



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL APPEAL NO. 12 OF 2010

ISAAC KANGANGI.....1ST APPELLANT

ISAYA KABERIA M'THINYAI.....2ND APPELLANT

VERSUS

RAHAB MUTHONI MUNGAI (substituted by

Catherine Nyambura Mungai).....RESPONDENT

(Being an appeal against judgment and decree in Nyeri Chief Magistrates Court Civil Case No. 886 of 2005 (Hon. J. Kiarie (SRM) delivered on 16th February, 2010)

JUDGMENT

The appellants were sued by the respondent for general damages under the **Law Reform Act (Cap. 26)** and the **Fatal Accidents Act, (Cap. 32)**. She also sought for special damages and interest at court rates on both general and special damages. The respondent sued in her capacity as the mother and the administratrix of the estate of Stephen Njau Mungai (deceased). It appears that the suit was initially filed in this Court but at some stage it was transferred to the magistrates' court where it was disposed of.

The basis of the respondent's suit was a road traffic accident which occurred on the 11th April, 1996 along Mwea-Embu Road; according to the respondent's plaint, the deceased was driving motor vehicle registration number KZM 207 (Nissan Matatu) when the 2nd appellant so negligently and recklessly drove, managed and/or controlled motor vehicle registration number KAD 195X that he caused it to collide into motor vehicle registration number KZM 207 as a result of which the deceased sustained fatal injuries.

The appellants denied the claim and filed their statement of defence in that regard; indeed they attributed the accident to the negligence of the deceased. That notwithstanding, so it was averred on behalf of the appellants, the plaintiff had received all agreed compensation in full and final settlement and therefore the suit against them was an abuse of the due process of the court.

The magistrates' court found for the respondent and awarded her a total sum of Kshs 1,129,574.00 made up as follows:-

1. Pain and suffering	Kshs.	10,000.00
2. Loss of expectation of life	Kshs.	70,000.00

3. Loss of dependency less 25% Kshs. 1,049,574.00

The respondent was also awarded costs and interest.

The appellants were aggrieved by this decision and so they appealed to this court and in their memorandum of appeal, they raised only four grounds of appeal; these grounds are as follows:-

1. The learned magistrate erred in law when she held that exhibit 14 and 15 discharge vouchers in which the respondent received a sum of Kshs 300,000/= of all claims was not in full and final settlement.
2. The award of Kshs 1,049, 574/= was exorbitant and arrived at on wrong principles of law and fact.
3. That in any case the learned magistrate did not deduct a sum of Kshs 300,000/= already received by the respondent in her final calculation.
4. That the learned trial magistrate reduced the amount awarded by 25% was ipso facto an admission that the respondent had finalised all her claims, present and future.

Being the first appeal, it is mandatory for this court to consider the evidence at the trial afresh and make its own conclusions independent of the factual findings of the lower court but bear in mind that it is only that court which had the advantage of seeing and hearing the witnesses. (**See Selle v Associated Motor Boat Co. [1968] EA 123**).

The plaintiff testified that the deceased died on 11th April, 1996 by which date he was aged thirty. He worked as a driver and at the time of his demise, he was driving vehicle registration number KZM 207 which then belonged to the deceased's mother, the original plaintiff in the suit in the lower court.

The plaintiff relied on the judgment in **Kerugoya Principal Magistrates' Court Traffic Case No. 2604 of 1996** in which the 2nd appellant was charged with three counts of causing death by dangerous driving contrary to **section 46** of the **Traffic Act, Cap. 403**; the deceased was named as one of the persons whose death was caused by the 2nd appellant's dangerous driving in one of the three counts. The 2nd appellant was convicted of all the three counts; for the first count he was fined him Kshs 4,000/= or be imprisoned for six months in default and for the second and third counts, he was fined Kshs 3,000/= and in default he was to serve five months imprisonment.

Besides the fatal injuries that the deceased sustained, the vehicle he was driving was also written off as a result of the accident. It was the evidence of the plaintiff that her mother was paid Kshs 300,000/= by Kenindia Insurance Company Limited in compensation for the loss of the vehicle; she produced a discharge voucher showing that the compensation was in respect of material damage to the vehicle and not for the injury or death of the deceased. According to that voucher, the plaintiff conceded 25% liability for the accident; she admitted liability to the same extent in the subsequent suit that was filed against the appellants.

