



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
HIGH COURT CIVIL APPEAL NO. 10 OF 2014

**HASSAN SALAT GUDOW (suing as legal representative of the estate of
ALI HASSAN SALAT)..... DECEASED**

V E R S U S

MOHAMED ADAN & 2 OTHERS RESPONDENTS

(Appeal from the decision and award in Mwingi SRM CC No. 71 of 2013 – V A Otieno Ag. SRM)

JUDGMENT

The appellant filed a plaint in the Subordinate Court at Mwingi alleging that the deceased died following a road traffic accident which occurred on the 23rd August 2011 on the Mwingi Thika road involving motor vehicle KBF 751 N Mitsubishi lorry and vehicle registration KBP 311V Nissan UD Bus. Both vehicles were travelling towards Nairobi and the Nissan Bus hit the Mitsubishi lorry from behind causing the accident in which the deceased Ali Hassan Salat lost his life. The appellant as administrator of the deceased therefore filed a suit seeking general damages under the Law Reform Act and Fatal Accidents Act, special damages and funeral expenses to be proved at the hearing, costs of the suit and interest at court rates.

The respondents filed a defence to the suit and denied occurrence of the accident. In the alternative they stated that, if the accident did occur, then it was caused or substantially contributed to by the negligence of the deceased. They listed the particulars of negligence of the deceased and asked that the suit be dismissed with costs.

In response to the defence, the appellant filed a reply to the defence reiterating the contents of the plaint and denying the particulars of negligence attributed to the deceased.

The suit proceeded to hearing and the appellant called 3 witnesses.

PWI was Benedict Kyalo a Police Constable based at Mwingi Traffic Base. It was his evidence that he was the Investigating Officer and that on 23rd August 2011 he received a report of an accident involving motor vehicle KBF 751M Mitsubishi lorry and KBP 311 V a Nissan bus which occurred on the Mwingi Thika Road. He proceeded to the scene, saw the victims and took them to hospital. It was his evidence that the lorry and the bus were both heading to Thika. The bus knocked the lorry from behind and both vehicles lost control and overturned. The deceased, who was a passenger in the lorry lost his life in the accident. He produced a police abstract and testified that the bus driver was charged with causing death in Mwingi Traffic Case No. 510 of 2011 and was convicted and fined Kshs 5,000/= or in default to serve 3 months imprisonment. He relied on the record of proceedings in the traffic case and stated that the bus driver Noor Osman was to blame for the accident.

In cross examination, he stated that he could not ascertain the point of impact. However he was aware that the deceased was a passenger in the rear of the lorry which was transporting goats. He stated that two people were travelling in the rear of the lorry and that passengers could have travelled in the front cabin of the lorry where there were seat belts.

PW2 was Abdi Acho a Police Officer. He testified that he was a cousin of the deceased and that on 23rd of August 2011 he was informed by the deceased's father that the deceased had died in an accident. He proceeded to the hospital to see the deceased and to the mortuary and then buried the deceased. He relied on a burial permit and letters of administration, a letter issued by the chief, a death certificate, and a demand letter from the advocates. He stated that the driver of the bus was charged in court and that the owner of the bus was one Mohammed Aden. According to this witness, the deceased was a livestock trader. He stated that funeral expenses amounted to Kshs 260,000/=. He stated also that the deceased was 28 years old and the second born with six siblings. It was his evidence that the mother of the deceased had died but the father was alive. He also stated that they paid Kshs 20,000/- to process letters of administration.

In cross examination, he reiterated that the deceased was his cousin. He also stated that the deceased was contributing towards family support.

PW3 was Hassan Salat the father of the deceased. He stated that he filed his witness statement. At that point the advocate for the appellant Mr. Musundi closed the case for the appellant.

The case was then set down for defence hearing on 6th March 2014. On that day however, Mr. Kanyithe for the respondents did not bring any witness to court. Instead he asked for a mention date to confirm filing of submissions.

