China Henan International Co-operation v Monde & another ((Suing as legal representatives of the Estate of Edward Moindi Rweya (Deceased)) (Civil Appeal 66 of 2020) [2023] KEHC 844 (KLR) (10 February 2023) (Judgment)

Neutral citation: [2023] KEHC 844 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL 66 OF 2020

REA OUGO, J

FEBRUARY 10, 2023

BETWEEN

CHINA HENAN INTERNATIONAL CO-OPERATION ..... APPELLANT

AND

FLORENCE BOSIBORI MONDE & ANOTHER (SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF EDWARD MOINDI RWEYA (DECEASED) ..... RESPONDENT

(SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF EDWARD MOINDI RWEYA (DECEASED)

(An appeal from the judgment and Orders of Hon. N.S Lutta Chief Magistrate Delivered on 30th September 2020 in Kisii Chief Magistrate's Case No 487 of 2019)

JUDGMENT

1. This is an appeal relating to the judgment delivered by Hon. N.S Lutta on 30th September 2020. The subject of the suit before the subordinate court was a road traffic accident where the respondent sued the applicant for general and special damages, interest and cost of the suit. The trial magistrate found the appellant 100% liable for the accident and awarded the respondent the following award:

    a. Pain and suffering 50,000/-

    b. Loss of expectation of life 80,000/-

    c. Dependency 3,836,160/-

    d. Special damages 80,000/-

2. The appellant dissatisfied with the judgment of the trial magistrate filed his memorandum of appeal dated 28th October 2020 on the following grounds:

    1. That the learned trial magistrate erred in law and in fact by apportioning liability at 100% as against the appellant despite the existence of contrary evidence.

    2. That the learned trial magistrate erred in law and in fact by failing to appreciate the testimony of the defence witness that the deceased respondent was at the time of the accident carrying two pillion passengers.

    3. That the learned trial magistrate erred in law and in fact by awarding general damages that were inordinately too high.

    4. That the learned trial magistrate erred in law and in fact by failing to appreciate the appellant's submissions and the authorities quoted therein.

    5. That the judgment herein was against the weight of the evidence offered before the court.

3. The appeal is challenging both liability and quantum. This being the first Appellate Court there is need to look at the evidence adduced before the lower court afresh bearing in mind that I had no benefit of seeing or hearing the witnesses as they testified. (See *Selle v Associated Motor Boat Company Ltd* [1968] E.A. 123, 126).

4. According to the respondent in his plaint, on 9th December 2018, the deceased was lawfully aboard motorcycle Registration No KMEJ 155W travelling along Suneka-Asumbi road and at Kiandege area, the appellant's driver negligently drove the appellant's Tuktuk Reg. No. KTWB 917 causing it collide with the motorcycle. As a consequence the deceased sustained fatal injuries. The deceased sustained severe head injury secondary to blunt frontal to the head from which he succumbed. The respondent sought to have the appellant held vicariously liable for the tortuous acts occasioned on the deceased. At the time of the accident the deceased was 28 years old making Kshs 30,000/- as a motor cycle rider. He also had a wife and children and his father Mariko ArweyaObure was also dependent on him.

5. The appellant in its statement of defence denied the claim and that it was vicariously liable for the tortuous acts occasioned on the deceased. The appellant averred that the accident was occasioned by the sole and/or contributory negligence of the respondent.

6. At the hearing before the subordinate court, the deceased's father Mariko Arweya Obure testified as Pw1. He adopted his witness statement that reiterated contents of the plaint. Pw1 testified that the accident was reported at Gesonso Police Station. The burial ceremony cost was about Kshs 140,000/-. He blamed the appellant's driver for the accident. On cross examination, he testified that he did not witness the accident. No. 88300 Moses Kasera (Pw2) produced an abstract of the accident between the Tuktuk and the motor cycle. He testified that the rider was fatally injured and the passengers were also injured. On cross examination he testified that he was not the investigating officer.

7. Justus Gesicho Mainya (Pw3) adopted his witness statement dated 20th July 2019 as his evidence in chief. He testified that on the material day at 1800 hours he was walking along Suneka – Asumbi road and on reaching near Kiwanja Ndege area he saw Tutktuk Reg No KTWB 917 which was coming from Asumbi direction lose control and hit the motorcycle KMEJ 155W that was coming from the opposite direction. The rider succumbed to his injuries on the spot while the two female passengers were rushed to hospital. On cross examination he testified that there was a lorry ahead of the motor bike but the motor cycle was not overtaking. The Tuktuk left its lane to the lane of the motor cycle. Edward Moenga (Pw4) the chief of Riana location testified that the deceased had a wife and children.

