REPUBLIC OF KENYA

High Court at Meru

Civil Appeal 65 of 2009

MICHIMIKURU TEA FACTORY…….APPELLANT

VERSUS

CHARLES LAUTANI IMUNYA……..RESPONDENT

J U D G M E N T

The respondent herein CHARLES LAUTANI IMUNYA through a plaint dated 2nd October, 2007 sued the appellant herein M/S Michii-Mikuru TEA FACTORY on behalf of the estate of JAVASON NGENTU CHARLES (DECEASED), who died in a road traffic accident, claiming general damages under the Law Reform Act (Cap.26), Laws of Kenya, and the Fatal Accident Act (Cap.32) Laws of Kenya, special damages and costs of the suit and interest.
The defendant appeared on 29th October, 2007 and filed defence dated 26th October, 2007 on 29th October, 2007. The defendant subsequently filed an amended defence dated 12th November, 2007 on 10th October, 2007. The respondent filed reply to amended defence on 16th November, 2007.

The suit proceeded to hearing. The plaintiff gave evidence and called two witnesses, whereas the defendant called two defence witnesses. The trial court after hearing the suit entered judgment in favour of the plaintiff on liability at 20:80 in favour of the plaintiff and on quantum pleaded and proved special damages of Kshs.32,290/- and general damages Kshs.424,000/- with costs and interest.
The appellant being aggrieved by the court's judgment preferred this appeal through a Memorandum of Appeal dated 8th July, 2009, filed on 9th July, 2009 setting out the following grounds of appeal.

1. That the learned trial Magistrate erred in fact and in law in finding that the plaintiff/respondent had discharged his burden of proof on a balance of probabilities based on the evidence adduced by the parties to the suit.

2. That the trial Magistrate erred in law and in fact in failing to take into account the evidence adduced by the defendant's witnesses and eventually holding the defendant/appellant 80% to blame and taking into consideration the evidence adduced in totality during the trial, the apportionment of liability at 80:20 arrived at by the trial magistrate was not supported by the evidence on record.

3. That the learned trial Magistrate erred in law and in fact in drawing erroneous inferences that the defendant/appellant's driver was driving at an excessive speed and that the appellant's driver was charged with dangerous driving, which inferences were not supported by any evidence on record.

4. That the learned trial magistrate exercised his discretion erroneously in his evaluation of the

evidence adduced in proof of liability by unquestionably believing the evidnce of the plaintiff's eyewitness and such came to an erroneous finding of liability against the defendant.

5. That the trial magistrate exercised his discretion wrongly in computing the amount awardable based on evidence that neither proved the pleaded multiplicand nor the deceased's earnings before death per the plaintiff's testimony and in using a high proportion considering the age and status of the deceased thus arriving at an inordinately high and excessive award on damages.

When the appeal came up for hearing on 30/7/2012 court gave directions that the appeal be determined by way of written submissions. The appellant's Counsel Ms. Muthoga Gaturu & Co. Advocates filed their written submissions on 21/2/2013 whereas Miss Mwangi, learned Counsel for the respondent filed her written submissions on 4th April, 2013. The court has carefully considered the learned advocates written submissions. It has also considered the pleadings and the lower court proceedings, judgment and the advocates opposing positions as well as the list of authorities attached and referred to the court.

The appellant's counsel and the respondent counsel in their written submissions have combined grounds No.1 to 4 of the Memorandum of Appeal and argued all of them together as they dealt with the evaluation of the evidence and on issue on liability. The grounds are interrelated and I propose to deal with grounds No.1, 2, 3 and 4 altogether as one ground of appeal. I also propose to deal with ground No.5 separately as it is on quantum of damages.

In grounds Nos 1, 2, 3, and 4 the argument is that the trial Magistrate erred in law and in fact in finding for the respondent on liability in absence of evidence in support of the respondent's claim. The appellant faulted the trial court in the way it analyzed the whole evidence from both the respondent's side and the appellant's side.

The respondent herein gave evidence as PW1 and called two witnesses, PW2 and PW3. PW1 Charles Imunya testified that he sued the appellant seeking damages arising out of a fatal accident involving the deceased and his son who died on 22/12/2005 following an accident.

