



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 42 OF 2010

COAST BUS (MSA) LTDAPPELLANT
VERSUS
DAVID MANDU BILEMBWA (suing as the legal
administrator
And personal representative of the estate of
SUSAN MBOGA MANDU (Deceased).....RESPONDENT

JUDGMENT

This is an appeal from the decision of the learned Senior Resident Magistrate **Mr. S. O. Atonga** which he delivered on 26th March 2010 vide **Kisumu CMCC No. 254 of 2008**. The appellant being dissatisfied with the same has preferred eight (8) grounds which are on the face of Memorandum of Appeal. When this matter came up for hearing the parties agreed to file written submissions only and let this court determine the appeal.

According to the amended plaint filed by the respondent on 26th March 2009, the deceased who was traveling as a fare paying passenger vide the appellant's motor vehicle registration number **KAQ 146 G** met her death when the said vehicle rammed into another motor vehicle registration number **KAP 476 X**. The said accident occurred along Kisumu – Kakamega road at a place called **Mamboleo**. The deceased died on the spot.

The defence was filed on 22nd July 2008 which attributed negligence on motor vehicle registration number **KAP 476 X**. Prior to trial the parties recorded a consent on liability in the ratio of 20% to 80% in favour of the respondent and appellant respectively. During the hearing the respondent called PW1 one **David Mandu Bilembwa** the deceased's husband. The appellant choose not to call any witness.

I have further read the judgment delivered on 26th March 2010 as follows:-

(a) Pain and suffering	Kshs. 30,000
(b) Loss of expectation of life	Kshs. 100,000
(c) Loss of dependency	Kshs. 800,000
(d) Special damages	<u>Kshs. 58,000</u>
Total	Kshs. 988,000
Less 20% contribution	<u>Kshs. 187,600</u>
Total	<u>Kshs. 800,400</u>

Costs and interest were awarded too to the Respondent.

To interfere or not by this court on the trial courts judgment was well settled now namely:-

“It must be satisfied that either that the judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one or that short of this the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages”. The said principles were quoted in **Kenfro Africa Ltd t/a Meru Express Services [1976] & another =vs= Lubia & Another (No.2)**

Having gone through the pleadings, proceedings, submissions and the judgment of the trial magistrate it is clear that the trial magistrate misdirected himself on various points in arriving at the said decision. The amended plaint states that the deceased left the following dependants:-

- (a) **Dorokass Shagiri** - **Daughter**
- (b) **Demali Anyasi** - **son**
- (c) **David Mandu Bilembwa** - **Widower**

During the evidence in Chief the respondent stated that the deceased left the following dependant

- (a) **Dorcas Shagiri** - **21 years**
- (b) **Damaris Anyasi** - **32 years**

On cross examination he stated that the deceased left the following issues who are alive

- (a) **Damaris Anyasi**
- (b) **Catherine Ayeda – married**
- (c) **Dorcas Shagiri**

He didn't produce any record of their ages to show whether or not they were dependant upon the deceased. The court ought to have evaluated the same. The respondent claimed that the deceased was a vegetable vendor at Kibuye market. No evidence was let to establish the same. No documentary evidence nor a witness was called to verify the same.

It's also worthy to note that the deceased died instantly. Ordinarily no damages is payable under this heading but I am guided by of Bosire J (as he then was) in **Kakiki =vs= Abdo & 2 others KLR [1990] page 329** where the learned judge said:

“In assessing damages on this head (Pain and suffering) consideration must be given to the fact that the same principles for assessing damages for victims who survive don't apply. Damages are not intended to compensate the deceased for the pain and suffering he succumbed to. They are more or less a windfall to his surviving relations. However, on the other side of the balance it should be borne in mind that a tortfeasor should not be permitted to benefit from his wrong doing merely because his victim died”.

The upshot of this is that though the appellant claims that the deceased died instantly, he should not be allowed to benefit on the deceased death. The damages of Kshs. 30,000 assessed by the trial court shall not be interfered with.

It has further been argued that the award of Kshs. 800,000 is excessive considering the age of the deceased. On this ground I shall agree with the appellant only to the extent of the figures given.

The deceased was 56 years old. There was no documentation as earlier stated of her earnings or income. As stated above she was a vegetable vendor. It's not clear whether indeed the people mentioned in the plaint, and during the hearing depended on her –except of course the respondent.

The court awarded her a figure of Kshs. 100,00 as her monthly income. I shall revise the same to Kshs. 5,000 being the figure around the minimum wage.

Assuming that the persons mentioned earlier own were her children, then at the age of 56 years they

would be the ones supporting her.

Further for the loss of expectation of life I shall award her a figure of Kshs. 80,000 bearing in mind that the deceased had reached a retirement age at the time of the accident. However I shall sustain the multiplier of the ten (10) years. I shall not disturb the element of special damages. I have computed the figures in terms of the receipts which were produced by consent. The same amount to Kshs. 58,000 although what was pleaded in the amended plaint is Kshs. 63,150. The issue of non admissibility therefore doesn't lie as the same were produced by consent.

In the premises I shall allow the appeal on the following terms:

(a) Special damages	Kshs.	58,000
(b) Loss of dependency	Kshs. 5,000 x 2/3 x 10 x 12	=400,000
(c) Pain and suffering	Kshs.	30,000
(d) Loss of expectation of life	<u>Kshs.</u>	<u>80,000</u>
Total	Kshs.	568,000
Less 20% contribution	<u>Kshs.</u>	<u>113,600</u>
Grand Total	<u>Kshs.</u>	<u>454,400</u>

The appellant shall also get ½ (half) costs of this appeal.

Orders accordingly.

Dated, signed and delivered this 2nd day of November 2011.

H. K. CHEMITEI
JUDGE

HKC/aa0