



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 58 OF 2018

MULTIPLE HAULERS TRANSPORTERS (EA) LTD.....APPELLANT

VERSUS

JOSEPHINE NZIOKA MUIA (Suing as the legal representative of the Estate of

JOSEPH NZIOKA MUIA-Deceased).....RESPONDENT

(Being an appeal from the judgment of Honourable P.N. Gesora (Mr.) (Chief Magistrate)

delivered on 11th January, 2018 in CMCC NO. 6014 of 2012)

JUDGEMENT

1. The respondent instituted Civil Suit No. 6014 of 2012 on behalf of the estate of the estate of Joseph Nzioka Muia, deceased, seeking for general and special damages against the appellant herein.
2. It was pleaded in the plaint dated 24th April, 2007 and amended on 10th November, 2015 that the appellant was at all material times the registered owner of Mercedes Benz Lorry, registration number KAE 764Y (*the subject vehicle*) and that sometime on or about 23rd January, 2005 while travelling along Nairobi-Mombasa Road aboard motor vehicle registration number KAR 344W, the deceased was involved in a fatal accident involving the aforesaid vehicle and the subject vehicle.
3. The respondent has blamed the appellant's driver and/or its agent, pleading that the subject vehicle was so negligently driven that it lost control, veered off the designated road and hit the motor vehicle in which the deceased was.
4. The appellant entered appearance and filed its statement of defence on 11th June, 2007 and 21st June, 2007. In its defence, the said appellant denied the particulars of negligence pleaded by the respondent, alleging in the alternative that if an accident did indeed occur, then the deceased substantially or wholly contributed to the same. The appellant went ahead to set out the particulars of negligence on the part of the deceased. The appellant further refuted the claim for special damages.
5. At the trial, the plaintiff tendered oral evidence in support of her case while the defendant closed its case without calling any witnesses.
6. Upon filing of submissions by the respective parties, the trial court rendered judgment as follows:

a) The appellant was held 100% liable for the accident.

b) General damages

- | | |
|---|-------------------------|
| <i>(i) Pain and suffering</i> | <i>Kshs.20,000/=</i> |
| <i>(ii) Loss of expectation of life</i> | <i>Kshs.120,000/=</i> |
| <i>(iii) Loss of dependency</i> | <i>Kshs.3,214,080/=</i> |

c) Special damages *Kshs.56,745/=*

Total

Kshs.3,310,725/=

7. The aforesaid decision has precipitated the appeal currently before this court. The memorandum of appeal dated 8th February, 2018 constitutes a total of 17 grounds touching on the twin questions on liability and quantum.
8. The appeal was disposed of through the filing of written submissions. In its submissions dated 18th March, 2019 the appellant argues that the learned trial magistrate erred in finding that *CMCC NO. 3241 OF 2006 (Catherine Njeri Wainaina v Multiple Hauliers)* was a test suit contrary to Order 38 of the Civil Procedure Rules, thus wrongly applying the finding on liability used in that particular case in concluding that the appellant was 100% liable.
9. On this point, the appellant further argues that the material facts and evidence in both instances varies hence there was no basis for the said magistrate to apply the analysis in the purported test suit, citing Section 34 of the Evidence Act.
10. It is also the appellant's submission that the learned trial magistrate wholly erred in finding it liable despite the respondent not having proven the same to the required standard.
11. In respect of quantum, the appellant contends that the learned trial magistrate wrongly applied a multiplicand of Kshs.22,320/= notwithstanding the fact that the respondent had not produced any recent pay slips indicating the deceased's income at the time of his death or an employment letter to support the claim that the deceased at all material times worked at Standard Chartered Bank. The appellant has instead proposed the sum of Kshs.10,000/= as a reasonable amount.
12. The appellant also contends that the learned trial magistrate gravely erred in inexplicably applying a multiplier of 18 years for a deceased person who was aged 39 years at the time of his death whereas the said appellant had submitted 16 years as an appropriate figure and had in fact cited comparable authorities in that respect.
13. The appellant further challenged the dependency ratio of 2/3 applied by the learned trial magistrate in the absence of evidence to show the dependants of the deceased and by also disregarding the respondent's testimony that she had an income of her own.
14. Further to the above, the appellant has urged this court to find that the learned trial magistrate had failed to discount the award made under the Law Reform Act in awarding damages under the Fatal Accidents Act.
15. It is the appellant's submission that the learned trial magistrate erred in awarding the sum of Kshs.3,214,080/= which superseded the amount prayed for by the respondent.
16. In her opposing submissions affirming the trial court's decision, the respondent maintains that the appellant's defence consists of mere denials given that it did not adduce any evidence to disprove her testimony and evidence on record.
17. As regards the aforementioned test suit, it is the respondent's stand that the learned trial magistrate did not rely entirely on the finding made therein and that in any event, the appellant has to date not lodged an appeal against the judgment. She further went ahead to argue that the facts in both instances are identical and that the only difference being that the test suit preceded the filing of the suit to which the appeal relates.
18. On the issue of dependency, it is submitted by the respondent that she gave oral evidence to the effect that she and the deceased shared 2 children, whom she presented in court; further submitting that evidence of the deceased's earnings was adduced before the trial court. The respondent has urged this court to dismiss the appeal as lacking in merit.
19. I have carefully considered the rival submissions on record alongside the relevant authorities cited. I have also re-evaluated the evidence placed before the trial court.
20. *Grounds (1) to (7)* of appeal concern the issue of liability. During her oral testimony as PW1 the respondent adopted her witness statement as filed and also produced copies of the documenta constituting her list and bundle by consent of the parties.
21. PW1 went on to give evidence that on the material day, the deceased was driving his friend's motor vehicle along Mombasa Road when the said motor vehicle got involved in an accident with the subject vehicle which was parked on the road without indicators on.
22. The witness stated that she came to learn of the accident through police officers from Industrial Area Police Station who contacted her and took her to the City Mortuary where the deceased's body lay. She further stated that the police officers who had visited the scene of the accident informed her that the deceased had died on the spot and that the owner of the subject vehicle was to blame; this was reiterated during cross-examination.
23. The respondent stated in cross-examination that the subject vehicle was at all material times being driven in a zigzag manner and without indicators on which proves negligence on the part of the appellant's driver/agent. It was also stated that the respondent was never summoned to testify in a traffic case in relation to the accident.
24. The learned trial magistrate stated that the police abstract produced by the respondent was never challenged by the appellant, neither was the evidence that the subject vehicle veered onto the wrong lane. In finding the appellant liable, the said magistrate placed reliance on the evidence presented in the test suit as well as the findings thereon.

