



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL SUIT NO.25 OF 2019

CHELI & PEACOCK MANAGEMENT LIMITED.....APPELLANT

VERSUS

CAROLINE MUENI MUNGAI (Suing as the

Administrator of the Estate of

FREDRICK KIMATHI KINOTI.....RESPONDENT

JUDGMENT

1. This is an Appeal from the judgment of Hon. P. Mutua SPM delivered on 19th March, 2019 in Nyeri CMCC No.181 of 2016; the respondents claim arose from a road traffic accident along Nyeri – Kiganjo Road near Kenya Co-operative Creameries depot involving motor vehicle registration number KBV 425G Toyota Saloon and motor vehicle registration number KBU 353X Mitsubishi Lorry;

2. The claim was for special and general damages under the Law Reform Act and the Fatal Accident Act; the trial court found the appellant 50% liable and made the following award;

- Liability: 50:50
- General damages for pain and suffering – Kshs.30,000/=
- Loss of expectation of life – Kshs.120,000/=
- Loss of Damages - Kshs.21,575/=
- Loss of dependency – Kshs.5,188,544/=

3. Being dissatisfied with the judgment of the trial court, the appellant filed this instant appeal and listed two (2) grounds of appeal as are summarized hereunder;-

(i) The learned magistrate erred in apportioning liability at 50% to the appellant despite the respondent not calling an eye witness or lead any evidence to show how the accident occurred;

(ii) The learned magistrate erred in awarding an excessive and inordinate award under the head of loss of dependency by adopting a multiplicand of Kshs.32,428/- instead of Kshs.14,409/- which was his net salary;

4. When this Appeal came up for hearing, the parties were directed to file and exchange written submissions; hereunder is a summary of the respective parties submissions;

APPELLANTS CASE

5. The appellant submitted that the respondent and her witness **PW2** a police officer both did not lead any evidence to demonstrate how the accident occurred and therefore failed to prove the appellants' negligence to warrant the 50% liability; **PW2** only produced a Police Accident Abstract which indicates that the matter was still pending under investigation and did not produce the police file nor the sketch map to determine the point of impact;

6. The respondent also called an eye witness **PW3** whose evidence the appellant contends was contradictory particularly on the point of

impact which the trial court noted; on one hand the witness in his testimony he had stated that the vehicles had collided at the centre of the road while under cross examination he claimed that the point of impact was on the right side as one faces Nanyuki as the body of the deceased was found here which was a clear indication that the point of impact was on the appellants lane;

7. The appellant contends that it called one witness whose testimony was credible and consistent; his evidence was that he was driving at 60kph towards the Nanyuki direction whereas the deceased's vehicle was from the Nanyuki direction and that its driver never left his lawful lane and it was the deceased's vehicle that left its lawful lane and encroached on its driver's side; under cross-examination he admitted to having seen the deceased's vehicle from a distance of 100metres but was unable to avoid the collision as it was so sudden; even though he was attentive he hadn't expected the deceased's vehicle to suddenly veer into his lane;

8. The appellant submitted that the respondent was obligated to prove negligence on the part of the appellant; case law relied on **Lilian Birir & Another vs Ambrose Leamon [2016]eKLR**;

9. On the issue of the multiplicand it was the appellants contention that the trial court erroneously adopted a multiplicand based on the deceased's gross salary instead of the net salary; case law relied on **Omar SharrifHasim & Another vs Boniface Asindu & 2 Others [2018]eKLR**;

10. In conclusion the respondent had failed to prove negligence and her claim should fail.

RESPONDENTS CASE

11. In response the respondent submitted that it was the evidence of **PW3** that the collision was at the centre of the road and the deceased's body was on the right side as one faces Nanyuki from Kiganjo; **DW1** had testified that he was driving at 60kph and had seen the deceased's motor vehicle from a distance of 100metres away but his evidence was devoid of any steps taken so as to avoid the collision;

12. The respondent submits that **DW1** appeared to admit that the body of the deceased being on the right was indicative of the point of impact which then was the correct lane for the deceased; it would also appear from the evidence of **DW1** that he never saw the accident happen and he stated that all that he heard was a big bang which showed that he was not alert otherwise he would have swerved or applied his brakes had he seen the deceased's motor vehicle encroaching into his lane; case law relied on **Kajiado Civil Appeal No.40 of 2018 RisaSampala vs David Kerembu & Agnes KwambokaOkeyo and Nkubenyamiro [1983]eKLR**;

13. The respondent argued that the appellant ought to prove that the trial court relied on wrong principles while apportioning liability at 50:50; case law relied on **Homabay Civil Appeal No.7 of 2014 Evans Nyakwana vs Cleophas Bwana Ongaro**; since the appellant failed to demonstrate this fact it would the trial court was correct in holding both the deceased and the appellant were equally at fault for the accident;

14. As for the issue of the multiplicand, the respondent submitted that the deceased's basic salary was Kshs.27,810/- and his net income was Kshs.39,810/-; the trial court in adopting Kshs.32,428/- was correct as it took into account the pay-slip which was the relevant factor and after deducting the statutory deductions arrived at the correct figure for the multiplicand; therefore the same does not warrant interference; case law relied on **Joshua MuriungiNganatha vs Benson KatabeLemungiyau (2016) eKLR and Stella NasimiyuWangila & Another vs Raphael OduroWanyamah (2016) eKLR; Kiambu Civil Appeal No.27 of 2017 Grace Wamue vs Florence WanjiruKirubi and Catholic Diocese of Kisumu vs Sophia AchiengTeteKsm Civil Appeal No.284 of 2001[2004]eKLR**;

15. In conclusion the appellant prayed for the dismissal of the appeal with costs.

ISSUES FOR DETERMINATION

16. After having read the written submissions filed by both parties and having perused the Record of Appeal this court has framed the following issues for determination;

(i) Whether the apportioning of liability at 50:50 was based on wrong principles of fact;

(ii) Whether the derived multiplicand was based on the application of wrong principles of law.

