



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 248 of 2005

(From the judgment of Honourable Mrs. H.A. Omondi, Chief Magistrate in CMCC No.4466 of 2002 at Milimani Commercial Courts, Nairobi.)

BERNARD GATHATU KAMAU.....1ST APPELLANT

FRANCIS KIARIE MBUGUA.....2ND APPELLANT

VERSUS

ELIZABETH NYAMBURA KURIA (Suing as a personal representative of the estate of)

HIRAM KIARIE NGANGA (DECEASED).....1ST RESPONDENT

JASPAL SINGH.....2ND RESPONDENT

PELICAN HAULAGE CONTRACTORS.....3RD RESPONDENT

J U D G M E N T

This appeal arises from a suit which was filed in the Chief Magistrate's Court at Nairobi by Elizabeth Nyambura Kuria, who is now the 1st respondent to this appeal. The 1st respondent brought the suit in her capacity as personal representative of the estate of Hiram Kiarie Nganga (Deceased). In the suit the 1st respondent who was also a widow to the deceased, claimed damages under the Law Reform Act and the Fatal Accidents Act from Bernard Gathatu Kamau and Francis Kiarie Mbugua (hereinafter referred to as the 1st and 2nd appellants). The claim arose from the death of the deceased in an accident involving the 1st appellant's motor vehicle KAJ 7684Y and the 3rd respondent's motor vehicle Registration No. KZD 802/ZB 938, which the 1st respondent claimed was caused by the negligence of the appellants.

In their defence the appellants denied liability contending that no accident occurred nor was the appellant's driver or agent negligent. The appellants also denied that the deceased was a passenger in their motor vehicle. In the alternative, the appellants maintained that the accident was wholly caused or substantially contributed to by the negligence of the driver or agent of motor vehicle Registration No. KZD 802/ZB 938. The appellants sought indemnity and contribution from Jaspal Singh and Pelican Haulage Contractors (hereinafter referred to as the 2nd and 3rd respondents). The 2nd and the 3rd respondents filed a defence in which they denied that the accident subject of the 1st respondent's suit was caused by their negligence. They maintained that the accident was caused by the negligence of the appellants.

During the hearing of the suit, the 1st respondent called 3 witnesses. These were; Sgt Patrick Ojwang a police officer who investigated the accident, Francis Kiarie Mbugua, (the 2nd appellant), who was at the material time driving motor vehicle KAJ 7684Y. Briefly the evidence adduced for the 1st respondent was as follows: -

The deceased was employed by the 1st respondent as a driver. On the material day, the deceased was a passenger in motor vehicle registration No. KAJ 7684Y, in which he was the co-driver. The vehicle was traveling from Bondo to Nairobi. Somewhere at Kimandura around Mai Mahiu area, the vehicle was going uphill when it encountered a stationary lorry on the road without any lights, chevrons or warning twigs. The weather was foggy and the driver of the motor vehicle was also blinded by oncoming motor vehicle lights. He tried to swerve to avoid the stationary vehicle, however, he hit the stationary vehicle with the left side of his vehicle which was the side where the deceased was seated. The deceased who was injured was rushed to the hospital. He succumbed to his injuries and died the next day.

Prior to his death, the deceased who was earning a salary of kshs.11,000/=, was supporting his wife and child. The 1st respondent produced receipts for expenses incurred as a result of the accident. Neither the appellant nor the 2nd or 3rd respondents offered any evidence at the trial. However, counsel for each party filed submissions. The 1st respondent's counsel urged the court to find that the 1st respondent had established her case and give judgment in her favour against the appellant and the 2nd and 3rd respondents. He urged the court to award Kshs.50,000/= damages for pain and suffering, Kshs.100,000/= loss of expectation of life, Kshs.1,584,000/= as loss of dependency, and Kshs.8,120/= as special damages.

For the appellants, it was submitted that the evidence adduced on behalf of the 1st respondent showed that the 2nd and 3rd respondent were the ones to blame for the accident and therefore they should be held wholly liable or at the very least 80% to blame. With regard to damages, the court was urged to award Kshs.10,000/= for pain and suffering, Kshs.70,000/= for loss of expectation of life, Kshs.380,000/= for loss of dependency and Kshs.20,000/= as special damages.

For the 2nd and 3rd respondents it was submitted that no records having been produced to prove the ownership of motor vehicle Reg. No. KZD 802/ZB 938 no cause of action had been established against the 2nd and 3rd respondents. It was further submitted that the evidence adduced showed that the accident was caused by glaring lights and foginess and the respondents cannot therefore be held liable.

With regard to damages, it was submitted that the claim for compensation in respect of funeral expenses was misplaced and ought not to be allowed as death is an eventuality which must occur. It was submitted that the 1st respondent had not proved her claim for loss of life and loss of dependency. The court was therefore urged to dismiss the 1st respondent's suit.

