



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO.115 OF 2015

CROWN BUS SERVICES LIMITED.....APPELLANT

-VERSUS-

JUDITH WERE MUKANI (Suing as the Administrator of the Estate of

MOSES ONGANGA WAFULA (DECEASED).....RESPONDENT

(Being an Appeal from the Judgment and Decree delivered by the Hon. J. Ngeno Chief Magistrate on the 8th September 2015 in Nakuru CMCC No.89 of 2013).

JUDGMENT

INTRODUCTION

1. The Respondent/Plaintiff herein filed suit against the Appellant seeking general and special damages for the death of **Moses Onganga Wafula**. He died as a result of an accident involving motor vehicle registration number KBF 922B which collided with the Appellant's/Defendant's motor vehicle registration number KAW 938F on 11th June 2011. The trial magistrate found the Appellant/Defendant 100% liable for the accident. He assessed damages at Kshs.5,064,462. He also awarded costs and interest.

2. The appellant being aggrieved by decision of the trial magistrate, filed this appeal on the following grounds:-

i. The learned Magistrate erred in law and in fact in holding that the Appellant's driver was 100% liable for the accident, which finding was against the weight of the evidence on record.

ii. The learned Magistrate erred in fact and in law in finding that the Appellant's driver was driving the accident motor vehicle at an excessive speed of the motor vehicle when no such evidence was placed before the court.

iii. The learned Magistrate erred in fact and in law in failing to give due weight and relevance to the evidence of DW1 and DW2 and casually holding that because the appellant's driver pushed the deceased's motor vehicle registration number KBF 922B for 80 metres then he must have been driving at an excessive speed and hence to blame for the accident.

iv. The learned magistrate erred in law in laying blame on the Appellant's driver on the basis that he had failed to swerve to the right when it was clear from the nature of the road that such a move would expose him to further accident with the oncoming traffic.

v. The learned Magistrate erred in law in and in fact in failing to value the evidence of DW1 as independent in nature which evidence was clear that the deceased's driver of motor vehicle registration number KBF 922B was to blame for the accident.

vi. The learned Magistrate erred in law and in fact in failing to deduct the sum of Kshs.220,000 awarded to the Estate under the Law Reform Act which amounted to a double award in law as the dependants under the Fatal Accidents Act in whose favour the award for Loss of Dependency was made were the same as the beneficiaries for the Deceased's Estate.

vii. The learned Magistrate erred in law in failing to consider the conventional awards for general damages in cases of similar nature and on the application of the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act No.50 of 2013 in the assessment of damages and award the maximum of Kshs.3,000,000 as provided by law.

viii. The learned Magistrate erred in law and in fact in failing to consider and/or give due weight to the Appellant's submissions on

the issues for trial before the court and in particular on the issues of liability and quantum of damages.

SUBMISSIONS BY APPELLANT

3. Appellant submitted that the respondent failed to discharge burden of proof for negligence. Appellant quoted summary of evidence on record by PW1 PC Hellen Owala as hereunder:-

“the saloon car KBF 992B seemed to have lost control and swerved to the right side lane where it collided head on with the bus and was trapped under the bus; that the saloon car seemed to have been in high speed. That the skid marks of the bus were at the scene showing that the bus tried to apply emergency breaks but could not move off the road as the scene was at a bridge. Further that the impact was on the lane of vehicles heading to Nairobi and blamed motor vehicle registration number KBF 992B and recommended inquest to be done before a magistrate.”

4. The Appellant submitted that PW1 reiterated evidence set out above on cross-examination. Appellant added that DW1 testified that on approaching Nakuru at Mbaruk area, he saw the respondent’s vehicle moving from the opposite direction in a zigzag manner and suddenly changed lanes onto the appellant’s lawful lane resulting in head on collision; that the appellant tried to apply brakes but it was too late.

5. Appellant further submitted that despite this overwhelming evidence absolving the Appellant from blame, the trial magistrate found him 100% liable. Appellant added that from the judgment, the trial magistrate arrived at the determination on liability on the basis that after collision, the Appellant’s vehicle pushed the Respondent’s vehicle for a distance of 80 meters; Appellant’s argument is that, that is not *prima facie* evidence of high speed. Further, that DW1’s evidence of driving at 70 km per hour has not been controverted and on the contrary the police investigation concluded that the deceased was driving at high speed.

6. Appellant submitted the accident occurred at the Appellant lane after the Respondent’s vehicle veered off its lane and joined the Appellant’s lane. Appellant submitted that had the deceased stuck to his lane, the accident would not have occurred.

7. Appellant further submitted that impact on the salon car was expected to be heavier as the saloon car is lighter than the bus which was loaded with about 40 passengers. Appellant relied on the case of **Sammy Ngigi Mwaura Vs John Mbugua Kagai [2006]eKLR** where the court of appeal held that mere collision of two vehicles or a vehicle and a person by itself without proof of negligence is insufficient to establish liability.

8. Appellant further submitted that the trial magistrate failed to take into consideration **Section 5(b)** as read with **Section 10 of insurance Act**, which places cap on award payable on compensation under the Insurance (motor vehicle third party) Risks Act at 3,000,000.

