



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 42 OF 2014

EVANS MUCHAI.....1ST APPELLANT

SAMSON MUCHAI.....2ND APPELLANT

VERSUS

TITUS GACHOKA WANYOIKE (SUING AS THE PERSONAL REPRESENTATIVE OF

THE ESTATE OF STEPHEN MUCHIRA GACHOKA -DECEASED.....RESPONDENT

(Appeal from the original judgment of Hon. M.C Chepseba (Mrs.) delivered on 22nd January, 2014 in Milimani CMCC No. 3085 of 2010)

JUDGMENT

In a Plaintiff dated 14th May, 2010, the Respondent claimed that on or about the 29th August, 2009 the deceased (Stephen Muchira Gachoka) was lawfully travelling as a passenger in motor vehicle registration number KAL 043Y along Thika road, when the first appellant so negligently, carelessly and/or recklessly drove the said motor vehicle that he caused it to veer off the road and to overturn as a consequence of which the deceased sustained injuries and his estate suffered loss and damage.

The particulars of negligence and special damages are set out in paragraph 7 of the plaintiff. The plaintiffs (Respondents) had sought damages under both the Law Reform Act Cap 26 and the Fatal Accidents' Act Cap 32 laws of Kenya.

The Appellant filed a Statement of Defence denying the claim and stated that the fatal injuries sustained by the deceased are attributable to the negligence, recklessness and/or carelessness of the Deceased for failing to fasten the safety belt.

The trial Magistrate heard the case and entered judgment in favour of the Respondent against the Appellant. He found the Appellant wholly liable for the accident and awarded the Respondent KShs. 10,000 for pain and suffering, KShs. 120,000/= for loss of expectation of life and KShs. 2,000,000/= for loss of dependency.

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

- i. That the Learned Magistrate fundamentally and grossly erred in making an award of KShs. 2,000,000/- for loss of dependency which was excessive and oppressive in the circumstances.
- ii. That the Learned Magistrate fundamentally and grossly erred when she applied a dependency

ratio of two thirds which was not supported by any evidence.

iii. That the Learned Magistrate fundamentally and grossly erred when she found that the deceased's earnings were Kshs. 10,000/= which was not supported by evidence on record.

iv. That the Learned Magistrate grossly and fundamentally erred by applying a multiplier of 25 years which was not supported by any evidence ,

v. That the Learned Magistrate grossly and fundamentally erred when he failed, refused and/or neglected to consider the Appellants Defence of inevitable accident.

vi. That the Learned Magistrate grossly and fundamentally erred when she failed,refused and/or neglected to apply and give effect to the principles that guide the award of general damages.

vii. That the learned magistrate grossly and fundamentally erred when she failed, refused and/ or neglected to appreciate, apply and give effect to the principles that guide the application of the principle of the burden and standard of proof in civil suits.

viii. That the learned magistrate grossly and fundamentally erred when she found that the appellants were wholly culpable which was not supported by the evidence in the circumstances of the case at hand.

As this is the first appeal, this court is called upon to analyse and re-assess the evidence on record and reach its own conclusions bearing in mind that it neither saw nor heard the witnesses testify (see **Selle v Associated Motor Boat Co. [1968] EA 123**).

In **Kiruga v Kiruga & Another [1988] KLR 348**, the Court of Appeal observed that;

“An appellate court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.”

From the above grounds of appeal, it is clear that the appeal is both on Liability and Quantum of Damages awarded. The issues for determination therefore are;

a. whether the trial magistrate erred in finding the Appellant wholly culpable for the accident and;

b. whether the trial magistrate made an award that was manifestly high in the circumstances.

LIABILITY

PW1 testified that the accident was a “*self-involving road traffic accident*”. PW2 who was also a passenger in the ill-fated vehicle gave his testimony that the 1st Appellant was avoiding hitting a lorry from behind when he swerved towards the right hand side of the road and hit a pillar. PW2 further testified that he was seated with the deceased at the back seat and they had their safety belts in place.

The 1st Appellant testified in the trial court as DW1. It was his evidence that a matatu braked abruptly and he quickly overtook it but ahead, there was a slow moving lorry and to avoid hitting it at the back he swerved to the right side but the motor vehicle lost control and hit a bill board pillar which impact caused the vehicle to turn 360 degrees to face the direction it was coming from.