Submissions were then filed by both parties counsel, and the court delivered its judgment on 31st March 2014 in the sum of Kshs 372,480/=:, together with costs. Dissatisfied with the decision and award of the trial court, the appellant has come to this court on appeal through Counsel M/s Magare Musundi and Company. The grounds of appeal are as follows:-

1. The learned Magistrate erred in law and in facts in finding that the appellant was contributory negligent contrary to the weight of the evidence which show that the appellant was not negligent at all.
2. The learned magistrate erred in law and fact in failing to find that the appellant was in no way connected with the events giving rise to the accident.
3. The learned Magistrate erred in law and facts in awarding damages for pain and suffering, loss of expectation of life, loss of dependency and funeral expenses that were manifestly low damages.
4. The learned magistrate erred in law and in fact in adopting wrong principles in assessing damages in the lower court leading him to assess manifestly low damages.
5. The learned magistrate erred in law and in fact in failing to consider the plaintiffs submissions and authorities on record.

The hearing of this appeal was by consent of the advocates for the parties, done through filing of written submissions. The appellant filed his written submissions on 9th April 2015. The respondents filed their written submissions on 12th June 2015. On the 24th of June 2015 M/s Njalale who appeared for the appellant elected not to highlight the submissions filed and asked the court to deliver its judgment. I have perused and considered both sets of written submissions and the authorities relied upon.

This is a first appeal. As a first appellate court I am required to reconsider all the evidence on record and come to my own conclusions. I have to put in mind that I did not have the opportunity of seeing the witnesses testify and determine their demeanor. See the case of ***Selle -vs- Associated Boat Company Limited (1968) EA 123.***

This appeal is principally on quantum of damages awarded to the appellant. I have to remind myself that the award of damages is the exercise of discretion of a trial court. An appellate court will be slow to

disturb an award of damages by a trial court, unless the award is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge (or magistrate) 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. See the case of **Butt -vs- Khan (1977) 1 KAR 1.**

The appellant has raised a number of issues on appeal and asks that the damages award be varied upwards. The respondents have maintained that the findings and award of the trial court should be retained and that the decision of the trial court should be left undisturbed.

I have perused the evidence on record and the Judgment and award of the trial court. The evidence on record is that of the appellant's witnesses.

The learned magistrate treated the award of damages under various heads. The first was under the Fatal Accident Acts. The learned magistrate found that the deceased was 24 years old at the time of death and that no evidence was tendered in court to prove his earnings. The magistrate thus took guidance from the Labour Institutions Act No. 12 of 2007 and adopted a sum of Kshs 5,000/= per month under the bracket of unskilled employees.

My perusal of the proceedings show that indeed no evidence was tendered in court regarding the earnings of the deceased. Nobody made any suggestion or tendered any evidence on his income. PW2 Abdi Acho a cousin of the deceased, merely said that the deceased was a livestock trader. He also said that they paid Kshs 260,000/= as funeral expenses and Kshs 20,000/= for processing letters of administration and asked for compensation. He did not give any indication at all on what the deceased used to earn and for what period. PW3 Hassan Salat the father of the deceased, merely stated that he filed a witness statement. He did not say anything in addition to that.

This situation left the magistrate in a dilemma as to how to determine the income of the deceased. That is why the learned magistrate applied the brackets used under the Labour Institutions Act, and in my view correctly so. The court also took a multiplier of 26 years, which in my view was also reasonable.

The dependency of those whom the deceased left behind was also not testified to in the evidence. It was only in cross examination that PW2 stated as follows ***“the deceased was contributing towards family support.”*** No further evidence was given on how and in what amounts the deceased used to contribute to family support. With that situation, the learned magistrate found that the ratio of dependency on the deceased was 1/3 for maintenance of the family. Again in the absence of any evidence from the appellant's side to suggest a different ratio, I am of the view that the learned magistrate was correct in awarding a dependency ratio of 1/3.

