



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 222 OF 2018

MULTIPLE HAULIERS (E.A.) LTD

DAVID WANJII MUTHUIAPPELLANTS

VERSUS

FARAJ SALIM FARAJ

SALIMA SALIM FARAJ (Suing as the Administrators of the Estate

of ZAHARA AWADH MBARAK (Deceased) RESPONDENTS

(An appeal from the judgment and decree of Hon. J. Kassam SRM in Msa CMCC No. 197 of 2014 made on 9/10/2018)

J U D G M E N T

1. The appellants were the defendants before the trial court. By a plaint dated 6th May, 2013, the respondents sued the appellants claiming both special and general damages on behalf of the estate of the late **Zahara Awadh Mbarak (“the deceased”)** for the death arising out of a road traffic accident that occurred on 30th March, 2011.
2. The respondents alleged that on the material date, the deceased was lawfully crossing the Mombasa – Nairobi highway at Mariakani when the 2nd appellant negligently drove and/or controlled motor vehicle reg. no. KAW 869N ZB 597 whereby it knocked the deceased who sustained injuries from which she succumbed.
3. The respondents set out what they considered to be the particulars of negligence of the 2nd appellant who was at the time driving KAW 869N ZB 597 (“the subject vehicle”) owned by the 1st appellant. They set out the particulars of special damages and those pursuant to both the **Law Reform Act** and the **Fatal Accidents Act**.
4. The appellants defended the suit vide their statement of defence dated 5th June, 2013. They denied the respondents’ claim and blamed the deceased for the accident. They set out therein what they considered to be the particulars of her negligence and pleaded contributory negligence. They prayed for the suit to be dismissed.
5. After trial, the lower court found that the respondents had proved their claim and awarded damages in the total sum of Kshs1,718,597/- plus costs. Aggrieved by the said decision, the appellants have appealed to this court against the judgment and decree.
6. This being a first appeal, this court is enjoined to re-appraise and re-evaluate the evidence afresh with a view to come to its own independent findings and conclusions but at all times remembering that it did not have the advantage of seeing the witnesses testifying. (See **Selle v. Associated Motor Boat Company Ltd [1968] EA 123** and **Peters v. Sunday Post Limited [1958] 424**).
7. The respondents’ case was that on the material day, **Mbarak Awadh (PW1)** received a call while in Mombasa and was informed that the deceased had been knocked down by the subject vehicle and taken to hospital. He rushed to Coast General Hospital where he found that the deceased had sustained head injuries and a fractured leg. She remained in hospital for 2 weeks before being released to go home.
8. However, the deceased succumbed to the injuries on 26/4/2011. The 2nd respondent was charged with reckless driving in the **Mariakani Traffic Case No. 398 of 2011** wherein he was convicted of the offence.

9. **PW2 Hassan Ali Wanini** was at Mariakani township on the material day. At about 10 am, he together and the deceased were crossing the subject road at a Zebra crossing at Mariakani. The deceased was ahead of him. He then saw the subject vehicle coming from the direction of Nairobi and thought that it will slow down but it did not. He rushed back but the deceased was not lucky as it knocked her and threw her to a drainage trench. He together with others rushed the deceased to Mariakani District Hospital.
10. **Salima Salim Faraj (PW3)** reiterated what **PW1** had told the court.
11. The appellants did not call any evidence. By a judgment delivered on 9/10/2018, the trial court held the appellants 100% liable and awarded damages amounting to Kshs.1,718,597/-.
12. It is against that judgment and decree that the appellants appealed to this court setting out 17 grounds of appeal which can be collapsed into 3, that; **the trial court erred in holding the appellants 100% liable and failing to apportion liability; the trial court erred in awarding Kshs.1,500,000/- for loss of dependency when there was no evidence of dependency and that the trial court failed to consider the appellants' submissions.**
13. Both parties filed their respective submissions which this court has considered. The appellants submitted that the respondents' witnesses only relied on their witness statements. That no police officer was called to give an account of the findings of the police investigations into the occurrence of the accident. That there was an admission that the deceased and **PW2** saw the subject vehicle approach yet the deceased did not take any measures to avoid the accident. That in the premises contributed to the occurrence of the accident. Finally, that the award of Kshs.1,500,000/- was manifestly excessive.
14. The respondents submitted that the documents were admitted by consent. That amongst those documents were the proceedings of the traffic case wherein the 2nd respondent had been found negligent in the occurrence of the subject accident. That the trial court was right in relying on **section 47A of the Evidence Act**. That the award of damages were not inordinately high and should therefore not be interfered with.
15. The first set of grounds were to the effect that the trial court erred in holding the appellants 100% liable yet no evidence of negligence was proffered by the respondents. The parties agreed that all documents be allowed by consent. In essence, that meant that there was no requirement of proving the contents in those documents. There was likewise no need of calling a police officer. The traffic proceedings were before the court and the testimony of the police was therein.
16. The contents of the documents that had been admitted were admitted. In this regard, the complaint that the trial court erred in relying on those documents has no basis and is rejected.
17. As regards the evidence before court, the record shows that the respondents testified on the basis of the witness statements they had filed. They were cross-examined on them. Those statements became proper evidence that could be relied on. The evidence was to the effect that the respondents were to blame for the accident. There was no rebuttal thereto by way of any testimony from the appellants.
18. One of the documents that had been submitted by consent was the proceedings in the **Mariakani Traffic Case No. 398 of 2011 Republic v. David Wanjii Muthui**. In that case, the 2nd respondent had been charged and convicted of the offence of causing death by dangerous driving.
19. Under **section 47A of the Evidence Act, Cap 80 Laws of Kenya**, a judgment that returns a conviction in a criminal trial which is not appealed against is to be taken as conclusive evidence of guilt of the offence charged of the person so convicted.
20. In this regard, the 2nd respondent having been convicted of the offence of dangerous driving which judgment has not been shown to have been varied or set aside, remains guilty of that offence.
21. The case of **Lilian Birir & Another v. Ambrose Leamon (Nkr HCCA No.116 of 2013) (UR)** is of no help to the appellants. The rationale in that case is that, a conviction in a criminal case does not *per se* attribute absolute liability on the part of a defendant. Some evidence need to be led. In the present case, the respondents led evidence on how the accident occurred.
22. It is clear that, an eye witness told the court how the 2nd appellant knocked the deceased on a Zebra crossing. No doubt this was a busy township where any motorist has to be on the lookout when driving through it. Moreover, the deceased was knocked on a Zebra crossing which is ordinarily designated for pedestrians to cross. It is not meant for motorists to fly past. This must have been in the contemplation and/or knowledge of the 2nd respondent.
23. The presumption in **section 47A of the Evidence Act** can only be rebutted by evidence on the part of the convicted person showing that the victim contributed to the occurrence of the accident. In the case at hand, the appellants offered no evidence.
24. The appellant's submitted that the deceased contributed to the accident in that, she must have seen the subject vehicle approaching. However, there was no basis for such an assumption. The deceased was innocently crossing the road on a zebra crossing.
25. The testimony of **PW2** that he saw the subject vehicle cannot be taken to infer that the deceased must have seen the subject vehicle in time. It must be remembered that **PW2** stated that the deceased was ahead of him and it was expected that the 2nd respondent will reduce the speed which he did not. In my view, in the absence of any evidence on the part of the appellants' to the contrary, the trial court was entitled in the circumstances of this case, to hold the appellants 100% liable. That disposes off the first two set of grounds.

