



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT GARISSA

CIVIL APPEAL 13 OF 2013

1. MOHAMED ADAN

2. ABDULLAHI MOHAMED.....APPELLANTS/RESPONDENTS

3. NOOR ALI OSMAN

VERSUS

1. HADIJA HASSANMOHAMED

2. ADAN IBRAHIM KARU

3. AHMED HASSAN KARU (Suing as the Legal Representative of the Estate of

ALI NOOR IBRAHIM KARU (DECEASED).....RESPONDENTS/APPLICANTS

JUDGMENT

The respondents brought proceedings in the subordinate court at Mwingi through a plaint dated 16th July 2012. They came to court as the legal representatives of the estate of Alinoor Ibrahim Karu, deceased.

It was alleged in the plaint that the 1st and 2nd appellants were the owners of motor vehicle registration KBP 311V Nissan UD Bus while the 3rd respondent was their authorized driver. That on 19th September 2011 the deceased was travelling as a lawful fare paying passenger in the said vehicle when the driver negligently drove managed or controlled the motor vehicle that he caused the same to lose control at Mutwangombe area, and rolled occasioning fatal injuries to the deceased who lost his expectation of a normal life. Particulars of negligence of the appellants were listed in the plaint. Particulars of the dependants or survivors of the deceased were also listed in the plaint. Particulars of special damages were also listed. The respondents asked for general damages under the Law Reform Act and Fatal Accidents Act. They also asked for special damages to be proved at the hearing. They further asked for costs of the suit and interest at court rates.

The appellants filed a joint defence through their counsel on 7th March 2013. They denied ownership of the motor vehicle and also denied that the deceased was a lawful passenger in motor vehicle registration KBP 311V and put the respondents to strict proof thereof. They also denied the occurrence of the accident.

In the alternative, they pleaded that the accident was caused or substantially contributed to by the

negligence of the deceased. They listed particulars of negligence of the deceased and denied that the doctrine of *les ipsa loquitur* is applicable. They also pleaded that the incident was due to an inevitable accident. They denied the damages suffered by the deceased.

Before the case was heard, liability was recorded by consent at 90% against the appellants, and 10% against the respondents.

At the hearing of the case before the trial court only by one witness Ahmed Hassan Karo testified as PW1. He stated that Hadija Hassan was the wife of the deceased and that he was a cousin of the deceased. According to him, they obtained Letters of Administration in order to institute the proceedings. He testified that the deceased was a business person operating shops in Mandera and Nairobi at Eastleigh Sunrise Shopping Complex, and left behind 9 children and 3 wives. According to him also, the deceased was the sole bread winner and was 38 years old, and left behind school going children. He stated also that the deceased spent about Kshs. 200,000/= every month on family related matters.

He stated further that approximately Kshs. 500,000/= was spent in funeral expenses, which included 1 camel which they bought for Kshs. 80,000/=, 3 goats, other food stuffs and other expenses for funeral activities. He stated that they did not retain documents for the funeral expenses.

In cross examination, he stated that he was not a dependant of the deceased. He stated that the deceased earned approximately Kshs. 200,000/= but did not have any records of that. Nor did he have receipts relating to funeral expenses.

Some birth certificates of children were produced in evidence.

That was the close of the respondents' case.

The appellants did not call any witness. Instead they elected to file written submissions.

Based on the evidence on record, the learned magistrate delivered a judgment in which he awarded a total of Kshs. 1,181,000/= together with costs and interest, after deducting the 10% contributory negligence of the deceased. The award included an award under the Law Reform Act and an award under the Fatal Accidents Act, together with special damages of Kshs. 20,800/=.

Dissatisfied with the decision of the trial court, the appellants have come to this court on appeal on the following grounds:-

- 1. That the learned magistrate erred in law and in fact in finding that the respondent was entitled to an award under the Fatal Accidents Act of Kshs. 1,421,500/= while the respondent had not proved its case to the required standard.**
- 2. The learned magistrates award of special damages was wholly erroneous as the same was neither pleaded nor proven as required under the law and was a miscarriage of justice.**
- 3. The learned magistrate erred in fact and in law in that he disregarded the appellants' submissions and judicial authorities on quantum of damages with the resultant miscarriage of justice to the appellants.**
- 4. The learned magistrate erred in fact and in law in failing to consider conventional awards for general damages in similar cases.**

By consent of counsel for the parties, the appeal proceeded by way of filing written submissions. The appellants counsel Kairu and Mccourt filed their written submissions on 30th September 2015. The respondents counsel Magare Musundi & Co. Advocates filed their submissions on 24th July 2015. None of the counsel highlighted the written submissions.