From that evidence, it is clear that the manner in which the driver of the vehicle KAL 043Y was handling the vehicle wasn't depicting that of a careful driver. No evidence was tendered to the effect that the deceased contributed to the accident. No evidence was tendered to show that the deceased had not

buckled his safety belt. Infact, the evidence available is that the deceased had his safety belt on. In her judgment, the Learned trial Magistrate observed that the 1st Appellant seemed to have been driving at an excessive speed hence his inability to control the vehicle. He was also not on the lookout as was reasonably expected otherwise he would have slowed down on noticing the braking matatu and would have been able to avoid the slow moving lorry.

The first appellant is on record as having admitted that he was not keeping a safe distance between him and the vehicles ahead as required by the law. Had he done so, he would have been able to control the vehicle. I fully appreciate the Learned Magistrate's reasoning in arriving at the decision that the Appellants are wholly liable and this court finds that according to the evidence on record, the accident was not inevitable as alleged by the respondent.

QUANTUM

On quantum, PW3, the father of the deceased testified that the deceased had just completed a degree course in Computer Science and had taken CPA I and II. Produced before the court as PEXH 3 and PEXH 4 were copies of the degree certificate and Kasneb result slips. The court was told that he had started his own business and used to support his siblings and the parents with between Kshs. 10,000/= to 15,000 per month.

The trial magistrate calculated general damages for loss of dependency based on an income of Kshs. 10,000 per month as a guide for one in business and not employed in the year 2009 with a multiplier of 25 years and a ratio of two thirds. Among the grounds of appeal are, the ratio of two thirds and multiplier of 25 years.

The case of **LI vs. NYAMBU T/A SISERA STORES [1990] KLR 534 at page 538** enunciated the principles to guide an appellate Court on damages as laid down by the Privy Council in **NANCE vs. BRITISH COLUMBIA ELECTRIC RAILWAYS COMPANY LIMITED [1951] AC 601** at page 613 to be that:

“The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of the law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages (Flint –vs- Lovell [1935] 1KB 354) approved by the House of Lords in Davis –vs- Powell Duffryn Associated Collieries Ltd. [1941]AC 601.”

In **Board of Governors of Kangubiri Girls High School & Another v Jane Wanjiku & Another NYR CA Civil Appeal No. 35 of 2014 [2014]eKLR** the Court of Appeal stated;

“The choice of a multiplier is a matter of the courts discretion which discretion has to be exercised judiciously with a reason.”

The respondent produced evidence to prove that the deceased had graduated with a degree of Bachelor of Science (in Computer Science) from the University of Nairobi. He had also sat and passed CPA part 1 section A and B but unfortunately no evidence was led by the respondents to prove loss of expected income from a computer science graduate in the job market which would have guided the court to make a reasonable award to the estate of the deceased in that regard.

Though the respondents told the court that the deceased was in business in which he was in partnership with another person, no sufficient evidence was availed to court to prove that such a business existed and how much money he was making from the same. It would have helped if the deceased partner in the said

business was called as a witness to testify on the profit that they were making. In absence of that evidence, I cannot help but find that the learned magistrate erred in applying a multiplicand of Ksh. 10,000/- without any basis.

With regard to the ratio that the trial court ought to have applied, the evidence available is that the deceased was not married and his only dependants were his siblings and the parents. In those circumstances, the learned magistrate ought to have applied the ratio of 1/3 but this is without prejudice to this court's finding that the respondents did not prove existence of the business and loss of income.

In view of the foregoing, I find that the appeal has merits and its hereby allowed to the extent that the magistrate's award on loss of dependency is set aside. However, the award on pain and suffering, loss of expectancy of life and liability at 100% are upheld.

In the circumstances of this appeal, there shall be no orders as to costs.

Dated, signed and delivered at Nairobi this 22nd day of September, 2017.

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L. NJUGUNA

JUDGE

In the presence of

..... *for the 1st Appellant.*

..... *for the 2nd Appellant.*

..... *for the Respondent.*