The plaintiff also testified that her deceased brother earned Kshs 300/= and was further paid Kshs 100/= for lunch; it is not clear from her evidence the regularity of these payments but her father who testified after her said the payments were made daily. Both the plaintiff and her father testified that the deceased used to assist his mother's dependants; her father was more particular that her son used to give him Kshs 200/= daily and that he lost this support when his son died.

The appellants did not call any evidence and therefore the only evidence that the learned magistrate was confronted with was that of the plaintiff; however, both parties filed written submissions in which they urged the respective positions they adopted in support of and in opposition to the suit in the lower court.

One of the main issues they raised and on which the court had to rule was the legal effect of the discharge

voucher which the respondent signed on 30th July, 1998. The appellants' position was that they were discharged from all claims of whatever nature when the respondent received the payment of Kshs 300,000/= from their insurer and executed the discharge voucher. The respondent could not agree; her position was that the payment was in respect of material damage only and had nothing to do with the compensation for the deceased's injuries or his subsequent death.

Upon reading the submissions filed by the parties in this appeal, it appears to me that the question of the legal implication of the discharge voucher has been escalated to this court and as the appellants have submitted, it is the central issue in this appeal. Owing to its centrality it is necessary that I reproduce here verbatim the contents of the discharge voucher:

Kenindia Assurance Company Limited

(Incorporated in Kenya)

THIRD PARTY DISCHARGE VOUCHER

I RAHAB N. MUNGAI of Post Office Box Number ***407 KARURI*** DO HEREBY ACKNOWLEDGE having received from KENINDIA ASSURANCE COMPANY LIMITED the sum of Kshs (words) ***THREE HUNDRED THOUSAND Kshs 300,000/=*** which I accept in full and final settlement of all claims, past present and future competent to me against ***ISAAC K. MITHEI*** (insured) in respect of an accident which occurred on the 11TH day of ***APRIL 1996*** along ***EMBU-MWEA ROAD*** involving vehicles Reg. No. ***KAD 195X*** and ***KZM 207 & KUE 899*** resulting in damage/injury/death to ***MOTOR VEHICLE REG.KZM 207***. It is understood that this payment is not to be construed as an admission of liability by the said ***ISAAC K. MITHEI*** (insured) or KENINDIA ASSURANCE CO. LIMITED. The settlement of the figure of Kshs. 300,000/= is arrived at after concession of 25% contributory negligence on my part which I hereby undertake to bear in the settlement of all claims, present and future arising out of the said accident. I hereby discharge the said ***ISAAC K. MITHEI*** (insured) and KENINDIA ASSURANCE CO. LIMITED forever in respect of this accident.

Signed: (claimant)

Full Name: *Rahab Muthoni Mungai*

& Address: *P.O. Box 403 KARURI*

Date: *30/7/98*

1D/0354432

WITNESS

Signed: _____

Full Name: _____

& Address: _____

Occupation _____

Date: _____

As far as I can gather from this voucher, the insurance company acknowledged that a road traffic accident occurred on the 11th April, 1996 and that it involved three vehicles one of which belonged to its insured,

Isaac K. Mithei; as a result of the accident there was damage to motor vehicle registration number KZM 207 which belonged to the claimant. In compensation for this damage, the insurance company reimbursed the claimant the sum of Kshs. 300,000/= for which the claimant acknowledged receipt upon execution of the discharge voucher.

Counsel for the appellants urged that the compensation was accepted “...*in full and final settlement of all claims past, present and future...*” Indeed these are the words adopted in the voucher but in my humble opinion and, with due respect to the learned counsel for the appellants, the nature of the claims referred to can only be understood properly in the context of the entire sentence in which the words have been used; their meaning and import cannot be construed or understood in isolation of the context in which they have been used.

A casual observation of the sentence in which the claims have been referred shows that the sentence begins with an acknowledgement by the claimant of receipt of the compensation; the basis and the purpose for which she is being compensated are matters explained in the latter part of the sentence and it is this part that appellants appear to have overlooked. That latter part literally shows that the compensation was in respect of the damage occasioned to motor vehicle registration number KZM 207 and therefore the compensation was accepted “*in full and final settlement of all claims, past present and future*” with respect to the *damage* of that particular motor vehicle as a result of a specific road traffic accident which occurred on particular day and at a particular place.

