REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 1 0F 2017

ROBERT MBURU WACHIRA.....APPELLANT

VERSUS

GETRAY ANYANGO OBUNDE.....1ST RESPONDENT

PROTUS MAKHETI MAKOKHA (suing on behalf of the estate of

DAVID WAMJALA WEBI).....2ND RESPONDENT

(Being an appeal from the Judgment and Decree delivered on 6th December, 2016

by Hon. M. Obura (Principal Magistrate) Milimani Commercial Courts

in CMCC No. 4698 of 2011)

JUDGMENT

1. The Respondents filed this suit as the Administrators of the estate of the deceased, David Wanjala Webi who died in a road traffic accident on 1st December, 2008. The Respondent's blamed the fatal accident on the negligent manner the motor vehicle registration No. KBC 325J was allegedly driven at the material time.

2. The Appellant filed a Statement of Defence and denied the claim. The Appellant blamed the accident as solely caused or contributed to by the deceased.

3. The Respondent filed a reply to the Defence, joined issues the Defendant and reiterated the contents of the plaint.

4. The case proceeded to a full hearing. The trial magistrate entered judgment on liability on 50:50 basis. The quantum of damages was as follows:

(a) Loss of expectation of life Ksh.100,000/=

(b) Pain and suffering Ksh.50,000/=

(c) Loss of dependency Ksh.4,982,384/=

(d) Special damages Ksh.60,500/=

Ksh.5,192,884/=

Less 50% contributory negligence Ksh.2,596,442/=

Total **Kshs.2,496,442/=**

5. The Appellant was dissatisfied with the said judgment and appealed to this court. The Appellant raised 17 grounds of appeal. During the hearing of the appeal which was by way of written submissions, the Appellant condensed the grounds of appeal to three grounds as follows:

a) Liability

b) Burden of Proof, and

c) Quantum

6. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:

> **"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)".**

7. The Respondents called three witnesses. PW1, PC. Charles Ondieki testified that an accident involving motor vehicle registration no. KBC 325J Nissan Sunny driven by Robert Mburu (the Appellant herein) and David Wanjala (deceased) was reported on 1st December, 2008. He produced the Police Abstract which reflects that the matter is "pending under investigations". He could not tell who was to blame for the accident.

8. PW2, Simon Madiala, testified that he alighted from a vehicle at around 11 p.m. and met his friend, the deceased, whom they walked together at the centre island of the road then they decided to cross to the opposite side. Further that he crossed first and left the deceased on the other side still walking at the centre island. That he suddenly heard a loud bang and realized his friend had been hit. That he went back and saw his friend's body lying on the grass at the centre island. He testified that he never heard any vehicle hoot or apply brakes. Further that he never gestured or waved to the deceased to cross the road.

9. On cross-examination PW2, admitted that there was a flyover (footbridge) ahead of them. He denied that the deceased was crossing the road at the material time. He confirmed that he did not see the deceased being hit but only heard loud noise.

10. PW3 Getray Anyango gave evidence on the family's loss following the death of the deceased.

11. DW1, Robert Mburu, the Appellant herein, testified that he was driving on Waiyaki Way from Nairobi towards Kikuyu on the inner lane when after the Uthiru Bridge the deceased appeared from a steep place on the left side of the road. Further that the deceased was staggering and that there was someone on the right who was gesturing. It was his testimony that the deceased was crossing the road and collided with the left headlights of the motor vehicle. He denied that the accident happened on the left side. He further testified that there is a depression on the left and he was not speeding as he was on a climbing lane and there were trees in the area. Further that he immediately applied brakes and tried hooting to avoid hitting the deceased. He further stated that the motor vehicle even left skid marks on the road.

12. On cross-examination, DW1 stated that he was driving at 60 kilometers per hour. He also conceded that he concentrated on the person who was gesturing on the right but denied focusing on him alone. He also denied the assertion that he did not hoot or brake. He further stated that traffic was light and there were no vehicles obstructing his lane.

13. From the evidence of the two witnesses at the scene, it is not clear who to blame for the accident. Both admit the occurrence of the accident but blame each other. They witnessed the accident but cannot give a decisive account of it. It is possible that PW2 did not see how the accident occurred as he has confirmed he only heard a loud bang. Similarly, DW2 may not have seen the deceased as he has also confirmed seeing and concentrating on the person gesturing on the right. Clearly, these are conflicting testimonies. I agree with the trial magistrate that it was not possible to pinpoint who exactly was to blame.

14. I am guided by the Court of Appeal's decision when faced with a similar dilemma in the case of ***Hussein Omar Farah v Lento Agencies [2006] eKLR (Nairobi Civil Appeal No. 34 of 2005)*** where it was observed 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… The trial court, as we have said, had two conflicting versions of how the accident occurred. Both parties insisted that the fault lay with the other side. As no side could establish the fault of the opposite party we would think that liability for the accident could be equally on both the drivers. We therefore hold each driver equally to blame."***

15. I therefore find both the driver and the deceased to blame for the accident. The trial court's finding on liability apportionment at 50:50 is upheld.

