



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL. NO. 220 OF 2012

GENERAL MACHINERY.....APPELLANT

VERSUS

OMAR WARIO ALIRESPONDENT

(Being an appeal from the Judgment delivered on 20th April, 2012 by Hon. T. W. C. Wamae (Chief Magistrate) Chief Magistrate's Court at Milimani Commercial Court in CMCC No. 6496 of 2006).

JUDGMENT

1. The Respondent filed suit in the lower court claiming damages arising out of a road traffic accident which occurred on the 2nd November, 2004. The Respondent is the administrator of the estate of his late son, Abdurashid Omar Wario who passed away following the accident. The suit is brought under the Law Reform Act Cap 486 Laws of Kenya and the Fatal Accidents Act Cap 32 Laws of Kenya. The accident is attributed to the alleged negligent manner in which the Appellant's motor vehicle registration No. KAJ 259V (Pulling Trailer)No. ZA 4020 was being driven at the material time.

2. The claim was denied as per the statement of defence filed. In the alternative, it was stated that the accident was solely or substantially caused by the negligence of the deceased. The particulars of the said negligence were set out in the Defence.

3. There was no reply to the defence.

4. The trial magistrate entered judgment in favour of the Respondent on 100% basis as follows:

(a) Pain and suffering	Ksh.70,000/=
(b) Loss of expectation of life	Ksh.100,000/=
(c) Lost years	Ksh.1,050,000/=
(d) Special damages	Ksh. 300/=
Total	<u>Ksh.1,220,300/=</u>
Less	Ksh. 170,000/=
Total	<u>Ksh.1,050,000/=</u>

5. The Appellant was aggrieved by the said judgment and appealed on grounds that can be summarized as follows:

(a) That the holding on liability was erroneous.

(b) That the award of general damages was excessive

(c) That the application of a multiplicand of Ksh.7,000/= was not in consonance with the Minimum Labour Wages Regulations.

(d) That the Appellant's evidence was not considered.

6. The appeal was canvassed by way of written submissions.

7. 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)”.

8. PW1 PC Boru Dima produced the police abstract as an exhibit. The said abstract reflects that the accident is “pending under investigations”.

9. PW2 Omar Wario Ali the father to the deceased testified that the deceased was employed as a turn boy and used to earn the sum of Ksh.7,000/= per month. The death certificate was produced as an exhibit. The same reflects that the deceased was 19 years old at the time of the accident and passed away on 8th November, 2004 while undergoing treatment.

10. PW3 Dr. Minda Okemwa produced postmortem report. The same confirms that the deceased died as a result of multiple injuries due to a road traffic accident.

11. PW4 PC Abdi Hassan visited the scene of the accident and drew sketch plans. His evidence was that there was no sufficient evidence to charge the driver. He further testified that there were no eye witnesses who volunteered to record statements. PW4's evidence that the deceased was opening the canvass and was at the back of the vehicle is attributed to the driver. However, the driver denied any negligence on his part. There was no evidence of a confession from the driver.

12. DW1 Pascal Ndaguza the lorry driver testified that the deceased who was a turn boy opened the doors and the canvas for the lorry to be checked at the gate. That while driving in, after about two metres he heard screams. He stopped and found that the turn boy had been run over by the front tyres of the trailer. The driver denied having reversed at the material time and stated that he looked through the side mirror but did not see the deceased. He stated that he was alone inside the motor vehicle and did not sound out any warning when he started driving in.

13. An evaluation of the aforesaid evidence reflects that the driver is the only witness from the scene who testified. None of the Plaintiff's witnesses was at the scene at the material time. The evidence from the scene visit fell short of stating who was to blame for the accident. It is therefore difficult in the circumstances of this case to determine who between the driver and the turn boy was to blame to what extent for the accident. I apportion liability on a 50:50 basis.

14. As stated by the Court of Appeal in **Hussein Omar Farah v Lemto Agencies [2006] eKLR** held as follows:-

“In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.”

15. The deceased died on 8th November, 2004, about four days after the accident. The award of Ksh.70,000/= for pain and suffering is reasonable as the death was not instantaneous.

16. There was no cogent evidence on the earnings of the deceased. The trial magistrate applied Minimum Labour Wages stated to be Ksh.7,000/=. The Minimum Labour Wages Regulations applicable in the year 2004 in Nairobi for a general worker was minimum of Ksh. 4,335/= as per the Regulations of wages for year 2004. I will round up the same to Ksh.5,000/=.

17. The deceased was 19 years old at the time of death. There is no evidence of marriage or any children. The Respondents are named herein as the parents of the deceased. According to the evidence of the father, the deceased lived with them in Kibera area of Nairobi and used to assist them with Ksh.5,000/= for their shopping and taking care of the siblings.

18. As stated by the Court of Appeal in the case of **Hellen Waruguru Waweru (suing as the Legal representative of Peter Waweru Mwenja (deceased) v Kiarie shoe Stores Ltd & 2 others [2015] eKLR**:

“The court should find the age and expectation of working life of the deceased and consider the ages and expectations of life of his dependents, the net earning power of the deceased (i.e. his income less tax) and the proportion of his net income which he would have made available for his dependents. From this it should be possible to arrive at the annual value of dependency which must then be capitalized by multiplying by a figure representing so many years of purchase. As emphasized above, the net income determines the multiplicand and it is only net of statutory deductions”

19. The deceased must have used some of his earnings on himself. I have considered the ½ ratio applied by the trial magistrate. Taking into account the uncontroverted evidence that the deceased lived with his parents, I find the same reasonable.

20. The award of general damages therefore works out as follows:

Pain and suffering	Ksh.50,000/=
Loss of expectation of life	Ksh.70,000/=
Loss of dependency (Ksh.5000 x 12 x 25 x ½)	Ksh.750,000/=
Special damages	<u>Ksh.300/=</u>
Total	<u>Ksh.870,300/=</u>
(Less 50% contributory negligence)	Ksh.435,150/=
Total	<u>Ksh.435,150/=</u>

21. With the foregoing, I find that the appeal has merits. Consequently, the judgment of the trial court is hereby set aside and substituted with a judgment for the sum of Ksh.435,150/= together with the costs in the lower court. The appeal having been partially successful, each party shall bear own costs.

Dated, signed and delivered at Nairobi this 25th day of Sept, 2018

B. THURANIRA JADEN

JUDGE