



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 146 OF 2001

BAY FOREX BUREAU LTD.....APPELLANT

VERSUS

JULIUS KIPLELACH LANGAT (*suing in his capacity as the legal representative of the estate of MICHAEL KIPKOECH LAGAT (DECEASED)*)

.....RESPONDENT

RULING

The Respondent sued the Appellant in Eldama Ravine Civil Suit No. 32 of 2001 for -

- (a) General damages,
- (b) Special damages.
- (c) Costs of the suit
- (d) Interest on (a), (b) and (c) above.

In a judgment delivered on 17th October 2001, the lower court found for the Respondent, in the sum of Ksh 300,000/= plus costs and interest at court rates.

Aggrieved with the said judgment, the appellant appealed to this court on 7 grounds set out in a Memorandum of Appeal dated 11th October, 2001 but filed on 13th December 2001. The grounds are -

(1) *The learned Resident Magistrate glaringly erred by giving little or no attention at all to the evidence given in defence that completely contrasted with that given by the plaintiff's purported eye witness as to the size and colour of the motor vehicle Registration No. KAM 468N, the subject of the alleged accident.*

(2) *The learned Resident Magistrate did not properly evaluate the evidence tendered before the court.*

(3) *The learned Resident Magistrate digressed into irrelevancies which clouded his appreciation of the case before him and thereby arriving at the wrong conclusion.*

(4) *The evidence given by Mr. Josephat Bunei Ngetich, the plaintiff's witness No. 2 was utterly unbelievable and false and should not have been the court's basis for arriving at the decision which it did.*

(5) *The learned Resident Magistrate erred by not concluding that the plaintiff had not proven his case on a balance of probabilities and that accordingly the suit ought to have been dismissed with costs.*

(6) *Despite the fact that it is now settled law that special damages must not only be pleaded but strictly proved, the learned magistrate erred by granting special damages for probate and funeral expenses when the same were not proved.*

(7) *The award was otherwise inordinately excessive.*

And by reasons thereof, the Appellant prayed that the judgment and decree of the Resident Magistrate be set aside with costs and that the Respondent's suit filed in the subordinate court be dismissed with costs.

The appeal was urged before me on 3rd November, 2010 by Mr. Mahida on behalf of the Appellant while Mr. Kipkenei urged against the appeal on behalf of the Respondent.

Mr. Mahida argued grounds 1-5 of the Memorandum of Appeal together and grounds 6 & 7 separately.

Grounds 1-5 concerned the identity of the motor vehicle whether it was KAM 468 M or KAM 468 N. Mr. Mahida argued that the evidence of the Respondent's star witness PW2 was contradictory, he at once referred to the vehicle as "**a big one**" or "**like a Suzuki.**" On the other hand the Appellant's sole witness DW1 and who testified that he was the owner of the vehicle, stated that it was a Toyota and that the vehicle was usually driven in Nairobi, that was blue in colour, that it was small, and it was usually driven in Nairobi, he had bought in November 2000, and that his son usually uses the vehicle. He himself had never gone to Eldama Ravine at any particular time.

In cross-examination, DW1 testified the he would not know what time his son may have driven the car, though he was aware of Sidiz Garage in Eldama Ravine Town, and he did not bring the same to court and does not keep records of the car's movement.

On grounds 6, Mr. Mahida submitted that special damages must not only be pleaded but must also be proved. The sum of Kshs 15,000/= as funeral expenses was not proved. Neither were the costs of probate proved.

On grounds 7, Mr. Mahida submitted that the award was excessive and that damages cannot be awarded on both Fatal Accidents Act, (*Cap. 32, Laws of Kenya*) and the Law Reform Act (*Cap. 26, Laws of Kenya*).

On those submissions, counsel submitted that the appeal be allowed, the judgment be set aside even though 50% of the decretal sum had been paid.