ANALYSIS:

17. Before addressing this issue, it is important to state that the principles to be considered when reviewing an Appeal on damages are laid out in the Court of Appeal case of **Bashir Ahmed Butt vs. Uwais Ahmed Khan (1982-88) KAR**; this decision sets out the parameters under which an appellate court will interfere with an award in general damages; it held that: -

'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...'

18. Similarly, in the case of **LoiceWanjikuKagunda vs. Julius GachauMwangiCA 142/2003** the Court of Appeal held that: -

'We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has

misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (see Mariga V Musila [1984] KLR 257).'

Whether the apportioning of liability at 50:50 was based on wrong principles of fact:

19. The appellants' contention was that the trial court wrongfully apportioned liability at 50% whereas the respondent had not discharged the burden of proof as to how the accident had occurred; in that the respondent had relied on the testimony of **PW3** which the appellant contends was contradictory in nature;

20. It is not disputed that there was an accident that occurred involving motor vehicles registration numbers KBV 425G and KBU 353X;

21. Upon perusal of the court record this court notes that the evidence of **PW3** was that he only heard a loud bang and could only construct the occurrence of the accident and the fact that there was a collision;

22. As for the appellant's witness **DW1** he did not even know how the accident occurred and could not state the evasive measures he had undertaken so as to avoid the accident despite the fact that the deceased's vehicle was approximately 100metres away;

23. With the matter still pending under investigation the police officer was not able to tell the trial court how the accident occurred and who was to blame for accident; there was therefore no conclusive evidence to fully determine who was to blame for the accident;

24. With one side blaming the other and the point of impact not having been established the trial court only had the evidence of **PW3** who was the only eye witness to the accident; the trial court in its judgment made the following observation;

'In that state of affairs the court is not therefore able to decide who was fully to blame for the accident.'

25. Being unable to determine who was attributable for causing the accident the trial court thus apportioned liability equally between the appellant and the deceased and it relied on the case of **Farah vs Lento Agencies [2006] 1KLR 123** where it was held that where there was no concrete evidence to determine who, is to blame between two drivers both should be held equally to blame; the trial court herein therefore apportioned liability equally between the appellant and the deceased;

26. Having re-assessed all the evidence adduced this court is satisfied that there is no clear evidence pointing to the negligence of a sole party but rather the two as having jointly caused the accident; therefore, the balance of probability on liability does not tilt against either party but is in equal measure and this court finds no good reason to interfere with trial court's decision in apportioning liability in equal measure on a ratio of 50:50;

27. This ground of appeal is devoid of merit and it is hereby disallowed.

Whether the derived multiplicand was based on the wrong application of principles of law:

28. The appellants' contention is that the trial court in calculating loss of dependency adopted a multiplicand that was based on the gross salary instead of the deceased's net salary; in that the trial court ought to have used a multiplicand of Kshs.14,409/- as adduced by the respondent as being the deceased's net salary;

29. Having perused the evidence on record it reflects that the deceased was a police officer earning a gross salary of Kshs.39,810/- and a pay slip for the month of May, 2015 was produced as **'PEXh.8'**; the trial court stated in its judgment that whereas ***'Only the net income should be adopted but the developments should only be limited to the statutory deductions – see Joshua Muriungi Nganatha vs Benson Katebe Lemungiyai [2016 eKLR; Rosemary Mwabua vs Steve Tiso Mwasya and Another [2018] eKLR.'***

30. The trial court deducted only the statutory deductions reflected on the pay-slip which were ***'WCPS Contributions Kshs.556.20, PAYE Kshs.5,875/40 and NHIF Kshs.950/- making a total of Kshs. 7,381.60.'***

31. Also relying on the same authorities cited this court is satisfied with the principles applied by the trial court in calculating the deceased's net income; and finds no good reason to interfere with the trial courts finding on the multiplicand derived the gross income being Kshs.39,810 less Kshs.7,381.60 which leaves a total net income of Kshs.32,428.40;

32. This ground of appeal is found to be devoid of merit and it is hereby disallowed.

FINDINGS AND DETERMINATION

33. For the forgoing reasons this court makes the following findings and determinations;

- (i) This court finds that the apportioning of liability at 50:50 was not based on wrong principles of fact;
- (ii) This court finds that derived multiplicand was not based on the application of wrong principles of law;
- (iii) The appeal is found to be devoid of merit in its entirety and it is hereby dismissed;

(iv) The judgment of the trial court is hereby upheld;

(v) The Respondents shall have costs of the appeal.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NYERI THIS 8TH DAY OF SEPTEMBER, 2021

HON. A.MSHILA

JUDGE