



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 614 OF 2013

DUNCAN KASUKU MUEKE.....APPELLANT

- V E R S U S -

MICHAEL GEORGE OMBILI.....1ST RESPONDENT

OKOTSI OMBILI.....2ND RESPONDENT

HARRIET WAIRIMU WANGOMBE.....3RD RESPONDENT

(Being an appeal from the judgement and decree delivered by Hon. C. Obulutsa (Mr) Ag Chief Magistrate on 14th October 2013 in Nairobi CMCC No. 12879 of 2004)

JUDGEMENT

1) On 14.10.2013, Hon. Obulutsa, learned Ag. Chief Magistrate, delivered a judgment in which Duncan Kasuku Mueke, the appellant was found liable for the accident which occurred on 25.12.2000 involving motor vehicle registration no. KAK 571A which motor vehicle knocked down the son of Michael George Ombili, the 1st respondent herein along Jogoo, Nairobi. The 1st respondent's son succumbed to the injuries after admission for one month at Kenyatta National Hospital. The appellant was dissatisfied with the aforesaid decision and was prompted to file this appeal.

2) On appeal, the appellant put forward the following grounds in his petition:

1. THAT the honourable learned magistrate erred and misdirected himself in law and facts when he held that the appellant was the owner of motor vehicle registration number KAK 571A as at 25.12.2000 when the accident occurred.

2. THAT the honourable learned magistrate erred and misdirected himself in law and facts when he found that the appellant was vicariously liable for acts of one David Kioko Muia when there was no employer/employee relationship between the appellant and the said David Kioko Muia.

3. THAT the honourable learned magistrate erred and misdirected himself in law and facts when he failed to appreciate that the 1st and 2nd respondents' case against the appellant had collapsed when the respondent withdrew their claim against David Kioko Muia and Priyesh Shah T/a Shethia Credit.

4. THAT the honourable learned magistrate erred in law and facts when he held that the appellant was the owner of motor vehicle when the only evidence of ownership before him was a copy of record showing that the 3rd respondent was at sometime the owner of the said motor

vehicle.

5. THAT the honourable learned magistrate erred and misdirected himself when he failed to find that the appellant was joined in the suit after the statutory time limit without a proper application having been filed to bring suit against him out of time.

6. THAT the honourable learned magistrate erred and misdirected himself when he relied on defence, filed by Priyesh Sha T/A Sheitia Credit whereas the case against him had been withdrawn and no evidence was tendered to support heat was pleaded therein.

7. THAT the honourable learned magistrate erred and misdirected himself in law and facts when he relied on oral and unsubstantiated evidence of one Joel K. Sang (PW3) on ownership whereas the appellant had categorically denied having been the owner at the time of the accident.

8. THAT the honourable learned magistrate erred and misdirected himself in law and facts when he found that the appellant was liable at 50% when the evidence before him showed that the deceased was wholly to blame for the accident.

9. THAT the honourable learned magistrate erred and misdirected himself in law and facts when he awarded the plaintiff kshs.400,000.00 for loss of expectation of life which was too high and resulted in wrong estimates.

10. THAT the learned honourable magistrate erred in law when he awarded damages to the 1st and 2nd respondent when they did not have authority or legal status to prosecute the suit on behalf of the deceased's estate.

11. THAT the honourable learned magistrate erred and misdirected himself in law when he used and applied wrong principles of law in assessing damages.

3) When the appeal came up for hearing, learned counsels appearing in this appeal recorded a consent order to have the appeal disposed of by written submissions.

4) I have re-evaluated the case that was before the trial court. I have also considered the rival submission. Though the appellant put forward a total of 11 grounds of appeal, they may be summarised to three broad grounds.

First, is a question which relates the ownership of motor vehicle registration KAK 571A.

Secondly, liability.

Thirdly, limitation of actions.

5) On the first issue, it is the submission of the appellant that the learned trial magistrate failed to appreciate that ownership of a motor cannot be proved by way of pleadings. It is submitted that evidence must be laid to support the pleadings. It is argued that the trial magistrate took the respondent's evidence as the gospel truth. The respondents are of the submission that there was evidence showing that the appellant admitted that he bought the motor vehicle but did not produce the agreement of sale nor the transfer forms. The recorded evidence shows that the trial magistrate believed the evidence of PW3 and concluded that the appellant was in fact the owner of the vehicle otherwise he would not have presented his driver to collect the motor vehicle which had been taken and detained at the police station after the accident. With great respect, I agree with the findings of the learned Ag. Chief Magistrate that on a balance of probabilities the appellant was the owner of motor vehicle registration no. KAK 571A having purchased it.

6) The second question to determine is liability. It is the appellant's submission that the traffic police

officer (PW3) who testified and told the inquest court that the victim was the cause of his own death since he was knocked down at the driver's lane. The respondents concentrated on the question relating to vicarious liability. It is clear from the holding of the trial magistrate that he found as a fact that the inquest was closed for lack of witnesses. The learned Ag. Chief Magistrate also concluded that there was no finding that the deceased or driver was at fault and as such liability should be apportioned equally. With respect, I agree with the manner the learned Chief Magistrate determined the issue and his decision should not be disturbed.

7) The other issue relates to quantum. The learned Ag. Chief Magistrate noted that the appellant did not make any submissions on quantum. He proceeded to take note of the fact that the deceased passed away a month after being admitted in hospital. The respondents were awarded ksh.400,000/= as general damages for pain and suffering, ksh.50,000/= for loss of expectation of life. The trial magistrate awarded the respondent ksh.600,000/= for loss of dependency tabulated as follows 5000 (monthly salary) with a multiplier of 30 years less 2/3 i.e $5000 \times 12 \times 30 \times 1/3 = 600,000/=$

8) The appellant is of the view that the aforesaid awards are inordinately high and should therefore be altered downwards.

9) I have considered the authorities cited over near similar awards in respect of similar injuries. I am convinced that the amounts awarded on various heads are reasonable and commensurate with the injuries suffered. The trial Ag. Chief Magistrate came to the correct decisions on quantum.

10) In the end, I find no merit in the appeal. It is dismissed in its entirety with costs to the respondents.

Dated, Signed and Delivered in open court this 24th day of November, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

.....for the Respondent