Mr. Kipkenei, on behalf of the Respondent opposed the appeal. The proper registration of the vehicle was KAM 468N, and that it belonged to the Appellant as there was no evidence from the appellant that the vehicle did not belong to it, and it was the vehicle which was involved in the accident. Counsel submitted that the Respondent had proved its case on the balance of probability, and that the damages awarded were not excessive.

I have considered the rival arguments as set out above. The first question or issue, what was the identity of the motor vehicle, the Respondent's star witness PW2 testified that it was KAM 468N. PW2 stated in cross examination by Mr. Nyawara counsel for the Appellant in the lower court - 4 of the court record (*p. 12 of the Record of Appeal*) -

"I never missed the number plate the Reg. No. was KAM 468. The vehicle was being driven at high speed.... I saw the vehicle which caused the accident."

In his evidence in chief PW2 testified that the vehicle was white in colour while DW1 said his vehicle was blue. The logbook gives the colour as sky-blue. It is thus possible that PW2 mistook the

colour, in as much as he thought it looked like a "Suzuki" there is however no disagreement as to the registration number of the vehicle, it was KAM 468N. A minor difference of the colour observed by a bystander would not detract from the actual identity of the vehicle shown by the logbook and the police abstract report "*De mini bus non curat lex*" is a principle of the law the law does not concern itself with trivialities. I hold as the lower court found, the vehicle was indeed KAM 468N.

The next question is whether the vehicle was the cause of the accident. The answer to this question is quite clear from the evidence of PW2. The vehicle passed him at high speed following the deceased who was cycling. A little later there was a bang, there was screaming and the vehicle which had been going towards Eldama Ravine had turned to the opposite direction without a windscreen. In effect the driver of the vehicle had fled from the scene of the fatal accident.

I think DW1 was very conscious of this in his evidence. The vehicle was usually in possession and custody of his son. He is careful not to mention the son's name, or where he was on the material day. DW1 who said he bought the motor vehicle from the Appellant in November 2009 did not produce any evidence of ownership. The copy of the log book shows the appellant as the registered owner.

Section 8 of the Traffic Act (*Cap. 403, Laws of Kenya*), states that the person in whose name a vehicle is registered shall, unless the contrary is proved be deemed to be the owner of the vehicle. And Section 9 of the Act provides -

"9(1) No motor vehicle or trailer the ownership of which has been transferred by the registered owner shall be used on a road for more than fourteen days after the date of such transfer unless the new owner is registered as the owner."

The accident herein occurred on 20th January 2001 some 2^{1/2} months after the alleged purchase. In any event as observed by Mr. Kipkenei, there was no evidence of change of ownership, and the vehicle therefore belonged to the Appellant and the lower court was entirely entitled to so hold. The lower court was also correct in finding on the evidence of PW2 that the vehicle was the cause of the accident.

The final question is whether the awarded damages were excessive. I do not think so. The deceased was a lad of 17 years. He could have been admitted to the Armed Forces, his life was cut short by the hit and a run-away driver. The sums awarded for loss of expectation of life for a multiplicand of 18 years was very conservative, as there was no evidence that life expectancy of the deceased was 35 years.

Section 6 of the Fatal Accidents Act expressly allows the award of funeral expenses. Whereas it is a general principle of law that special damages being actual outlays arising from the accident, should not only be pleaded but also proved, unless there is a specific person assigned to keep track of all funeral expenses, it is usually emotionally difficult to keep track of such expenditure and in my view, provided a claim for funeral expenses is reasonable, it should be allowed. Taking into account that the body of the deceased was moved to a mortuary, a post-mortem done, a coffin bought, mourners accorded customary thanksgiving, a sum of Shs 15,000/= claimed is not unreasonable. I have no reason to interfere with it. Nor would I interfere with the probate expenses of Kshs 10,000/=.

All in all, the decretal sum of Shs 300,000/= was reasonable. I have no reason to interfere with it.

The appeal is therefore dismissed with costs to the Respondent.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 6th day of May 2011

M. J. ANYARA EMUKULE
JUDGE