



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Appeal 224 of 2002

PYRETHRUM BOARD OF KENYA.....1ST APPELLANT

ROBERT TIAMBATI MASIKONDE 2ND APPELLANT

VERSUS

KAMAU NJEHIA

***(Legal representative to Mwangi Kamau)*RESPONDENT**

JUDGMENT

By a decree issued by the Senior Principal Magistrate in Nakuru CMCC 2487 of 2002, judgement was entered for the respondent for a total of Kshs 301,550/-. The respondent was found 100% liable for the accident. The decree represents a sum of Kshs 80,000/- for the loss of expectation of life. Lost years – Kshs 180,000/- being Kshs 1,500 x 12 x $\frac{2}{3}$ x 15, Pain and suffering – Kshs 20,000/- and special damages - Kshs 21,550/-.

The appellant was aggrieved by this judgment. They have appealed and raised several grounds of appeal which were consolidated during the hearing. Counsel for the appellant submitted that the judgement of the trial court does not comply with the provisions of order 20 rule 4 of the Civil Procedure Rules. He faulted the trial court for failing to make a concise statement of the case, the issues for determination were not identified and the reasons for the judgment.

The judgement was also challenged for failure to give reasons for the finding the appellants liable at 100% and for the application of the multiplier of 16 years. Further counsel submitted that this suit was filed outside the statutory period. The accident occurred on 7th January, 1997 and the suit was filed on 29th November, 2000 after a period of 10 months. Although there was an order allowing the respondent to file the suit outside the time, counsel submitted that the reasons advanced by the respondent for filing the suit late, are not the reasons envisaged under the provisions of the Limitation of Actions Act. Counsel made reference to the provision of section 27 (2) of the Limitation of Actions Act and also the case of Kabugu Mutua –vs- Kenya Bus Service Limited NRB HCCC No. 4045 of 1988.

Lastly counsel submitted that the plaintiff did not prove the case on a balance of probability. There was no evidence of ownership of the motor vehicle. The only evidence was a police abstract form which was not acceptable according to the judgment of the court of Appeal in the case of Thuranira Karauri –vs- Agnes Ncheche, Court of Appeal No. 192 of 1996. Where the court of appeal held that:

“The plaintiff did not prove that the vehicle which was involved in the accident was owned by the defendant. As the defendant denied ownership, it was incumbent on the plaintiff to place before the judge a certificate of search signed by the Registrar of the motor vehicles showing the registered owner of the lorry.”

Similarly counsel for the appellant submitted that special damages of Kshs 21,550/- was not proved. There was no evidence to prove that the deceased used to earn Kshs1,500/- per month as a conductor. Counsel therefore urged the court to allow the appeal and set aside the judgement and decree of the trial court.

This appeal was opposed, Mr. Karanja counsel for the respondent submitted that there was no evidence of rebuttal by the appellants. The plaintiff's evidence was not controverted. There was therefore no need of framing the issues in a matter which is not contested by evidence. Moreover, failure to frame the issues does not invalidate the judgment under the provisions of Section 78(1) of the Civil Procedure Act. The first appellate court can rewrite the judgment.

On the issue of liability, the trial court was justified in holding the appellant 100% liable based on the evidence of a eye witness whose evidence was not challenged. The ownership of the motor vehicle was not in issue since in the defence of the appellant did not deny the ownership. Indeed the defence attributed the cause of the accident to the deceased whom they alleged recklessly run into the road. On the issue of the limitation of time the plaintiff had lawfully obtained the order of the high Court for the extension time which was quoted on the top of the plaint and during the hearing the pleadings were produced. The validity of the order granting leave was not questioned. Counsel distinguished the case of *Thuranira Karauri (supra)* from the present case.

On quantum, the earnings of the conductor were assessed by the trial court. There was no documentary evidence to prove such a claim because it is common knowledge that not every employee gets a document to prove employment.

This being a first appeal, this court is mandated to re- evaluate the evidence before the trial court and arrive at an independent judgement. However, this court should bear in mind that it never saw or heard the witnesses testify and give due allowance for that. The principles governing the matters to bring to bear by the first appeal court were articulated in the case of Kiruga Vs Kiruga & Another [1988] KLR page 348 in which the Court of Appeal held:

“An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.”

The respondent gave evidence in support of his claim and relied on the evidence of James Ngera Mwangi PW2 who said he was walking with the deceased when the accident occurred. According to James, they were walking with the deceased along Nyahururu Nakuru Road near Muchanganyiko Centre, James entered a shop and suddenly he heard a bang and when he checked he found that the deceased had been hit by a vehicle which landed on the ditch.

