



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 1 OF 2017

EMMANUEL MBURU..... 1ST APPELLANT

MECH INVESTMENTS..... 2ND APPELLANT

-VERSUS-

PAUL MUASYA NDIVE & ANNE NGUSYE MUNGUTI

(Suing as legal representatives of the estate of STEPHEN KYALO MUASYA *alias*

KYALO STEPHEN MUASYA-DECEASED RESPONDENT

[An appeal from the Judgment of Hon. C.A. Ocharo (Senior Principal Magistrate) delivered on 6.12.2016 in Civil Case No. 291 of 2015 before the Chief Magistrate's Court at Machakos]

BETWEEN

PAUL MUASYA NDIVE & ANNE NGUSYE MUNGUTI

(Suing as legal representatives of the estate of STEPHEN KYALO MUASYA *alias*

KYALO STEPHEN MUASYA -DECEASED)PLAINTIFF

-VERSUS-

EMMANUEL MBURU1ST DEFENDANT

MECH INVESTMENTS.....2ND DEFENDANT

JUDGEMENT

1. According to the pleadings in the trial court, the deceased was 28 years old when he died as a result of a road accident and an action was brought in the Chief Magistrates Court at Machakos through his father and wife, as a legal representatives against the appellants jointly and severally for damages for loss of dependency, loss of expectation of life and pain and suffering under the Fatal Accidents Act and the Law Reform Act as well as special damages due to negligence.

2. It was pleaded that on 15.3.2014 the deceased was a passenger aboard vehicle KBD 322G along Mua-Hills- Kitanga road which vehicle was registered in the names of the appellants and that the deceased was involved in a self-involving accident that he suffered fatal injuries. The respondent pleaded *res ipsa loquitur*. The 1st and 2nd appellants filed a memorandum of appearance but no defence hence interlocutory judgement was entered against them.

3. The suit proceeded for hearing on **20.9.2015** where the Respondents and a police officer testified and the respondents closed their case.

4. Parties filed submissions and the court delivered judgement on **6.12.2016** in which Hon. C.A Ocharo held the Appellants 100% liable for the accident and awarded the Respondent damages amounting to **Kshs. 2,550,699/-**.

5. This appeal is against the finding of the trial court. The contents of the appellant's appeal are set out in the memorandum of appeal filed on 5.1.2017 that challenged the finding on liability as well as quantum. Counsel prayed that the judgement of the trial court be set aside and

appropriate orders be made.

6. The appeal was canvassed vide written submissions. Counsel for the appellant filed submissions on 17.7. 2019 and submitted on the issue of quantum and liability. Learned counsel submitted that there was no evidence of earnings of the deceased hence the minimum wage of Kshs 9,372/- ought to have been applied. It was submitted that the award of damages was too high. On the issue of liability, counsel submitted that Pw1 and Pw2's evidence was not an eye witness account and that the abstract was not evidence of how the accident occurred. Counsel offered Kshs 1,355,619 as damages.

7. There are no submissions on the part of the respondent.

8. This being a first appeal this court's role as the first appellate court is to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court saw and heard the parties and giving allowance for that so as to reach an independent conclusion as to whether to uphold the judgment. This was observed in the case of **Selle v Associated Motor Boat Co. [1968] EA 123**.

9. Without going to the merits of the appeal, I note that the factual foundation of the appellant's case in the trial court is lacking. This is because no defence had been filed and that the interlocutory judgement that was passed against the appellants had not been set aside. It is trite law that the pleadings are the foundation of a case and anyone who seeks to approach the court in respect of a matter before the court ought to do so and in so far as this matter is concerned, by filing a defence. In **Captain Harry Gandy v Caspair Air Charter Ltd. (1956) 23 EACA 139**, Sir Ronald Sinclair said:

"The object of pleadings is of course, to ensure that both parties shall know what are the points in issue between them, so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent."

The Appellants having failed to file a statement of defence to the claim and failing to participate in the trial left no doubt that the respondent's evidence was uncontroverted. The copy of records confirmed that the 1st appellant was the owner of the accident vehicle. The trial court was right in finding the appellants 100% liable in damages. Hence the finding on liability was sound and I see no reason to disturb it. Suffice to add that the interlocutory judgement against the appellants has never been set aside to date.

10. As regards the quantum of damages I note that the learned magistrate awarded Kshs 100,000/ for pain and suffering. It was confirmed that the deceased remained in hospital for about three weeks before passing on and therefore he must have undergone excruciating pain. The conventional sums awardable under this head of damage ranges from 10,000/ to 150,000/ depending on the period the victim took before passing on. I find the amounts reasonable and there is no need to disturb it. On loss of expectation of life the sum of Kshs 10,000/ awarded is reasonable. On loss of dependency a multiplicand of 9,450/ per month for an unskilled labour as there were no proof of income was appropriate in my view. A multiplier of 30 years adopted by the trial court is fair since the deceased died at the age of 28 years and as he was supporting his immediate family comprising of a wife, two children and parents a dependency ratio of 2/3 was quite in order thereby coming to a total sum of Kshs 2,268,000/. On special damages the sum of Kshs 82,699/ was pleaded and that receipts for the said sum were produced and thus the said sum is awarded. The total sum of Kshs 2,550,699/ plus costs and interest was properly arrived at by the trial court. I see no reason to disturb the same.

11. In the result it is my finding that the appeal herein lacks merit and is hereby dismissed with costs to the respondents.

It is so ordered.

Dated and delivered at Machakos this 4th day of February 2020.

D. K. Kemei

Judge