



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 294 OF 2013

(Appeal arising from the Judgment of Principal Magistrate, Hon. B. OCHIENG, delivered on 23.08.2013 in Tigania SRMCC NO 102 OF 2012)

(CORAM: GIKONYO J)

JOHN MUTUMA NDEGE.....1st APPELLANT

MICHIMIKURU TEA FACTORY LIMITED.....2nd APPELLANT

VERSUS

JAMES BARABI M' LAIBUTA (Suing as the Legal Representative of the

Estate of SAMSON MWENDA (DECEASED).....RESPONDENT

JUDGMENT

[1] This Appeal arises from the Judgment of Tigania Principal Magistrate's Court in which the court awarded the Respondent a sum of Kshs 1,779,030 being General and Special Damages for pain and suffering suffered as a result of a road traffic accident which occurred on 10th November 2010 in which the Respondent's son was fatally injured.

[2] The Appellants were aggrieved by the said judgment and filed a Memorandum of Appeal filed in court on 20th September 2013 which carries the following grounds of appeal:

- 1. THAT the learned trial Magistrate erred in law in apportioning liability at 90:10 in favour of the plaintiff whereas the evidence on record pointed heavily towards negligence on part of the deceased.**
- 2. THAT the learned trial Magistrate erred in law in failing to take into account the award under the Law Reform Act while awarding damages under the Fatal Accidents Act.**
- 3. THAT the learned trial Magistrate erred in law in adopting a multiplicand of Kshs 10.000 without any basis in support of the same.**
- 4. THAT the judgment of the learned trial Magistrate is against the law and weight of evidence on record.**

[2] When the matter came up for hearing on 28th April 2016, it was agreed that this matter be disposed off by way of written submissions. The Appellants submitted on liability that, there were no independent eye witnesses called. In any event, it was not expected to call eye witnesses considering the fact that the accident occurred well past midnight. They submitted that a police officer cannot be said to be an eye witness to an accident as his duty before court was to produce an Abstract to confirm the occurrence of an accident.

[3] It was contended that in view of the fact that the parties gave two different versions of the accident and in the absence of independent eye witness, the best the court could do was to apportion liability equally.

[4] The Appellant also submitted on quantum of damages to the effect that the award for loss of dependency was erroneous, speculative and based on no evidence and that the same should be set aside and a fresh assessment under the said head be made by this court. It was submitted that, where there was scanty information on the deceased's earnings, the conventional principle would be to make a global award. Consequently, the Appellant urged the court to set aside the decision and the judgment of the lower court and substitute it with a global award of Kshs 400,000 as damages.

[5] The Respondent also submitted and urged that the evidence tendered by the Appellants during the trial was contradictory and at the very least unconvincing. On the other hand, the Respondent argued that the testimonies of PW2 and PW4 corroborated each other; they narrated the events of the night the accident happened. Further, according to the Respondent, this evidence was corroborated by the evidence of PW3- the investigating officer who visited the scene- his evidence explained how the trailer of the tractor ended up hitting and lying on the deceased on the side of the road. The Respondents contrasted their evidence with that of the Appellants' witnesses which they said the learned trial magistrate noted in his judgment was unconvincing and dismissed it as an afterthought. As such, the Respondent stated that the court exercised its discretion properly in apportioning liability as it did.

[6] The Respondents also submitted on quantum of damages and stressed that the evidence adduced at the trial court showed that the deceased was earning at least Kshs 20,000 from tea farming and that this evidence was not controverted during cross examination. Therefore, the learned magistrate relied on the evidence before him to arrive at the decision and that he was justified in applying a multiplicand of Kshs 10,000. On reduction of the award under the Law Reform Act, the Respondent sought to rely on Section (2) of the Law Reform Act and contended that the Appellants had not shown any circumstances that existed why the damages under lost years should be deducted from the award made under the head loss of dependency. Consequently it was contended for the Respondent that the award was not excessive but reasonable, fair, modest and just.

DETERMINATION

[7] I have carefully considered this appeal, the submissions by the parties and the authorities relied upon by the parties. This being a first appeal, the court should analyze and re-assess the evidence on record and reach its own conclusions except bearing in mind that it neither saw nor heard the witnesses testify See *Selle v Associated Motor Boat Co.* [1968] EA 123 and *Kiruga v Kiruga & Another* [1988] KLR 348. It is not in dispute that there was no eye witness to the accident. PW 3 the police officer who testified in this case stated as follows in examination in chief:

“the driver of the tractor was to blame as he was driving dangerously. The driver it was recommended was to be charged with causing death by dangerous driving. I was transferred from the station before he could be charged. The deceased was not to blame for the accident....”

