



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 217 OF 2008

ALFALAH WHOLESALERS LTD.....APPELLANT

VERSUS

FLORENCE MARTHA CHEGE alias

MARTHA LUMBASI (suing as a personal

representative of PATRICK CHEGE).....RESPONDENT

(An appeal from the judgment and decree of Hon. CHARLES MBOGO

(Ag. Chief Magistrate) dated and delivered on the 27th day of

November, 2008 in the Original KISII CMCC No. 548 of 2007.)

JUDGMENT

1. The respondent herein **FLORENCE MARTHA CHEGE alias MARTHA LUMBASA** sued the appellant before Chief Magistrate's court at Kisii in **CMCC 548 of 2007** in her capacity as the personal representative of the estate of **PATRICK CHEGE** (hereinafter "the deceased").
2. The respondent's claim before the trial court was for both general and special damages arising out of a road traffic accident that occurred on 30th March 2007 in which the deceased sustained fatal injuries. The respondent's case was that on 30th March 2007, the deceased was lawfully riding a motorcycle along Migori-Isebania road when near Bridge or thereabout the appellant's driver drove the appellant's motor vehicle reg. No. KAP 575A so recklessly and negligently thereby knocking down the deceased who sustained fatal injuries as a consequence thereof.
3. In its defence filed before the trial court on 21st February 2008, the appellant denied liability for the accident and attributed its occurrence to the negligence of the deceased and after considering the evidence tendered by both parties and their witnesses the trial court entered judgment in favour of the respondent in the total sum of Kshs. 1,905,393.60 thereby precipitating the instant appeal in which the appellant has listed the following grounds of appeal:

1. THAT the learned trial magistrate erred in law and in fact in finding that the appellant do pay the respondent Kshs. 1,795,393,60/= for loss of Income, Kshs, 100,000/= for Loss of dependency and Kshs. 10,000/= for Pain & Suffering, which awards were arbitrary,

unwarranted and excessive in the circumstances.

2. **THAT the learned trial magistrate erred in law and in fact in not finding that he whole awards were excessive, outrageous and prohibitive.**

3. **THAT the learned trial magistrate erred in not taking into account entirely the submissions of the appellant.**

4. **THAT the learned trial magistrate erred in law and in fact by failing to apportion liability between the Respondent and the Appellant.**

5. **THAT the learned trial magistrate erred in law and in the fact and fact in failing to find that it is the deceased who wholly caused the accident by ramming his motor cycle into the appellant's vehicle.**

6. **THAT the learned trial magistrate erred in not taking into account that the deceased was in full control of the motor-cycle that caused his death.**

7. **THAT the learned trial magistrate's finding and decision were against the weight of the evidence adduced.**

8. **THAT the learned trial magistrate erred in not taking into account that the Respondent had not proved ownership of motor vehicle registration No. KAP 575A and thus no award should have been granted in the circumstances thereof to the respondent.**

4. When the appeal came up for directions on 21st September 2015, parties agreed to canvass it by way of written submissions.

Appellant's submissions

5. On liability, the appellant faulted the trial magistrate for finding that the appellant was wholly to blame for the accident when there was ample evidence tendered by the appellant's witnesses to the effect that the deceased was drunk at the time of the accident and did not heed the appellant's driver's warning of his intention to turn right. It was the appellant's case that the circumstances of under which the accident in question took place were such that liability should have been distributed at 90% to 10% in favour of the appellant.

6. On quantum, the appellant submitted that the award for loss of income was excessive in view of the fact that the trial court adopted a multiplier of 13 years instead of 9 years.

7. The appellant further stated that the award for loss of expectation of life should have been subtracted from the award under Fatal Accidents Act. The appellant relied on the case of **Grace Wairimu Mwangi vs Joseph Mwangi Gitinda Machakos HCCC No. 162 of 1994.**

Respondent's submissions

8. On liability, the respondent stated that the trial court was justified in holding that the appellant was wholly to blame for the accident in view of the fact that there was no expert evidence in support of the claim that the deceased was drunk at the time of the accident and was therefore incapable of making proper judgment while riding on the said road.

