REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 107 OF 2010

BETWEEN

1. STANLEY MWANGI NDIRANGU

2. KENBLEST BAKERY LTD......................................APPELLANTS

AND

JULIUS MUNGATHIA KAUMBUTHU…....................RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. M.T Kariuki, SRM, in Tigania SRMCC No 45 of 2009 dated 17th August 2010).

JUDGMENT

STANLEY MWANGI NDIRANGU and **KENBLEST BAKERY LTD**, the appellants herein, were the defendants in the Tigania Senior Resident Magistrate's Court Civil Case Number 45 of 2009. They were sued for a claim for general and special damages after motor vehicle KAS 420 G was involved in an accident on 1st June 2006 with **JOYCE CIORUI KAUMBUTHU** deceased, who was a pedestrian along Meru-Maua road. The first appellant was the driver of the said motor vehicle at the material time while the second appellant was the registered owner.

After the hearing of the case the learned trial magistrate apportioned liability at 100% against the first appellant and held that the second appellant was vicariously liable. The learned trial magistrate made awards as follows:

1. Damages under the Law Reform Act.

    (a) Pain and suffering Kshs.300 000/=

    (b) Loss of expectation of life Kshs.100 000/=

2. Damages under Fatal Accidents Act.

    (a) Loss of dependency Kshs. 100 000/=

The total award was Kshs. 518 500/=

The appellants were aggrieved by the awards on several heads and filed this appeal. In the Memorandum of Appeal the appellants set out eight grounds of appeal can summarized as follows:-

1. The learned trial magistrate erred in law and in fact by finding the appellants 100% liable.

2. The learned trial magistrate erred in law and in fact by giving an excessive award for pain and suffering.

3. The learned trial magistrate erred in law and in fact by giving an excessive award for loss of expectation of life.

4. The learned trial magistrate erred in law and in fact by making awards on both the Law Reform Act and on the Fatal Accidents Act.

The respondent prayed that the award of the trial magistrate be upheld.

When the matter came for directions on 10st March 2016, it was agreed by both counsel that the appeal would be canvassed by filing and exchanging submissions. The submissions were duly filed and exchanged.

This Court is conscious of its role as the first appellate court as stated in **SELLE vs. ASSOCIATED MOTOR BOAT CO. LTD. [1965] E.A. 123**, has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter. This court must, however bear in mind the fact that it neither saw nor heard the witnesses and to make due allowance for that.

How did the accident that gave rise to this appeal occur? The respondent's case gave two contradicting versions of the accident. According to the evidence of **Benjamin Mutua Murega** (PW3) who said that he witnessed the accident, the lorry left the road and hit the deceased off the road. However, **P.C Joseph Murage** (PW2) is that the record he produced indicated that the point of impact was 8 meters from the edge of the tarmac on the road, suggesting that the deceased was crossing the road when she was hit. There was no attempt to reconcile these two versions. The learned trial magistrate was therefore wrong in apportioning the liability at 100% against the appellants.

The evidence on record indicate that the point of impact was immediately after a road bump. The lorry driver was therefore expected to slow down. My opinion is that the deceased contributed to the accident. In view of the road bump, I apportion her contribution at 10%. The appellants will shoulder 90% liability.

The award of general damages under the head of pain and suffering is dictated by the duration between the accident and the death. Where the death is almost immediate, the damages are nominal. In the case of **BENEDETA WANJIKU KIMANI vs. CHANGWON CHEBOI & ANOTHER [2013] eKLR** Judge Anyara Emukule observed as follows:

> ***In common law jurisprudence of which Kenya is part, the courts have evolved two principles, loss of expectation of life and pain and suffering by the deceased, for award of damages under the Fatal Accidents Act for pain and suffering …..... determined what is commonly referred to as a conventional sum which has increased over the years from Kshs 10,000/= to Kshs. 100,000/= currently. The basis of the increase has basically been based upon the increase of life expectancy from 45 years to run 60 years currently, that life itself was, until cut short by the accident worth something to the estate.***
>
> ***The generally accepted principle is that very nominal damages will be awarded on this head claim if of death followed immediately after the accident. Higher damages will be awarded if the pain and suffering was prolonged before death.***

In the instant case the deceased passed on immediately. The learned trial magistrate applied the wrong principle in awarding Kshs. 300 000/= on this head. The respondent's counsel was aware of the principle for in his submission he prayed for an award of Kshs. 10 000/=. I therefore substitute the award of Kshs. 300 000/= with that of Kshs. 10 000/= for pain and suffering.

I have been urged to make a finding that the award in the head of expectation of life was excessive. The principles which must be observed by an appellate court in an appeal against an award of general damages was stated in the case of **KEMFRO AFRICA LTD. t/a MERU EXPRESS & ANOTHER vs. A.M. LUBIA & ANOTHER (NO.2) [1987] KLR 30** where it was held as follows:-

> ***The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial judge were held by the former Court of Eastern Africa to be that it must be satisfied that either the judge, in assessing 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.***

In the instant case the award cannot be said to be excessive to warrant any interference with.

The appellants faulted the trial magistrate for failure to deduct the awards under the Law Reform Act from while making the total calculation. In the case of **KEMFRO AFRICA LTD. t/a MERU EXPRESS & ANOTHER vs. A.M. LUBIA & ANOTHER** (supra) it was held:

Only the part of the Law Reform Act award which represents the non- pecuniary loss e.g. the award for the loss of expectation of life is deductible.

In the instant case the award under the head of pain and suffering and that under the head of loss of expectation of life ought to have been deducted.

The award will therefore be as follows:

1. Damages under the Law Reform Act.

    (a) Pain and suffering Kshs. 10 000/=

    (b) Loss of expectation of life Kshs.100 000/=

2. Damages under Fatal Accidents Act.

    (a) Loss of dependency Kshs. 100 000/=

    (b) Special damages Kshs 18 500/=

The total award was Kshs. 210 000/=

Less damages under Law Reform Kshs. 110 000/=

Less 10% contributory negligence the net is Kshs 106 650/= plus costs in the lower court.

To that extent the appeal succeeds. Each party will meet own costs for the appeal.

DATED at MERU this 28th day of April, 2017.

KIARIE WAWERU KIARIE

JUDGE