16. On quantum, it is important to note that an appellate court would not easily interfere with the trial courts' discretion on this issue unless it found that the trial court applied wrong principles in arriving at the finding. As stated by the Court of Appeal in the case of **Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v A M. Lubia and olive Lubia 91985) 1 KAR 727:**

"....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 court are well settled. The appeal court must be satisfied either that the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages....."

17. The trial court found that a multiplier of 18 years was reasonable having regard to the vicissitudes of life and went ahead to apply a multiplier of 22 years. The deceased died at 38 years. He worked for KK Security at the time.

18. Dependency is a question of fact to be established by way of evidence. In this regard, as stated by the Court of Appeal in the case of **Hellen Waruguru Waweru (suing as the Legal representative of Peter Waweru Mwenja (deceased) v Kiarie shoe Stores Ltd & 2 others [2015] eKLR**:

"The court should find the age and expectation of working life of the deceased and consider the ages and expectations of life of his dependents, the net earning power of the deceased (i.e. his income less tax) and the proportion of his net income which he would have made available for his dependents. From this it should be possible to arrive at the annual value of dependency which must then be capitalized by multiplying by a figure representing so many years ... As emphasized above, the net income determines the multiplicand and it is only net of statutory deductions"

19. In the public sector the retirement age in Kenya is generally 60 years. With the imponderables of life, it is not certain that the deceased would have worked up-to his retirement age. The trial magistrate in adopting 22 years assumed that the deceased would have worked up-to 60 years. I agree with the submissions by the Appellant's side that 22 years is on the higher side. I adopt a multiplier of 18 years as proposed by the Respondent at the trial court.

20. The trial magistrate adopted a multiplicand of Kshs. 28,309 as exhibited in the deceased's pay slip of November 2008. It is contended by the Appellant that the said multiplicand includes items that are not termed as monthly income for example the leave and overtime allowances. PW3, the deceased's wife also confirmed that indeed overtime allowance is not payable always because some days are busy some are not. Further that the leave allowance was paid since the deceased was to proceed for his leave before his demise.

21. I have perused the pay slip for November 2008 and I am in agreement with the Appellant's submissions that indeed a leave allowance of Ksh. 9,000 is included together with overtime payment of Kshs. 1,302.20 and Ksh. 2,778 which does not amount to a monthly salary.

22. The best way to get the multiplicand herein is to deduct the leave, overtime allowance and take into account the tax element. The gross pay including overtime and leave allowance is **Ksh. 31,102/=** The allowances in total is **Ksh. 9,000/= (leave allowance) + Ksh. 1,250/= (leave travel allowance) + Ksh. 4,080/= (1,302.20 +2,778/=) (overtime allowance)** which is equals to **Ksh. 14,330.20.** Gross income is **(Ksh. 31,102 - Kshs.14,330.20) = Ksh. 16,771.80.**

23. A P.A.Y.E of **Ksh. 1,723.20** was charged which is equal to 7.9% of Kshs. 21,902 that was subject to tax. In this case I will apply a P.A.Y.E of 7.9% on the gross income **(Ksh. 16,771.80)**. 7.9% of 16,771.80 equals to **Ksh.1, 324.97**. Net income is gross income less tax. This means that the deductions on the deceased's payslip, i.e N.H.I.F, N.S.S.F and Welfare will form part of net income because they are not tax. The deceased's net pay would then be:

Gross pay…….16,771.80

Add total deductions……...1,070.00

Less P.A.Y.E……..…1,324.97

NET PAY…….<u>16,516.83</u>

24. There is uncontroverted evidence that the deceased was married with two children. I will therefore apply the dependency ratio of 2/3. The damages for loss of expectation of life would be: **Ksh. 16,516.83 x 12 x 2/3 x 18 = Ksh. 2,378,423.52**

25. It is stated that the award of special damages of Kshs. 60,500 was not proved but that only Ksh. 38,000/= was proved. It is trite law that special damages must not only be specifically pleaded but also proved. The Respondent pleaded Ksh. 65,100/=. I have perused the receipts attached and found that the trial court rightly held that Ksh. 60,500/= was proved. I uphold the trial court's finding under this head.

26. This Appeal partially succeeds. The total award herein is as follows:

(a) Pain and suffering Ksh. 50,000.00

(b) Loss of Expectation of Life Kshs. 100,000.00

(c) Loss of Dependency Ksh. 2,378,423.52

(d) Special Damages <u>Kshs. 60,500.00</u>

Total <u>Kshs. 2,588,932.52</u>

Less 50% contribution **Kshs. 1, 294,461.76**

The judgment of the lower court is set aside and substituted with a judgment for the sum of Kshs. **Kshs. 1, 294,462**, costs and interest. Since the Appeal has partially succeeded each party shall bear its own costs of the Appeal.

Dated, signed and delivered at Nairobi this 4th day of November, 2021

B. THURANIRA JADEN

JUDGE