



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 163 OF 2011

SULUENTA KENNEDY SITA

SONY FUEL INJECTION LIMITED APPELLANTS

VERSUS

JEREMIAH RUTO (Suing as legal representative of the estate of

Joyce Jepkemboi) RESPONDENT

(Being an Appeal from the Judgment and Decree of the Chief Magistrate Honourable C. G MBOGO (CM), in ELDORET CMCC No. 936 of 2005, dated 26th August, 2011)

JUDGMENT

- 1.** By a plaint dated 16th May 2005, the respondent in this appeal *Jeremiah Ruto* suing in his capacity as the legal representative of the Estate of *Joyce Jepkemboi* instituted suit against the appellants *Saluenta Kennedy Sita* and *Sony Fuel Injection Ltd* claiming both general and special damages under the *Law Reform Act* and the *Fatal Accidents Act*.
- 2.** It was the respondent's case at the lower court that the 1st appellant who was the agent of the 2nd appellant so negligently drove motor vehicle Registration Number KAL 138 Q Mitsubishi Pick Up on 22nd October 2002 along the Nandi Hills – Kapsabet road that it lost control, veered off the road and violently hit the deceased, a girl aged 14 years causing her fatal injuries. The vehicle was owned by the 2nd appellant. The respondent therefore sought compensation for her untimely death on behalf of her Estate and her dependants.
- 3.** The appellant in their joint statement of defence dated 14th November 2005 denied any liability as alleged in the plaint. They specifically denied that the 1st appellant was at the material time the driver of the aforesaid motor vehicle or an agent of the 2nd appellant. They also denied occurrence of the accident and all the particulars of negligence attributed to the 1st appellant as stated in paragraph 9 of the plaint. In a nutshell, they denied all the allegations levelled against them in the plaint and put the respondent to strict proof thereof. But on a without prejudice basis, they claimed that if the accident occurred as alleged, the deceased solely caused or substantially contributed to its occurrence.
- 4.** After a full trial, the learned trial magistrate rendered his decision on 26th August, 2011. He found the appellants 100% liable for the accident in which the deceased sustained fatal injuries. He also awarded the respondent a total sum of Kshs. 1,090,000 in general damages and Kshs. 20,744 in special damages.

5. The appellants were dissatisfied with the learned trial magistrate's decision on both liability and quantum. They proffered this appeal vide a memorandum of appeal dated 23rd September 2011. They relied on eight grounds of appeal which I reproduce verbatim herein below;

(i) The learned trial magistrate erred in law and fact in holding the Appellants 100% liable for causing the accident inspite of the fact that the Respondent did not prove liability against the appellants.

(ii) The learned trial magistrate erred in law and fact in dismissing in failing to find and hold that the respondent had failed to establish the ownership of the suit motor vehicle.

(iii) The learned trial magistrate erred in law and fact in failing to find and hold that the evidence given by the Respondent's witnesses was contradictory and could not support a finding of 100% or any other level of liability.

(iv) Without prejudice to the foregoing, the learned magistrate erred in law and fact in failing to hold the deceased wholly or contributorily negligent for causing the accident.

(v) The learned trial magistrate erred in law and fact in making an award of damages that was in excessive and inordinately high in the circumstances.

(vi) The learned magistrate erred in law and fact in failing to take into account all the facts that are relevant while making an assessment of damages before arriving at his decision particularly relating to the age of the deceased.

(vii) The learned magistrate generally erred in law and fact in failing to take into account the authorities referred to him by the respondent and previous guides on assessment of damages before arriving at his decision.

(viii) The learned magistrate generally erred in law and fact in giving a decision that was not supported by the law and the facts.

6. The appeal was prosecuted by way of oral submissions. At the hearing, the appellants were represented by learned counsel *Mr. Mathai* instructed by *Ms Gicheru and Company Advocates* while learned counsel *Mr. Chebii* instructed by *Ms Chebii and Company advocates* appeared for the respondent.

