



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 90 OF 2015

(Being an appeal from the original judgement and decree of Hon. Wahome, Principal Magistrate, of 12th November 2015 in Kakamega CMCCC No. 533 of 2006)

ANTONY NYAGAH.....APPELLANT

VERSUS

JOHN KIMANI GITAURESPONDENT

JUDGMENT

1. The suit at the trial court, in Kakamega CMCCC No. 533 of 2006, was initiated by the respondent herein against the appellant, for general and special damages, arising from a road traffic accident that occurred on 21st August 2005, involving a motor vehicle, belonging to the appellant, that the deceased wife was travelling in as a fare paying passenger, and she died as a consequence thereof. The respondent attributed negligence on the part of the appellant's driver, and sought damages under both the Law Reform Act, Cap 26, Laws of Kenya, and the Fatal Accidents Act, Cap 32, Laws of Kenya.

2. The respondents filed a defence, essentially denying liability.

3. At the oral hearing only the respondent and his witnesses testified. The respondent stated that the deceased was his widow. He was informed that she had died in an accident. She was 42 years old, and a mother of five children, aged between eighteen and twenty-five. He explained that she used to run a business at Vihiga, whose monthly profit was about Kshs. 110, 000.00. The business was unfortunately destroyed during the post-election violence of 2007/2008. He said that he spent Kshs. 200, 000.00 for her funeral, but he did not produce any receipts for they were destroyed during the election violence. He called an eyewitness who stated that he saw the vehicle roll, he went to the scene to assist, and noted that one woman had died on the spot. A police witness confirmed the accident and stated that the deceased died in it.

4. After reviewing the evidence adduced at the trial and other material on record, the trial court held that the deceased was a passenger in the vehicle, which was self-involving, and, therefore, the appellant was 100% liable, and awarded damages as follows:

- (a) Pain and sufferingKshs. 30, 000.00;
- (b) Loss of expectation of life.....Kshs. 150, 000.00;
- (c) Loss of dependencyKshs. 3, 600, 000.00

TOTAL Kshs. 3, 780, 000.00.

5. The appellant was aggrieved by the decision, and lodged this appeal. His case, as articulated in his memorandum of appeal, dated 19th November 2015, is that the trial court awarded special damages when the same had not been pleaded nor proven, the trial court made an award which was above the maximum allowed by statute, the trial court erred in finding that the respondent's case had been proved on a balance of probability, the trial court had erred in calculating the earnings of the deceased, the multiplier adopted was excessive and was not founded on the pleadings or evidence, the court took into account extraneous facts that were not before the court, and the respondent was awarded double compensation .

6. Directions were taken on 31st October 2019, for disposal of the matter by way of written submissions. Both sides have complied with those directions by filing their respective written submissions.

7. The appellants written submissions are dated 4th December 2019. In the written submissions, the appellant submits that the ownership of the accident vehicle was not established as no police abstract, nor records from the registrar of motor vehicles, were produced, and, therefore,

it was not established that the accident vehicle belonged to the appellant, so as to attach liability to him. The appellant has cited *JRS Group Limited vs. Kennedy Odhiambo Andwak* [2016] eKLR, to support his position. With regard to quantum, the appellant has raised a number of issues. Firstly, he submits that there was no proof of the earnings of the deceased nor that she was engaged in any business. No licences were produced or bank account records or tax records. The appellant has no issue with the figure of Kshs. 30, 000.00, awarded for pain and suffering, but submits that for loss of expectation of life the conventional figure ought to have been Kshs. 100, 000.00 at the time. On loss of dependency, it is submitted that there was no evidential basis for arriving at the conclusion that the deceased earned Kshs. 6,000.00 per day. He submits that the court should have calculated loss of dependency based on the minimum wage at that time, which would have yielded a figure of Kshs. 1, 080, 000.00.

8. On his part, the respondent, submits that the judgement entered by the trial court was fair considering all the circumstances.

9. On liability, I note that the respondent did not produce any document that linked the appellant with the accident vehicle. Copy of records from the registrar of motor vehicles or copy of a logbook or even the police abstract was produced. Some evidence was necessary to establish that the motor vehicle in question belonged to the appellant at the material time. No such evidence was presented. The appellant did not present any evidence at the trial, but that did not absolve the respondent of the obligation to connect the appellant to the accident vehicle. I note too that the court did not address its mind to the matter of ownership of the subject vehicle. The respondent did not address the matter at all in his written submissions. The importance of such proof is underscored in the authorities cited by the appellant, *JRS Group Limited vs. Kennedy Odhiambo Andwak* (supra) and *Ignatius Makau Mutisya vs. Reuben Musyoki Muli* [2015] eKLR. With regard to the cause of action, there was clearly no proof that the subject vehicle belonged to the appellant at the material time, and, therefore, it was not established that the appellant bore liability for the accident.

10. On quantum, the appellant argued on only two items, loss of expectation of life and loss of dependency. On loss of expectation of life, he submitted that the proper figure to award should have been Kshs. 100, 000.00, the conventional figure then. He did not cite any authorities to support that contention, and I would not interfere with what the trial court awarded. On loss of dependency, the main thrust of his case is lack of proof of the business that the deceased was running as at the time of her death and of the sort of income she was making from that business or trade. I agree entirely with the appellant. No iota of proof was presented with respect to those two. There was, therefore, no basis for the use of the figures that the trial worked with to arrive at the award for loss of dependency. I would agree with the appellant, that in the absence of proof the trial court ought to have worked with the figure for minimum wage applicable at that time.

11. My conclusion is that the respondent did not prove his case to the required standard for the reasons given above. The trial court ought to have dismissed the suit before it. I find that the appeal herein has merit, and I allow it, with the result that the suit in Kakamega CMCCC No. 533 of 2006 is hereby dismissed. Each party shall bear their own costs, both here and at the court below.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 8TH DAY OF MAY, 2020

W. MUSYOKA

JUDGE