



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO.13 OF 2016

FELIX KITAVI WAMBUA.....APPELLANT

VERSUS

SANTURINA KAINYU AND GODFREY MICHENI NGARA (*Suing as legal representatives of*

DAVID MWITI MICHENI- Deceased.....RESPONDENT

JUDGEMENT

The late DAVID MWITI MICHENI died in a road Traffic accident on 1st June, 2012. The deceased was a passenger in motor vehicle registration No. KAY 861J. The respondent filed a suit before the Magistrate's court seeking damages as a result of the death. The respondents are the deceased's widow and father. The trial court held the appellant 100% liable and awarded the respondents a total of Ksh.3,089,070 /= This led to the filing of the appeal.

The appeal is based on the following grounds: -

- 1. The trial Court erred by holding that the respondents had proved their case against the appellant.***
- 2. The trial Court erred in law and fact by holding the appellant 100% liable.***
- 3. The trial court erred in law and fact by applying a multiplicand of Ksh.15,259 as the deceased's earnings while no basis had been laid.***
- 4. The appellant's written submission were not considered.***
- 5. The trial court failed to follow rules of precedents in awarding general damages.***
- 6. The trail Court considered irrelevant matters in arriving at its decision.***

M/S J.K. Kibicho & Co. Advocates appeared for the appellant. It is submitted that the appellant tried to avoid hitting a motorcycle while driving the accident vehicle. He swerved to the extreme right and in the process a head-on collision with another vehicle occurred. All the blame laid squarely on the motor cycle rider. The rider joined the main road from a feeder road. Although the appellant did not institute 3rd party proceedings against the motor cycle rider, the court should not turn a blind eye on the evidence that it is the rider who abruptly joined the main road from a feeder road. The accident was inevitable. The appellant acted in a reasonable manner. The appellant was driving in a reasonable speed as there is a corner at the scene of the accident.

It is also submitted that the trial Court failed to consider the appellant's submission and the authorities cited by the appellant. The trial court's jurisdiction was Ksh.3million as it was a Resident Magistrate's Court. The multiplicand of Ksh 15,259/35 assumed that the deceased was a driver. The evidence shows that he was a mechanic by profession. The mere fact that the deceased had a driving licence did not mean that he was a driver. Counsels opine that Ksh.5000 monthly could be a fair assessment of the deceased's income. Counsels also **CONTENT** that liability ought to have been assessed at 50:50 between the appellant and the unknown motor cycle rider.

M/S Khan & Associates appeared for the respondents. Counsels submit that order 1 Rule 15(1) of the Civil Procedure Rules 2010 gives clear direction when a party claims contribution from a third party. The claimant shall join such a third party to the proceedings. The court cannot hold the unknown cyclist to blame as he is not a party to this suit. Counsels rely on Section 107, 108 and 112 of the Evidence Act.

It is also submitted that the burden of proof fell on the appellant who failed to discharge it. Counsel rely on the case of **JAMES GIKONYO MWANGI –V- DUKE MORARA, KISII HCCCA 1 OF 2012** where Justice Okwany held that it was the duty of the defendant to join and tender evidence against a third party it seeks contribution/indemnity from and that no judgment can be entered against a party who was not brought aboard the proceedings.

On quantum, Counsels submit that the sum of Ksh.15,259/35 as a multiplicand is fair. There is no basis for adopting Ksh.5000 as a multiplicand. The amount of Ksh.15,259/35 is the earnings of a driver. According to the respondent, the Magistrate's Court Act No.26 of 2015 was amended on 18th December 2015 and by January, 2016, the pecuniary Jurisdiction of a Magistrate was enhanced to Ksh. five million (Ksh.5,000,000).

This is a first appeal. This Court has to re-evaluate the evidence afresh and make its own conclusion. The principles upon which an appellate court can interfere with an award of damages are well established. In the case of **HELLEN WARUGURU WAWERU (suing as the legal representative of PETER WAWERU MWENJA (deceased) V KIARIE SHOE STORES LTD, Nyeri Civil Appeal No.22 of 2014** where the Court of Appeal stated at para 10 as follows: -

As a general principle, assessment of damages lies in the discretion of the trial court and 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. The Court must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one or that, short of this, the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damages. See *Kemfro Africa Ltd t/a Meru express & another V A.M. Lubia and another [1982-88] 1 KAR 727, Peter M. Kariuki V Attorney General CA Civil Appeal No.79 of 2012 {2014} eKLR and Bashir Ahmed Butt V Uwais Ahmed Khan [1982-88]KAR 5*

Before the trial Court PW1, the deceased's widow testified that the deceased died on 16.2.201. She went to the hospital. The deceased was still alive but died later at 6.00pm. The deceased was 31 years old and used to earn Ksh.30,000 monthly. The two had one child aged ten (10) years. She used to depend on the deceased. She was a housewife. The deceased had been employed by his father. The deceased's father is a mechanic.