The compensation could not have been meant for the personal injuries or death of any of the victims of the accident, not least the deceased. The discharge voucher itself shows this could not possibly have been the case because it is expressly suggested in its wording that a claimant could be compensated either under all or any of the following heads; material damage, injury or death of the accident victim. In this particular case the words ‘injury’ and ‘death’ were clearly cancelled and compensation was stated to be for ‘damage’ to the claimant’s motor vehicle.

If the compensation was global as to cater for the damage of the claimant’s vehicle and the injury and death of her son, there is no explanation offered why the claims under the heads of ‘injury’ and ‘death’ were cancelled and only motor vehicle registration number KZM 207 specified as the damaged material for which compensation was made. In short, my interpretation of the discharge voucher is that the 1st appellant and his insurance company were only discharged from any claim that the claimant would have raised against the 1st appellant for any compensation relating to the damage to her motor-vehicle; the discharge was restricted to the material damage only and not to the injury or death of any of the victims of the traffic accident.

Having so found, and contrary to the argument by the learned counsel for the appellants, the learned magistrate was not bound to deduct the compensation for the material damage from the award made under the heads of Law Reform Act and the Fatal Accidents Act; such deduction could only have been viable if the claimant had sought for and had been awarded damages for material damage in the suit in which these damages were awarded or in a separate suit.

One other issue that the appellants raised was the apportionment of liability between the appellants and the respondent. The learned magistrate held that parties had consented to this apportionment at the ratio of 25:75 against the appellants. The learned counsel for the appellants categorically denied in his submissions that there was such a consent. However, despite this denial, the record from the lower court shows that the same counsel was not only aware of this consent but that he also submitted in the lower court that the concession of liability by the plaintiff was a demonstration enough that he contributed to the accident. To quote him, this is what he said in his written submissions filed in court on 4th August, 2009:-

“...therefore a mere conviction will not bind itself to the fact that the accident may have been contributed to by the driving of the plaintiff and in fact on 6th March, 2003 before the then Justice Juma, liability was conceded by the plaintiff to the extent of 25% by consent...”

Now, if the learned counsel is not just aware of the consent but knows its minute details as well, I am unable to understand why he is disputing the existence of that consent at this level; suffice it to say, his argument is obviously *mala fides* and does not deserve any further consideration by this honourable Court.

Counsel also urged that the reduction of the court's award by 25% was ipso facto an admission that all respondent's claims had been settled; this, once again, cannot be true because there is no suggestion that reference was made to the discharge voucher at all when the consent was recorded. In any event, I have stated what I believe to be sufficient reasons why the discharge of the appellants from any material damage claims had nothing to do with the suit for damages in compensation of the death of the deceased.

One other ground upon which the appeal was based was that the award made was 'exorbitant' and was arrived at on wrong principle of law and fact. No other reason has been given in the submissions as to why the appellants thought this amount is 'exorbitant' except to urge that the learned magistrate ought to have deducted the sum of Kshs 300,000/= for her award.

Whether this sum should have been deducted from the court's award is a question that I have answered elsewhere in this judgment; If I have to add anything, I can only say that assessment of damages is an exercise that is well within the discretion of the trial judge or magistrate and the appellate court will only interfere where trial court either took into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is based on no evidence. The Court of Appeal in **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5** said of the discretion of the trial court in assessing damages in the following terms:-

“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 or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.”

Except to say that the sum of Kshs 300,000/= ought to have been deducted from the award made by the court, the appellants have not given any reason for the submission that the court award was exorbitant. For my part, I am persuaded that the learned magistrate exercised her discretion properly in assessment of the damages payable to the respondent; there is no hint that the award was inordinately high as to represent an erroneous estimate and neither is there any proof that the learned magistrate considered an irrelevant factor or disregarded a relevant factor.

I am, in these circumstances, inclined to conclude that the appellants' appeal lacks any merit and I can do no better than dismiss it with costs. It is so ordered.

Dated, signed and delivered in open court this 10th June, 2016

Ngaah Jairus

JUDGE