



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
HIGH COURT CIVIL APPEAL NO. 136 OF 2013

BETWEEN

RYCE EAST AFRICA LTD.....APPELLANT

AND

ALI MOMBO SHABAN.....RESPONDENT

(Being an appeal from the judgment and decree of Hon E.S. Olwande Ag S.P.M, delivered on 17.10.2013 in Butere PMCC NO. 18 of 2013 between Ali Mombo Shaban (suing as the administrator and legal representative of the estate of Sadiq Okwara Musungu(deceased) – vrs – Ryce East Africa Ltd)

J U D G M E N T

Introduction

1. The appellant herein was the defendant in Butere PMCC NO. 18 of 2013. By his plant dated 01/03/2013, the Respondent claimed both general and special damages in the sum of Kshs.45,500/= in respect of a road traffic accident which is said to have occurred on or about 07.12.2012 along the Bungoma- Mumias road at Watoya Market involving motor vehicle Registration Number, KBS 695T Isuzu Bi-max and the deceased herein, Sadiq Okwara Musungu.
2. The respondent pleaded at paragraph 3 of the plaint that the appellant, his servant and or agent was negligent in driving Motor Vehicle Reg. No. KBS 695T Isuzu Bi-Max and thereby caused the said vehicle to fatally collide with the deceased. Particulars of negligence are set out under the said paragraph 3 of the plaint.
3. At Paragraph 4 of the plaint the respondent averred that as a result of the accident and subsequent death of the deceased, the deceased's family suffered loss and damage both under the Law Reform Act and the Fatal Accidents Act. The deceased's family was said to have been survived by 2 daughters and 1 son. The deceased was said to have been aged 29 years at the time of death.

The Appellant's Defence

4. The appellant entered appearance and filed its statement of defence on 08.05.2013. The appellant denied all the allegations as per the plaint, including the fact that an accident of the nature described by the respondent or any other accident occurred. In the alternative the appellant alleged at paragraph 6 of the statement of Defence that if ever any accident occurred, then the said accident has wholly occasioned and/or substantially caused by the negligence on the part of the respondent. The particulars of negligence are set out in the statement of Defence. The appellant prayed that the respondent's suit be dismissed with

costs. The respondent filed reply to defence.

Judgment of the Trial Court.

5. The respondent's case proceeded to hearing during which the respondent testified and also called 2 witnesses being, Mombo Shaban as PW2 and Mathias Okwiri, Matanji as PW3. The appellant's only witness was Edwin Oluoch Otieno DW2, Sales representative with Airtel and temporary Manager for Bungoma territory.

6. At the close of the hearing and after carefully considering the evidence adduced the trial court framed 6 issues for determination:-

- a) Whether the defendant was the owner of the motor vehicle Reg. Number KBS 695T.
- b) Whether an accident happened involving the deceased and motor vehicle Reg. Number. KBS 695T
- c) Who is to blame for the accident and to what extent?
- d) Whether the plaintiff and the dependants of the deceased are entitled to damages under the Fatal Accidents Act and The Law Reform Act.
- e) Quantum of damages
- f) Costs

7. In her Judgment the learned trial Magistrate answered issues 1 and 2 in the affirmative. The learned trial Magistrate also found that from the evidence placed before her the appellant was wholly responsible for the accident and that as a result of the said accident, the respondent and the deceased's dependants were entitled to compensation under the relevant statutes. The trial court therefore entered judgment for the respondent as against the appellant as follows;-

- a) Liability – 100%
- b) Loss of dependency – kshs.1,400,000.00
- c) Special damages – Kshs.25,500

Plus costs and interest.

The Appeal

8. The appellant was aggrieved by the whole of the learned Magistrate's judgment and filed this appeal which is premised on 15 grounds of appeal set out in the Memorandum of Appeal. The appellant therefore prays that;-

- i. The appeal be allowed
- ii. The judgment of the lower court delivered on 17.10.2013 be set aside and be substituted with a correct and/ or proper finding.
- iii. The Respondent do pay costs in the lower court and in this particular appeal.