The record shows that parties consented to have the evidence adduced in Runyenjes Principal Magistrate Civil Case No.7 of 2013 be adopted as part of the evidence. The evidence of Caroline Nkatha and PC Wekesa was to be adopted as PW3 and PW4. The evidence of Mercy Muthoni was to be adopted as that of PW2. Unfortunately the bound record of appeal does not contain that evidence.

The original record of the trial Court has those proceedings Runyenjes PMCC No. 7 of 2013 was between Caroline Nkatha Mukindia (Plaintiff) against Felix Kitavi Wambua (defendant). The defendant in that case is the appellant herein. The proceedings indicate that Dr. Njiru was PW1, Caroline Nkatha Mukindia was pW2, Corporal Moses Wekesa was PW3. Felix Klitan Wambua was DW1. There is no evidence of Mercy Muthoni. There was no consent adopting the appellant's evidence in Runyenjes PMCC 7/2013 as his evidence in the case before the trial court. However, the line taken by the trial court is that Caroline Nkatha was PW2, corporal Wekesa PW3 and the appellant was DW1.

Caroline's evidence was that on 1.6.2012 at about 1.00pm she was heading to Isiolo along the Embu –Meru road. She was a passenger in Motor vehicle number KBE 752E, Subaru salon. There was a motor cycle ahead of the vehicle. The vehicle attempted to overtake the motor cycle. There was an on coming car from the opposite direction. The two vehicles had a head-on collision. She suffered a broken right wrist and was admitted at Embu Provincial hospital for 23 days.

According to Caroline Nkatha, there was a corner at the scene of the accident. A motor cycle was ahead of them and it had emerged from their left side. The appellant swerved to the right hand side of the road and hit the oncoming car that was heading towards Embu.

Corporal Moses Wekesa's evidence was that the appellant was charged with the offence of causing death by dangerous driving. He went to the scene after the accident. The collision occurred on the right hand side of the road as one faces Meru. At the scene, the road has a bend and there is a continuous yellow line. Overtaking is not allowed. The driver of motor vehicle KAY 861J passed on. Caroline told him that the Subaru driver was trying to overtake the motor cycle. According to Corporal Wekesa, the appellant was over speeding. There is a feeder road. He produced a sketch plan which shows that the point of impact was 4.5 metres from the feeder road. The accident occurred before reaching the feeder road. It is his evidence that it was not possible that the motor cycle caused the accident.

The appellant's evidence was that on 1.6.2012 he was driving motor vehicle registration No.KBE 752A at about 11.00am. There was nothing in front of him. Suddenly a motor cycle emerged from a feeder road. He tried to avoid hitting it by swerving to the other side of the road. He tried to slow down. He was driving at between 70 to 80km/h. He did not see the motor cycle at a good distance. He was not in a hurry. He collided with another vehicle. Caroline was seated on his left hand side. It is his evidence that he blames the motor cyclist for the accident.

The appeal raises the following issues: -

1. Who was to blame for the occurrence of the accident.

2. Did the trial Court correctly assess the amount of damages payable to the respondents.

On the first issue, the main contention by the appellant is that the Accident was also caused by the motor cyclist. He was driving at between 70-80 km per hour. The record shows that Caroline Nkatha was the only passenger in the Subaru vehicle. Motor vehicle KAY 861J was a Mitsubishi Pajero. According to Caroline, the appellant tried to overtake the motor cycle. The appellant swerved to the right hand side and

collided with an on coming vehicle. The deceased was the driver of the on coming vehicle.

Corporal Wekesa took a sketch of the scene. Unfortunately, the sketch is not part of the record and was not included in the lower court file. Despite the absence of the sketch plan, it is the evidence of corporal Wekesa that the accident occurred about 4.5 metres from the feeder road. His own assessment was that the motor cycle could not have caused the accident.

The appellant herein filed his defence dated 3rd December, 2014. Paragraph 5 of the defence reads as follows: -

In the alternative and strictly without prejudice to the foregoing, the Defendant avers that if an accident occurred, which is denied, then the same was wholly and/or substantially contributed to by the negligence of the deceased and the driver of KAY 861J.

PARTICULARS OF NEGLIGENCE OF THE DECEASED

- (a) ***Boarding a vehicle that was already full to capacity.***
- (b) ***Failing to buckle up his safety belt despite the same being availed for his use.***
- (c) ***Hijacking a moving vehicle thus making the driver lose control over the same.***
- (d) ***Causing the accident.***

PARTICULARS OF NEGLIGENCE OF THE DRIVER OF MOTOR VEHICLE REG. NO.KAY 861J

- (a) **Overtaking when it was not safe to do so.**
- (b) **Encroaching on the lawful lane of travel of the motor vehicle Reg. KBE 752E.**
- (c) **Driving on the wrong lane**
- (d) **Causing the accident**

The defendant further denies that the doctrine of *res ipsa loquitor*, the Highway code and the provisions of the Traffic Act Cap 403 Laws of Kenya are applicable in this matter and the Plaintiff is put to strict proof.

