



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 85 OF 2015

ASISA CHITECHI OKECH

(suing as the administrator and personal representative of the estate of

RASHID ISSA MALALA – Now deceased).....APPELLANT

VERSUS

SCARCE COMMODITIES LTD.....1ST RESPONDENT

CHARLES KARIUKI KAMAU.....2ND RESPONDENT

(An appeal from the judgment of Hon. SM Shitubi, Chief Magistrate, in Kakamega

CMCCC No. 159 of 2011, delivered on 23rd September 2015)

JUDGMENT

1. The suit at the primary court was initiated by the appellant against the respondents, and it arose from a fatal road traffic accident that allegedly happened on 7th April 2010, involving a vehicle belonging to the 1st respondent, and allegedly driven by the 2nd respondent, and the deceased herein. The appellant sought general and special damages, and costs of the suit. The trial court took evidence, and found in favour of the respondents, on the basis that the ownership of the accident vehicles was not proven.

2. The appellant was aggrieved, hence the instant appeal. It raises several grounds that trial court erred in finding that the appellant had proved her case on a balance of probability, the trial court gave more weight to the oral evidence of the respondents as against the documentary evidence presented by the appellant, the trial court erred in holding that the appellant had not proved the ownership of the accident vehicle, the trial court erred in dismissing the evidence of the police officer and the police abstract produced by the appellant, the trial court came to the wrong conclusions, the trial court failed to consider all the evidence presented, and the trial court did not consider the submissions and authority presented by the appellant.

3. The appellant applied for leave to present additional evidence relating to ownership of the vehicles mentioned at the trial, being registrations marks and numbers KBR 090C, KBB 492D and ZC 7990. The application was dated 31st May 2018, and was allowed in a ruling delivered on 14th February 2020. The appellant was directed to present the additional evidence through an affidavit to be filed through a supplementary record appeal. That supplementary record of appeal was filed herein on 13th March 2020, dated 12th March 2020.

4. Directions were taken on 24th June 2021, for disposal of the appeal by way of written submissions. The record before me indicates that only the appellant filed written submissions, on 29th September 2021, dated 28th September 2021. In the said written submissions, the appellant argues only on liability, which is the principal case on appeal, and quantum.

5. On liability, it is submitted that the appellant had produced a police abstract form, which showed that the accident vehicles were KBB 492D-ZC 7990, belonging to the 1st respondent. It is asserted that the trial court erred in finding that the ownership of the vehicles were not proven. It is argued that ownership of a motor vehicle is usually given by the person who presents themselves to the police after the accident, and the police cannot create an owner by themselves. It is further submitted that the 2nd respondent testified that he was stopped by the police and his motor vehicle impounded and inspected, and that the police could not have gotten the information on the ownership of the motor vehicle from anywhere else apart from the driver himself, the 2nd respondent. It is asserted, relying on *Lake Flowers vs. Cila Francklyn Onyango Ngonga & another* [2008] eKLR (Tunoi, Bosire & Aganyanya JJA), that in the absence of any other evidence, to counter the police abstract, the same was adequate as proof of ownership. It is submitted that the respondents did not adduce any documentary proof to counter

the evidence on ownership as detailed in the police abstract. It is further submitted that the police evidence identified the accident vehicle as KBB 492D-ZC 7990, which was the vehicle they impounded and inspected, and it was the vehicle that the appellant's witness alleged to have witnessed causing the accident. It is submitted that the trial court should have found the respondent fully liable for the accident.

6. On the additional evidence, the appellant submits that the same shows that KBB 492D and ZC 7990 were registered in the name of the 1st respondent, and that the other vehicle that the 2nd respondent alleges to have been driving on the day of the accident, KBR 090C, was not registered in the name of the 1st respondent, and was not even a lorry but a station wagon. It is further submitted that the police did not refer to it at all in its report.

7. On quantum, the appellant submits that the court should award Kshs. 150, 000.00 for loss of expectation of life, Kshs. 50, 000.00 for pain and suffering, and Kshs. 50, 150.00 as special damages. On loss of dependency she asks for a figure of Kshs. 1,331, 520.00. To arrive at that figure, she has used a multiplicand of Kshs. 5, 548.00, being what the deceased was proved to have been earning. He was aged 30 years at the material time, and she proposes a multiplier of 30, had he continued working up to age 65 years. He was married with two children, and, therefore, she proposes a multiplier ratio of 2/3. The multiplication, 5,548 x 30 x 12 x 2/3, brings the total to Kshs. 1,331, 520.00. The global total comes to Kshs. 1, 581, 670.00. She relies on *Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwaya – deceased) vs. Kiarie Shoe Stores Limited* [2015] eKLR (Waki, Nambuye & Kiage JJA).

