



REPUBLIC OF KENYA

High Court at Machakos

Civil Appeal 33 of 2010

NORMAN MULINGE MASILA APPELLANT

AND

AGNES NZISA KASYOKA & PATRICK MANDI MULILYA

(Suing as legal

representatives and administrators of the estate of KASYOKA

MULILYARESPONDENTS

J U D G M E N T

In a judgment delivered on 17th March 2010, the Principal Magistrate at Makueni found the appellants 100% liable in negligence and assessed damages and made an award as follows:-

“The plaintiff’s claim then works out as follows:-

1. Pain and suffering	Kshs.10,000/=
2. Loss of expectation of life	Kshs.100,000/=
3. Loss of dependency	Kshs. 800,000/=
Total	<u>Kshs. 910,000</u>

4. Special damages pleaded were Kshs. 5,200/=. The plaintiff produced receipts in excess of that amount. A party is bound by his/her pleadings and special damages have to be specifically pleaded and proved. I will therefore award the plaintiff Kshs.5,200/= as special damages.

In sum the plaintiff is awarded Kshs.915,200/=. The plaintiff also gets costs of the suit and interest. Right of appeal explained.”

The appellant who was the defendant in the trial court was dissatisfied with the decision. He therefore has appealed to this court through his counsel Ngulli & Company Advocates on several grounds as follows:-

1. THAT the learned trial magistrate erred in law and fact in holding that the appellant was solely to blame for the accident.
2. THAT the learned magistrate erred in law and fact in failing to hold that the police never

conducted their investigations on the accident thus negligence was not proved.

3. The learned trial magistrate erred in law and fact in granting orders that were not prayed for and/or pleaded by the respondent in the plaint.
4. The learned trial magistrate erred in law and infact in failing to consider adequately or at all the submissions by the defence, and in particular the authorities cited on quantum of damages under the Fatal Accidents Act and the Law Reform Act.
5. The learned trial magistrate erred in law and infact in failing to find that the respondent had not proved her case on quantum against the appellants on a balance of probabilities.
6. The learned trial magistrate erred in law and in fact in making an award for damages that was inordinately high and excessive in the circumstances.
7. The trial magistrate erred in law and in fact in taking into account matters which were outside the pleadings.

Both the appellant's counsel and respondent's counsel filed written submissions. Mr Makau who appeared for the appellant on the hearing date and Mr Nzavi who appeared for the respondent briefly highlighted the submissions filed. I have perused the submissions filed.

This being a first appeal, the court is duty bound to re-evaluate the evidence on record and come to its independent conclusions. It is also trite that an appellate court should be slow to interfere with an award of damages – See **Butt –vs Khan (1977) 1 KLR 1** where the court stated:-

“An appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge (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.”

In the written submissions of the appellant it is contended that the multiplier should have been 15 years rather than 20 years as the deceased was aged 32 years.

Secondly, it is contended that as the beneficiaries to the estate were the same, the award for loss of expectation of life was deductible. Reliance was placed on the case of **Kemfro Africa Ltd –vs- Lubia (1982-88) 1 KLR 727** and the case of **Loise Wairimu Mwangi –vs- Joseph W Kamau (2006) e KLR**. It was proposed that an amount of Kshs.505,200/= in general damages was adequate compensation.

For the respondent it was contended in submissions that the appellant did not produce any evidence at the trial. The evidence was overwhelming on liability and that the award of the lower court was not excessive. Reliance was made on the submissions used by the respondent in the trial court.

Indeed, in the trial court the appellant elected not to tender any evidence in defence. The respondent called four (4) witnesses. In their respective submissions on damages in that court, the appellant's counsel Mr Ngulli asked for a multiplier of 20 and summarized the award he thought should be made by the court as follows:-

“From the foregoing, the plaintiff's claim may be summarized as:

Damages for pain and suffering	Kshs.10,000/=
Damages loss of expectation of life	Kshs.100,000/=
Damages for loss of dependency	Kshs.800,000/=
Total	<u>Kshs.910,000/=</u>

Proven specials and other expenses may be awarded”.

The respondent's counsel on the other hand asked for Kshs.150,000/= for loss of expectations of life; Kshs.1,120,000/= for loss of years; Kshs.100,000/= for pain and suffering; special damages of Kshs.50,200/=, as well as costs and interest.

The learned trial magistrate awarded the figure that the appellant's advocate suggested. Even the multiplier of 20 used by the trial court was that suggested by the appellant's counsel. It was Kshs.910,000/=. The same counsel now appears to be changing the goal posts. The said counsel does not state that he made an error or misled the trial court. In my view, the appellant is bound by the submissions of his advocate.

The alleged errors of the magistrate are not errors at all. The appellant through his counsel cannot persuade the court to do one thing today and change after the court accedes, and say something totally different on appeal tomorrow. That in my view is an abuse of the process of the court which should not be permitted. I will not permit the same.

Consequently, I find that the appeal lacks merits. I dismiss the same with costs to the respondent.

Dated and delivered at Machakos this **18th** day of **October** 2012.

.....

George Dulu
Judge

In the presence of:

Mr Asiyo holding brief for Mr Ngulli for Appellant

Mr S.M. Makau holding brief for Mr Nzavi for Respondent

Court clerk: Nyalo