26. On damages, the appellants complained that Kshs.1,500,000/- was excessive in the circumstances. There was no evidence of earning on the part of the deceased. It is noted that the deceased was aged 55 years. The parties invited the court to make a global award in the circumstances.

27. The principles applicable on an appeal on quantum were set out in the case of **Butt v. Khan [1982-88] 1 KAR 1**. The court stated:-

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low”.

28. It is not in dispute that there was no evidence of earnings in this case. Further, the children of the deceased were not shown to be dependent on the deceased. The only dependent may have been the husband aged 61 years, not financially but in taking care of his daily chores. His life must have been made difficult after the demise of the deceased.

29. Damages awardable under the law are not meant to punish the perpetrator nor are they meant to enrich the claimant. It is an award made to compensate a party for the loss suffered.

30. I do not agree with the submission by the appellants that the deceased may have been depending on the husband. The days when women were there only to be seen are long gone. They are actively involved in matters welfare for their families. No doubt, a married woman complements the life of a husband, whether she is earning or not. She gives him company and the warmth the husband needs as a human being. She cannot be dismissed as being worthless as the appellants seemed to suggest.

31. To the extent that the wife provides the companionship required, the husband is dependent on her wife and in the event she passes on, he loses such dependency. Though difficult to quantify that loss in monetary terms, compensation must be made.

32. The respondents submitted in the lower court for an award of about Kshs.1.8m while the appellants submitted for Kshs. 200,000/-. The trial court awarded Kshs.1.5 million. Since there was no evidence of financial income of the deceased, taking into consideration her age and the fact that awards should not be too prohibitory, I am of the view that Kshs.1.5 million was a little bit on a higher side. Taking into consideration the factor of inflation, the age of the deceased and everything else in this case, I will award Kshs.800,000/- under this head.

33. For pain and suffering, in **Stella Kanini Jackson & Anor v. Kenya Power and Lighting Company Ltd [2012] eKLR** an award of Kshs.20,000/- was made where the deceased died after some few minutes. In the present case, the deceased stayed in hospital for 2 weeks and died after 26 days. The award of Kshs. 80,000/- is reasonable in the circumstances.

34. As for loss of expectation of life, I find the sum of Kshs.100,000/- to be the confessional sum and I allow the same. As to special damages, the sum of Kshs.38,597/- was proved. I allow that sum.

35. Accordingly, I allow the appeal set aside the award of Kshs. 1,500,000/- on loss of dependency and substitute therefor an award of Kshs.1,000,000/-. The judgment will therefore be as follows:-

a) Loss of dependency	-	Kshs.1,000,000/-
b) Pain and suffering	-	Kshs. 80,000/-
c) Loss of expectation of life	-	Kshs.100,000/-
d) Special damages	-	<u>Kshs. 38,597/-</u>
Total	-	Kshs.1,218,597/=

36. The said sum shall attract interest at court rate from the date of judgment before the trial court until payment in full. The respondents will have the costs of the suit in the lower court and half the costs of the appeal.

It is so decreed.

DATED and DELIVERED at Mombasa this 13th day of September, 2019.

A. MABEYA

JUDGE