REPUBLIC OF KENYA

HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 19 OF 2009

(Appeal from the judgment by HON. A.K. MWICIGI, R.M in MERU CMCCNO 157 OF 2008 delivered on 17.2.2009)

(CORAM: GIKONYO J)

E.P. COMMUNICATIONS LIMITED ….....……1ST APPELLANT

JOHN GACHOIYIA NDERITU…….....……...2ND APPELLANT

Versus

ISAAC MUTHURI(The Administrator of the Estate of

M'ANAMPIU M'RIRIA)…….....……RESPONDENT

JUDGMENT

Appeal on liability and quantum

[1] The Appellants were dissatisfied by the entire judgment by Hon. A.K. Mwicigi and appealed on both liability and quantum of damages citing the following Seven (7) grounds of appeal:

1. ***That the learned Trial Magistrate erred in law and in fact in failing to take into account the evidence, proceedings and judgment in the traffic case preferred against the second appellant, being Meru Traffic case No. 368 of 2008 and thus reached a wrong finding on liability.***

2. That the learned trail magistrate erred in law and in fact in falling to find that the accident was wholly or substantially contributed to by the deceased's negligence, in light of the evidence before the Trial Magistrate Court.

3. That the learned trial magistrate erred in law and in fact in awarding damages that had not been proved.

4. That the learned trial magistrate erred in law and in fact in making awards under the Fatal Accidents Act when the plaintiff /respondent herein was not proved to be the deceased's dependant/entitled to benefit under the said Act.

5. That the learned trial magistrate erred in law and in fact in adopting a multiplier that was too high in the circumstances.

6. That the learned trial magistrate erred in law and in fact in adopting a multiplicand based on the minimum wage limit which was totally inapplicable.

7. That the learned trial magistrate erred in law and in fact in failing to consider or appreciate the defendants/appellants submissions on the issues of quantum and liability.

[2] Both parties canvassed the appeal through, and filed written submissions. I will consider the said submissions. But I must do what the first appellate court should do; evaluate the evidence and come to own conclusions except being minded that I neither heard nor saw the witnesses when they testified. I will not, however, reproduce or rehash the evidence as was captured by the trial magistrate for two reasons; (1) the evidence is part of record; and (2) it will be wearisome to, and a very boring reading for the reader who is anxious to reach the core of the evidence adduced and the significant findings of the court. I am not prepared for such style which will elicit no delight as a style of judgment writing.

Of liability

[3] The Appellants submitted that the deceased was wholly or substantially to blame for the accident. They argued that the deceased was attempting to cross or staggered into or was walking along the road at an inappropriate place. The Appellants emphasized two things. The first one is that the point of impact was 2 metres into the road at the right side of the road towards Meru which means that the deceased was in the road not off the road. The second is that the 2nd Appellant was acquitted of the charge of causing death by dangerous driving. Therefore, they held the view that based on the evidence of PW2 and the fact of acquittal, the trial magistrate erred in holding the Appellants to be 90% liable for the accident. The Respondent on the other hand submitted that the trial magistrate considered all the evidence tendered including the criminal proceedings and properly apportioned liability. I should ask: What facts emerge from the evidence?

[4] From the evidence of PW2 and PW3, one fact is clear; that the accident occurred on the right side of the road as you go from Nkubu to Meru. The sketch plan produced by the police showed that the point of impact was 2 metres into the road at the right side. That fact is not disputed by the Appellants. Again, it is clear that the motorcycle herein was riding from Nkubu to Meru. The proper scheme within the traffic code in Kenya is that a motorist should keep left on the road unless overtaking. Therefore, from the facts of the case, the motorcycle was riding on the wrong side of the road. The available evidence by PW3 shows that the motorcycle was overtaking another motor vehicle at the time. Another important fact is that the accident happened at a bridge called Kathirawhere it is said that the road was narrow- a factor which would discourage or prohibit overtaking. In any case, even if the 2nd Appellant was entitled to overtake, he owed other road users a duty of care; he ought to have considered and to take into account the presence of the deceased on the road before overtaking. These facts show that the motorcycle was substantially to blame for the accident. I should state here that, contrary to the submissions by the Appellants, PW3 and the deceased were walking on the road. In fact, PW3 was walking behind the deceased when the accident took place and his account of the accident is direct evidence. The evidence of PW2 that the deceased was crossing the road is not based on anything and is not evidence of any eye witness. From the facts and evidence adduced, I do not think the deceased was crossing the road but was walking on the road. The trial magistrate came to a similar conclusion upon the evidence produced. And given the circumstances of this case, contrary to the submissions by the Appellant the fact that the deceased was walking on the road would only warrant a small and not substantial proportion of contributory negligence. Therefore, the trial magistrate did not err in finding that the Appellants and the deceased were 90% and 10% to blame for the accident, respectively. Again proceedings and judgment in the traffic case preferred against the second

appellant, being Meru Traffic case No. 368 of 2008 were considered and needless to state that those proceedings were just evidence for consideration by the court. The law should be understood here that the standards of proof in civil and criminal proceedings are totally different: balance of probabilities and beyond reasonable doubt, respectively. Thus, an acquittal in a criminal proceeding does not *per se* absolve the Defendant of liability in a civil case. Accordingly, I find no reason for interfering with the judgment of the trial magistrate on liability. I uphold it. On that finding, Ground 1 and 2 fails. I will now proceed to determine the question of quantum of damages.