9. The respondent maintained that the trial court fully appreciated the evidence tendered before it and made the correct verdict that the appellant was to blame for the accident.

10. On quantum, the respondent argued that the same was at the sole discretion of the court which discretion cannot be interfered with by the appellate court as long as the same is exercised judicially. He

further argued that the court's discretion in awarding damages can only be ousted on appeal when it is shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.

11. On the issue of the multiplier adopted by the trial court, the respondent argued that the said multiplier was not inordinately high as it was in line with the multiplier adopted in similar cases such as **Checkers Trading Ltd & Another vs Fatuma Kimanthi C.A 317 of 2003** wherein a multiplier of 9 years was used for a deceased aged 50 years and **Kisii HCCC 23 of 2009 Beatrice Nyanchma Obuya vs Hussein Dairy Ltd** where the deceased was aged 45 years and a multiplier of 15 years was adopted.

12. On whether the award on loss of expectation of life should be subtracted from the award made under Fatal Accidents Act, the respondent submitted that all the court needs to do is to take into account the award under Fatal Accident's Act when making an award under Law Reform Act and not make a deduction as suggested by the appellant. The respondent relied on the decision in the case of **Kemfro Africa Ltd t/a Meru express Services (1976) 2 KLR 30**.

13. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence in order to make its own independent conclusions. It must, however, keep at the back of its mind the fact that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd. [1968] EA 123** and **Peters vs Sunday Post Limited [1985] EA 424** where in the latter case, the court rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

14. The respondent testified that she was the widow of the deceased having been married to him on 23rd May 1996 and that on 30th March 2007 she was waiting for the deceased outside a shop along Isebania Posta Road when she saw him approaching on a motorcycle but no sooner had he crossed bridge that motor vehicle Reg. No. KAP 575, which was travelling at a high speed from the opposite direction, lost control and knocked him off the motor cycle. The deceased landed on a trench and the respondent rushed to the scene to assist him but he unfortunately died while undergoing treatment. She produced a burial permit and death certificate as Pexhibit 2a and 2b respectively. She also produced the deceased's pay slip as Pexhibit 6 and stated that the deceased was aged 42 years at the time of his death. She added that she had 3 children with the deceased who were aged 15 years, 7 years and 3 years respectively at the time of the trial. She stated that the deceased earned Kshs. 42,933/= per month from his employment with the government out of which he would give her Kshs. 20,000/= for her upkeep and that of their children.

15. On cross examination, she stated that the vehicle that hit the deceased belonged to her neighbor and that she saw it speeding from the opposite direction before crossing to the side of the road where the deceased was.

16. PW1 No. 67509 PC William Ndegwa, the police officer who investigated the said accident, stated that his investigations revealed that the appellant's motor vehicle suddenly veered from its lane to the right lane where it knocked the deceased who was travelling from the opposite direction. On cross examination, he stated that the appellant's driver did not give any warning that he intended to turn to the right.

17. DW1 Ahamed Khanir Mlae was the appellant's driver of the ill-fated motor vehicle. His testimony was that he was driving along Migori-Isebania Road at about 30km per hour on the material day when the deceased emerged from behind him and hit the vehicle when he had already indicated that he was turning to the right side.

Analysis and Determination

18. I have perused the record of appeal, and the submissions filed by the parties herein. I note that the main issue for determination is whether the trial court erred in its findings on both liability and quantum were proper.

19. It was not disputed, that the deceased died as a result of the injuries that he sustained in the accident that occurred on 30th March 2007. It was also not in dispute that the deceased had dependants and earned a gross sum of Kshs. 42,933/=. Indeed, the appellant herein did not take issue with the multiplicand of Kshs. 17,263/= that was adopted by the trial court in calculating the multiplier. The appellant however contested the multiplier of 13 years applied by the trial court in arriving at the amount payable to the respondent under the Fatal Accidents Act. The appellant also took issue with the trial court's findings on liability at 100% in favour of the respondent.

