



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO.198 OF 2018

TRAKANA MOMBASA LIMITED.....1ST APPELLANT

DEDA JAJI NZUYA.....2ND APPELLANT

-VERSUS-

GEORGE AMWAYI ISAYA.....RESPONDENT

(Being an Appeal from the Judgment/Decree of Hon. Wahome, Chief Magistrate, Molo delivered on 11th December 2018 in Molo CMCC No.127 of 2018)

JUDGMENT

BACKGROUND

1. This appeal arises from suit filed by the plaintiff in the lower court in his capacity as legal representative of late **Jonathan Kiplagat Changwony (Deceased)** who died after being hit by the 1st defendant's vehicle which was being driven by the 2nd defendant. The plaintiff sought the following prayers: -

- a. General damages under Fatal Accident's Act (Cap 32 of the Laws of Kenya) for the benefit of the estate of the deceased, damages under Law Reform Act (Cap20 of the Laws of Kenya).
- b. Special damages.
- c. Interest on (a) and (b) above.

2. The plaintiff availed five witnesses. After hearing, by judgment delivered on 11th December 2018, the trial magistrate apportioned liability at 10:90 in favour of the plaintiff. He assessed as follows: -

- a. Pain and suffering.....kshs 50,000
- b. Loss of expectation of life.....kshs 150,000
- c. Loss of dependency.....kshs 6,000,000
- d. Subtotal.....kshs 6,200,000
- e. Less 10%.....kshs 620,000
- f. Total.....kshs 5,580,000
- g. Special damages.....kshs 165,550.
- h. Costs and interest until payment in full.

3. The defendants/appellants being aggrieved by the said determination filed appeal against both liability and damages awarded on the following grounds: -

i. That the learned trial magistrate erred in law and fact in finding the Appellant 90% liable when there was evidence to support such finding on liability for the subject accident thereby imposing upon the appellant liability beyond the scope or magnitude envisaged or tenable in law.

ii. That the learned magistrate erred in law and in fact in holding the Appellant liable on the basis, not of evidence adduced by the parties, but rather on the basis of surmise and assumptions supported by the proceedings of the court and therefore the holding on liability is untenable.

iii. That the learned magistrate erred in law and in fact by disregarding the normal course of human event in finding without any evidential basis that the Appellant's motor vehicle would just leave the road, knock the respondent and go back to the road without any demonstrated cause.

iv. That the learned magistrate erred in law and in fact in seeming to import and apply the strict liability on the driver of the subject motor vehicle, the 2nd appellant when there was no pleading of that cause of action and imposing what appears strict liability and unnecessary burden on the appellants.

v. That the learned magistrate erred in law and in fact in making awards on damages for pain and suffering and other awards that are manifestly high, exaggerated, uneconomical, punitive, ruinous, unsubstantiated and in violation of principles of making an award of damages in cases of the nature of the instant suit.

vi. That the learned magistrate erred in law and fact by making award of damages for loss of dependency on the presumption that the respondent were totally and/or only dependent on the deceased when there was no such pleading and or conclusive and reliable medical evidence in that respect.

vii. That the learned magistrate erred in law and fact in making duplicate award under Law Reform Act and Fatal Accident Act without taking the awards against each other.

viii. That the learned trial magistrate erred in making unsubstantiated special damages which were never pleaded and or proved as required in the circumstances and in law.

4. Parties agreed to proceed in HCCA No.196 of 2018 a matter arising from the same accident together with HCCA No.198 of 2018.

5. I allowed appeal on liability and made apportioned liability at 20: 80 in favour of the plaintiff. I adopt the same finding on liability in this matter.

6. Similar submissions were made in HCCA No.197 of 2018. I will adopt submissions as captured in that file. I also adopt my analysis in respect to issues raised for appeal in respect to duplicate awards and looks at award under each head in this matter.

7. In respect to award under loss of dependency, kshs.30,000 was adopted as monthly earnings. Evidence adduced was that the deceased was a farmer earning kshs.80,000 but court indicated that on keen scrutiny he was a farmer earning kshs.30,000 a month and also noted that oral evidence was adduced to the effect that he was a taxi driver and running a bar earning kshs.30,000. Court found that kshs.30,000 was not exaggerated for a taxi driver cum businessman.

8. On multiplier the plaintiff had proposed 35 years while the defendant proposed 18 years. From the death certificate the deceased was aged 30 years. In my view for a personal in business a multiplier of 25 years is reasonable. I will not therefore interfere with that finding.

9. On multiplicand I note that the deceased was married with one child. Evidence adduced is that he was relied on by his family. A ratio of 2/3 in the circumstances is reasonable. I will not also interfere with that finding.

10. On special damages, I note from record that the respondent produced a bundle 7 receipts for funeral expenses totalling up to kshs.125,300. The receipts were not challenged by defence. I have no reason to doubt the said expenses and will not interfere with award under that head.

11. **FINAL ORDERS**

1. Liability apportioned at 20:80 in favour of the plaintiff

2. Appeal on damages dismissed

3. Total award to be subjected to 20% contribution

4. Each party to bear own costs.

Judgment dated, signed and delivered via zoom at Nakuru This 7th day of May, 2020

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RACHEL NGETICH

JUDGE

In the presence of:

Schola - Court Assistant

Mr. Kisila Counsel for Appellants

Oganda holding brief for Gekonga Counsel for Respondent