That he obtained limited grant of letters of administration before filing the suit in Meru HCSC No.30/2006 which he produced as Exhibit 1(a). Receipt for Kshs.15,000/- as Exhibit 1(b). PW1 testified that he did not witness the accident as he was not at the time of accident at the scene of the accident. He was informed of the accident and proceeded to the scene where he found the body of the deceased lying across the road. He called police who came to the scene shortly after. That police took measurements after 3 days of the accident. The respondent testified that he was later issued with a police abstract and produced the police abstract. He also produced a bundle of receipts on funeral expenses as plaintiff exhibit 3. Post mortem receipt as exhibit 4, receipt of coffin, exhibit 5, Death Certificate as exhibit 6(a), and receipt exhibit 6(b). Demand Notice exhibit 7. He testified that the deceased died at the age of 22 years. That the deceased had just completed Form 4 and had scored a mean grade of B plain. He produced the result slip as exhibit 8. He testified that the deceased used to assist him in tea farm management and due to his assistance he used to earn over Kshs.2000/- monthly from tea. That he now lost that income. He testified that the deceased had wished to proceed with his education all the way to the University and become a Lawyer. PW1 testified that he carried the search at the Registrar of Motor Vehicles and came to know Motor Vehicle Reg. NO. KAT 064N belonged to the appellant at the time of the accident. PW1 produced a copy of Motor Vehicle, recorded as P.exhibit 9.

During cross-examination the respondent testified that he was not aware if the appellant had denied ownership of the motor vehicle KAT 064N. That when he went to the scene of accident at Ndera he did not find appellant's motor vehicle at the scene as the vehicle had sped off and was parked at some nearby tea collection center called Njene. PW2 Kimathi Joshua testified that on 22/2/2005 he was at Amuga heading to Kathangundi in the company of Javason Charles, the deceased. That the motor vehicle Registration No. KAT 064N of the appellant approached them from their direction at high speed at a corner. That there was another vehicle on the left side and KAT 064 N tried to overtake the other vehicle and went off and hit the deceased whist on his left side off the road. That the deceased was approximately 1 metre off the road. The deceased was hit by driver's side and the driver did not stop. PW2 stated that the deceased had not returned to the road when he was hit and blamed the driver for the accident.

During cross-examination PW2 confirmed he was with the deceased at the time of the accident. That when the deceased was hit he died instantly. He testified that the accident occurred at 6.00 p.m. and he was able to see the lorry as the one of the appellant's M/S Michii Mikuru Tea Factory. That the accident occurred before reaching where the pick-up was parked on the right side facing Kathunguru. PW3 No.53765 P.C Joseph Ngeera testified that he had police file regarding an accident IAR 24 of 2009

involving vehicle No.KAT 064N Nissan Lorry and a pedestrian which had occurred on 22/12/2005 at 5.30 p.m. along Michi Mikuru road near Ndera road. He testified the drive lost control and hit a pedestrian killing him instantly. That report was made to Tigania police station who visited the scene and collected the deceased body to Meru General Hospital Mortuary. That investigation revealed that the driver did not even notice that he had caused the accident but came to know of the accident after returning to the tea buying center. That members of public beat him till he was unconscious. That police issued a police abstract in respect of the deceased and a post mortem report prepared. During cross-examiantion PW3 confirmed the accident had occurred on 22/12/2005. He stated that DW1 and DW2 claimed that the deceased was stealing a ride but they did not see him do so.

The defence witnesses in their defence called two witnesses , DW1 Luciano Lina, testified that on 22/12/2005 he was driving motor vehicle Reg. No.KAT 064N, Nissan UD Diesel Leave carrier and was accompanied by two clerks. That he carried two trips of tea leaves. That at 7p.m as he was going back members of public bounced on him and beat him up till he became unconscious. He was taken to Maua Hospital where he was admitted for one week. He testified that he was told after leaving hospital that a boy who was stealing a ride had fallen off his lorry and died. He testified that he did not even get to know where the accident occurred. He denied hitting the deceased. He stated that it is not true that he was speeding when the accident occurred. He admitted that there is a traffic case going on in which he is charged with an office of causing death by dangerous driving. During cross-examination DW1 admitted he was driving motor vehicle No.KAT 064N along Ndera road at 6p.m. He testified the road is busy and other vehicles ply the road too. He testified members of public bounced on him and that he is not aware of any other driver on the said road had been attacked. DW2 Joseph Mutua, testified that on 20/12/2005 he was a passenger in Motor Vehicle KAT 064N with another colleague of his. The vehicle was being driven by DW1. That on the way he stated that they were attacked by a group of people. He testified that he was told that a boy who had stolen a lift had fallen off the vehicle and died. That DW2 reported to the AP Officers with whom he returned to the scene of and found the body of the deceased at the scene. He testified that he gave evidence in a traffic case at Tigania Law Courts. During cross-examiantion DW2 testified that there was no time he saw the deceased steal a lift. He stated that it was only their lorry that was blamed for the accident.

