



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 165 OF 2010

BRUSH MANUFACTURERS LIMITED.....1ST APPELLANT

PETER NGIGI MANDE.....2ND APPELLANT

VERSUS

GRACE WACHERA IRUNGU

NELSON NDINDI IRUNGU (Suing as the Legal Representative of the Estate of

JOHN IRUNGU WAIKWA (DECEASED).....RESPONDENTS

(Appeal from the judgment of A.K NDUNGU (Mr.) delivered on 28/04/2010 in Milimani CMCC No. 314 of 2005)

JUDGMENT

The Respondents were the Plaintiffs at the trial Court suing on their behalf and on behalf of the Estate of John Irungu Waikwa (the “**Deceased**”). In a plaint dated 8th December, 2004, the Respondents Claimed that on or about 22/12/2003, the Deceased was on the pedestrian island along Jogoo Road, when the 2nd Defendant acting for the .1st Defendant’s gain or as of right so negligently drove, managed/ or controlled motor vehicle registration number KZW 291 that it collided with the Plaintiff who sustained fatal injuries from which he died on the same day after enduring pain and suffering and by his death, his estate and dependants have suffered loss and damage.

The plaintiffs averred that the 2nd defendant was negligent, the particulars of which were:-

- (a) Failure to keep any or proper look out or to have due regard for other road users.
- (b) Causing the motor vehicle to veer off the road or onto the island
- (c) Failure to exercise due care and attention,
- (d) Losing control of the motor vehicle,
- (e) Driving at unreasonable speed in the circumstances and;
- (f) Failure to take any reasonable avoiding action

The Plaintiffs prayed for judgment against the Defendants jointly and severally for;-

- a) Loss of dependancy
- b) Pain and Suffering before death
- c) Loss of expectation of life
- d) Special damages of Kshs. 53,675; and
- e) Costs and interest

The Defendants filed a Statement of Defence dated 2nd March, 2005 in which the 1st defendant denied the claim in totality and without prejudice, contended that if indeed the said accident occurred, it was as a result of the Plaintiff's own negligence, the particulars of which were:-

- a. Failure to take adequate precaution while crossing the road;
- b. Failing to use the nearby pedestrian fly over constructed to allow for the safe crossing of the road;
- c. Crossing the road when it was not safe to do so;
- d. Failing to have regard for other lawful road users;
- e. Causing the said accident

In his judgment, the trial Magistrate fixed the deceased's monthly income at Kshs. 10,000. He further noted that the deceased who died at the age of 40 years would have worked upto 60 years but considering the contingencies of life, he used a multiplier of 15 years and thus calculated loss of dependency as $10,000 \times 15 \times 12 \times \frac{2}{3} = 1,200,000/=$ and awarded Kshs. 52,000/= in special damages as the amount pleaded and proved. The learned Magistrate did not make any award for pain and suffering since there was no clear indication of the time the deceased died. Therefore, Judgment was entered in the following terms:

a) Special damages	Kshs. 52,200
b) Pain and Suffering	Nil
c) Loss of expectation of life	Kshs. 120,000/=
d) Loss of dependency	Kshs. 1,200,000/=
TOTAL	Kshs. 1,372,200

Aggrieved by the trial magistrate's judgment, the Appellants filed this appeal on the following grounds:

- a. THAT** the trial magistrate misdirected himself in law and in fact in copying and/or wholly rewriting the judgment of the Hon. Maina SPM (Miss) which judgment has been set aside.
- b. THAT** the trial magistrate erred in law and in fact in disregarding the evidence and submissions of the Defendants and proceeded to enter judgment for the Plaintiffs;
- c. THAT** the trial magistrate erred in law and in fact in not finding that the Plaintiffs had not proved their case on a balance of probability.
- d. THAT** the trial magistrate erred in law and in fact in not finding that the Plaintiffs failed to prove liability.

This being a first appeal, the duty of this court is to re-evaluate the evidence that was tendered before the lower court and determine whether the appeal is to stand or not. In the case of **Ephantus Mwangi and Geoffrey Ngugi Ngatia v. Duncan Mwangi Wambugu [1982]-88 1KLR 278** the principle is that a Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence or the judge is shown to have acted on wrong principles.

In the case of **Mbogo & Another -v- Shah (1968) EA 93 at 96**, it was stated that *an appellate court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the judge misdirected himself or acted on matters which the court should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in so doing arrived at a wrong conclusion.*

From the grounds of Appeal, it is clear that the Appeal is both on liability and the quantum of damages awarded.

The Plaintiffs called two witnesses. The first witness (PW1), Cyrus Mwangi Kamau, testified that on the fateful day he was at Makadara Court area and he saw the deceased standing on the pedestrian island in between the dual lane road along jogoo road. That the deceased was hit while standing at the pedestrian island by the vehicle which was driving in the inner lane. He was standing at Uchumi supermarket. He is a matatu driver and he knew the deceased as he was his customer who used to deal in meat at Burma market which he could take to Kariobangi. He took one hour to record a statement at the Buru buru police station.

The 1st Respondent, Grace Wachera Irungu (PW2) testified that the deceased, who was her husband, died in the year 2003. That they used to live in a rental house in Kariobangi paying a monthly rent of Kshs. 1500/= . She produced a card that could allow the deceased to access the slaughter house and receipts for school fees for their two children. Nelson, their son was training in mechanics at Thika and Wanja their daughter was at St. Xavier Girls, Thika. PW 2 further testified that the deceased had purchased land in Nyeri at Kshs. 150,000/= and another for Sh. 35,000/= with money he earned from the business.