I should emphasize that a litigant's case is proved through evidence. That is what the relevant sections of the Evidence Act (Cap 80) requires. A litigant's case is not proved through written submissions. Written submissions, or submissions generally, are meant to highlight or clarify the evidence tendered and make legal propositions from the facts in the evidence tendered in court. Submissions do not prove a case of a litigant. In my view therefore the award of Kshs 514,800/= under this head is based on the evidence, and cannot be disturbed.

Under the Law Reform Act, the learned magistrate dealt with loss of expectation of life. The learned magistrate stated that he was guided by a case of **Moses Ngarachu -vs- G D Githanga High Court 1738 of 1996** and came to the conclusions that a sum of Kshs 60,000/= was adequate compensation for loss of expectation of life. The trial court also found that as the deceased had died instantly a sum of Kshs 10,000/= was fair compensation for pain and suffering.

Loss of expectation of life is what, if the deceased survived but was incapacitated, would be loss of earning capacity. Again under this head the learned magistrate was not assisted by the evidence from the appellant to show what the appellant would have been earning for the rest of his life if he lived. Therefore the court had to do the best it could in the circumstances. I find no better way of assessing this award with the facts and evidence which was before the trial court. I will thus not disturb this amount.

As for pain and suffering the evidence on record suggest that though the injured were taken to Mwingi Hospital, the deceased died almost instantly after the accident. Again the appellants counsel did not put questions to the witnesses to say where exactly the deceased had died. Therefore the findings of the trial magistrate that the deceased died instantly cannot be faulted. In my view therefore the figure of Kshs 10,000/= was adequate compensation for pain and suffering, bearing on mind the evidence that was tendered at the trial.

The learned magistrate found that he had to apply the principle of deduction for awards made under the Fatal Accident Acts and the Law Reform Act, and as such reduced Kshs 70,000/= awarded under the Law Reform Act from the total award. In dealing with this issue, I am guided by the case of *Kemfro Africa Limited Trading as Meru Express Service -vs- Lubia and Another (1982 -88) 1 KAR 72* where it was held that “taking into account” is not the same thing as going into a mathematical deduction. In my view, taking into account simply means being mindful, and that the court should be careful not to award damages under the two Acts separately in such away that they would amount to unjust enrichment to a successful litigant. Therefore in my view, taking into account would mean that the award under the second Act should be moderate in appreciation of the fact that an award has already been made under the other Act. In the present case, I do not see anything outrageous or anything unfair to the respondent to allow the award of Kshs 70,000/= not to be deducted. In my view therefore, the learned magistrate erred in deducting that amount. In the result I will vary the judgment of the trial court slightly and order that the amount of Ksh 70,000/= will not be deducted from the total award to the appellant. There also appears to be an error in the total figure of Kshs 455,600/=. It should be Kshs 465,600/=.

In the result, I will order that the total award will be all Kshs 465,600/= plus Kshs 70,000/= which comes to Kshs 535,600/=.

The court also made an order and finding for 20% contributory negligence on the part of the deceased. The evidence on record is that the appellant was riding in the back carrier of the lorry which was transporting goats. He appears to have been taking care of those goats. He could have taken a risk with regard to the driver of that canter lorry. That risk would however be limited to any injury caused by the goats or the discomfort of travelling in the rear of the canter. He however certainly did not take a risk with regard to a third party vehicle coming to smash the canter lorry from behind. In my view therefore the respondents were 100% to blame for the accident. The deceased was not contributorily negligent. I will therefore also vacate the finding of the magistrate that the deceased was 20% contributory negligent.

In the result the appeal is allowed in part. I find that the respondents were 100% to blame for the accident. I also find that the amount of Kshs 70,000/= was wrongly deducted from the final award by the learned magistrate. I order that the award of damages of Kshs 535,600/= will this be paid without the deduction of Kshs 70,000/= and also without deductions of 20% contributory negligence. I award the costs of this appeal to the appellant as well as interest till payment in full.

Dated and delivered at Garissa this 23rd July 2015.

GEORGE DULU

JUDGE