8. The appellant in its defence relied on the testimony of Peter Owuor Obonyo (Dw1) testified that he is a mechanic with the appellant and on the material day they were from Asumbi after he had done some repairs on the appellant's motor vehicles. As they approached the airstrip area after navigating a sharp left bend he noticed an oncoming truck approaching from the other bend. As they approached the truck, a motor cycle with two pillion passengers swerved onto their lane with an intention of overtaking the truck. The motor cycle crushed at the front door of the Tuktuk causing it to lose control and to the left side of the road where the vehicle rested on its panel.

9. The appeal was dispensed by way of written submissions and both parties filed their respective submissions. The appellant in its submissions testified that their vehicle was on its rightful lane at the time of the accident and that the motor cycle carried excess passengers. They argued that liability should be apportioned in the ratio of 60:40 in favour of the respondent. They relied on the case of *Rosemary Kaari Murithi v Benson Njeru Muuthita & 3 Others* eKLR 2020 where the court stated:

> " This court finds that while the accident was caused by the Appellant, the rider substantially also contributed to the attendant liability for which the Appellant was ordered to shoulder. The question, I ask myself is whether it is proper to let bodabodas in general get away with impunity of illegality carrying excess pillion passengers. My answer to the question is in the negative. A rider who knowingly and deliberately breaks the law bycarrying more pillion passengers than permitted by the law should be held accountable for his actions. In this instance, Kenneth Mwiti Mbuba was not held accountable for carrying excess passengers and should have shouldered more liability than 10% attributed to him by the trial court. I am also inclined to find that a person who voluntarily gets on a bodaboda when he/she finds that there are more than one should equally be held accountable and hence culpable. To that end this court finds that the trial court apparently misdirected himself on that score and had he done so certainly he would have attributed more liability to the Respondent. I find that the Appellant should have been found 60% liable and I hereby do find that the Appellant was 60% liable while the Respondents were 40% liable for either carrying excess pillion passengers or being excess pillion passengers and hence causing more liability to the Appellant after the accident occurred."

10. The respondent argued that the fact that the rider was carrying excess passengers or had committed a traffic offence was not a basis for holding contributory negligence in the absence of evidence that indeed the excess passenger contributed to the accident (see *David Kariuki v Joyce Wangui Kariko* [2014] eKLR). The respondent further submitted that Dw1 was not a credible witness as he was under the employment of the appellant and therefore could not give testimony that would incriminate his employer.

11. After carefully considering the evidence presented before the subordinate court, it is not apparent who caused the accident as the two eye witnesses at the scene gave, 2 sets of account as to how the accident occurred. In such instances, the Court of Appeal in the case of*Hussein Omar Farah v Lento Agencies* [2006] eKLR held that:

> " In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame."

12. After considering Pw3's and Dw1's versions of how the accident occurred, it is not possible to ascertain who was to blame for the accident. On the one hand, Pw3 on cross examination confirmed that there was a lorry in front of the motorcycle but the deceased was not overtaking and that it is the appellant's vehicle that lost control thereby causing the accident. The evidence of Dw1 was that the deceased was overtaking the lorry without being in the proper lookout of oncoming vehicles, and therefore hit the Tuktuk's door causing the Tuktuk to lose control. The trial magistrate in his judgment found that the appellant was 100% liable for the accident after considering the evidence of the respondent. Had he considered the evidence before court in totality he would have arrived at a different finding. From the evidence before the trial court, it is not possible to make a finding on who was to blame for the accident.I find that liability has tobe shared by the parties at 50:50.

13. I now turn to consider whether the damages awarded were inordinately high. The parameters under which an appellate court will interfere with an award in general damages were stated by the Court of Appeal in *Bashir Ahmed Butt v Uwais Ahmed Khan* (1982-88) KAR as follows:

> 'An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low...'

14. The appellant submitted that Kshs 10,000/- was sufficient under the head pain and suffering as opposed to the Kshs 50,000/- awarded by the trial court. The appellant died on the spot immediately after the accident. I find no reason to interfere with the trial court award of Kshs 50,000/-. The award of Kshs. 50,000/- was not only reasonable but reflective of the current awards (see *Melbrimo Investment Company Limited v Dinah Kemunto & Francis Sese (Suing as Personal Representative of the Estate of Stephen Sinange alias Reuben Sinange (Deceased)* [2022] eKLR).

