



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 181 OF 2019

1. SALESIO IRERI KARIUNGI

2. ESTHER KARIMI IRERI(Suing as the legal representatives of the Estate of

DENNIS MUCHIRI IRERI (DECEASED).....APPELLANTS

VERSUS

RAPHAEL KURIA.....RESPONDENT

(An appeal from the Judgment of the Senior Principal Magistrate's Court at Kikuyu, D.N. Musyoka, SPM dated 22nd October, 2019

in

SPMCC NO. 212 OF 2016)

JUDGMENT

1. **SALESIO IRERI KARIUNGI** and **ESTHER KARIMI IRERI**, the appellants filed a case before the Senior Principal Magistrate's court at Kikuyu seeking compensation for special and general damages for the fatal accident of their son, **DENNIS MUCHIRI IRERI** (deceased). The deceased, a pedestrian was knocked down by the respondent's vehicle registration NO. **KBC 652D** on 6th September, 2015. The deceased succumbed to his injuries after being taken to hospital for treatment. The trial court by its judgment of 22nd October, 2019 made the following awards:-

(a) Pain and suffering	- Kshs.30,000/=
(b) Loss of expectation of life	- Kshs.100,000/=
(c) Loss of dependency	- Kshs.1,360,000/=
Sub-total	- Kshs. 1,490,000/=
Less 50%	- Kshs. 745,000/=
(d) Special damages	- Kshs.143,429/=
Total	- <u>Ksh. 888,429/=</u>

2. That judgment aggrieved both the appellants and the respondent. They filed an appeal and cross appeal against that judgment.

FACTUAL BACKGROUND

3. The deceased, a pedestrian was knocked down by respondent's vehicle while he crossed the road on Waiyaki way. Both parties confirm

that the accident occurred in the middle of the road. It occurred at 20.00 hours. The respondent stated in his evidence that while he approached Uthiru 87 trading centre, which is along Waiyaki way, he noted a Public Service Vehicle (PSV) slowdown in order to stop at designated bus stop. He slowed down and changed from the outer to the inner lane. The following is what he stated in evidence in chief:-

“As I passed the now parked PSC on my left, I suddenly saw the deceased in the middle of my lane at what looked like an attempt to cross the road. I applied my brakes and hooted but due to the close proximity, I knocked down the deceased.”

4. The trial court by its judgment had this to say on liability:-

“I find that both the deceased and the defendant (the respondent hereof) were negligent and I do hold them 50%:50% liable for the accident that took away the life of the deceased.”

5. The appellant has brought the following grounds of **appeal**:-

“(a) That the learned magistrate erred in law and fact ignoring (sic the plaintiffs’ (appellant’s) evidence on the deceased’s earning.

(b) That the learned magistrate erred by ignoring the plaintiffs’ evidence in arriving at his decision on liability.

(c) That the learned magistrate erred in law and in fact in failing to award interest on special damages which stood undisputed.”

6. The respondent raised the following grounds in his **cross appeal**:-

“(a) The learned trial magistrate erred in holding the respondent 50% liable instead of dismissing the suit against the respondent.

(b) The learned trial magistrate erred in failing to give due weight to the circumstances of the accident as explained by the respondent whose evidence was the only version of events on record which was uncontroverted.

(c) The learned trial magistrate erred in law and fact in failing to attach due weight to respondent’s evidence and submissions and authorities attached to.

(d) The learned trial magistrate erred in law and fact in assessing and awarding general and special damages where in the appellant(s) failed to prove her (sic) case.

ANALYSIS

7. As the first appellate court, this Court is expected to subject the trial court’s evidence to fresh and exhaustive scrutiny and to reach its own conclusion bearing in mind that this Court neither saw nor heard the witnesses testify: see the case of **SELLE & ANOTHER VS. ASSOCIATED MOTOR BOAT CO. LTD & OTHERS (1968) EA 123.**

8. The issues for consideration in this appeal and the cross appeal, and which flow from the above parties’ grounds are: -

(a) Whether the trial court erred in determining liability.

(b) Whether the trial court erred in failing to take into account the deceased’s earning.

(c) Whether the trial court erred in not awarding interest on special damages.