8. On liability, at the trial the appellant adduced evidence that the accident vehicle was KBB 492D-ZC 7990. There was a witness who alleged that he was an eyewitness, who was at the scene, and saw the accident happen before his very own eyes. He did not note the details of the lorry, but he saw it at the police station. The appellant produced a police abstract, which identified the accident vehicle as KBB 492D-ZC 7990, owned by the 1st respondent and driven by the 2nd respondent. The 2nd respondent gave an oral statement, saying that KBB 492D-ZC 7990 did not belong to the 1st respondent, and that it was not the vehicle that he was driving that day, saying that he was driving another vehicle altogether, KBR 090C.

9. It would appear that the trial court did not give much regard to the details of the police abstract, and chose to give prominence to the oral testimony of the 2nd respondent. Documentary evidence cannot be contradicted by oral evidence. The proper way for the respondents to impeach the contents of the police abstract should have been for them to provide proof, by way of a certificate of official search, showing that the 1st respondent did not own KBB 492D-ZC 7990. The courts have severally held that the police abstract is sufficient proof of ownership of an accident vehicle, as the details on ownership carried in the police abstract would have been provided by the owner of the vehicle or the driver, or obtained from the particulars in the insurance sticker displayed on the windscreen of the accident vehicle. See *Lake Flowers vs. Cila Francklyn Onyango Ngonga & another* [2008] eKLR (Tunoi, Bosire & Aganyanya JJA), *Wellington Nganga Muthiora vs. Akamba Public Road Services Ltd & another* [2010] KLR 84 (Keiwua, Onyango Otieno & Visram JJA), *Joel Muga Opija vs. East African Sea Food Limited* [2013] eKLR (**Onyango Otieno, Azangalala & Kantai JJA**), *Francis Mutito Mwangi vs. MM* [2016] eKLR (Nyamweya J) and *Benard Muia Kilovoo vs. Kenya Fresh Produce Exporters* [2020] eKLR (Gitari J). It is incumbent on anyone who wishes to contradict the details in the police abstract to furnish other evidence to the contrary, usually by availing the registration details from the registrar of motor vehicles. The appellant discharged the onus on her, to prove ownership when she presented the police abstract, and the burden shifted to the respondents to present alternative evidence of ownership, by availing records from the registrar of motor vehicles. It was not enough for the 2nd respondent to contradict the document from the police by oral evidence. It is my view that the appellant did not even need to file additional evidence at the appeal to prove the same point, as the evidence given at the trial was sufficient. But the additional evidence does confirm the evidence presented at the trial, that KBB 492D and ZC 7990 were owned by the 1st respondent, and that KBR 090C was not owned by the 1st respondent, contrary to what the 2nd respondent tried to make the trial court believe. So, on liability, the trial court should have found in favour of the appellant. As the respondents denied liability totally, and did not lead any evidence on the question of contribution, I shall hold that the respondents were 100% to blame for the accident.

10. On quantum, the trial court stated that it would have awarded Kshs. 30, 000.00 for pain and suffering and Kshs. 100, 000.00 for loss of expectation of life. On dependency, the court took the age of the deceased to be 30, and that he would have continued to work till 55, and his salary was said to be Kshs. 5,548.00 per month. The court used these figures to work out dependency at Kshs. 1, 101, 600.00. It was found that the special damages were proven at Kshs. 54, 700.00.

11. On pain and suffering, I would award a sum of Kshs. 50, 000.00, proposed by the appellant, for the deceased died seven days after the accident, and, therefore, I expect that he underwent quite a bit of pain and suffering. On loss of expectation of life, the conventional figure is Kshs. 100, 000.00. See *Makano Makonye Monyanche vs. Hellen Nyangena* [2014] eKLR (Sitati J) and *Caleb Juma Nyabuto vs. Evance Otieno Magaka & another* [2021] eKLR (Wendoh J). On dependency, the age of the deceased was said to be 28 years, the official retirement age is 60 years, he would have officially continued working till he was 60, and, therefore, he still had some 32 years to go. Taking the vagaries of life into account, I would settle on a figure of 27. He had a wife and children of tender years, so the ratio of 2/3 should apply. The calculation should work out as follows: 5548 x 27 x 12 x 2/3, making Kshs. 1, 198, 368.00. The proven special damages worked out to Kshs. 54, 700.00. The global total should be Kshs. 1, 403, 068.00.

12. Finally, I find that there is merit in the appeal and I hereby allow it. I set aside the order dismissing the suit at the primary court, and I substitute it with orders that liability attaches to the respondents at 100%, and there is a global judgment for Kshs. 1, 403, 068.00, worked out as indicated above. Interest shall be calculated from the date of the judgment at the primary court, and the appellant shall have costs both here and at the court below. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 4th DAY OF February, 2022

W. MUSYOKA

JUDGE