15. The appellant submitted that there was no proof that the deceased who was 28 year old was earning Kshs 30,000/-. It faulted the respondent for failing to present a record of the deceased's earning and urged the court to apply Kshs 6,896/- under the Wages and Regulation Order 2017 for general labourers. The appellant also faults the multiplier of 32 adopted by the trial court. They relied on the case of *James Gakinya Karienye& Another(suing as legal representatives of the estate of David Kelvin Gakinya (deceased)v Perminus Kariuki Githinji* [2015] eKLR where a multiplier of 12 was adopted for a deceased who was 27 years old. In the alternative, they invite the court to consider the findings of the 2009 Kenya National Population Census that puts the life expectancy at 45.

16. The respondent conceded that the multiplicand adopted by court was not supported by the relevant law and that the appropriate multiplicand would have been Kshs 13,431.30 based on the *Regulation of Wages (General) (Amendment) Order*, 2018. The retirement age is 60 and the multiplier of 32 was based on the said limit. They relied on the case of *Mildred Aori Odunga v Hussein Dairy Limited* (2010) eKLR where the deceased was 28 and a multiplier of 32 was applied.

17. It cannot be assumed that the *Regulation of Wages (General) (Amendment) Order*, 2018 should apply on account that the money the deceased earned by the deceased from his rider business was unknown. There was clear evidence in Pw1's statement that the deceased was a motor cycle rider. It is not in dispute that he died while he was engaged in his trade. There is no evidence whatsoever that was led to show he is a general labourer. Pw1 gave clear evidence that the deceased was a motor cycle rider and his evidence was not shaken on cross examination. Although the trial magistrate applied an income of Kshs 30,000/- he did not give a reason how he arrived at the sum. In my view, an income of Kshs 10,000 is more reasonable. The court in*David Mwenda & another v Alice Kawira (Suing the Administrator*

of the Estate of John Munyoki Malyunga (Deceased)) [2018] eKLR in awarding a bodaboda rider Kshs 10,000/- as his monthly income within the Kisii locality held as follows:

> 7.I now turn to the claim under the *Fatal Accidents Act*. As regards the earnings, the trial magistrate was correct to note that it was not necessary that the claimant produce documents. This finding is consistent with the decision of the Court of Appeal in *Jacob Ayiga Maruja & Another v Simeone Obayo* KSM CA Civil Appeal No. 167 of 2002 [2005]eKLR where it was observed that, "We do not subscribe to the view that the only way of proving earnings is equally the production of documents."The claimants need only prove the case on a balance of probabilities. Pw 1 testified on oath that the deceased was in bodaboda business and he in fact died while carrying a pillion passenger. The issue is what is the multiplicand to adopt. PW 1 stated that the deceased was earning about Kshs. 1,000/- per day while the trial magistrate relied on, "gazetted wages which is about Kshs. 15,000/- per month." It is not clear what gazette the trial magistrate was referencing. While the sum of Kshs. 1,000/- per day would be reasonable, I take into account the fact that there would be good days and bad days and I find a sum of Kshs. 500/- on average more reasonable and if he was working for 6 days a week, his monthly income would be Kshs. 10,000/-.

18. The trial magistrate adopted a multiplier of 32 for reasons that the deceased would have worked until the retirement age of 60.In determining the multiplier to be adopted, the court may consider the nature of employment of the deceased and the fixed retirement age, the period of expected dependency, the condition of life that the deceased could have lived, noting that the standard of life and the life expectancy in Kenya has reduced over the years due to factors such as poverty, impact of HIV and the risk of road traffic accidents (see *David Mwenda & another supra*). Therefore a multiplier of 25 in my view would be most appropriate.

19. It is not in dispute that the deceased had dependants, that is, a wife and children. It was also pleaded that the deceased's father was also a dependent. Having considered the submissions before this court, it is not in dispute that the dependency ratio of 2/3 applied by the trial magistrate was correct. In this regard,the award for loss of dependency should therefore work out as follows; 10,000 x12 x 25 x 2/3 = 2,000,000/-.

20. Consequently, I allow the appeal against the trial court's award and substitute it with an award of Kshs.1,105,000/- made up as follows;

    a. Liability 50:50

    b. Pain and suffering Kshs. 50,000/-

    c. Loss of expectation Kshs. 80,000/-

    d. Loss of dependency Kshs. 2,000,000/-

    e. Funeral expenses and special damages Kshs. 80,000/-

    Kshs.2,210,000/-

    Total is Kshs. 2,210,000/= less 50%

    Net total Kshs 1,105,000/=

21. The appellant shall have half the costs of the appeal.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT KISII THIS 10TH DAY OF FEBRUARY 2023

R.E. OUGO

JUDGE

In the presence of:

Miss Anyango For the Appellant

Miss Kusa For the Respondent

Orwasa C/A