



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL APPEAL NO. 142 OF 2009

COMPLY INDUSTRIES LIMITED.....1ST APPELLANT

DANIEL KIPROTICH BUSIENI.....2ND APPELLANT

VERSUS

MARTHA NGIMA MUTHINI (*Suing as the Legal*

Representative of the Estate of the late Stephen Mirau Muthini).....RESPONDENT

JUDGMENT

1. Martha Ngima Muthini (*the Respondent*) filed suit in the lower court as the legal representative of the estate of the Late Stephen Mirau Muthini. She sought special damages and general damages under the Fatal Accidents Act and the Law Reform Act for fatal injuries sustained by the deceased. The Respondent's case was that on 1st November 2004, the deceased was cycling along Nakuru- Nyahururu Road near Mberea Farm when he was hit by the first Appellant's motor vehicle registration number KAL 700 F Mercedes Benz. She attributed the occurrence of the accident to the negligence of the second Appellant who was at the time driving the said vehicle with the authority of the first Appellant.

2. By their defence filed on 9th October 2006, the Appellants denied ownership of the said motor vehicle, the occurrence of the accident and the particulars of negligence in the plaint. In the alternative they alleged that if any accident occurred then the same was solely or substantially contributed to by the negligence of the deceased.

3. After full hearing the trial court found that the second Appellant was negligent and proceeded to hold the first Appellant vicariously liable. She awarded the Respondent a global sum of Kshs. 600,000/= for general damages, special damages of Kshs. 5,800/=, costs of the suit and interest.

4. Aggrieved by the judgment of the court, the Appellants have appealed to this court on the 9 grounds in the memorandum of appeal filed on 6th July 2009 which may be summarized as follows-

(a) *that the trial magistrate erred in law and fact in awarding a global sum of Kshs. 600,000/=without applying the evidence against the principles applicable to a claim under the Law Reform Act and the Fatal Accidents Act,*

(b) *that the trial magistrate erred in law and fact in failing to properly calculate the loss of dependency applicable based on the multiplicand,multiplier and dependency ratio established by the evidence before her and the binding authorities cited by the parties,*

(c) that the learned magistrate failed to exercise her discretion judiciously in awarding damages and failed to apply the settled legal principles.

5. For the above reasons, the Appellants urged this court to review or set aside the judgment and decree of the lower court dated 1st July 2009 and to award the Appellants the costs of this appeal. The parties argued the appeal by way of written submissions. The Appellants' submissions are dated 16th October 2013 and the Respondent's are dated 24th June 2013. The Appellants faulted the finding of the trial court on liability alleging that the evidence did not meet the standard of proof in civil cases. In particular and relying on the case of **ANNE NJOKI MWANGI Vs. PAUL NDUNG'U MUROKI [2004] eKLR** the Appellants submitted that failure to produce police sketch maps was fatal to the case as there being no eye witness to the accident, the court could not properly establish who was to blame.

6. On quantum the Appellants contended that the trial magistrate erred in awarding a global sum of Kshs. 600,000/= as general damages. According to them, the court should have awarded damages as follows:

Under the Law Reform Act

- (i) Pain and suffering- Kshs. 10,000/=
- (ii) Loss of expectation of life- Kshs. 80,000/=

(b) Under the Fatal Accidents Act

- (i) Kshs. 239,940/= tabulated as follows-
 - multiplicand- Kshs. 3,999/=
 - multiplier-15 years; and
 - dependency ratio- $\frac{1}{3}$

7. Thus the total award of damages ought to have been Kshs. 149,940/ after deducting the award under the Law Reform Act of Kshs. 90,000/= from the award of loss of dependency under the Fatal Accidents Act.

8. The Respondent's Counsel did not make any submissions on liability. It was however her contention that the trial court's award of Kshs. 600,000/= was not unlawful. Relying on the holdings in **KENYA BREWERIES LTD Vs. SARO [1991] KLR 408, SAMMY NGIGI MWAURA Vs. JOHN MBUGUA KAGAI & ANOTHER [2006] eKLR** and **DAVID KAJOGI M'MUGAA Vs. FRANCIS MUTHOMI [2012] eKLR** it was submitted that awarding of a global figure is neither unprecedented nor excessive.

9. I have considered the submissions of the parties and the authorities cited. The issues for determination in this appeal are-

- (a) whether the trial court erred in finding the second Appellant negligent and liable for the occurrence of the accident; and
- (b) whether the trial court applied the proper legal principles in her assessment of damages

OF LIABILITY

10. This court is alive to the requirement that being the first appellate court, it must re-evaluate and analyse all the evidence that was produced in the lower court and arrive at its own independent findings keeping in mind that it did not get the chance to see the witnesses and observe their demeanor.

11. There was no dispute as to ownership of the motor vehicle registration number KAL 770F as a copy of records was produced (PEX3) showing that at the time of the accident, the same was owned by the first Appellant. PW2, Patrick Karanja Murimi who was with the deceased when the incident occurred gave evidence on the circumstances of the accident. He testified that on 1st November 2004, he was cycling with the deceased along the Nakuru-Nyahuru Road. As they were cycling down a slope at Mberera Farm he saw a lorry coming from behind at a very high speed. It swerved off the road into the forest causing him to fall off his bicycle as he tried to avoid being hit. It then proceeded on and overturned, crushing the deceased and trapping him underneath it. During cross-examination PW2 stated that he did not witness the accident and could not tell how it occurred as the deceased was cycling about 20 metres ahead of him.