The Duty of this Court

9. As this is a first appeal this court is under a duty to reconsider and evaluate the evidence afresh with the

view of reaching its own conclusions in the matter. The only caution the court has to take is that it has no opportunity of seeing and hearing the witnesses who testified during the trial. This means that if the appellant has raised issues that touch on the demeanor of witnesses this court has to be slow in reaching a contrary opinion to that of the learned trial court. This court has also to be cautious generally when considering the appeal, so that it is only when it is crystal clear that the learned trial Magistrate applied the wrong principles or failed to appreciate the facts of the case, that it should reverse the judgment of the learned trial Magistrate. See **Selles & Another – vrs – Associated Motor Boat Co. & others [1968]EA 123.**

Submissions

10. This appeal proceeded by way of written submissions. The appellant's submissions are dated 02.03.2016 but filed on 03.03.2016. I have carefully read through the submissions. The respondent's submissions were belatedly filed on 22.08.2016 after the court found out during the writing of the Judgment that the respondent's submissions were not on the court file although counsel for the appellant had erroneously informed the court on 16.06.2016 during mention of the matter that both parties had filed their written submissions. I have also read through the Respondent's written submissions which are titled. "Applicant's written submissions," filed on behalf of the respondent by M/S Mukisu & Co. Advocates.

Issues for Determination

11. The appellant has isolated three (3) issues for determination and since I am in agreement with the same, I will consider them as follows:-

- a) Whether or not the learned trial Magistrate erred in holding the appellant 100% liable.
- b) Whether the respondent proved negligence against the appellant and
- c) Whether the quantum awarded by the learned trial magistrate was reasonable in the circumstances.

Analysis and Determination

a) Whether or not the learned trial magistrate was right in holding the appellant 100% liable

12. The ground on liability was subsumed in grounds 1,2,3 and 4 of appeal. The appellant submitted that the fact that the deceased was a motorcyclist and further that since the appellant's driver was driving in his correct lane, then the learned trial Magistrate ought to have apportioned liability. Counsel for the appellant singled out the evidence of Number 53012 PC Jackson Wanyama who testified as PW1 who stated in part of his evidence in chief:-

"The victim is Sadiq Okwara. He was pedal cyclist. The witness is Mathias Okwiri;

And during cross examination, PW1 stated

" I was not the investigating officer in the traffic case.

I confirmed that the accident occurred.

I do not have the police file

I do not know who was to blame for the accident."

13. Mathias Okwiri who testified as PW3 stated as follows in part of his evidence in chief:-

“The potholes had been covered. The vehicle that hit him was Reg No. KBS 695T. The vehicle was coming from Mumias direction and heading to Bungoma. It was coming from front at a very high speed. When he got near us, the tyre of the vehicle burst and the vehicle lost control and came at us. It hit the deceased while he was on his correct lane. The person to blame was the driver of the vehicle who drove at a very high speed. The deceased did not jump off his bicycle. He had not taken any alcohol. We had just left work”

During cross examination, PW3 stated the following:-

“We were on the left side of the road while facing Mumias. The vehicle was coming from Mumias direction in its correct lane. The tyre burst and because the vehicle was at a high speed the driver lost control and went towards the plaintiff. We were not cycling on the tarmac. We were off the road. It is not true that Sadiq was evading a pot hole and that is why he was hit -----the deceased was in front of me. He did not swerve.”

14. On the issue of liability, the respondent submitted that the evidence of the eye witness who was PW3 clearly shows that the applicant’s driver, Dw1 was driving at such a high speed that he could not control the vehicle when a tyre burst. That because of DW1’s failure to control the vehicle he veered off towards the direction of the respondent and fatally hit him.

15. I have myself carefully reconsidered all the above evidence. I have also carefully considered the testimony of DW1, who while admitting that the vehicle veered off the road when the tyre burst occurred contended that the deceased also swerved, leading to a collision in the middle of the road.

16. I have also carefully considered the judgment of the learned trial Magistrate in which she found that DW1 was evasive in his evidence and that he could not say whether or not he hit a pot hole which caused the tyre burst. The learned trial Magistrate who saw and heard both PW3 and Dw1 concluded that the testimony given by PW3 was to be believed and not that of DW1. The learned trial Magistrate was also satisfied that the impact was on the deceased person’s side and not in the middle of the road as alleged by DW1.

