REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 625 OF 2015

EAST AFRICAN GROWERS LTD.....APPELLANT

-VERSUS-

WILSON K. MACHARIA.....1ST RESPONDENT

CHRISTINE WAMGU MACHARIA.....2ND RESPONDENT

(An appeal from the judgement of L. Komingoi (Mrs.) Chief Magistrate's Court at Thika dated 4th December, 2015 in CMCC No. 622 of 2014)

JUDGEMENT

1. Phin Martin Gachoki Macharia, deceased, was on 23rd March 2005, fatally injured when motor cycle registration KAL 570U he was riding collided with lorry registration KAQ 520B along Thika Road. Wilson Kaburi Macharia and Christine Wangui Macharia, 1st and 2nd respondents respectively, in their capacities as the legal representatives of the estate of the deceased, filed a compensatory suit against East African Growers Ltd, the appellant herein and being the registered owners of motor vehicle registration KAQ 520B, and its driver, Peter Muriithi Mutheki (now deceased). Hon. L, Komingoi, learned Chief Magistrate heard the suit and in the end, entered judgment in favour of the respondent and against the appellant.

2. Being aggrieved, the appellant preferred this appeal and put forward the following grounds.

> **1. The learned magistrate erred in not giving some substantial contributory negligence to the deceased motor cyclist when the traffic court had (whilst convicting the driver of the appellant's vehicle registration number KAQ 520B) specifically ruled that "to that extent" the driver was careless.**
>
> **2. The learned magistrate despite having before her the authority of Asal v Muge & Nother (2001 KLR 203) added a sum of kshs.100,000/- as loss of expectation of life which was erroneous.**
>
> **3. The learned magistrate erred in granting to the respondents 2/3rd of the deceased's salary for many long years whilst it was on record that the deceased was unmarried and was thinking of marriage. Such dependency at best can be one-third of the deceased's earnings.**

3. When the appeal came up for hearing, learned counsels appearing in the matter recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have also considered rival written submissions plus the case law cited by learned counsels. In this appeal, the appellant is basically challenging both the decision on liability and quantum.

4. On liability, it is the submission of the appellant that the mere that the appellant's driver was convicted for the offence of causing death by dangerous driving was not conclusive evidence that he was the only person whose negligence caused the accident. This court was beseeched to find that there was sufficient evidence to show that the deceased contributed to the accident. The appellant submitted that the trial magistrate erred when she failed to consider the element of contributory negligence.

5. The trial Chief Magistrate was also accused of failing to take into account the evidence that was tendered in the traffic case against the appellant's driver. According to the appellant, the evidence in the traffic case shows that the deceased was negligent and therefore he substantially contributed to the accident in question. This court was beseeched to find the appellant's deceased driver 55% liable while the appellant shoulder's 45% liability. It is correctly pointed out by the appellant in its submission in response to the respondent's written

submission that the respondents did not make any submission on the question of liability.

6. I have examined the trial court's findings on liability. In her judgment the learned Chief Magistrate stated in part as follows::

> **"The plaintiff blamed the 2nd defendant for the accident. He told the court that the 2nd defendant was charged with the offence of causing death by dangerous driving vide Traffic Case no. 1500/2005. The proceedings were produced as exhibit P6. The 1st defendant was found guilty and convicted and fined kshs.5000/= in default to serve one year imprisonment. There was no appeal against this conviction. I find that the 2nd defendant was to blame for the accident. The 1st defendant is vicariously liable for the acts of his driver and/or agent, the 2nd defendant. The particulars of the 2nd defendant are given in paragraph 5 of the plaint.**
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> **The defendants filed a statement of defence dated 22//6/2007 denying each and every allegation attributed to the 2nd defendant in the plaint. Instead they attributed the accident to the deceased's negligence. In paragraph 5 of the statement of defence they gave the particulars of the deceased's negligence. The defence called one witness DW1 – Jared Bwana Arita, an investigator told the court that he carried out investigations with regard to this accident. He produced the sketch plan as exhibit D1. He told the court that the lorry was turning when it collided with the motor bike which was ridden by the deceased. He stated that the deceased ought to have noticed the lorry. When cross examined by the plaintiff's counsel he admitted that he went to the scene a week after the accident. There was nothing much to see.**
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> **I have considered the evidence on record and the written submissions. The issue for determination are:**
>
> **a. Liability**
>
> **b. Quantum**
>
> **As stated earlier I find the 2nd defendant wholly to blame for the accident."**

7. It is apparent from the above excerpt that the learned Chief Magistrate considered the proceedings in the traffic case plus the evidence presented by both parties before her court and came to the conclusion that the appellant's driver was wholly to blame for the accident.

8. The appellant summoned Jared Bwana Arite (DW2), the investigator of the accident to testify. DW1 presented the sketch map of the scene of the accident and told the trial court that the appellant's lorry was turning when it collided with the deceased's motor cycle. DW2 also stated that the deceased ought to have noticed the lorry turning. The learned Chief Magistrate noted that DW2 visited the scene a week after the accident hence there was nothing to prove.