LIABILITY

9. On liability, the pertinent evidence was that of the respondent and the insurance investigator’s report, exhibited by the respondent.

10. It will be recalled that I reproduced hereinabove what the respondent stated in his evidence in chief. To reiterate, the respondent’s evidence was that he noted the PSV slow down at a designated bus stop. The respondent stated that he in turn slowed down. But it is what he did after slowing down that is material to determine liability. The respondent said that on slowing down, he began and did change his lane from the out lane to the “innermost” lane.

11. The insurance investigator’s report was crucial in understanding the action taken by the respondent when the PSV stopped at a bus stop. The Waiyaki Way, according to the insurance investigator’s report, is a dual carriage way. That road has a demarcation of the central Island made of cement blocks. The report further stated:-

“There is a gap in the blocks to allow pedestrian crossing and there isn’t a zebra crossing.”

12. The respondent’s evidence and the sketch map attached to the investigation report show that the deceased was knocked by the respondent’s vehicle while he was in the middle of the “innermost lane”.

13. The investigator's sketch map shows that the deceased had crossed the road from the middle concreted island, was halfway into the inner lane when the respondent, who was blocked by the PSV, which stopped at a bus stop, changed lanes into the inner lane where the deceased was in the process of crossing the road.

14. That is what the respondent stated in his statement, and again I will reiterate as follow:-

“As I passed the now parked PSV on my left, I suddenly saw the deceased in the middle of my lane at what looked like an attempt to cross the road.”

15. The respondent then described how he attempted to break to hoot but due to his close proximity to the deceased, he knocked him down.

16. From the above evidence, it is clear the deceased began to cross the road on the inner lane when there was no vehicle approaching and while he was half way through that lane, the respondent in what seemed to have been his intent **not** to stop behind the PSV which stopped at the bus stop, changed lanes only to meet the deceased who was already halfway through that lane crossing the road.

17. I reject the respondent's argument that there was no concrete evidence to distinguish the blame and I therefore find that the holding on the case ***SALMIN MBARAK AWADHI VS. EMMA NTHOKI MUTWOTA (2017) eKLR*** not applicable to the facts of this case.

18. The respondent had a reasonability to ensure that it was safe to change lanes. It is obvious that he did not so ensure and hence why he stated that he suddenly saw the deceased crossing the road. It is the respondent in changing lanes who found the deceased already in the process of crossing the road. It is also obvious from the respondent's own narration of how the accident occurred that the respondent, as he changed lanes from the outer into the inner lane was travelling at high speed. This is explained by the respondent's own statement that he saw the deceased suddenly and although he tried to break, hoot he knocked the deceased because of the close proximity.

19. On consideration of the above discussion, I find the trial court erred to find that liability for the accident was 50:50%. In my view, liability ought to have been at 90:10% in favour of the appellant.

DECEASED'S EARNINGS

20. Appellant by the plaint filed before the trial court claimed that the deceased was 21 years old, a casual labourer earning Khss.1,500 per day when he died. However, when the appellant ***Salesio Ileri Kariungi*** testified before court, he stated that he could not “tell how much” the deceased earned. Appellants called ***Michael Kamau Kiige*** as a witness. This witness stated that he was a professional mason earning between Kshs.1000 and Kshs.1500 per day, depending on construction where one works. This witness stated that the deceased was known to him, they worked together earning between Kshs.1,000 and Kshs.1,500 per day. The witness also stated that it was him who paid the deceased and the workers, as their foreman. He stated before his death the deceased and him were working in the same construction site whereby he paid the deceased Khss.1,200/= per day. The following was the evidence of this witness:

“In the jua kali (informal) sector, there is no record of what goes on. Employer gives you money and you pay workers as agreed.”

21. The witness who described himself as the foreman of the deceased was very sketchy in where and when they worked together with the deceased. He was unable to state where, if at all, he last worked with the deceased. It follows that the appellants failed to shift the burden of proof to prove that the deceased worked at a construction site earning Kshs.1,200 per day. It would however seem that the deceased worked in the informal sector where it is not possible to state what the salary was. In such circumstances, the trial court cannot be faulted for having adopted Kshs.10,000/= per month as the deceased's salary. It follows that the trial court's award of loss of expectation of life will not be disturbed in this appeal. This issue fails.