The respondent also testified that on the 7th January 1997, the deceased was knocked down by the motor vehicle belonging to the defendant. He received a report about the accident. The deceased was taken to the Provincial General Hospital Nakuru but he passed away on the 10th January, 1997. The respondent obtained the death certificate as well as a police abstract form. He testified that the deceased was aged 30 years as at the time of his death. He was working as a conductor in Nakuru town earning Kshs 1,500/- per month out of which he used to give the respondent Kshs 800/- per month. The respondent said he is 85 years old. The deceased was the only child and his wife is aged 74 years. During cross examination, the respondent was questioned why he filled the suit late. He explained that first of all he did not have money to file suit. He however obtained the leave of the court. He had paid some money to a lawyer but was not issued with a receipt.

The appellant did not adduce any evidence although counsel filed written submissions, he urged the court to dismiss the suit which was filed out of time. Regarding the assessment of damages, the counsel for the respondent urged the court to assess Kshs 12,000/- for the loss of the expectation of life and Kshs 5,000/- for special damages

I have considered this matter, the trial court considered the evidence on record and found that it was not rebutted, the appellant was found to be 100% liable. In the one page judgment the issue of limitation of period was not considered and no reasons were given for adopting the multiplicand of 15 years to arrive at assessment for loss of dependency. As stated earlier in this judgment, this court is mandated to rewrite the judgment and give reasons upon consideration of the evidence before the trial court.

I agree with the learned trial magistrate that the plaintiff's case was not rebutted by the defence. There was an eye witness who testified that he was walking with the deceased when the deceased was knocked down by the motor vehicle. The respondent produced a police abstract form which showed that an accident occurred along Nakuru Nyahururu Road involving a motor vehicle registration No. KZG 852 Toyota Corolla.

When the appellants were sued they filed a statement of defence, there was no denial of the ownership of the motor vehicle. I agree with the submission by the counsel for the respondent that the issue of the ownership of the motor vehicle was not at all before the trial court. During the trial of the case, the appellant was represented by counsel and no objection was raised regarding the production of the police abstract which is a public document. Accordingly this case is distinguishable from the case of Thurairara Karauri (*Supra*).

As regards the issue of limitation of period within which the suit ought to have been filed, it should be noted that the respondent had obtained the leave of the court to file the suit out of time. The order granting leave was not challenged. What was challenged was the reasons that the respondent gave to obtain the leave. The trial court did not consider this aspect. Perhaps because the leave was granted by the High Court and the trial court may have been uncomfortable to disregard the order of the High Court. The High Court that gave leave must have been persuaded by the reasons given by the respondent. When this suit was filed it is indicated on the heading that it was pursuant to the leave granted in Nakuru HCC No. 545 of 2000 [OS] issued on 1st November, 2000. The reasons why the respondent was late were explained to the trial court.

I am not convinced that the trial court erred by not accepting the defence of limitation on a balance of probability, the respondent explained during trial that it took him time to gather money to be able to file the suit, he gave some money to a lawyer but was not given a receipt. It is not quite clear to me whether this was not a fact of a decisive character that once a litigant pays money to a lawyer and the suit is not filed this to me constitutes a defence of limitation.

On the issue of quantum the learned magistrate awarded Kshs.1,500/- being a salary of a conductor. This is unskilled labour even if the deceased was not a conductor, and was engaged otherwise, as a casual labourer the sum of Kshs.1,500/- is not exorbitant in the circumstances. The respondent who is the father of the deceased testified that the deceased was aged 30 years. However the plaint states that the deceased was aged 45 years at the time of his death. The death certificate does not indicate the age of the deceased. The trial court that heard the evidence believed that the deceased was aged 30 years. Even if the trial court was wrong on this, a multiplier of 15 years gives the deceased the age of 60 which is still reasonable considering that the deceased was in the informal employment which is not governed by the normal retirement age of 55 years. Taking into consideration all the evidence, I am not satisfied that the trial court misdirected itself except only on the assessment of special damages. The special damages that were proved was only Kshs. 700/-. I therefore set aside the order in respect of special damages and substitute it with an order for special damages for Kshs. 700/-. This appeal succeeds in respect of that award only. The rest of appeal lacks merit and it is dismissed with costs to the respondent. Since the appellant has partially succeeded the costs due to the respondent will be $\frac{3}{4}$.

Judgment read and signed this 13th day of June, 2008

M. KOOME

JUDGE