Of Quantum

[5] Grounds 3, 4, 5 and 6 relate to quantum of damages. I will handle them together. Parties also argued them as such. According to the Appellants, the trial magistrate erred in applying a multiplicand of Kshs. 4000 after finding at page 145 of the record that ''…there was no record and certainly on the deceased's earnings…''. They also urged that dependency was not proved. They beseeched the court to set aside the award for loss of dependency. They cited two cases in support of this position. The Respondent on the other hand asserted that the trial magistrate applied correct principles in assessing damages; used minimum government wage for there was no concrete evidence on income. He also contended that he proved that the deceased had dependants including him.

The legal threshold

[6] I will apply the test as set out in the case of ***BASHIR AHMED BUTT v UWAIS AHMED KHAN*****[1982-88] KAR 5that**;

> ***An appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles of that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.***

[7] Upon considering the evidence tendered, dependency by the widow one Salome Kamuitu, the plaintiff and his other siblings Mary Mpinda, Stella Mukomunene and Anne Kendi was proved. The evidence also revealed an important fact; that, at the time PW1 testified the widow was incapacitated and was being assisted by the Respondent. I should also state that the evidence adduced proved that the deceased had his own cattle and a shop, despite absence of documentary evidence of the exact income that he made. I need not remind that the law in Kenya is that income of deceased may be proved by other means other than production of certificates or documents.See the decision by the Court of Appeal in the case of ***JACOB AYIGAMARUJA& ANOTHER vs. SIMEON OBAYO [2005] eKLR*** *that:*

> ***We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things. In this case, the evidence of the respondent and the widow together with the production of school reports was sufficient material to amount to strict proof for the damages claimed. Ground one of the grounds of appeal must accordingly fail".***

[8] Accordingly, dependency was proved. Similarly, it was shown that the deceased had some income but was not exactly stated. The question now would be: In the circumstances of this case, was the use of multiplicand an error in principle for which the court can interfere with the award on loss of dependency? First and foremost, where annual or monthly dependency and the expected length of the dependency are not known or knowable without undue speculation, the trial court

should not feel beholden to using the multiplier method in assessing damages. In such situation, the court should award a global award which it deems reasonable after taking into account all the relevant factors. On this please see Ringera J (as he then was) in the case of **Kwanzia Vs Ngalali Mutua & another** that:

> ***"The Multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency are known or are knowable without undue speculation, where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do."***

This case may not have been appropriate to use the multiplier method to assess damages. The trial magistrate erred in that respect.Nevertheless, I have found that the plaintiff and the estate were entitled to loss of dependency. The only question would be what would be reasonable award of damages. Taking into account the dependency, the age of the deceased and life expected I award a global award of Kshs. 160,000 for loss of dependency. This is fair compensation for the dependants herein.

Of Special damages

[9] The award of Kshs. 45,250 as special damages was hotly contested. According to the Appellants, the receipts for funeral expense and the coffin were all dated 27th March 2007 which is the date when the deceased died. They submitted that the receipts were fabricated in order to make a claim.They also took a specific objection to the receipt for medical expenses for Kshs. 3,000 which they said was not pleaded in the plaint as required by the law. They urged the court to set aside the sum of Kshs. 30.400 and only allow the sum of Kshs. 15,000 on special damages. The Respondent contended that he paid the sums shown in the receipts produced. He urged that those receipts were issued to him and that any mistake on the dates was committed by the issuer. He stated that he did not have any control on the dates on the receipts. He asked the court to leave the award for special damages undisturbed. I have looked at the receipts. It is true they bear the date of 27th March 2007. The explanation given on the date is reasonable and I accept it. The only sum that was not specifically pleaded is the doctor's fee which I disallow.The sum of Kshs 50 was proved tto have been paid for the Certificate of death. I award Kshs. 50 thereto. The sum pleaded and proved and which I hereby grant is Kshs 45,250.

Loss of expectation of life, and pain and suffering

[10] The trial magistrate awarded a sum of Kshs. 100,000 and Kshs. 120,000 for loss of expectations of life, and pain and suffering, respectively. These awards were not challenged at all. I also find that they are deserved. Indeed the deceased died after 2 weeks; from the injuries he sustained he must have suffered immense pain and suffering. I uphold those awards.

The final analysis

[11] In the final analysis enter judgment on liability in the ratio of 90%:10% against the Appellants and the Respondent respectively. I also make the following award in favour of the Respondent:-

(a) Loss of Dependency……Kshs. 160,000

(b) Loss of expectation of life……Kshs. 100,000

(c) Pain and Suffering……Kshs. 120,000

(d) Special damages……Kshs. 45,250

TOTAL…….Kshs. 425, 250

Less 10% contribution…….. Kshs. 42,525

NET…….Kshs. 382, 725.

[12] I also award costs and interest in the lower court and the appeal. The appeal fails to the extent expressed above. It is so ordered.

Dated, signed and delivered in open court this 21st day of April 2016

F. GIKONYO

JUDGE

In the presence of:

Mr. Gikunda advocate for the Respondents.

Mr. Kiogora advocate for Wambua advocate for appellants.

F. GIKONYO

JUDGE