I have carefully considered the submissions by both counsel, the proceeding and the trial court's judgment as well as the grounds of the Memorandum of Appeal. The learned trial Magistrate in his judgment considered the evince by both the appellant and the respondent. I have analyzed the whole evidence and have considered the same. There is no dispute that the only eye-witness in this case was PW2 Kimathi Joshua who was with the deceased at the time of accident. He gave a detailed evidence as to how the accident occurred and the manner in which motor vehicle KAT 064N owned by the appellant was driven and how it hit the deceased who was off the road. The vehicle did not stop after the accident but sped off. The evidence of PW3, Pw2, DW1 and DW2 is clear that the accident in question occurred between 5.30 p.m and 6.00 p.m along Michii Mikuru road near Ndera. That the deceased died at the spot. The witnesses corroborated the evidence of PW2 and the deceased body was found along Michi Mikuru road at Ndera where the accident occurred at the time stated by PW2. DW2 confirmed their vehicle was being driven along the said road at around 6.00 p.m. PW3 issued a police Abstract to PW1, exhibit 2, which points out the deceased as Javason Ngentu a pedestrian, not a passenger involving motor vehicle Registration No.KAT 064N owned by the appellant. That both police abstract, exhibit 2 and copy of Records of Motor Vehicle from KRA confirm M/V KAT 064N belonged to the appellant at the time of the accident.

DW1 in his evidence stated that he could not recall causing any accident when driving Motor Vehicle REg.No.KAT 064N on 22/12/2005. He denied that an accident occurred due to over speeding and averred he was driving at a speed of 20KPH along Ndera road. DW2 testified that he did not witness any accident but that he overheard members of public at the scene saying that the deceased had stolen a lift by hanging on the rear body of the vehicle had fallen off and died along Ndera road.

The trial court after analyzing the respondent's and appellant's evidence quite correctly found and held that DW1 and DW2 evidence was hearsay. That they overheard people say the deceased had fallen off their vehicle while stealing a lift and died. The appellant did not call the person who witnessed the deceased stealing a lift or fall off the vehicle. DW1 and DW2 did not see the deceased at the time of the accident either on the road or stealing a lift. The trial court which had the opportunity to hear the witnesses and determine their dismeanour found appellant's witnesses unreliable and found the only reliable evidence to be that of PW2 as he was the only witness who saw and witnessed the accident

occur. The trial court quite correctly found DW1 who was driving the vehicle did not even notice that he had knocked the deceased as implying that he was over speeding, careless and failed to keep guard and proper attention to the safety of other road users. He further concluded that there was no way the members of public could have opted to pour their anger on DW1 as the driver of M/V Reg. NO.KAT 064N to the exclusion of all other drivers on the road. He held that he had no doubt that DW1 was the one who knocked down the deceased and sped off. The trial court found further link of the DW1, with the accident resulting to the deceased death, from evidence of PW3, who confirmed issuance of police abstract to PW1 in which M/V Registration No.064N is mentioned and the evidence of DW1 being charged with an offence of causing death to the deceased. DW1 stated that he was driving at a speed of 20KPH and it was not dark yet. A driver driving at 20KPH can easily see what is around him and even when a person jumps and falls he is able to see and hear the impact.

In view of the foregoing, I find that the trial Magistrate correctly found the respondent had discharged his burden of proof on balance of probabilities based on the evidence adduced by the parties. The trial court took into account the evidence adduced by both the respondent and respondent's witnesses and that of the appellant's witnesses and correctly for reason he gave apportioned liability at 80:20 in favour of the respondent. The trial court's finding that DW1 was driving at an excessive speed was not based on an erroneous inference but on evidence. The trial court which had the opportunity to see and hear the witnesses was not impressed by the appellant's witnesses. He found them unreliable and found PW2 reliable. There was evidence of eye-witness. PW2 and there was evidence of PW3, DW1 and DW2 confirming DW1 was charged with an offence of causing death by dangerous driving. These were undisputed facts and court correctly considered the same in its judgment and made no error at all. The trial court did not exercise its discretion erroneously in the evaluation of evidence adduced in proof of liability and the question of believing. The evidence of a witness or not is for the trial court but not for an appellate court to challenge such a finding.

In view of the foregoing, I find no merits in grounds No.1,2,3 and 4 of the Memorandum of appeal and the same are dismissed.

On ground No 5 of the Memorandum of Appeal appellant faults the trial court on grounds that it exercised its discretion wrongfully in computing the amount awardable based on evidence that neither proved in pleaded multiplicand nor the deceased earnings before death. The appellant submitted that on quantum that the award under Law Reforms Act ought to be taken into account when computing total amount awardable and referred to the case of **HUMPREY MUIGANA & ANOTEHER –V- ROBERT KIBIBIRI GICHUKI & ANOTHER NAKURU HCCC NO.85 OF 1996.**

The appellant also referred me to the case of **MAINA KAMAU & ANOTHER V JOSPHAT MURIUKI WANGONDU& ANOTHER CIVIL APPEAL NO.148 OF 1989**, in which the Court observed:

"The rights conferred by Section 2(5) of the Law of Reform Act(Cap.26) Laws of Kenya, for the benefit of the estates of the deceased persons are stated to be in addition to and not in derogation of any rights conferred on dependants of deceased persons by the Fatal Accidents Act. This does not mean that damages can be recovered twice over, but if damages recovered under the Law Reform Act, devolve on the dependants, the same must be taken into account in reduction of the damages recoverable under the Fatal Accidents Act."

