



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CIVIL APPEAL NO.35 OF 2019

BETWEEN

CHARLES MAOSA a.k.a CHARLES ECHUKU MAOSAAPPELLANT

AND

AAA [suing as legal representative of the estate of GOO-deceased].....RESPONDENT

(Being an Appeal from the judgment in Oyugis Chief Magistrate's CMCC No. 87 of 2017 by Hon. J.S Wesonga –Senior Resident Magistrate).

JUDGMENT

1. The appellant herein was the defendant in Oyugis Chief Magistrate's CMCC No. 87 of 2017. This was a claim that arose from a road traffic accident involving motor vehicle registration number KCE 113S where the deceased sustained fatal injuries. The learned trial magistrate delivered judgment dated 11th February, 2019 and made an award of Kshs.423, 250/=, in favour of the plaintiff after factoring in contributory negligence.

2. The appellant was aggrieved by the said judgment and filed this appeal. He was represented by Peter M. Karanja, advocate. He raised nine grounds of appeal as follows:

- a) The learned trial magistrate erred and misdirected herself in law in apportioning liability against the appellant.
- b) The learned trial magistrate erred and misdirected herself in law in failing to find that the appellant was not negligent and did not bear any liability at all.
- c) The learned trial magistrate's decision apportioning liability against the appellant is unsound and unsupportable on the evidence and the applicable law.
- d) The learned trial magistrate erred in law and in fact in failing to find that the plaintiff's evidence departed from the pleadings and that the plaintiff was bound by his own pleadings which were never amended.
- e) The learned trial magistrate erred in law and in fact in failing to find that the negligence and the particulars of that alleged negligence pleaded in the plaint were never established on the evidence.
- f) The learned trial magistrate erred in law and in fact in failing to find that the deceased was the sole cause of the accident and down played/ignored all evidence on causation favourable to the appellant.
- g) The learned trial magistrate erred in law and in fact in failing to find that the onus lay on the plaintiff to prove, on a balance of probability, that the defendant was liable in negligence.
- h) The learned trial magistrate ignored and/or paid li service to the precedents cited before her, which were applicable and binding on her, both on the question of liability and the quantum.
- i) The learned trial magistrate erred in law and in fact in failing to assess the quantum of damages in accordance with the applicable principles and precedents.

3. The appeal was opposed by the respondent through the firm of Nyatundo & Company, Advocates who urged for the dismissal of the appeal.

4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

5. There were two versions on how the accident that claimed the life of the deceased occurred. According to the appellant, the deceased boarded the lorry without the knowledge of the driver. However according to the evidence adduced for the respondent, the deceased talked to the lorry driver before embarking on the lorry.

6. Blasio Opere (PW2) testified that he was at the scene of the accident where he was waiting the motor cycle ferrying him to be repaired. A boy with a spade stopped the lorry driver. When the boy was boarding, the lorry driver drove off and the boy fell off the moving vehicle.

7. Victor Nyanga Biri (DW1) was the driver of the lorry from where the deceased fell off. He testified that he suspected that the boy boarded the lorry at Ongoro where he had stopped to enquire about sand from an agent called Odhis.

8. The learned trial magistrate was justified from dismiss the defence. The evidence of Odhis being an independent eye witness would shed more light on what transpired. Failure to call him would only lead to adverse inference that had he been called, his evidence would not have supported the version by the appellant.

9. I therefore find that the learned trial magistrate was justified to apportion liability at 50%:50%.

10. The appellant contends that the judgment on quantum was excessive. The appellant in his submissions during trial had proposed a global award of kshs.400, 000.00 and cited several authorities.

11. The respondent in the trial court had proposed an award of Kshs. 1,600,000.00.

12. It is trite law that an appellate court will only interfere with an award of the trial court if certain circumstances are satisfied. In **Butt vs. Khan [1981] KLR 349** at page 356 Law JA stated:

...an appellate court will not disturb an award of 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 a figure which was either inordinately high or low.

13. I have looked at several authorities cited by the parties. In **Leonard Kaunyangi vs. David Mati [2018] eKLR** the High Court gave a global award of Kshs. 500,000.00 on 21st day of March, 2018. The deceased was aged 17 years. In **Kengen Limited & another vs. Jane Nesunga Khala (suing as the personal representative and administrator of the Estate of Alex Wekesa Nyongesa (Deceased) [2017] eKLR** a global award of Kshs. 500,000.00 for deceased aged 18 years was made on 15th day of March 2017 by the High Court.

14. The impugned judgment was delivered judgment dated 11th February, 2019 and the deceased herein was aged 15 years. I am from the foregoing persuaded to interfere with the award. I set aside the award by the learned trial magistrate and substitute it with a global award of Kshs. 500,000.00. The special damages will remain as awarded.

15. Since the appellant has partially succeeded, he will be entitled to half costs both in this court and in the trial court.

DELIVERED AND SIGNED AT HOMA BAY THIS 21ST DAY OF JULY, 2021

KIARIE WAWERU KIARIE

JUDGE