REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL 220 OF 2016

JAMES GICHUHI MUNYAKA

(Suing as the administrator of the estate of

BERNARD MUNYAKA GICHUHI.....APPELLANT

VERSUS

FESTO LANGAT.....1ST RESPONDENT

THOMAS KEINO KIPROTICH.....2ND RESPODENT

(Being an appeal from the decision of Hon. Racheal Ngetich, Chief Magistrate in

Milimani CMCMM No. 6474 of 2012 dated and delivered on 31st March, 2016)

JUDGEMENT

This appeal arises from the judgment of the lower court in which an award of Kshs. 2,673,958/= was made in favour of the appellant against the respondent. The appellant had sued the respondents for damages in which his son died as a result of a road traffic accident involving motor vehicle registration No. KBM 165 C/ZC 2361 which took place on 18th July,2011 along Waiyaki Way Nairobi. The appellant attributed the accident on the negligence of the 2nd respondent who was the driver of the motor vehicle owned by the 1st respondent. The respondents denied the appellant's claim but after full hearing, the lower court found that the respondents were 70% to blame while the deceased was to blame to the extent of 30%. On quantum the lower court awarded Kshs. 50,000/= for pain and suffering, Kshs. 100,000/= for loss of expectation of life. Kshs. 3,600,000/= for loss of dependency and Kshs. 69,940/= special damages. The total was subjected to 30% contributory negligence leaving a balance of Kshs. 2,673,958/=.

The appellant was aggrieved by the said judgment and filed this appeal. In the Memorandum of Appeal dated 19th April, 2016 the lower court was faulted for failing to consider adequately or at all the submissions of the appellant alongside the cited authorities. The lower court was also faulted in the way it apportioned liability in the absence of any evidence supporting such a finding.

The award on loss of expectation of life was also faulted for being inordinately low as to represent entirely erroneous estimate of the compensation to which the appellant was entitled to. The appellant also was aggrieved by the lower court for failing to allow all the special damages pleaded and proved, and finally that the multiplier used was manifestly low and presented an entirely erroneous estimate.

Parties to his appeal have filed their respective submissions and cited some authorities. It is my duty to reconsider and evaluate the evidence adduced before the trial court with a view to arriving at an independent conclusion.

DW 1 who was the driver of the motor vehicle testified that he only saw the deceased after the collison. He told the court that he was driving at 40 kilometres per hour and that the deceased emerged immediately after a small vehicle had overtaken him.

After the impact, it was his evidence that the deceased was thrown to the side of the road where he had come from. The distance according to him was 10 metres away into a thicket. He placed the time of the accident at around 7.30 p.m. and his lights were on. According to him, he never saw the deceased before hitting him and he tried to swerve after he had already hit him. He denied that the deceased was off the road and he never saw him standing at that position.

Other than the 2nd respondent, there was no other person or witness who testified relating to the accident. P.W. 3 P C Charles Odiek testified and produced a copy of the occurrence book. He was not at the scene neither was he the investigating officer. As at the time he gave evidence, the case was still pending under investigation.

It was his evidence however that, the deceased was intending to cross the road from the right to the left when he was knocked down by the motor vehicle. Although the 2nd respondent told the court that the scene was near the fly over at Kabete, P.W. 3 told the court that there was no foot bridge near the scene of the accident. I believe there is a difference between a fly over and a foot bridge but nothing turns on that issue.

If the 2nd respondent was driving at 40 kilometres per hour on the left lane of the road, and that the deceased came from the right hand side, then he had sufficient time to notice him approaching and take evasive action. This is more so if it is true that his lights were on. His evidence shows that he drove without due care and attention of the other road users who included the deceased crossing the road. This conclusion is reinforced by the fact that he only noticed the deceased after the collision with him. It is also doubtful that his speed was 40 kilometres per hour. This is because, if that were true, the deceased could not have been thrown 10 metres away into the thicket after the collision.

Other than his allegation that the deceased smelt of alcohol, there was no other evidence to support that evidence. On the other hand, the deceased had responsibility to take care of his life. If the motor vehicle that knocked him had its lights on, he ought to have noticed the same and assessed the distance to allow him cross safely. That he was knocked down shows that he also did not pay particular attention to the approaching motor vehicle. The facts however, place more blame on the 2nd respondent who was the driver of the motor vehicle.

The lower court apportioned 70 % liability on the part of the 2nd respondent. My assessment of the facts and evidence is that that was an understatement. I find that the 2nd respondent should bear 80% of the blame while the deceased contributed 20% of the blame.

On the issue of quantum, I bear in mind that the appellate court should hesitate to interfere with the award of the trial court, unless it is inordinately too low or too high so as to give an entirely erroneous estimate or that the trial court applied wrong principles.

I have looked at the cited authorities by both counsel. The awards for pain and suffering and loss of expectation of life were within limits and I see no reason to disturb the same. On special damages, this must be specifically pleaded and strictly proved. The appellant produced evidence relating to charges paid at Nairobi hospital Kshs. 2,000/= fees paid to obtain interim letters of administration Kshs. 25,000/= to obtain copy of motor vehicle records Kshs. 500/= and Kshs. 67,940/= for obituary advertisement. The total adds up to Kshs. 95,440/=. There is a receipt for charges paid at Matter Hospital but which were not specifically pleaded. The trial court should have awarded special damages amounting to Kshs. 95,440/= which I hereby do.

On loss of dependency, the deceased died at the age of 24 years. Although his monthly salary plus commissions earned made a total of 75,000/= per month, the trial court was right to use an average figure of Kshs. 45,000/=. He was not married and the assumption is that he used 2/3 of his earning towards himself and 1/3 on his parents. The trial court used a multiplier of 20 years.

There is nothing to suggest that the deceased was in poor health or that he could not have worked up to the retirement age of 60 years or even more considering he worked in a family business. With respect, the use of 20 years as the multiplier was on the lower side. It should however be borne in mind the vagaries and vicissitudes of life. The correct multiplier going by several decided cases should be 30 years which I hereby use to calculate loss of dependency.

In that regard, loss of dependency works up to Kshs. 45,000/= x 30 x 12 x 1/3 = Kshs. 5,400,000/=. The total figure shall be Kshs. 5,645,440/=. This figure shall be reduced by 20 % contributory negligence on the part of the deceased that is Kshs. 1,129,088/=. Leaving a balance of Kshs. 4,516,352/=.

In the end, this appeal is allowed by setting aside the judgment of the lower court and in place thereof enter judgment in favour of the appellant in the total sum of Kshs. 4,516,352/=. The appellant shall also have the costs of the appeal and interest at court rates.

Dated, signed and delivered at Nairobi this 17th Day of October, 2019.

A. MBOGHOLI MSAGHA

JUDGE