



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCA NO. 11 OF 2020

FRANCIS MATHEU WAMBUA APPELLANT

-VERSUS-

ALPHONCE MUSAU NZIOKA 1ST RESPONDENT

NDUNGE WAWERU 2ND RESPONDENT

(Suing as the Legal Representative of the estate of URBANUS KIOKO MUSAU (DECEASED))

(Being an appeal from the original judgment of Hon M.K Mutegi (S.R.M) in Tawa Senior Resident Magistrate's Court SRMCC Case No. 54 of 2019 pronounced on 5th February, 2020).

JUDGMENT

1. In a judgment delivered on 13th February 2020, the magistrates' court entered judgment for the respondent who were plaintiffs at the trial, against the appellant (who was the defendant) in the following terms –

Judgment will thus be as follows :-

1) Liability 100% against the defendant

2) Quantum

a) Pain and suffering	Kshs. 30,000/=
b) Loss of expectation of life	Kshs.100,000/=
c) Loss of dependency	Ksh.5000,000/=
d) Special damages	Kshs.292,250/=

Total **Kshs.5,422,250/=**

3) Costs of this case to the plaintiffs.

4) Interest at court rates.

2. Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal through counsel M/s C.W Githae & company on the following grounds –

1) The learned magistrate erred in law and fact in finding the appellant 100% liable.

2) The learned magistrate erred in law and in fact in awarding Kshs.30,000/= for pain and suffering.

3) The learned magistrate erred in law and in fact in awarding Kshs.5,000,000/= for loss of dependancy.

4) The learned magistrate erred in law in awarding Kshs.292,250/= as special damages.

3. The appeal proceeded through written submissions. The appellant's counsel C.W Githae & company filed their written submissions on 16/8/2021 while the respondents' counsel M/s A.K Mutua filed submissions on 27/8/2021.

4. This is an appeal on both liability and quantum of damages. I will start by reminding myself the time revered principle that as a first appellate court I am duty bound to freshly evaluate all the evidence on record and come to my own independent conclusions an inferences – see **Selle & Another –vs- Associated Motor Boat Co. Ltd & Others (1968) E.A 123.**

5. I also have to bear in mind the principle to be applied on review of quantum of damages awarded by a trial court as stated in the case of **Kenfro Africa Ltd t/a Meru Express Service Gathogo Kamini –vs- A.M Lubia and Oliver Lubia (1982 – 88) IKAR 727 at page 730** wherein Kneller J.A stated as follows –

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal for Eastern Africa to be that it must be satisfied that either the Judge, in assessing damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

6. At the trial, the respondent called two (2) witnesses, and the appellant called one (1) witness. No Police Officer or doctor was called to testify, though several documents and reports were relied upon.

7. Pw1 was Ndunge Waweru the wife of the deceased who testified that the deceased was aged 28 years and was a farmer and also employed at a petrol station Better Masaku Kenol Service Station Ltd earning Kshs.30,000/= a month. They had one child Alfred Musau Kioko aged 4 years. She gave an account of how the accident occurred, though she was not at the scene. It was her testimony that they spent Kshs.292,250/= for funeral expenses. She stated that she and her child were dependants of the deceased whom they expected to depend on up to his 60th birthday.

8. Pw2 was Gitonga Zacharia whose evidence was that he was an eye witness of the accident. According to him, the deceased rode a motorcycle from Kitui side towards Machakos, when a lorry from the Machakos side suddenly turned right to the side of the deceased to a feeder road and the accident occurred. He blamed the lorry driver for the death of the deceased who was hit by the rear left side of the lorry and died after screaming for help for five minutes. He said he was sitting merely 20 meters from the accident scene.

9. The defendant's witness was the appellant Dw1. He testified that the accident occurred but blamed the motor cycle driver the deceased for over speeding. His evidence was that the deceased attempted to overtake a matatu and he then swerved to his right to avoid a collision, but the deceased still hit the rear tyres of the lorry and died. He stated that ordinarily he should have swerved to the left but said there was a wall and a ditch that side. The traffic case is still pending.

10. Having re-evaluated the evidence on records, I find like the trial magistrate that the appellant was 100% liable for the accident. It is obvious from the evidence of Pw2 Gitonga Zacharia the eye witness and the appellant himself, that the deceased was hit on his own correct side of the road. Secondly, if indeed there was a matatu that the deceased was overtaking as alleged by the appellant, it would also have been involved in the accident. Thirdly, the appellant had no reason to swerve to the side of the deceased to avert an accident, from the same deceased. In swerving to the right, the appellant actually precipitated the accident instead of avoiding or mitigating the accident. He was thus 100% to blame for the accident.

11. With regard to the quantum damages awarded, the appellant's counsel was only specific in relation to special damages in his submissions before the trial court, where counsel proposed a figure of Kshs.75,250/=. Though the submissions covered the other heads of claims of damages counsel left the matter to the trial court to sift the case authorities and determine the damages. Though I have not seen the respondent counsel submissions before the trial court, the magistrate acknowledged in the judgment that both sides filed submissions and I take it that the respondents' counsel filed submissions before the trial court.

12. Both counsel have filed written submissions on liability and quantum of damages in this appeal, and I have considered the same.

13. Having considered the respective submissions and perused the trial court record and judgment, in my view, the only figure that appears high is that on loss of dependancy of Kshs.5,000,000/=. However, I note that the trial court relied on an undisputed employment letter of the deceased. There was no dispute on the deceased's age of 28 years, and the magistrate took into account only 25 years, up to around 55 years instead of 60 years. The letter of employment from Better Masaku Kenol Service Station Ltd dated 14/12/2018 also indicated a monthly salary of Kshs.30,000/= and the magistrate used Kshs.25,000/= and dependency ratio of 2/3. All these are not in dispute, and thus in my view there is no justification in disturbing the award as the correct factors were taken into account in assessing damages on loss of dependency, taking into account that the child was aged 4 years.

14. In my view, the appellant has not demonstrated that the magistrate either took into account irrelevant matters or failed to take into account relevant matters in determining the quantum of damages in the case herein. There is thus no reason to interfere with the award of damages.

15. I thus find no merits in the appeal and dismiss the same with costs to the respondents.

Delivered, signed & dated this 11th day of November, 2021, in open court at Makeni.

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GEORGE DULU

JUDGE