The respondent's counsel submitted that the quantum of damages were not excessive. The respondent counsel further urged that court took into account that the respondent cannot recover damages both under the Law Reform Act and the Fatal Accident Act and reduced the awarded sum by Kshs.100,000/- being sum awarded under the Law Reform Act.

The trial court considered that the deceased died at a tender age of 22 years having completed Form IV with a grade B. That he had aspired to be a lawyer. That the deceased had no specific earning though PW1 stated that he used to help him with tea picking and other family chores. The court had no doubt that with a mean grade B, at Form IV, the deceased had every prospect of furthering his education through University and even becoming a lawyer with the parallel programmes now mushrooming in all our public universities.

The trial Magistrate found the decision of **FRANCIS MAGARA V DOUGLAS OJWANG ONACHI & ANOTHER HCCC NO.670/2000(Nairobi)** relevant in which judgment a multiplicand of Kshs.6,000/- and a multiplier of 10 years was applied for a deceased aged 17 years, though the evidence

of expected salary had been tendered. The trial court also considered the effect of inflation on Kenya shilling since 9 years had lapsed. The court considered the expected earning of a practicing advocate and the period the deceased would have practiced had he made to the legal profession. The trial court in arriving at the quantum of Kshs.520,000/- considered a multiplier of 13 years, estimated income at a figure of kshs.5,000/- and dependency ratio of 2/3. On applying the multiplier of 13 years, the trial court in its judgment noted that both counsel were in total agreement on that multiplier . On page 38 of the appellant's submissions last paragraph it submitted that a multiplier of 13 years is reasonable and quoted authorities in support. I therefore find that the court acted properly in applying the multiplier of 13 years. On the income of Kshs.5,000/- applied by court the figure is not excessive or unreasonable basing on the possible minimum wage that the deceased would have been earning by then if he had to remain in the same position. On the dependency ratio the deceased who was a bachelor, and whose dependants were his parents and siblings, he would have used 2/3 of his expected earnings for his personal use to cater for his living expenses and I find 1/3 is what would be available for his dependants. I refer to the case of **WERE & 6 OTHERS V ATTORNEY GENERAL(1986) KLR 277** in which Lady Justice Aluoch, J, as she then was held:-

"2. Following the dependency rule in the case of NYOKABU V PUBLIC TRUSTEE(1965) E.A 530,two thirds of the net income of a family man is now widely accepted as a basis for dependency."
In View of the fact that the deceased was a bachelor and had no wife or children of his own he was not obligated to give support to the dependants herein to the extent of 2/3rd of his income. The deceased had to meet his basic needs first and would at least use 2/3rd and have 1/3rd available to his dependants. I therefore agree with the appellant's submissions that the trial court exercised its discretion wrongly in computing the amount awardable using a dependency ratio of 2/3 instead of 1/3rd of the deceased income. The appellant's ground No.5 of the appeal therefore succeeds.

The respondent ought to have been awarded the pleaded and proved specials of Kshs.32,290/. General damages under the Law Reform Act and Fatal Accident Act should have been calculated as follows:-

On liability 80:20 percent in favour of the respondent.

1. On loss of dependency - (5000x13x12x1/3) - 260,000

2. On loss of expectation of life - 100,000

360,000

3. Less loss of expectation of life -100,000

260,000

4. Pain and suffering 10,000

5. Special damages 32,290

302,290

6. Less 20% contributory negligence(20%) 60,458

7. Total due 241,832

The upshot of the matter is that the appellant's appeal is allowed against the judgment of the Senior Resident Magistrate delivered on 18th June, 2009 and same is substituted with the following:-

a. The judgment of the learned trial Magistrate dated 18th June, 2009 be and is hereby set aside.

b. The learned Trial Magistrate judgment dated 18th June, 2009 be and is hereby substituted with judgment for total sum of Kshs.241,832/-

c. The respondent is awarded costs at lower court with interest on specials from the date of filing suit upto final payment and interest on damages to him from the date of trial court's judgment till payment in full.

d. The appellant is awarded costs of this appeal.

DATED, SIGNED AND DELIVERED AT MERU THIS 23RD MAY, 2013.

J. A. MAKAU
JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

1. Mr. Rimita(Rtd Judge) h/b for Mr. Mugambi for the appellant

2. Mr. Murango Mwenda h/b Miss Mwangi for the respondent

J. A. MAKAU
JUDGE