20. On the multiplier, I find that this is normally determined by the age of the deceased and his/her expected age of retirement. In the instant case, the deceased was aged 42 years and was employed by the government as a veterinary officer. This court takes judicial notice of the fact that in government employment, the deceased would have retired at the age of 60 years in accordance with the relevant government laws. There was no evidence to challenge this legal retirement age of civil servants.

21. The deceased was reported to be of good health prior to his death as there was no evidence of vicissitudes of life or other imponderables or illness that could have shortened his expected 18 more years of service in the government. The Appellant did not rebut the respondent's evidence that the deceased was a civil servant who could have worked up to the age of sixty (60) years which is the statutory retirement age for civil servants in Kenya.

22. It is important to point out that an appellate court ought not to disturb an award by a trial court merely because it could have adopted a lower figure. The Learned Trial Magistrate exercised his discretion judiciously and adopted a multiplier that was not unreasonable.

23. This court was not persuaded by the Appellant submissions that the Learned Trial Magistrate erred when he adopted a multiplier of nine 13 years. I therefore find no basis for interfering with and/or disturbing the said Learned Trial Magistrate's finding on the multiplier as the same was fair and modest.

24. Turning to the issue of liability, it was not in dispute that the accident occurred when the appellant's motor vehicle knocked down the deceased who was riding a motor cycle. The respondent attributed the accident to the negligence of the appellant's driver whom she alleged, swerved from his side of the road all over sudden and without any warning thereby knocking down the deceased who was riding from the opposite direction.

25. On his part, the appellant's driver confirmed that he knocked the deceased as he was turning to the right side of the road after indicating that he was about to branch to the right. The testimony of the appellant's driver confirms the respondent's testimony that the deceased was knocked while riding on the right side of the road and that indeed, the appellant's vehicle was not on its correct lane on the road at the time the accident occurred. The trial court found the appellant's driver 100% liable for the accident. Courts have severally held that apportionment of liability is a discretionary function of the trial court which the appellate court should not interfere with except in very exceptional circumstances. In the case of **Owners Of Steamship Or Versel (British Fame) Versus Owners Of Steamship Oversea Macc Gregor (1943) IAER33** whose decisions central principle is that *"the finding of the trial judge as to the degree of blame to be attributed to two or more tort feasons involves an individual choice or discretion and will not be interfered with on appeal save in very exceptional circumstances"*.

26. The case of **Khambi And Another Versus Mahithu And Another (1969) EA 70** where the CA held inter alia that *"an apportionment of liability made by a trial judge will not be interfered with on appeal save in exceptional cases as where there is some error of principle or the apportionment is manifestly erroneous."*

27. In the instant case, I find that the appellant has not demonstrated that there were any exceptional

circumstances or error in principle that would warrant this court's interference with the trial court's apportionment of liability. The respondent witnessed the unfortunate accident, in which her own husband was the victim, as it unfolded and had the following to say in her testimony before the trial court:

“While I was waiting for him outside the shop, I saw him coming from Dede while riding a motor cycle. He rode near a bridge. I saw a vehicle coming from Isebania. My husband was on the left lane. I saw the vehicle speeding. It lost control before knocking down my husband who fell into a trench on the left side of the road.”

28. The respondent's account on how the accident took place coupled with the appellant's driver's testimony that he knocked the deceased on the right side of the road must have informed the trial court's decision to find the appellant 100% liable for the accident and I find no reason to interfere with the said decision.

29. The upshot of my finding is that this appeal fails on both grounds of liability and quantum with the result that it is hereby dismissed with costs to the respondent.

Dated, signed and delivered in open court this 14th day of December, 2017

HON. W. A. OKWANY

JUDGE

In the presence of:

- N/A for the Appellant
- N/A for the Respondent
- Omwoyo court clerk