7. In his submissions, *Mr. Mathai* abandoned all the other grounds of appeal and only relied on grounds 5 and 6 of the Memorandum of Appeal. He submitted that the learned trial magistrate erred when undertaking the assessment of damages by proceeding on the basis that the deceased was 14 years at the time of the accident; that he erroneously indicated that her age was stated in the death certificate while as the death certificate was silent on the age of the minor; that the trial court also proceeded on the wrong premise that the parties had agreed on a multiplier of 35 years; that the learned magistrate erred in assessing damages for dependency while in fact dependency was not proved and in awarding special damages of Kshs. 20,470 when the same were not proved.

8. In his rebuttal, *Mr. Chebii* reminded the court about its mandate as an appellate court relying on the authority of ***Butt V Khan 1981 KLR 349***. He urged the court not to interfere with the award of damages given to the respondent arguing that the trial court did not make an error in their assessment. He invited the court to note that the appellants in their submissions had suggested a multiplier of 35 years as a basis for the calculation of lost years. He also averred that it was not disputed that the deceased was 14 years old at the time of her death and that had she lived, she could have worked for between 25 and 60 years. He urged the court to dismiss the appeal for lack of merit.

9. This being a first appeal to the High Court, it is an appeal on both facts and the law. The duty of a first appellate court is now well settled. A first appellate court is enjoined to re-evaluate all the evidence adduced before the lower court in order to reach its own independent conclusions but in doing so, it

should give due allowance to the fact that it did not have the opportunity of seeing or hearing the witnesses. See: *Williamson Diamond Ltd V Brown (1979) EA I*; *Selle V Associated Motor Boat Company Ltd & others (1968) EA 123*.

10. That said, it is significant to note at the outset that though the appellate court is mandated to review and reverse the findings or verdict of the lower court, it must exercise its jurisdiction with caution. As a general rule, an appellate court should not interfere with the findings or decision of a lower court unless it is demonstrated that in reaching its decision, the lower court made an error of law or took into account irrelevant considerations or that the court based its decision on no evidence or a misrepresentation of the evidence. See: *Ephantus Mwangi and Geoffrey Nguyo Ngatia V Duncan Mwangi Wambugu (1982 – 88)I KAR-278*; *Sumaria & Another V Allied Industries Ltd (2007) 2 KLR I*.

11. Having set out the principles that are supposed to guide the first appellate court in its appellate jurisdiction, I shall now proceed to apply those principles to the facts and decision of the lower court in this appeal. I wish to begin by observing that though the appellants had in their memorandum of appeal challenged the trial court's verdict on both liability and quantum, as stated earlier, they abandoned through their learned counsel all the grounds of appeal relating to the challenge on liability.

12. I say so because grounds 5 and 6 of the memorandum of appeal only challenged the trial court's decision on the award of both general and special damages. I do not therefore find it necessary to delve into the appeal on liability since the trial courts finding on liability is no longer contested. I consequently uphold the trial courts finding on liability save to add that the liability should be shouldered by the appellants jointly and severally.

13. With respect to the award of damages, although an award of damages is always at the discretion of the trial court, an appellate court can still interfere with the award if it is proved that the trial court in assessing the damages acted on wrong legal principles; took into account irrelevant factors or omitted to consider relevant factors or that the damages were either inordinately high or low as to lead to a reasonable inference that it was an erroneous estimate of the damage suffered.

In *Mariga V Musila (1984) KLR 251*, the Court of Appeal in discussing this principle held 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....”

14. I have carefully considered the pleadings; the evidence on record relevant to the issue of assessment of damages; the grounds of appeal; the judgment of the trial court and the submissions by counsel on record. I note that this was a fatal injury claim under the *Law Reform Act* and the *Fatal Accidents Act*. Under the *Law Reform Act*, the Estate of the deceased was entitled to general damages for pain and suffering; loss of expectation of life and funeral expenses. The dependants of the deceased were also entitled to compensation under the *Fatal Accidents Act* for loss of dependency.

15. Under the *Law Reform Act*, the Estate through the respondent who was its legal representative was awarded Kshs. 10,000 for pain and suffering and Kshs. 100,000 for loss of expectation of life. I am unable to fault the two awards because from the trial court's judgment, it is clear that the learned trial magistrate properly addressed his mind to the legal principles applicable to the award of damages on those heads and the awards made in previous cases. More importantly, the trial court based its decision on the evidence on record. It appreciated that the deceased died one day after the accident and must have undergone pain and suffering before her demise. If truth be told, I am of the view that the award of Kshs. 10,000 for pain and suffering in this case was too little but given that I cannot substitute my discretion with that of the trial court, I will not disturb the award. The award of Kshs. 100,00 for loss of expectation of life was fair and just given that the deceased was a minor who had a long life ahead of her had it not been abruptly cut short by the accident in question. In the premises, I uphold the said award.