This evidence was never challenged in cross examination and remained uncontroverted. The learned trial magistrate in his judgment who had the singular opportunity to see and hear the witnesses testify observed inter alia as follows:

“of the two versions of how the accident happened, I find the plaintiff’s version more credible than the defence. First it is suicidal for one throwing himself into on the path of an oncoming vehicle at night in a bid to force it to stop as the risk of being run over is very real’

“the detachment of the trailer from the tractor can only be attributed to the careless manner DW1 was driving the tractor and or his failure to ensure that the trailer was fastened securely to the tractor. I am satisfied that DW1’s negligence substantially contributed to occurrence of the accident. I will apportion liability in the ration 90:10 in favour of the deceased against the 1st defendant.

[8] I turn to the law. In law the Court can infer negligence from the circumstances in which the accident occurred by invoking the principle of *res ipsa loquitor*. In the book by Winfield & Jolowicz on Tort 17th Edition the learned author wrote-

“This has traditionally been described by the phrase *res ipsa loquitor* – the thing speaks for itself. Its nature was admirably put by Morris L. J. when he said that it:

‘Possesses no magic qualities, nor has it any added virtue, other than that of brevity, merely because it is expressed in Latin. When used on behalf of a plaintiff it is generally a short way of saying:

‘I submit that the facts and circumstances which I have proved establish a prima facie case of negligence against the defendant ...’ There are certain happenings that do not normally occur in the absence of negligence and upon proof of these a court will probably hold that there is a case to answer.”

The learned author went further to say:

“The essential element is that the mere fact of the happening of the accident should tell its own story so as to establish a prima facie case against the defendant. This is commonly divided into two parts on the basis of Erle C.J.’s famous statement in *Scott v London and St. Katherine Dock Co*:

“There must be reasonable evidence of negligence, but when the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.”(Emphasis mine).

The circumstances of this accidents and the case are such that I find nothing on which to fault the finding of fact by the learned magistrate in apportioning liability at 90:10 in favour of the deceased against the Appellants. I uphold that finding and find that the trial magistrate exercised discretion properly.

Of quantum

[9] I cannot avoid to cite the case of **KEMFRO AFRICA LIMITED T/A MERU EXPRESS SERVICES, GATHONGO KANINI vs. A.M. LUBIA AND OLIVE LUBIA**, where it was decided by the Court of Appeal on 27th day of February 1985 inter alia that:-

“...the principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied that either 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 , he amount is so inordinately high that it must be a wholly erroneous estimate of the damages”

[10] Applying the said test, the Respondents case in the lower court was that the deceased was aged 28

years at the time of his demise and that he was maintaining his wife and two children. From the evidence, the deceased was a farmer earning Kshs 20,000 per month. In cross examination PW1 stated that he did not have the deceased number to confirm that he was a tea farmer. On this, it was submitted for the Respondent that the award for damages was erroneous, speculative and based on no evidence and should be set aside. But here I should be guided by what the Court of Appeal stated in the case of **JACOB AYIGA MARUJA & ANOTHER VS SIMEON OBAYO [2005] eKLR** that:

“We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things. In this case, the evidence of the respondent and the widow together with the production of school reports was sufficient material to amount to strict proof for the damages claimed. Ground one of the grounds of appeal must accordingly fail”.

[11] In this case the learned trial magistrate estimated the deceased’s earnings at Kshs 10,000 and adopted a multiplier of 20 years and a multiplicand of 2/3 and calculated dependency as follows:

$$10,000 * 20 * 12 * 2/3 = 1,600,000$$

The Appellants, however, stated that multiplier method was not appropriate in this case; a global sum was. In unravelling this matter, I am content to cite a work of Ringera J (as he then was) in the case of **Kwanzia Vs Ngalali Mutua & another** that:

“The Multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency are known or are knowable without undue speculation, where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do.”

But after considering the entire circumstances of the case and the evidence tendered, age of the deceased, his career and or business, dependency and the expected length of the dependency is also known or are knowable without undue speculation. See the evidence of PW4. Accordingly, in my considered opinion the estimation by the trial magistrate of his earnings was not unfounded. Therefore, the award is not manifestly excessive or low so as to amount to an erroneous estimate. The trial magistrate neither took into account irrelevant factor or left out a relevant factor to justify disturbing of the award. I am satisfied that the learned trial magistrate excersed his discretion properly and I find no reason to interfere or disturb the award made by the learned magistrate. In the end result and having come to the above conclusion, I find the Appellant’s appeal to be without merit and I accordingly dismiss it with costs to the Respondents. It is so ordered.

Dated, signed and delivered in open court at Meru this 23rd day of March 2017

F. GIKONYO

JUDGE

In the presence of:

Mr. Kariuki advocate for appellant

Mr. Otieno advocate for Carlpeters for respondent

F. GIKONYO

JUDGE