector. The award of Ksh.100,000/= for loss of expectation of life is also reasonable and falls within the range of similar awards.

15. The mother to the deceased, PW1 Jennifer Mwari stated that the deceased was a loader and used to give her Ksh.10,000/= per month to pay school fees for the siblings and Ksh.1,000/= for her own use. The mother did not know how much money the deceased earned per month. The evidence of PW3 was that loaders earned Ksh.500/= per day. The trial magistrate applied a multiplicand of Ksh.6,000/= as per the labour Regulations (Legal Notice 197 Act No. 12 of 2007). I do not fault this approach in the circumstances of this case. There was no evidence on the actual earnings of the deceased. There was no evidence to prove that the Ksh.500/= was earned consistently every day.

16. On the loss of dependency, the trial magistrate fell into error when he applied a dependency ratio of 2/3 without any cogent evidence in support of the same. In the circumstances of this case a dependency ratio of 1/3 is reasonable. There is no evidence that the deceased left behind a wife or children. Therefore $Ksh.6000 \times 12 \times 25 \times 1/3 = Ksh.600,000/=$.

17. The total award therefore works out as follows.

| | |
|--|-----------------------------|
| a) Pain and suffering | Ksh.40,000/= |
| b) Loss of expectation of life | Ksh.100,000/= |
| c) Loss of dependency $Ksh.6,000 \times 12 \times 25 \times 1/3$ | Ksh.600,000/= |
| d) Special damages | <u>Ksh.43,000/=</u> |
| Total | <u>Ksh.783,000/=</u> |

18. The judgment of the lower court is hereby set aside and substituted with a judgment for Ksh.783,000/= plus interest. Costs in the Lower Court to the Respondent. The appeal having been partially successful, each party to bear own costs of the appeal.

B. THURANIRA JADEN

JUDGE

Dated, signed and delivered in Meru this 26th day of July, 2018

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