I have considered the submissions on both sides. I have also considered the authorities relied upon. I have perused the proceedings as well as the judgment.

This being a first appeal, I am required to consider the evidence on record afresh and come to my own conclusions and inferences. See the case of *Selle Vs. Associated Boat Company Co. Ltd [1968] EA 137.*

The liability was admitted by consent. The issue on appeal is on quantum of damages awarded, and the findings supporting the same.

Counsel for the appellants has challenged the quantum of damages by stating that the award under the Fatal Accidents Act was a mistake, as no explanation was given as to how the Hon Magistrate arrived at a multiplicand of Kshs. 10,400/=. According to counsel, the magistrate should have used a multiplicand of Kshs. 6,130/= in computing the award for lost years. Counsel relied on a schedule on minimum wages under Subsidiary Legislation published in 2010.

On special damages counsel submitted that same were neither pleaded nor proved. According to counsel, the statement that Kshs. 500,000/= was used for funeral expenses by the only witness PW1, remained an allegation as no receipt was produced. The magistrate therefore had no basis for arriving at the figure of Kshs. 20,800/= as special damages. Counsel relied on a case of *Francis Muchenthiga Vs. David N. Waweru 2014 ECLR.*

The respondents counsel, urged that this court should uphold the award of the trial court and dismiss the appeal with costs. Counsel relied on a number of cases, such *Jesse Mburu and another Vs. Ann Karimi Mugambi [2012] ECLR,* and the case of *Kigarigari Vs. Ayayua [1985] KLR 273.*

This is an appeal on quantum of damages. It is trite that the assessment of quantum of damages is an exercise of discretion by a trial court. An appellate court will only interfere if the said exercise of discretion was erroneous in that the award is either too high or too low as to result to an injustice, or it is based on a wrong principle or as misapprehension of facts. See the case of *Butt Vs. Khan [1977] IKLR1.* An appellate court will not impose a quantum of damages just because it thinks that it would award a different sum if the trial was before it.

The appellants have complained that special damages were neither pleaded nor proved. Courts have held that special damages must be pleaded and also proved before they can be awarded. In the plaint herein, a general statement on special damages was made for funeral expenses to be proved at the hearing. What the single witness PW1 said in evidence is that they spent about Kshs. 500,000/= on funeral expenses. He mentioned the value of a camel and four goats to justify the amount. He stated that they spent other monies on other funeral activities.

The evidence of the single witness PW1, is not supported by any documents. It also lacks detail as to what the camel was for and what the goats were for, and what actually happened to them. No other details were given by him as to how money was spent for the funeral of the deceased. In those circumstances, in my view, funeral expenses being special damages were not proved in court. Though proof of special damages does not necessarily need to be based on documents, statements by the single witness is so bare that it does not amount to proof of special damages. It is an allegation. I thus will set aside the award for special damages.

The appellants counsel has also argued that the multiplicand used by the trial court for lost years was wrong. Counsel suggested a multiplicand based on what they call published minimum wages.

In arriving at the multiplicand of Kshs. 10,400/= the learned magistrate stated in the judgment as follows:-

“The court shall rely on wage guidelines a Legal Notice No. 70 of 2009, basic monthly wage for a hired driver and adopt a dependency ratio of 2/3”.

Therefore it can be said that the magistrate considered the deceased to be in the bracket of a driver, in the absence of other evidence. The appellants' counsel did not interrogate the single witness when he testified in court that the deceased was earning Kshs. 200,000/= per month. The court found that the deceased could earn an income of a driver, which was Kshs.10,400/= per month according to Legal Notice No. 70 of 2009. In my view, on the evidence on record, and since the appellants' counsel did not seriously challenge the allegations made by the single witness on the income of the deceased, the magistrate was fair in deciding that the deceased would earn about Kshs. 10,400/= a month.

To conclude, in my view, the only award that is erroneous is that on special damages of Kshs. 20,800/=, which I hereby set aside. I however uphold the decision of the trial court on the other heads. of the monetary award.

The appeal is allowed in part to the extent of setting aside the special damages of Kshs. 20,800/= awarded by the trial court. The appellants will pay 80% of the respondents' costs of the appeal, as the appeal has succeeded only in part.

Dated and delivered at Garissa this 27th day of April 2016

GEORGE DULU

JUDGE