16. Regarding damages for loss of dependency, the appellants complain that the learned trial magistrate erred in law in awarding the sum of Ksh. 980,000 allegedly because dependency had not been proved and that the trial court acted on the wrong premise that the parties had agreed on a multiplier of 35 years.

17. Though I agree with learned counsel *Mr. Mathai* that dependency is a question of fact which must be proved before any damages can be awarded, I wish to disagree with learned counsel that dependency was not proved in this case. From the evidence on record, I find that dependency was proved with respect to the deceased's parents though it was not proved with regard to her sisters *Eunice Ruto* and *Rose Jepkosgei Ruto*. I say so because parents of a deceased person are included in the definition of "dependants" under *Section 4* of the *Fatal Accidents Act*. The respondent who testified as PW1 stated in his pleadings and in his evidence that he was the father of the deceased and that the mother was *Eunice Ruto*. Though the deceased's parents were not strictly speaking her dependants at the time of her death given that she was only a minor, there is evidence that the deceased was in class 6 at the time of her death and her parents just like all other parents in the African traditional setting had expectations that she would provide for their financial needs and take care of them in their sunset years when she was done with the school system. This is when dependency would have set in and if God granted them long life, they would have gained by depending on her financial support in future.

18. In calculating damages for loss of dependency in cases where the victim is a minor, courts have more often than not given a global figure guided by the minor's performance in school if there was evidence the minor was in school and his or her career prospects. In this case however, guided by the parties written submissions, the learned trial magistrate calculated loss of dependency using the other method based on expected monthly income and a multiplier of 35 years. This is a multiplier that was infact suggested by the appellants in their written submissions dated 5th August, 2011.

19. Regarding the multiplicand, the trial court adopted Kshs.7,000 which in his view was closest to the minimum wage guidelines for an unskilled worker. I have looked at the *Regulation of wages (General) Amendment Order of 2011* which was applicable then and have noted that the minimum wage for a general labourer was set at Kshs. 6,999. The adopted multiplicand of Kshs. 7,000 was not therefore unreasonable. The dependency ratio of 1/3 was also appropriate in the circumstances of this case. I do not therefore find any good reason to disturb the award of Kshs. 980,000 for loss of dependency. The same is affirmed.

20. Turning now to the award of special damages, it is the appellant's contention that the learned trial magistrate erred in awarding a sum of Kshs. 20,744 when the same was not proved during the trial.

21. The law is that special damages must not only be pleaded but must also be strictly proved. It is clear from the learned trial magistrate's judgment that he was very well aware of this principle. It was his finding that this amount had been strictly proved. My re-appraisal of the evidence tendered by PW1 and the copies of receipts produced in support of his claims regarding the monies paid as hospital expenses, mortuary charges, post mortem charges, purchase of coffin and cost of obtaining death certificate reveals that the respondent only proved a sum of Kshs. 16,431 in special damages. It is therefore my finding that the trial court erred in awarding a sum of Kshs. 20,744 instead of the proved amount of Kshs. 16,431. I therefore set aside the award of Kshs. 20,744 and substitute it with a sum of Kshs. 16,431.

22. In the end, this appeal succeeds to a limited extent in that the award of general damages in the sum of Kshs. 1,090,000 is upheld while the award of special damages is reduced from 20,744 to Kshs. 16,431.

I consequently set aside the judgment of the trial court and substitute it with a judgment in favour of the respondent in the total sum of Kshs. 1,106,431. The amount shall accrue interest at court rates from the date of the judgement of the lower court until final payment.

23. The appellants shall bear the respondent's costs in the lower court and given that the appeal has partially succeeded, they shall have one third of the costs of the appeal.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 31st day of January, 2017

In the presence of:

Ms. Matoke holding brief for Dr. Chebii for the respondent

Mr. Siboe holding brief for Mr. Mathai for the appellant

Mr. Lobolia Court Clerk