It is therefore evident that the appellant did not attribute any blame on the motorcycle. The defence makes no reference to the cyclist. The submissions in this appeal does not attribute any blame on the deceased. Before the trial court, the appellant alleged in his pleadings that the deceased was to blame. In this appeal, the blame has shifted to the motor cyclist. The appellant did not enjoin the owner of the other vehicle or the cyclist. This court cannot hold that either the cyclist or the other vehicle were to blame as they were not parties to the original suit. How will the respondent be able to execute against non parties should this court hold such a non-parties to blame. I do find that the appellant's submissions are just an afterthought. The trial court correctly held the appellant 100% liable. The appellant's own passenger blamed him for the accident.

On quantum, there is evidence that the deceased was 31 years old. The trial court adopted a multiplier of 25 years. This has not been contested. The trial court also deducted Ksh.100,000 awarded for loss of expectation of life from the final award. No issue has been raised on this deduction. My view is that the deduction is not mandatory. The court of Appeal in the case of **HELLEN WARUGURU (Supra)** held that there has been misinterpretation of the **KEMFRO AFRICA LTD V A.M. LUBIA** case [1982-88]1 KAR 727. The Court of Appeal stated as follows:

This Court has explained the concept of double compensation in several decisions and it is that some courts continue to get it wrong. The principle is logical enough, duplication occurs when the beneficiaries of the deceased's estate under the Law Reform Act and dependants under the Fatal Accidents Act are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the fatal Accidents Act should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the Law Reform Act, hence the issue of duplication does not arise.

The confusion appears to have arisen because of different reporting of the Kenfro case (supra) which was heavily relied on by Mr. Kiplagat. The version he relied on is from [1982-88] 1 KAR 727 which concentrates on the decision of Kneller JA in extracting the ratio decidendi. The same case, however, is more fully reported in [1987] KLR 30 as Kenfro Africa Ltd via Meru express Services 1976 & another –vs- Lubia & another (No.2) and the ration decidendi is extracted from the unanimous decision of all three Judges. It was held, inter alia that:-

An award under the Law Reform act is not one of the benefits excluded from being taken into account when assessing damages under the Fatal Accidents Act, it appears the legislation intended that it should be considered.

The Law Reform Act (Cap 26) section 2 (5) provides that the rights conferred by or for the benefit for the estate of deceased persons shall be in addition to and not derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accidents act. This therefore means that a party entitled to sue under the Fatal Accidents act still has the right to sue under the

Law reform Act in respect of the same death.

The words 'to be taken into account' and 'to be deducted' are two different things. The words in Section 4(2) of the Fatal Accidents Act are 'taken into account'. The Section says what should be taken into account and not necessarily deducted. It is sufficient if the judgement of the lower court shows that in reaching the figure awarded under the Fatal Accidents Act, the trial Judge bore in mind or considered what he had awarded under the Law Reform Act for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction.

The deduction of the entire amounts made under the LRA in this case was erroneous once again, we have to interfere with the final award of damages. We observe that the High Court reduced even further the figure of Sh.100,000 awarded for Loss of the expectations to sh.70,000 despite confirmation in the judgment that there was no dispute on the ward. Mr. Kiplagat attempted to justify the reduction by the argument that it would be beneficial to Hellen because less amount would be deducted from the Fatal Accidents Act award. With respect, that argument is misguided since there is no compulsion in law to make the deduction.

The main contention in this appeal is the adoption of Ksh.15,259/35 as the monthly earnings. The record shows that that amount was deemed as the minimum salary for a driver. The trial Court considered the appellant's offer of Ksh.5000 monthly as a multiplicand. The trial court was guided by the 2013 general wages regulation order. The amount of Kshs.15,259/35 was the minimum wage for a driver or mechanic that time. The deceased was driving a vehicle when he died. It is not required that the deceased must have been permanently employed for him to qualify for the award of the minimum wage. PW1 did not testify that her husband was only a mechanic. She told the court that her father in law is also a mechanic. It is her evidence that the deceased was a driver cum mechanic. He used to earn about Ksh.30,000 monthly,.

The issue for consideration is whether the trial court considered irrelevant factors in assessing damages or applied the wrong legal principles. It is clear that the deceased was a young man in his 30s. The multiplier of 25 years seems to have enhanced the award. The deceased was a driver as well as a mechanic. The sum of Ksh.15,259/35 was not plucked from nowhere. The trial court was guided by the minimum wage regulations. I am satisfied that the trial court correctly applied the law.

I am satisfied that the appeal lacks merit. The award is guided by the law. I see no good reason to interfere with the findings of the trial Court. It is not manifestly excessive. The finding of the trial court is backed by the applicable legal principles. The trial Court had jurisdiction to award the amount it awarded. I do find and hold that the appeal lacks merit and is hereby dismissed with costs to the respondents.

Dated and Signed at Marsabit this..... Day of May, 2018

S. CHITEMBWE

JUDGE

Dated, Signed and Delivered at Embu this 15th day of May, 2018

F. MUCHEMI

JUDGE