17. In my own considered view the evidence given by PW3 remained consistent both during examination in chief and during cross examination. The mere fact that the deceased was a pedal cyclist does not automatically make him a contributor to the accident. The appellant’s motor vehicle hit the deceased while he was riding on his side of the road and of the tarmac. The deceased had no chance of avoiding the collision. The combined ground I of the appeal therefore fails.

b) Whether the Respondent proved negligence against the appellant.

18. On this issue, PW3 stated that the subject motor vehicle was being driven at very high speed. He also testified that when the tyre burst occurred, DW1 lost control of the vehicle and veered off from his proper side of the road and went straight to where the deceased was and fatally hit him. I have carefully considered the evidence of PW3 vis-a-vis the evidence given by DW1 and I am satisfied that the respondent proved on a balance of probability that DW1 breached the duty of care by driving at very high speed and thereby failing to control the motor vehicle after the tyre bust. Though I neither saw nor heard pw3, the record has convinced me that he was a truthful witness and I have no reason to depart from the finding of the learned trial Magistrate. Ground 2 of the appeal thus fails.

(c) Quantum

19. The appellant submitted that the award of Ksh.30,000/= for pain and suffering was inordinately high on the ground that there was no evidence that the deceased died later on. The appellant contends that the court should have awarded the conventional sum of kshs.10,000/= for pain and suffering.

20. From the evidence of PW3 the deceased died in hospital. I find the submissions of the appellant on this issue misleading because the evidence shows that the deceased died in hospital after suffering much

pain and trauma. For this reason, it cannot be said that the award of kshs.30,000/= for pain and suffering was inordinately high in the circumstances.

21. Regarding the award of kshs.130,000/= for loss of expectation of life the appellant submits that the same was also excessive. The appellant proposes a figure of kshs.60,000/-. Upon careful consideration of the evidence, and the various authorities on this issue, I find no merit in the appellant's complaint. I am satisfied that the learned trial Magistrate considered the right parameters in arriving at the above stated amount.

22. The final issue that has arisen under quantum of damages is that the learned trial Magistrate erred in awarding double compensation to the respondent by failing to deduct the sum of kshs.130,000/= awarded under the Law Reform Act. In this regard, reliance was placed on **Nairobi HCCC No. 63 of 2010 between Joseph Kahiga Gathii & Another – vrs – World Vision Kenya & 2 others** and also **Nakuru High Court Civil Appeal No. 43 of 2003 between Joseph Wachira Maina & Another – vrs – Mohammed Hassan.**

23. In the **Gathi case** (above) it was correctly held that the amount awarded under the Law Reform Act ought to be deducted from the total damages awarded to avoid a situation of double compensation to the same person.

24. In the instant case, the learned trial Magistrate awarded the sum of kshs.130,000/= under the Law Reform Act. Since an award was made under the Fatal Accidents Act, the sum of Kshs.130,000/= for loss of expectation of life ought to have been deducted from the total sum awarded. This ground of appeal succeeds.

Conclusion

25. In light of the above, this appeal succeeds only in part, to the extent that the sum of kshs.130,000/- for loss of expectation of life ought to be deducted from the global award. Accordingly judgment is entered for the respondent as against the appellant as follows:-

- a) Liability – 100%
 - b) Pain and suffering – kshs.30,000.00
 - c) Loss of expectation of life – kshs. 130,000.00
 - d) Loss of dependency – kshs.1,400,000.00
 - e) Special damages – Kshs. 25,500.00
- Kshs.1, 585,500.00
- Less loss of expectation life kshs. 130,000.00
- Kshs.1,455,500.00

26. The respondent shall have the costs of this appeal

Orders accordingly.

Judgment delivered, dated and signed in open court today at Kakamega this 21st day of September, 2016

RUTH N. SITATI

JUDGE

In the presence of;-

Miss Omwenga (absent).....for Appellant

Mr. Nandwa for Mr. Mukisu (absent).....for Respondent

Mr. Lagat.....Court Assistant