12. PW3 was NO. 51991 PC Will Ngunjiri. He was at the time stationed at Kerengero Police Station. He went to the scene of the accident and according to him, the deceased was hit off the road as he attempted to avoid impact. He therefore blamed the driver of the vehicle for the accident. The second Appellant was charged with the offence of causing death by dangerous driving but PW3 could not confirm the outcome of the case. Although he took measurements of the scene before the vehicle was towed away and the deceased's body taken to the mortuary, he did not produce the sketch map as an exhibit before the court. He however produced a copy of the police abstract PEX2.

13. The Appellants did not lead any evidence to support their case. Nonetheless, it was submitted by Counsel for the Appellants that the Respondent had failed to prove on a balance of probability that the second Appellant was liable for the occurrence of the accident.

14. According to Counsel, PW2 testified that when he saw the over-speeding lorry behind him, he swerved off the road and fell as he tried to avoid impact. Therefore, he was not sure how or what caused the vehicle to overturn. In addition, the fact that the deceased was cycling about 20 metres ahead of him, means that PW2 was not in a close position to tell the proximate cause of the accident.

15. Further PW3 only went to the scene after the occurrence of the accident. Having failed to produce the Police sketch maps, it is impossible to tell who was to blame for the accident.

16. I do not agree with the submissions of counsel for the appellants. The facts of this case clearly show that the second Appellant was driving the motor vehicle down the slope at such an excessive speed that he lost control of it. PW2 was almost hit but he managed to avoid impact and in the process sustained minor injuries. The driver however failed to regain control of the vehicle and as a result it overturned crushing the deceased who was 20 metres ahead of PW2 while, according to PW3, he was attempting to move off the road. Although neither PW2 nor PW3 saw the accident and could not tell what caused it to overturn, the court cannot make any other inference other than the second Appellant was negligent. He owed the deceased and other road users a duty of care. He ought to have been diligent and on the look out and maintained proper control of the vehicle. The circumstances of the accident point to the second Appellant as the person who was solely to blame and failure to produce the Police sketch maps does not in any way raise doubt as to his negligence.

17. Consequently, I uphold the finding of the trial court on liability.

OF QUANTUM

18. The Appellants alleged that the trial court erred in awarding the Respondent a global sum of Kshs. 600,000/= as general damages without showing how the same was calculated or taking into account the principles for award of damages under the Law Reform Act or the Fatal Accidents Act. In particular it was alleged that the trial court did not take into account the evidence before her and the submissions of the Appellants on the multiplier, multiplicand and dependency ratio to be applied in calculating the damages for loss of dependency under the Fatal Accidents Act.

19. In her judgment, the trial court found that the evidence on the earnings of the deceased were not clear and therefore awarded a global sum of Kshs. 600,000/= as damages. Although she did not clarify, it

appears to me that this sum was for lost years or loss of dependency hence the reference to the lack of evidence of earnings.

20. According to the Respondent, that award of a global sum was proper and cited several authorities where such awards were made. I have considered the cases and in my view such an award is only made where the deceased was a child and not being engaged in any financial enterprise, the court recognises that his estate has suffered loss as a result of his death. This award is an estimate of the financial benefit that would have been accorded to his estate had he lived a full life.

21. In the instant case, the Respondent was entitled to an award under the Fatal Accidents Act for loss of dependency. It was alleged in the Plaint that the deceased had completed his primary school education in the year 2000 and was about to enroll for a mechanic's course. After completion of this court it was suggested that he would have earned an average salary of Kshs. 10,000/= per month. However, PW1 testified during trial that the deceased was a casual labourer and gave her a net sum of about between Kshs. 500 - 1,000/= per month to cater for household expenses.

22. The trial court was satisfied that the deceased supported his family although the exact amount was not ascertainable. In the circumstances she ought to have adopted the amount payable to a casual labourer at the time which, according to Legal Notice No. 36 of 2004, was Kshs. 3,999/=.

23. According to the death certificate, the deceased was 21 years old. It is my view that he would have engaged in gainful employment for 20 years, taking into account the uncertainties of life and I adopt this figure as the multiplier. On the dependency ratio, PW1 testified that the deceased was not married and lived at home. He was survived by his parents, PW1 and David Muthini. It is my view that he spent a third of his earnings on his dependants.

24. Consequently I award the Plaintiff Kshs. 319, 920/= for loss of dependency, tabulated as follows: Kshs. 3,999/= (*multiplicand*) x 12 x 20 (*multiplier*) x $\frac{1}{3}$ (*dependency ratio*). In computing this amount I have taken into account the award made under the Law Reform Act, and find it to be fair and reasonable.

25. Further I find that the trial magistrate erred in failing to make awards for pain and suffering and loss of expectation of life under the Law Reform Act. For pain and suffering, the evidence suggests that the deceased died instantly after the accident. I find that an award of Kshs. 10,000/- to be sufficient under this head. In regard to loss of expectation of life, it is my view that Kshs. 100,000/= would suffice.

26. The award of the lower court of Kshs. 5,800/= for special damages was not challenged having been pleaded and proved. The same is therefore upheld.

CONCLUSION

27. In summary I confirm the finding of the lower court on liability and special damages. The judgment of Kshs. 600,000/= for general damages is however set aside and substituted as follows:--

(a) <i>General damages for pain and suffering</i>	<i>Kshs. 10,000/=</i>
(b) <i>General damages for loss of expectation of life</i>	<i>Kshs. 100,000/=</i>
(c) <i>General damages for loss of dependency</i>	<i>Kshs. 319,920/=</i>
(d) <i>Special damages</i>	<i><u>Kshs. 5,800/=</u></i>
<i>Total</i>	<i><u>Kshs. 435,720/=</u></i>

(e) *Having succeeded partially in this appeal, the Appellants shall have half the costs of this appeal.*

(f) *The above sum of Kshs. 435,720/= shall carry interest at court rates from the date hereof till payment in full.*

28. There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 18th day of June, 2014

M. J. ANYARA EMUKULE

JUDGE