



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL APPEAL NO. 20 OF 2015

ABEL MOKUA.....APPELLANT

VERSUS

JOHN MOKUA ATEI & ANNAH BIRITA MOKUA

(Suit as Legal Representative of GEOFFREY MOKUA ATEI.....RESPONDENTS

[Being an appeal from the Judgement and Decree of Hon. Njoroge – CM delivered on the 17th day of April, 2014 in Nyamira SRM CC No. 181 of 2012 between JOHN MOKUA ATEI and ANNAH BIRITA MOKUA (Suing as Legal Administrate of the Estate of the deceased GEOFFREY MOKUA ATEI VS ABEL MOKUA)]

JUDGEMENT

The suit arose from an accident that occurred on the 17th May 2012 along Senta – Nyamira road involving motor vehicle Reg. No. KAC 094B and a rider (deceased). The trial court entered judgement for the plaintiffs and assessed liability at the ratio of 50:50. He then proceeded to award the plaintiff damages which are the basis of this appeal. The defendant (the appellant herein) being dissatisfied with the judgement and decree filed a Memorandum of Appeal on the 4th December 2017. he raised the following grounds: -

- 1. That the learned trial magistrate erred in law and fact in failing to dismiss the Respondent’s suit in the lower court as they had not proved their case on a balance of probability.**
- 2. That the learned trial magistrate erred in law and fact in holding the appellant 50% liable for the alleged accident when there was no sufficient evidence to support that finding.**
- 3. That the learned trial magistrate erred in law and fact in failing to hold the deceased wholly liable for the accident.**
- 4. That the learned trial magistrate erred in law and fact in failing to make a finding that “the deceased was the one hit the rear tyre of the Appellant’s motor vehicle which was on its proper lane.”**
- 5. That the learned trial magistrate erred in law and fact in failing to consider and/or disregarding the evidence of the Appellant and PW2 (the police officer) in his judgement.**
- 6. That the learned trial magistrate erred in law and fact in making an award on Special Damages of Kshs. 20,000/= that were not proved as required by law.**
- 7. That the learned trial magistrate erred in law and fact by awarding the Respondent a sum of Kshs. 10,000/= for pain and suffering while not considering that the deceased succumbed to his injuries on the spot.**
- 8. That the learned trial magistrate erred in law and fact by awarding the estate of the deceased a sum of Kshs. 100,000/= for loss of expectation of life when it was not entitled to the same and/or the same was so excessive as to amount to an erroneous estimate of loss or damage suffered by the estate of the deceased.**
- 9. That the learned trial magistrate erred in law and fact in using Kshs. 7,500/= as the estimated monthly income of the deceased despite the fact that monthly earnings had not been proved by Respondents.**
- 10. That the learned trial magistrate erred in law and fact in applying the multiplier of 20 years while awarding loss of dependency without any legal basis or jurisdiction.**

11. That the learned trial magistrate erred in law and fact in using the ratio of ½ instead of 1/3 since the deceased was not married and had no dependants.

12. That the learned trial magistrate erred in law and fact in awarding the estate of the deceased a sum of Kshs. 600,000/= for loss of dependency/lost years that was so excessive as to amount to an erroneous estimate of loss or damage suffered by the estate of the deceased.

13. That the learned trial magistrate erred in law and fact in failing to deduct the award on loss of expectation of life from final award thus leaving the estate of the deceased to benefit twice.

14. That the learned trial magistrate erred in law and fact in failing to consider the appellant's submissions and legal authorities relied upon in support to the Defence thereof.

15. That the learned trial magistrate erred in law and fact by overly relying on the Respondent's submissions and legal authorities which were not relevant and without addressing his mind to the circumstances of the case.

16. That the learned trial magistrate's decision albeit, a discretionary one was plainly wrong.

Parties agreed to dispense the appeal by way of written submissions. The respondents filed their submissions on 30th July 2018. However, by the time of writing this judgement, the appellants had not filed their submissions. This court therefore considers that this appeal was not prosecuted. Be that as it may from the record, the appellant's contention was that the trial magistrate ought to have made a finding that the deceased was the one who hit the rear tyre of the appellant's motor vehicle which was on its proper lane.

Counsel for the respondent submitted that both parties were blaming each other for the accident and the trial court was fair to rule that both parties share blame equally.

Counsel for the respondent correctly submitted that an appellate court can only interfere with the trial court's discretion on an award of damages if it is satisfied that the trial court took into account an irrelevant factor or left out a relevant factor or the award was too high or low as to amount to an erroneous estimate or that the assessment was not based on evidence. Counsel relied on the following: -

1. Julius Omollo Ochanda & Another vs Samson Nyaga Kinyua [2010] eKLR.

2. Kemfro African Ltd t/a Meru Express Service, Gathogo Kanini vs A. M. Lubia and Olive Lubia: (1982 – 88) 1 KAR.

3. Alexander Okiya Anagwe (Suing as the administrator of the estate of Patricia Kezia Anangwe (deceased) vs Reuben Muriuki Kahuha & 3 others (2015) eKLR.

4. Nyamira Tea Farmers Sacco vs Wilfred Nyambati Keraita & Another [2011] eKLR.

A perusal of the trial court's record reveals that both the appellant and the respondents blamed each other for the accident. Pw2, the traffic police officer produced a police abstract which confirmed that in fact the accident occurred. The trial magistrate noted that the results of the investigations were never produced and this could have shed light on whether the driver was to blame and on that ground the trial magistrate found that liability be apportioned equally between the parties. On this I find that the trial magistrate did not err in apportioning liability as where an accident is not denied but the drivers blame each other and none of them adduces evidence to prove where the blame lies the way to go is to find both of them equally to blame.

On quantum the trial magistrate awarded damages as follows: -

Pain and suffering – Kshs. 10,000/=

Loss of expectation of life – Kshs. 100,000/=

Loss of dependency – Kshs. 600,000/=

Funeral expenses – Kshs. 35,000/=

Special damages – Kshs. 20,000/=

I find that the awards were modest. The award on funeral expenses was reasonable even though there was absence of receipts to support that expenses occurred (*See Ali Sheikh Ahmed & Another V NKJ & Another (Suing on their own behalf and in their capacity as the administrators of the estate of the late JMJ [2017] eKLR.*

Accordingly I dismiss the appeal and confirm the award made by the trial magistrate and further award the costs of the case in the lower court and this appeal to the respondents.

It is so ordered.

Signed, dated and delivered at Nyamira this 11th day of October 2018.

E. N. MAINA

JUDGE