REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO.515 OF 2012

TWIGA CONSTRUCTION CO. LTD .....APPELLANT

-V E R S U S –

MARY OYELLO ELLY ISICHE

RHODA MANDE KWENDO.....RESPONDENT

(Both suing as administrator of the estate of the late

SHARDRACK ELLY ISICHE

(Being an appeal from the judgement of Hon. C. Obulutsa (Mr)Senior Principal Magistrate delivered on 27th September, 2012 in Milimani Civil Suit no. 4750of 2010)

JUDGEMENT

1. Mary Oyello Elly Isiche and Rhoda Mande Kwendo the respondent herein filed an action against Twiga Construction Co.Ltd the appellant herein, in which they sought for compensation as joint administrators of the estate of the late Shadrack Elly Isiche. The deceased at the time was an employee at the appellant's company. It is alleged that on or about 26th October 2009, the deceased was in the company of other employees, after closing work at the appellant's company, while heading to board motor vehicle KXT 997 an Isuzu lorry belonging to the appellant company, when he was hit by the said lorry and fell down, as a result whereby he sustained fatal injuries.

2. The respondent testified and summoned the evidence of one witness. The appellant summoned one witness. In the end, Hon. C. O. Obulutsa, the learned Senior Principal Magistrate found appellant wholly to blame for the accident and gave judgment in favour of the respondent as follows:

Pain and suffering	ksh.50,000/=
Loss of expectation of life	ksh.100,000/=
Loss of dependency	ksh.2,520,000/=
Special damages	k*sh.10,050/=*

3. Being aggrieved, the appellant preferred this appeal to impugn the aforesaid decision. The appellant put forward the following 7 grounds in its memorandum of appeal.

1. ***The learned magistrate erred in law and in fact in entering judgment against the appellant and finding the appellant 100% negligent when considering the evidence of the same had not being proved.***

2. ***The learned magistrate erred in law and in fact by failing to consider the demand of contributory negligence based on the evidence adduced by the appellants and its submissions.***

3. ***The learned magistrate erred in law and in fact in making an award in general damages in favour of the respondent that was too excessive in the circumstances.***

4. ***The leaned magistrate erred in law and in fact in awarding damages for loss of dependency by adopting a multiplier of 35, that was too high in the circumstances.***

5. ***The learned magistrate erred in law and in fact in holding that the deceased's income was ksh.9,000/= when no evidence was tendered to that effect.***

6. ***The learned magistrate erred in law and in fact in not sufficiently taking into account all the evidence presented before him and in particular the appellant's evidence.***

7. ***The learned magistrate erred in law and in fact by failing to take into account the appellant's submissions and judicial authorities cited before him in arriving his judgment.***

4. When the appeal came up for hearing, learned counsels appearing in this matter recorded a consent to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have also taken into account the rival written submissions. Though the appellant put forward a total of 7 grounds, I am convinced that they may be summarised into two main grounds namely

i. *Whether or not the learned trial magistrate erred in law and in fact on his award on liability (grounds 1, 2, 6)*

ii. *Whether or not the learned trial magistrate erred in law and in fact on his award on damages (grounds 3, 4, 5, 6, 7)*

5. The first ground of appeal is whether or not the learned trial magistrate erred in law and in fact on his award on liability. The appellant submits that he was not 100% negligent and the deceased was guilty of contributory negligence, becuase he was not mindful of his safety. As such the trial court erred in finding the appellant 100% liable for the accident. It's the appellants submission that this court should set aside the judgment of the trial court and substitute a finding that the appellant and respondent were equally to blame for the accident and apportion liability at 50%:50%. The appellant cited the case of **Haji –vs-Marair Freight Agencies Ld (1984) KLR 139**, where it was held that, where it is proved by evidence that both parties are to blame and there are no means of making a reasonable distribution between them, the blame can be apportioned equally on each.

6. Its the respondent's submission that the appellant caused the accident by; using a wrong mode of transport for its employees, a lorry without seats, built for the purposes of carrying luggage and not human beings, having a defective motor vehicle and having a careless driver. For these reasons, the respondent states that the deceased did not in any way contribute to the accident and thus the appellate court should uphold the finding of the trial court.

7. Having considered the divergent arguments and having re- evaluated the evidence presented before the trial court, I have come to the conclusion that the trial court's decision on liability cannot be faulted. The respondent presented credible evidence which proved on a balance of probabilities that the appellant was wholly to blame for the accident.

8. The 2nd ground of appeal is whether or not the learned trial magistrate erred in law and in fact on his award on damages. On quantum, the learned Senior Principal Magistrate awarded ksh.2,520,000/= as

general damages for loss of dependency,kshs.100,000 for loss of expectation of life and kshs.50,000/= for pain and suffering. The appellant did not submit on general damages for loss of expectation of life and general damages for pain and suffering. For general damages for loss of dependency, the appellant submits that the award was too excessive in the circumstances.

9. The appellant submits that the trail court should have applied a monthly salary of ksh.6,000/=x12months x10years multiplier= 6000x12x10=720,000/= subjected to 50% contribution to arrive at a final figure of ksh.360,000/=

10. It is the respondents submission on the other hand that, the awards on general damages were sufficient and should therefore not be disturbed. The respondent further pointed out that even if the court was to disregard the monthly salary of kshs.9000/= awarded by the trial court, then the amount of kshs.10,500/= would have been consequently applied, being the minimum wage allowable at the time of the deceased death for a general labourer.

11. Having considered the rival arguments and having re-evaluated the evidence presented before the trial court, I have come to the conclusion that the trial court's decision on quantum cannot be faulted.

12. PW1 confirmed the deceased was being paid kshs.300/= per day. PW1 also stated that they worked including Sunday. The deceased died on Sunday when the accident occurred. The death certificate shows the deceased was 20 years at the time of his death. PW2 stated that the deceased had 3 dependants. The deceased could have worked upto 60 years of retirement, but given the uncertainties of life, a working age of 55 adopted by the trial court was reasonable. Subjected to a 2/3 dependency, thus

9000x35 (55-35)x12x2/3=2,520,000/=.

13. I am convinced that the finding of the trial magistrate on quantum was well founded. Therefore, the appeal as against quantum is without merit.

14. In the end and on the basis of the above reasons, this appeal is found to be without merit. It is dismissed in its entirety with costs to the respondent.

Dated, Signed and Delivered in open court this 20th day of December, 2017.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent