



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL NO. 8 OF 2018

CHARLES KIRUTHU MWANGI.....APPELLANT

VERSUS

ANISIA IGANDU NJUE (Suing as the legal representative/

Administrator of the estate of JACOB NJUE DAVID).....RESPONDENT

J U D G M E N T

A. Introduction

1. This is an appeal against the judgment of Embu Principal Magistrate in CMCC No. 93 of 2016. The respondent sued the appellant and another not before court for compensation following a fatal road accident. The respondent sought general damages under the Law Reform Act and under the Fatal Accidents Act as well as special damages of Kshs. 60,000/= and costs of the suit. The appellant's agent was found 100% liable for the accident and the respondent awarded damages of Kshs. 1,860,000/= all inclusive.

2. Being dissatisfied with the court's judgement, the appellant filed his memorandum of appeal dated 27th February 2018 based on fourteen grounds that can be summarised as follows;

- a) *That the learned magistrate erred in law and fact in apportioning liability at 100% against the appellant.*
- b) *That the learned magistrate erred in law and fact in awarding exorbitant damages against the prevailing range of comparable awards.*
- c) *That the learned magistrate erred in law and fact in awarding special damages that were not specifically pleaded and proved.*

3. The parties disposed of the appeal by written submissions.

B. Appellants' Submissions

4. It was submitted that the trial court misapprehended the law by finding the appellant 100% vicarious liable for the accident caused by the actions of his alleged driver as he had proved that the said driver had no authority to drive the vehicle. The appellant also submitted that the trial court's reliance on the traffic proceedings where he was charged, convicted and fine for causing the accident was not sufficient evidence to find him culpable for the accident as was held in the case **Nakuru HCCA No. 116 of 2013, Lillian Birir & Anor v Ambrose Leamon.**

5. It was also submitted that no evidence of monthly earnings/wages could be discerned from the testimony of the witnesses who testified in proof of loss of dependency and further there was no legal explanation why the trial court adopted a multiplicand of Kshs. 20,000/= instead of Kshs. 8,579/= which was the minimum wage for general labourers and this led to an excessive award.

6. The appellant also submitted that the award for loss of expectation of life of Kshs. 150,000/= was excessive and should be reduced to Kshs. 70,000/= and further that the award for pain and suffering was also exorbitant to warrant it to be disturbed.

C. Respondent's Submissions

7. It was submitted that as the registered owner of motor vehicle no. KBY 054J, he was 100% liable for the acts of the 1st defendant and that his report to the police that his car was missing was an attempt to cover up the accident as it was made two days after the appellant's knowledge of the accident. Reliance was placed on the case of **Kenya Bus Services Ltd v Humphrey Civil Appeal No. 295 of 2000** where the Court of Appeal stated inter alia that "where it is proved that a car has caused damage by negligence, then in the absence of evidence to

the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible.”

8. It is submitted that the respondent took out Limited Grant of Letters of Administration and was therefore entitled to damages under both the Law Reform Act and Fatal Accidents Act. It was also submitted that the court was right and applied the correct principles in assessing the damages.

9. It was also submitted that special damages had been specifically pleaded and proved.

D. Analysis & Determination

10. The duty of the first Appellate Court is to subject the whole of the evidence to a fresh exhaustive scrutiny and make any of its own conclusions about it bearing in mind that it did not have the opportunity of seeing or hearing the witnesses first hand. See the case of **Selle & Anor v Associate Motor Boat Co. Ltd 1968 EA 123.**

11. It is my considered view that the issues for determination emanating from the pleadings herein are as follows;

- a) *Whether the learned magistrate erred in apportioning liability at 100% against the appellant.*
- b) *Whether the learned magistrate awarded excessive award in damages against the prevailing range of comparable awards.*
- c) *Whether the learned magistrate erred in awarding special damages which were not proved.*

12. The evidence before the trial court as relayed by PW2 was that on the 10/10/15 an accident occurred involving the appellant's driver and the respondent's deceased husband who was riding a motorcycle. PW2 testified that after the accident, the appellant's agent fled the scene and was later charged, convicted and fined for causing the accident. The appellant testified as DW1 and stated that he had given his car to a friend on the material date of the accident who in turn had given it to another individual who had caused the accident. The appellant testified that a day after the accident he reported the car missing.

13. The trial court found the appellant fully liable as it was registered in his name and its driver caused the accident. It is the appellant's case that there was no sufficient evidence to find him 100% liable for the accident. It is on record that the appellant was charged and convicted of the offence of causing death by dangerous driving. He did not appeal against the judgment. PW2 testified that the point of impact was on the left side of the motor cycle. It is therefore the respondent's driver who lost control and hit the cyclist on his side.

14. Considering the circumstances of the case and the unrebutted evidence of PW2, I find that the respondent's driver caused the accident through negligence. I have no reason to interfere with the trial court's finding on liability.

15. On loss of dependency, PW 1, the respondent testified that her husband used to make Kshs. 20,000/= per month out of his boda boda business and that he had an account with a Sacco. She further testified that their children were all adults though they were not working. Though no books of accounts were produced, the trial magistrate adopted the monthly wage of Kshs. 20,000/=. Although the evidence tendered by PW2 was unrebutted, the respondent did not produce any evidence to prove the deceased's income.

16. From the death certificate and also the evidence of PW 1 the deceased was aged 51 years. The age in the death certificate is a reflection of the age which was in the deceased's identity card. There was no evidence to dislodge the respondent's evidence on the age of the deceased.

17. There was no evidence as alleged by the appellant that the deceased lived a sickly life. Nonetheless, it cannot be denied that in life there are preponderables and vicissitudes that can shorten one's life, besides an accident which may not permanently affect a person's capacity to earn his/her living.

18. Having considered that the deceased incurred business overheads such as various trade licences, servicing and repair of his motor cycle, I hereby award Kshs. 15,000/= as the monthly income.

19. In **Joseph Kahiga Gathii & Anor v World Vision Kenya & Others [2010] eKLR**, a multiplier of 8 years was adopted for a deceased who was 57 years.

20. In **Stephen Onsumu Kibagae v Rebeka Mwangi Simion & Anor [2014] eKLR**, a multiplier of 9 years was upheld on appeal, for a deceased who was 57 years.

21. On dependency; it is not denied that the deceased was a family man with wife and children who depended on him. It is therefore conventional for the court to apply the ratio of 2/3 as part of income deceased was using to maintain his family.

22. Damages for loss of dependency are computed as follows: -

$15,000 \times 12 \times 10 \times 2/3 = 1,200,000/=$ which I hereby award. The award of the trial court is hereby set aside.

23. Under the Law Reform Act, the trial Court awarded Kshs. 150,000/= for loss of expectation of life and Kshs. 50,000/= for pain & suffering. The appellant proposes a figure of Kshs. 70,000/= for loss of expectation of life and that the award for pain and suffering be reduced. Kshs. 100,000/= was awarded as conventional figure for loss of expectation of life in the cases of **Makano Makonye Mwanjaye v**

Hellen Nyangena (2014) eKLR and Lucy Wambui Kohoro v Elizabeth Njeri Obuong (2015) eKLR. Consequently, the trial court's award for loss of expectation of life is reduced to Kshs. 100,000/=.

24. On pain and suffering I note that in the case of Premier Dairy Limited vs Amarjit Singh Sagoo & Another [2013] eKLR the court therein awarded a sum of Kshs 75,000/= for pain and suffering. In this case the deceased died the same day and I therefore find that the trial court's award of Kshs. 50,000/= to be reasonable.

25. Contrary to allegations by the appellant, I find that the special damages pleaded by the respondent were specifically proven through receipts. The trial magistrate made no error in this item of damages.

26. In the circumstances foregoing, this court hereby varies the judgment of the learned trial magistrate in the following terms: -

a) Pain and suffering	-	Kshs. 50,000/=
b) Loss of expectation of life	-	Kshs. 100,000/=
c) Loss of dependency	-	Kshs. 1,200,000/=
d) Special damages	-	<u>Kshs. 60,000/=</u>
	-	<u>Kshs. 1,410,000/=</u>

27. The total sum payable to the respondent is Kshs. 1,410,000/=.

28. The appeal is partly successful.

29. Each party to meet his own costs of appeal.

30. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 3RD DAY OF DECEMBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Mr. Njenga for Wangari Muchemi for Appellants