In her judgment, the trial magistrate found the appellant and the 2nd and 3rd respondents jointly liable for the accident. She apportioned liability at 60% against the appellant and 40% against the 2nd and 3rd respondents. Adopting a multiplier of 19 and a dependency ratio of 2/3 she assessed damages in respect of loss of dependency at Kshs.1,672,000/=. She also awarded Kshs.100,000/= for loss of expectation of life, Kshs.30,000/= for pain and suffering and Kshs.8,770/= for proven special damages.

Being dissatisfied the appellant has now lodged this appeal raising the following grounds:

- (i) That the learned magistrate erred in law and in fact in finding that the appellants were in any way liable for causing the accident.
- (ii) That the learned magistrate erred in law and fact and against the weight of evidence in apportioning liability between the appellants and the 2nd and 3rd respondents at the ratio of 60 to 30% respectively.
- (iii) That the learned magistrate erred in law and in fact in assessing damages for pain and suffering at

Kshs.30,000/=.

(iv) That the learned magistrate erred in law and in fact in assessing damages for loss of expectation of life at a sum of Kshs.100,000/=

(v) that the learned magistrate erred in law and in fact and against the weight of evidence in assessing loss of dependency at Kshs.1,672,000/=.

(vi) That the learned magistrate erred in law and in fact and contrary to the evidence adduced in finding that the deceased's monthly salary was Kshs.11,000/= as the multiplicand.

(vii) That the learned magistrate erred in law and in fact in adopting a multiplier of 19 years.

(viii) That the learned magistrate erred in law and in fact by assessing and applying a dependency ration of one-third (1/3) against the weight of evidence adduced.

(ix) That the learned magistrate failed to properly evaluate the evidence adduced and came to an erroneous conclusion.

(x) that the award herein is too high in the circumstances and inordinately higher than awards granted in similar cases previously decided by the honourable court.

Counsel for the appellants submitted that the evidence of the eye witness was clear that the appellants' driver took all action to avoid the accident but it was not possible because of the vehicle of the 2nd and 3rd respondent which was stationary on the road. He therefore urged the court to set aside the apportionment by the trial magistrate and find the 2nd and 3rd respondent 100% liable. It was further submitted that there was no evidence that the deceased endured any pain and therefore the award in respect of pain and suffering was not justified, while in respect of loss of expectation of life was said to be on the higher side. With regard to loss of dependency, it was maintained that the evidence regarding the deceased's income was not sufficient and the trial magistrate should therefore have adopted a minimum wage. Finally it was submitted that the special damages were not proved and ought therefore not to have been awarded.

For the 1st respondent it was submitted that the trial magistrate properly considered and apprehended the evidence and applied the high principles. It was maintained that the driver of the appellant's motor vehicle which was on motion and which collided with the rear of the 2nd respondent's stationary motor vehicle was the one who should bear the greater responsibility for the accident. In support of this contention, counsel cited the following cases:

(i) *Patel vs Yafesi & Others (1972) EA 28.*

(ii) *Vyas Industries vs Diocese of Meru (1982) KAR 115*

It was contended that the appellant did not plead any negligence against the 3rd party in his defence.

With regard to award for damages, it was submitted that there was sufficient evidence that the deceased succumbed to his injuries after a day and the award for pain and suffering was proper. As for the awards for loss of expectation of life, loss of dependency and special damages, it was submitted that the awards were not based on wrong principles nor were they unsupported by evidence.

I have carefully reconsidered and evaluated the evidence which was adduced before the trial magistrate. It was not disputed that there was an accident involving the appellant's vehicle and a stationary vehicle. It is evident that the weather was not favourable, it being foggy and wet. The appellant's vehicle appears to have been traveling at an unreasonably high speed. Although the appellant's driver who was Pw3 appears to have blamed the driver of another vehicle for dazzling him with its headlights no 3rd party

proceedings were initiated against the driver of that vehicle. In the circumstances of this case, the apportionment of liability by the trial magistrate was proper.

As regards quantum, the trial magistrate proceeded on the evidence adduced before her. There was evidence that the deceased died a day after the accident and therefore the award in respect of pain and suffering was justified. The award of Kshs.100,000/= in respect of loss of expectation of life is consistent with the generally accepted conventional figure for such loss.

As regards the award for loss of dependency, there was evidence that the deceased was a driver. There was evidence that the deceased was earning Kshs.11,000/=. The trial magistrate had no reason to ignore the evidence before her and adopt the minimum age as was proposed by the appellant's advocate. Given the deceased's age of 36 years the dependency ratio of 19 was fair as was the 2/3 dependency ratio. All in all, I am satisfied that the trial magistrate proceeded on the correct principles in assessing damages. Accordingly, I find no merit in this appeal and do therefore dismiss it with costs.

Dated and delivered this 4th day of November, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Ms Omondi for the appellant

Gachimu for the responde