9. It is also the evidence of DW2 that he was aware that the lorry driver changed his lane which is a traffic offence. DW2 stated that the lorry driver was to blame for the accident. The 1st respondent (PW1) testified and produced the proceedings of the traffic court as an exhibit in evidence in which the appellant's driver was convicted and fined kshs.100,000/=. In his evidence before the traffic court, P. C. Raphael Mwaka (PW4), the Thika Traffic Base stated that he visited the scene of the accident after receiving a call and found the lorry and the motor cycle had collided.

10. PC Mwaka further stated that a sketch map of the accident scene was drawn. He also stated that the lorry did not give way to the motor cyclist. The pillion passenger, one Albert Mbaluka testified as PW1 before the traffic court. He said that the lorry which was ahead of the motor cycle crossed the road before the motorcycle hit it.

11. PW1 said the motor cycle was ridden at a high speed of 70 km/hr. Having analysed the evidence tendered before the traffic court and before the trial court, I am convinced that the appellant's driver was wholly to blame. The appellant's driver did not give way to the motor cyclist before changing its lane to turn at the diversion to Delmonte.

12. There is an argument that the motorcycle rider was moving at a high speed of 70km/hr. I do not think this assertion should sway the decision of the court because there is evidence tendered to show that there was a speed limit of below 70 km/hr.

13. The investigating officer did not tender evidence to show that the motor cycle was riding on a speed higher that the speed limit of the section. Therefore the learned Chief Magistrate cannot be faulted for holding the appellant's driver wholly liable for the accident.

14. On quantum the appellant urged this court to find that damages under the Law Reform Act and the Fatal Accidents Act merge when the dependants are one and the same persons. It is the appellant's submission that the learned Chief Magistrate erred in awarding kshd.100,000/= damages for loss of expectation of life despite having before her the decided case of **Asal =vs= Muge & Another (2001).** This court was urged to set aside the award of kshs.100,000/= made in favour of the respondents.

15. The applicant also pointed out that the trial court applied an erroneous multiplier of 28 years to calculate damages for loss of dependency without considering the exigencies and imponderables of life. The appellant proposed a multiplier of 20 years and suggested that the award on this head be calculated as follows:

17,400/=x1/3x12x20=1,392,000

With amount being reduced by 55% i.e.

Special damages	ksh.100,000/=
General damages	ksh. 30,000/=
Damages for loss of	
Dependency	ksh.1,392,000/=
Total	ksh.1,522,000/=
Less 55%	ksh. 837,000/=
Net	ksh. 683,900/=

16. The respondents are of the view the awards should not be disturbed since the same are excessive. It was also argued that the award is neither high nor excessive. There is no doubt that the deceased passed away at the age of 29. The learned Chief Magistrate adopted the age of 28 years as reasonable. At the time of the deceased's death, the retirement age was and is 60 years. The respondents had proposed a multiplier of 31 years but the trial court preferred a multiplier of 28 years arguing that the same is reasonable.

17. I agree with the submissions of the appellant that taking into account the exigencies and imponderables of life, it is possible that the deceased may not have lived to the age of 60 years. However the learned Chief Magistrate did not apply the years that would presume that the deceased would have lived upto the age of 60 years but instead preferred to have a multiplier of 28 thus assuming that the deceased would retire at 57 years. I find the trial magistrate's proposal to be reasonable.

18. The appellant has urged this court to set aside the award of kshs.100,000 on loss of expectation of life. With respect, I agree with the appellant. I am convinced that through the award of damages for loss of dependency, the dependants of the deceased are restored to the position that they had occupied before the accident. For the above reason the appeal as against quantum partially succeeds.

19. In the end, the appeal as against liability is dismissed. However the appeal as against quantum partially succeeds in that the award of ksh.100,000/= for loss of expectation of life is set aside.

20. For avoidance of doubt, the decision on appeal is as follows:

a. The appeal as against liability is dismissed.

b. The appeal as against quantum partially succeeds in that the award of kshs.100,000/= for loss of expectation of life is set aside.

Consequently the award on appeal is as follows:

i. General damges

a. Pain and suffering	**ksh. 30,000/=**
b. Loss of dependency	
17,400x1/3x12/28/=	**ksh.1,948,800/=**
ii. Special damages	**ksh. 100,000/=**
Total	**ksh.2,078,800/=**

c. Respondent to have costs of the suit.

d. The award to attract interest at court rates from the date of judgment of the trial court until full payment.

e. In the circumstances of this appeal, a fair order on costs on appeal is that each shall bear its own costs.

Dated, signed and delivered at Nairobi this 11th day of October, 2019.

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J. K. SERGON

JUDGE

In the presence of:

……. for the Appellant

……. for the Respondent