INTEREST ON SPECIAL DAMAGES

22. The trial court did not award interest by its judgment. The appellants having proved their claim in special damages they were entitled to interest at court rate from the date of filing suit until payment in full. This indeed is the jurisprudence set out in the decided cases. One such case is ***HEINZ BROES V BUSCAR (K) LTD & OTHERS (2019) eKLR*** as follows:-

“In the case of FRANCIS JOSEPH KAMAU LEATHA VS HOUSING FINANCE COMPANY OF KENYA LTD [2015] eKLR, Odunga J held that interest therein would accrue from the date of filing judgment. He had due regard to the case of LWANGA VS CENTENARY RURAL DEVELOPMENT BANK [1999] 1 EA 175 where it was held that:-

“The award of interest prior to the institution of the suit is rationalised in two ways: (1). that the plaintiff is thereby being compensated for being kept out of his money. He has been deprived of the use of his money from the time he incurred his loss. On that basis, interest is to run from that date. (2). that the defendant wrongfully withheld the plaintiff's money. The emphasis here is on the Defendant's wrongful withholding of the Plaintiff's money. On that basis, interest is to run from the date when the Defendant ought reasonably to have settled the plaintiff's claim. This is rather punitive.”

The payment of interest on general damages from the date of judgment has been settled by the Court of Appeal in the cases of SHARIEF SALIM & ANOTHER VS MALUNDU KIKAVA [1989] eKLR and ROYAL MEDIA SERVICES LTD & ANOTHER VS HON JAKOYO MIDIWO [2018] eKLR amongst other cases.

23. In particular in the case of SHARIFF SALIM & ANOTHER VS MALUNDU KIKAVA [1989] eKLR (Supra), the Court of Appeal rendered itself as follows: -

‘There is no gainsaying the fact under Section 26 of the Civil Procedure Act, the award of interest on a decree for the payment of money for the period from the date of the suit to the date of the decree is a matter entirely within the discretion of the court. But this discretion being a judicial one must be exercised judicially. The whole idea at the end of the day is to do justice to both parties. In the case of PREMA LATA VS PETER MUSA MBIYU [1965] EA 592, the appellant, in a suit for damages for personal injuries, was awarded Kshs 24,000, as general damages and Kshs 1,742.80 as special damages but the judge refused an application to award interest on these two sums from the date of filing suit until judgment. On appeal, the Court of Appeal for East Africa held that in personal injury cases, interest on general damages should not be awarded for the period between the date of filing suit and judgment but that interest should normally be awarded on special damages if the amount claimed has been actually expended or incurred at the date of filing the suit...’”

23. Accordingly, from the above decisions, the trial court erred in failing to award interest on special damages without assigning any reason for not doing so.

DISPOSITION

24. Following the above finding, the trial court’s judgment is upheld except for apportionment of liability for the accident which this Court finds and holds is 90:10% in favour of the appellants.

25. For the avoidance of doubt, the following is the judgment for the appellants:-

a) Pain and suffering	– Kshs.30,0000/=
b) Loss of expectation of life	– Kshs.100,000/=
c) Loss of dependency	– Kshs.1,360,000/=
Sub-total	- Kshs.1,490,000/=
Less 10%	- Kshs.149,000/=
d) Special damages	- Kshs.143,429/=
Total	- Ksh.1,484,429/=

26. Interest is awarded to appellants at court rate from date of filing the case before the trial court until payment in full on the award of special damages.

27. Interest is awarded to appellants at court rate on the award in general damages from date of the trial court’s judgment until payment in full.

28. The appellants are awarded costs of the trial court and costs of this appeal.

JUDGMENT DATED AND DELIVERED AT KIAMBU THIS 2ND DAY OF DECEMBER, 2021.

MARY KASANGO

JUDGE

Coram:

COURT ASSISTANT: MAURICE

FOR THE APPELLANTS : MS. MUGO HOLDING BRIEF FOR MR. WAMBUGU

FOR THE RESPONDENT: MS. MSHILLA HOLDING BRIEF FOR MS. SEREM

COURT

JUDGMENT DELIVERED VIRTUALLY.

MARY KASANGO

JUDGE