



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Civil Appeal 130 of 2008

BOBMIL INDUSTRIES LTD..... 1st APPELLANT
KIMANI MWAURA2ND APPELLANT
VERSUS

STEPHEN ESHITEMI MALIKA (Suing as legal
Administrator of the Estate of the late
KENNEDY INDAKWA ESHITENI..... RESPONDENT

JUDGMENT

The respondent, **Stephen Eshitemi Malika** brought a claim under the **Fatal Accidents Act** and the **Law Reform Act** for himself and the estate of his deceased son **Kennedy Indakwa Eshiteni** who was involved in a fatal road accident with a motor vehicle **KAN 176E** driven at the time of the accident by the 2nd appellant but belonging to the 1st appellant.

The accident occurred on 22nd March, 2006 along Nakuru - Eldoret Road near Ngata Farm. The respondent blamed the 2nd appellant for the accident and called an eye witness **PW2 David Taizua Wakungu** (David) who happened to be working at a construction site nearby when the accident occurred. According to him the deceased was cycling his bicycle off the main road towards Nakuru town from Ngata Farm directions when he (David) noticed a canter motor vehicle traveling at a high speed towards the same direction as the deceased but behind him. That the driver of the motor vehicle in an attempt to avoid hitting a pothole on the road veered off to the left where the deceased was cycling knocking him down and killing him instantly.

A police officer, **PW3, Cpl Watson Kipkemoi** visited the scene and drew the sketch plan which depicted the body of the deceased lying on the road together with the bicycle. The motor vehicle stopped some 183m from where the body and the bicycle lay. The witness did not establish the point of impact.

But according to the 2nd appellant it is the deceased who hit a pothole, lost control and swerved on the way of the motor vehicle. The 2nd appellant swerved also to the right to avoid hitting him. He did not realize he had hit the deceased. He stopped and on checking he confirmed that the deceased had been hit. He concluded that it was the deceased who hit the motor vehicle.

With that evidence the learned trial magistrate, **B. Atiang, RM** found the appellants 100% liable for the accident.

On quantum he awarded to the respondent Kshs.479,050/= being both general and special damages.

The finding of liability and the award aggrieved the appellants who have challenged the decision in this appeal citing eight (8) grounds which I have condensed and summarized as hereunder;

1 that the claim was not proved

2 that the learned trial magistrate relied on matter not canvassed at the trial.

3 That the award under the Law Reform Act was not taken into account

Learned counsel for the respondent conceded the last ground but maintained that there was sufficient evidence to back the finding of liability while the quantum was also reasonable.

I have considered these submissions by appellant's counsel and hold the following opinion of the matter.

It is settled law that an award of damages is an exercise of discretion and an appellate court will not normally interfere with the finding of the trial court on assessment of damages unless it can be demonstrated that the magistrate acted on wrong principles or awarded so excessive or so little damages that no reasonable court would. See also **Makube V Nyamuro** (1983) KLR 403.

It is the function of this court being the first appellate court to re-evaluate the evidence on record in order to arrive at its own independent decision. There is no doubt that the deceased died as a result of the accident involving him and the motor vehicle in question. Both the deceased and the motor vehicle were traveling on the same direction. The only two broad questions that fall for determination is whether the accident was caused by the reckless driving of the 2nd appellant and whether the respondent was entitled to the sum awarded as damages.

It was the evidence of the eye witness (David) that there were potholes on the road. There was a particular one in the middle of the road that motor vehicles from both direction were avoiding. It was while in the process of avoiding that pothole that the deceased was knocked down, while cycling outside the road. That evidence seems to receive support from the evidence of the 2nd appellant who confirmed in his testimony that indeed the deceased together with three other cyclists were on the left side of the road. He however attributes the accident also to a pothole that the deceased person's bicycle hit before losing control.

I am persuaded by the evidence presented for the respondent. The 2nd appellant had seen the cyclists traveling ahead of him some 30m away; he appreciated the state of the road – full of potholes yet he did not approach them with care. Indeed I am convinced he was driving at a high speed in view of the distance he covered before stopping at 183m away.

I conclude, as did the learned trial magistrate that the accident was solely caused by the 2nd appellant and the 1st appellant is vicariously liable

On quantum the deceased was 32 years old and single. He appeared to support his father – the respondent only. The respondent asserted without evidence that the deceased was a mason earning a monthly salary of Kshs.10,000/= out which he supported the respondent with Kshs.4000/=Kshs.5000/= per month.

Both side agreed that without proof of earnings the court would be guided by Kshs.3000/=, the minimum wage. Relying on the authority of **Pius Muinde Ndosi V The Headmaster, Machakos Girls High School and 2 Others**, Machakos HCCC No.458 of 1998 where Nambuye, J awarded Kshs.100,000/= for loss of expectation of life and Kshs.1,200,00/= for lost years in respect of a 16 year old girl who died in a road accident. The respondent suggested Kshs.1,080,000/= for loss of dependency on a multiplier of 30 years and Kshs.100,000/= for loss of expectation of life. The appellants on their part proposed Kshs.60,000/= for loss of expectation of life and Kshs.331,200/= for loss of dependency on a multiplier of 23 years and discounting 2/5. The appellants relied on the case of **Alfayo Mutonyi Simala V Karim Bus Services** HCCC No.3837 of 1987, decided in 1990.

I have considered these proposals and adopt a multiplier of 25 years at a monthly income of Kshs.3000/= discounted by 2/5

(3000 x 12 x 25 x 2/5 = 360,000/=). Loss of expectation of life **Kshs.80,000/=**, pain and suffering - **Kshs.10,000/=** and special damages **24,150/=**.

Clearly there is little departure from the assessment of the learned trial magistrate. His award of **Kshs.479,050/=** will be substituted **474,150/=** less **Kshs.90,000/=** awarded under the **Law Reform Act**

Appeal is allowed and judgment is entered jointly and severally against the appellants in the sum of **Kshs.384,150/=**. I award costs of this appeal and the trial to the respondent.

Dated and delivered at Nakuru this 20th day of July, 2010.

W. OUKO

JUDGE