



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL APPEAL NO.35 OF 2011

ELDORET EXPRESS CO. LTD.....APPELLANT

VERSUS

WILLIAM KIRUI KORIR AND KAREN KORIR

*(Both suing as the Administrators of the estate of Simon Cheruiyot Korir)...***RESPONDENTS**

(Being an Appeal from the Part of the Judgment delivered by the Honourable M. Ongundi Chief Magistrate on the 10th of August 2011)

JUDGMENT

This Judgment is the result of the appeal against the Judgment of **Hon. Ongundi, the then Chief Magistrate delivered on 10th August 2011, vide Kericho C.M.C.C no.323 of 2009**. The history of this case started when **William Kirui Korir** and **Karen Korir** in their capacities as the legal representatives of the Estate of **Simon Cheruiyot Korir**, deceased filed a compensatory suit vide the Complaint dated 18th August 2009, claiming damages for the fatal injuries the deceased suffered as a result of a road traffic accident involving motor vehicle registration no. KBD 300G which veered off the road thus crashing the deceased who was lawfully walking along Kericho-Nakuru road near Kedowa area on 30th April 2009 while being driven by a driver under the employment and direction of Eldoret Express Co. Ltd, the Appellant herein. It was the Respondents case that the Appellant's driver, recklessly and negligently drove the bus thus causing it to veer off the road. The Appellant defended the suit. The learned Chief Magistrate heard the suit and in the end, she entered judgment in favour of the Respondents and against the Appellant as follows:

- i. Pain and suffering.....10,000**
- ii. Loss of expectation of life.....100,000**
- iii. Loss of consortium.....100,000**
- iv. Funeral expenses.....15,000**
- v. Loss of dependency.....2,969,600**

The learned Chief Magistrate further found the Appellant 60% liable while the Respondents were found to be 40% liable. The Respondents' net award was fixed at Kshs.1,781,760.

The appellant was dissatisfied hence this appeal. On appeal, the appellant put forward the following grounds:

- 1. The learned Magistrate erred in fact and in law in finding on liability contrary to the evidence produced during the hearing.**

2. **The learned Magistrate erred in fact and in law in finding that the Defendant's driver was negligent in any measure which was not supported by any evidence.**
3. **The learned Magistrate erred in fact and in law in finding that the Plaintiff was entitled to general damages that were too high in view of the injuries suffered by the deceased.**
4. **The learned Magistrate erred in law and in finding that the Defendant's driver was negligent in any measure after establishing that the point of impact was on the road and in the path of the bus and that the bus did not veer of the road and hit the deceased as pleaded in the Plaintiff.**
5. **The learned Magistrate erred in fact and in law in failing to consider the Defendants' submissions.**
6. **The learned Magistrate erred in fact and in law in failing to consider conventional awards for general damages in cases of similar injuries.**
7. **The learned trial Magistrate's holdings on liability and quantum of damages are not supported by facts or law.**
8. **The decision of the learned trial Magistrate is without factual or legal rationale.**
9. **The learned Magistrate's decision is against the weight of the evidence. It is proposed to ask the Court for the following orders that:**

a. This appeal be allowed with costs.

b. The Judgment of the Honourable Chief Magistrate, Kericho dated 10th August 2011 be set aside and the Plaintiff's suit be dismissed with costs to the Defendants.

When the appeal came up for hearing learned counsels recorded a consent order to have the appeal disposed of by written submissions. In the first ground, the appellant argued that the pleadings are at variance with the evidence. The appellant pointed out that, the Plaintiff stated that the Appellant's bus veered off the road and violently hit and crashed the deceased, a pedestrian, who was off the road. The Appellant argued that the evidence did not support the aforesaid averment. It is said that P.W.3 claimed that the on coming vehicle had its headlights on thus blinding them and that the deceased remained behind about 20 metres. P.W.3 further stated that the deceased was behind him when he was knocked down hence he did not witness the incident. The appellant posed the following question: that if the bus was driven from behind, then how could it blind them? The Respondent is of the view that the evidence of P.W.3 was consistent with the pleadings. I have considered the rival submissions and it is clear in my mind that the discrepancies pointed out are not so material as to affect the veracity of the evidence. There is no doubt that the accident occurred involving the appellant's bus registration no. KBD 300G and the deceased. As a result of the collision, the deceased died on the spot. It is the evidence of P.W.3 that he was walking with the deceased before he was knocked down 20 metres away. The fact that 40% contributory negligence was assigned to the deceased means that the learned Chief Magistrate took into account all the relevant factors. I am convinced that on a balance of probabilities, the appellant was liable to the extent prescribed. In fact the evidence of D.W.2, the bus driver shows that the bus was so close to the deceased that the driver was unable to stop the bus by braking thus hitting the deceased. The learned Chief Magistrate was therefore right to infer that the bus driver was speeding thus liable by 60%. She cannot be faulted hence the appeal as against liability must fail.

On quantum, the appellant argued that the trial Magistrate erred when she applied a multiplier of 29 years instead of 19 years. It is the appellant's argument that the deceased being a machine operator would retire at the age of 40 years as opposed to 55 years. I find this argument to be without any empirical evidence hence it must be rejected. The learned Chief Magistrate applied the correct multiplier.

In the end, I see no merit in the appeal. The same is dismissed with costs to the Respondent.

Dated, Signed and delivered in open court this 4th day of April, 2014.

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J.K.SERGON

JUDGE

In the presence of:

Mr. Mutai holding brief for Mr. Rotich for the Appellant

Mr. Terer holding brief Ngole for Respondent

Mutai:

I pray for a stay of thirty (30) days.

Court:

There be a stay of execution of the decree for thirty (30) days.

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J.K.SERGON

JUDGE