25. I have looked at the judgment entered in the test suit which was filed against the appellant and it is apparent that the plaintiff therein called four (4) witnesses, including an eye witness and the investigating officer. The trial court in the end found the appellant 100% liable.

26. Further to this, there is no indication that the finding on liability in the test suit has been challenged by way of an appeal. In view of the foregoing, it is fair to state that the issue of liability was considered and settled in the test suit hence this court has no reason to revisit the issue..

27. *Grounds (8) through to (17)* are in respect of quantum. It is noteworthy that the respondent is essentially challenging the awards made under the heads of loss of dependency and special damages.

28. PW1 testified stating *inter alia*, that the deceased was her husband and that they were blessed with two (2) children, one of whom is a minor and whose birth certificates were availed to her advocate. The witness also stated that the deceased worked as an accountant and consultant and that he was the sole breadwinner of the home. She tendered in evidence a copy of the deceased's pay slip for the year 1997, indicating that it was the only copy she was in possession of.

29. In her submissions before the trial court, the respondent on the one hand urged the trial court to award Kshs.3,000,000/= for loss of dependency with reference to the award of Kshs.2,950,000/= made in the test suit; and Kshs.56,745/= as special damages. On the other hand, the appellant proposed an award of Kshs.640,000/= for loss of dependency and special damages amounting to Kshs.48,900/= respectively.

30. In the end, the learned trial magistrate applied a multiplier of 16 years, a multiplicand of Kshs.22,320/= and a dependency ratio of 2/3 and awarded Kshs.3,214,080/= for loss of dependency. The said magistrate equally awarded the special damages as prayed.

31. The law is well settled that in deliberating on whether to interfere with the award of a trial court, an appellate court ought to take into account the following principles stated in *Kemfro Africa Ltd t/a Meru Express Services 1976 & Another [1976] v Lubia & Another (No. 2) [1985] eKLR* :

a) whether the trial court took into account an irrelevant factor, or

b) whether the trial court left out of account a relevant factor, or

c) whether the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.

32. I have taken note of the above and wish to first address the award on loss of dependency. The appellant has largely argued that the award under this head was excessive and made on the premise of an improper application of the multiplier and multiplicand.

33. As concerns the age of the deceased, his death certificate confirms that he was 39 years old at the time of his death. On the subject of his employment, nothing was availed to prove that he worked as an accountant or that he offered consultancy services. Nonetheless, the respondent at least attempted to produce evidence of his earnings by way of a pay slip dated March, 1997 albeit the same was issued years prior to his demise. This explains the learned trial magistrate's basis for relying on the net income of Kshs.22,320/= indicated therein as a multiplicand and I find the same to be reasonable.

34. As concerns the multiplier, the appellant cited *Gladys Banchiri Nyambeki v Interfreigh (K) LTD [2007] eKLR* and *Lorna Amimo v Akamba Public Road Service & another [2008] eKLR* before the trial court where respective multipliers of 16 years were applied for deceased persons whose age was similar to that of the deceased in this instance. The respondent did not propose any multiplier.

35. On his part, the learned trial magistrate upon considering the multiplier applied by the appellant, settled for a multiplier of 18 years. Given that the retirement age generally ranges between 55 and 60 years, I am satisfied that the multiplier applied by the said magistrate was reasonable.

36. In respect to the dependency ratio, the trial court record reveals that no documentation was availed to ascertain the existence, number and ages of the deceased's children. However, I have noted that PW1 had given the relevant birth certificates to her advocates and that her children appeared in court. In the premises, I am of the view that the learned trial magistrate identified the dependants and correctly applied a dependency ratio of 2/3.

37. On the subject of special damages, the same ought to be granted as pleaded and proved. I have re-evaluated the receipts tendered before the trial court; the same total the sum of **Kshs.55,400/=** as pleaded and proved.

38. The appellant argued that the learned trial magistrate failed to discount the award made under the **Law Reform Act** in awarding damages under the **Fatal Accidents Act**. Upon perusal of the judgment, I am unable to identify anything to indicate the necessity of making any deductions. In any event, the courts have on numerous occasions held that so long as the relevant court takes into account the awards provided for under the above statutes, there is no need to undertake any mathematical deductions. I have no basis on which to find that the learned trial magistrate contravened this principle.

39. In the end,

The appeal as against liability is dismissed.

1. The appeal as against quantum partially succeeds as against the award on special damage. The award of ksh.56,745/= is set aside and is substituted with an award of ksh.55,400/=.

40. For the avoidance of doubt the awards on appeal are as follows:

i. General damages

- a. Pain and suffering ksh. 20,000/=
- b. Loss of expectation of life ksh. 120,000/=
- c. Loss of dependency ksh.3,214,080/=

ii. Special damages ksh. 55,400/=

Total ksh.3,409,480/=

iii. Each party to meet its own costs of the appeal.

Dated, Signed and Delivered at Nairobi this 12th day of July, 2019.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

.....for the Respondent