On the other hand, the Appellants' witness, Peter Mande Ngige the 2nd Defendant (DW1) testified that he was driving canter registration number KZW 291 as an employee of the 1st Defendant. That on reaching Uchumi, Makadara, someone emerged onto the road and he hit him. He was on the left side of the lane and on the right side there was another canter. The person emerged from the right side in front of the other canter while him, he was driving behind the said canter and his vehicle hit him.

The Appeal was canvassed by way of written submissions which I have duly considered as well as the authorities relied on by the parties.

ON LIABILITY

This court is alive to the requirement that, being the first appellate court, it must re-evaluate and analyse all the evidence that was adduced in the lower court and arrive at its own independent findings keeping in mind that it did not see the witnesses and observe their demeanors.

It is neither in dispute that the 2nd Appellant was driving motor Vehicle registration number KZW 291 nor is it in dispute that he was an agent of 1st Appellant. . The testimony of PW1 as well as DW1 is in agreement that the said accident occurred and that, the 2nd Appellant knocked down the deceased. Both PW1 and DW1 place the scene of accident at the same spot, Uchumi, Makadara. However, the Appellant submitted that PW1 gave contradicting evidence in that he stated that he was at Makadara Court area and again that he was standing at Uchumi supermarket. I have analysed the statement and I see no contradiction for reason that one can state that he is in a certain locality but at one spot in that area. I understand that PW1 was within the area of Makadara court and specifically standing at Uchumi Supermarket. I however hasten to add that the fact that his name does not appear in the list of witnesses

does not make him a less credible witness.

The Respondents raised a very fundamental legal issue before the trial court to the effect that no negligence was pleaded on the part of the deceased. It was also contended that the 2nd defendant did not file a defence to the claim after the interlocutory judgment was set aside by consent of the parties. The Respondents have thus submitted that the evidence tendered by DW1, is bare and cannot be considered.

This court has carefully considered the two issues raised and my reaction to it is as follows;

With regard to the first issue, I have taken trouble to peruse the defence that was filed by the first defendant. In paragraph 5 of the same, it sets out the particulars of negligence of the plaintiffs. The plaintiffs in that case are **Grace Wachera Irungu** and **Nelson Ndindi Irungu**. The two have sued as legal representatives to the estate of the deceased **John Irungu Wakwa** and they or none of them was involved in the accident that occurred on 22/12/2003. The accident involved the deceased and no negligence has been attributed to him. It is trite law that parties are bound by their pleadings.

On the 2nd issue, the record is clear that, the 2nd defendant did not file any defence following which an interlocutory judgment was entered against him on the 30th September, 2005. However, on the 12/1/2010, a consent was recorded in court setting aside the interlocutory judgment that had been entered against the 2nd defendant and the matter proceeded for hearing on the same day without a defence on record for the 2nd defendant.

The question that arises is, what is the value of the evidence that was adduced by the 2nd defendant when he did not have a defence on record? In my humble opinion, such evidence has no probative value as pleadings form the foundation of any claim and where a party has not filed a defence, like in this case, any evidence that he adduces in court, no matter how strong, is worthless.

The 2nd Appellant on his part has argued that he had not been served with the summons to enter appearance. He averred that the trial court misdirected itself in not applying the law in respect of non service of summons. I wish to note that the consent was recorded in court by the parties and the trial magistrate had nothing to do with it save to adopt what the parties had agreed on. Having agreed to proceed with the matter on the same day the consent was set aside, counsel for the Appellant made a fundamental error in law which in my opinion is fatal and cannot be remedied at this stage. It was not the duty of the trial magistrate to advise the counsel for the Appellant on what was expected of him. He has himself to blame and he should not shift such blame to the trial magistrate.

In the premises, I find as the trial magistrate rightly did, that the plaintiffs' case was not rebutted in law by any pleadings, it was legally undefended. The learned magistrate was right in finding liability at 100% against the Appellants.

ON QUANTUM OF DAMAGES.

The general principle applicable in considering an appeal on quantum is that while the assessment of damages is at the discretion of the trial judge, the appellate court will only interfere where trial judge in assessing damages either took into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is based on no evidence (see **Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727**). The Court of Appeal in **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5** stated as follows;

“An appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respects and so arrived at a figure which was either inordinately high or low.”

I have considered the submissions of both parties on this aspect. The deceased was a businessman working as a butcher and a card to the slaughter house was produced. Having regard to the evidence of PW2, the deceased was paying school fees for two of his children, house rent and other related bills. He had purchased two parcels of land from the proceeds of his business. Even though there was no evidence in form of statement to show the income of the deceased, the evidence produced is good enough to estimate his income.

In the case of *Jacob Ayiga Maruja & Another v Simeone Obayo* CA Civil Appeal No. 167 of 2002 [2005] eKLR the Court of Appeal observed that;

“We do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving earning 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.”

Having regard to the circumstances of this case, I find that an award on the quantum of damages made by the trial court was reasonable and not excessive so as to attract the intervention of this Court. As to the duplicity of Awards under both fatal accident’s Act and the law reform Act, the recent jurisprudence by the court of Appeal in the case of **Hellen Waruguru Versus Kiarie Shoes stores Ltd Nyeri Civil Appeal 22/2014** seems to have changed that position. In the said case, the court held that damages should be awarded under both heads. I am bound by the same.

In the end, I find and hold that the Appeal has no merits and is hereby dismissed with cost to the Respondents.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 29th Day of September, 2017.

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L. NJUGUNA

JUDGE

In the Presence of

..... for the Applicant

..... for the Respondent