RESPONDENT’S SUBMISSIONS

9. In response, the Respondent submitted that all 5 occupants of the saloon vehicle sustained serious injuries and due to their demise, it was impossible to get an independent version as to the real cause of the accident

10. Respondent supported the trial court on liability. Respondent submitted that on the respondent noticing the saloon car, the driver applied brakes and moved 20 meters before the point of impact and thereafter pushed the saloon car back by 79.8 meaning the driver covered 100 meters and the only logical conclusion is that he was over speeding as per evidence of PW1.

11. He further submitted that as per DW2 the driver of the bus had full lights on instead of deeming, which interfered with the ability of saloon driver to see the road properly.

12. On damages the respondent cited the case of **Kemfro Africa Limited T/A Meru Express Services, Gathogo Kanini Vs M.M.Lubia & Another [1998]eKLR** where the court held as follows:-

“....It must be satisfied that either the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

13. On loss of dependency Respondent submitted that the trial court adopted the proposal by defence and awarded the estate of the deceased Kshs.4,829,462. On multiplier, the Respondent submitted that the deceased was 37 years old at the time of the accident and he would have worked for 23 years before retire. He urged court to enhance multiplier from 12 to 23 years.

14. On deceased’s earnings respondent urged court to enhance the net pay to 77,062.80 being average net pay for 2 months and multiplicand to 2/3 as the deceased was survived by a widow and five children; that the findings under pain and suffering and loss of expectation of life are reasonable.

15. On awards being capped at 3 million, respondent submitted that the respondent misinterpreted provisions of insurance (motor vehicle third party risks (amendment) Act.

ANALYSIS AND DETERMINATION

16. I have considered arguments by parties herein. This being the first appellate court, this court is required to reevaluate evidence adduced and arrive at an independent determination. This I do while minded of the fact that I never got the opportunity of taking evidence first hand

and will therefore give due allowance.

17. From record PW1 said that from the police file, the salon car swerved onto the oncoming vehicle's lane and skid marks show that the bus tried to brake and that the accident took place in a bridge. He concluded that the driver of KBF 992B was wholly to blame. However, in cross-examination, PW1 said that the accident was pending under investigation; final findings were yet to be made. He said the skid marks were 16.8 meters before the point of impact and the bus driver may have been doing high speed.

18. On the issue of liability, it is evident that final findings of investigations were not available to the court at the time of hearing. Preliminary investigations as per PW1's evidence were that the salon vehicle veered off its lane. On the other hand, the bus driver saw the saloon car moving in a zigzag manner at a distance of not less than 16.8 meters. The bus driver in cross-examination said that his stop distance would have been 10.15 meters and that he noticed the oncoming vehicle at a distance of 20 meters. If he was indeed moving at a speed of 70 kilometers per hour the question that to follow was, was he not able to control the vehicle at a distance of 10.15 as he said; the fact that he moved to a distance of 79.8 meters after the impact confirm that the speed was higher than 70 km/hr. Even though it is indicated that the accident occurred at a bridge and the bus driver could not swerve if he managed to bring the vehicle to a stop, the impact if not avoid collision. I find that the bus driver contributed to a greater extend to the accident

19. From record, I note that apart from the bus driver no other eyewitness testified. Though PW1 said a passenger in the bus recorded statement, he never adduced evidence.

20. From the foregoing, I find that it would be appropriate to apportion liability and do apportion at 30:70 in favour of Plaintiff. Plaintiff/Respondent to shoulder 30% and Defendant/Appellant 70%.

21. In so far as quantum is concerned, I note that the deceased's Net Pay was Kshs.67,062.80. This is what the court applied. I will not interfere with the same. On multiplier death certificate confirm that the deceased died at the age of 37 years. The court applied a multiplier of 18 years, which I find reasonable and will not interfere.

22. In respect to multiplicand, the court applied ½(half). My view is that since the deceased had a wife and 5 children most of his money would go to his family. I find that a multiplier of 2/3 would be appropriate; thus award under loss of dependency will be as follows:-
 $67.062.80 \times 18 \times 12 \times 2/3 \dots\dots\dots 9,657,043.20$

23. Damages will therefore be as follows:-

1. Pain and suffering.....	20,000
2. Loss of expectation of life.....	200,0000
3. Loss of dependency.....	9,657,043.20
4. Special damages.....	15,000
GRAND TOTAL.....	9, 892,043.20
Less 30 %.....	(2,967,612.96)
NET.....	6,924,430.20

24. FINAL ORDERS

1. Appeal on liability is allowed. liability apportioned at 30:70 in favour of plaintiff/respondent
2. Appeal on award under loss of dependency is allowed. Multiplicand of 2/3 to apply. Loss of dependency reassess at Kshs.9,657,043.20.
3. Judgment delivered on 8th September, 2015 is set aside.
4. Judgment entered for plaintiff/respondent against the defendant for kshs 6,924,430.20.
5. Each party to bear own costs of appeal.
6. Cost of trial court to the respondent/plaintiff.

Judgment Dated, signed and delivered at Nakuru this 13th day of June, 2019.

.....
RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Schola/ Jared Court Assistant

Ms. Wanjiru holding brief for Mr. Kuina Counsel for Appellant

N/A Counsel for Respondent