



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO.370 OF 2017

URBANUS MUTINDA & JULIANA KASALU MAKAU (Suing as the

Administrators of the Estate of the late Charles Mutua)...APPELLANT

VERSUS

AGRI FRESH LIMITED.....1ST RESPONDENT

LOLOMARK LIMITED.....2ND RESPONDENT

(Appeal from the Judgment of Honourable I. Gichobi (Ms.) Senior Resident Magistrate at Nairobi delivered on 23rd June 2017 in CMCC No. 1207 of 2015)

JUDGMENT

The Appeal herein arises from the judgment of Hon. I. Gichobi (SRM) delivered on the 23rd June, 2017 in Milimani CMCC No. 1207 of 2015. The Appellants, who were the plaintiffs in the lower court case filed a plaint dated 7th March, 2015 claiming special and General damages under the fatal accidents Act and the law Reform Act plus the costs of the suit.

The cause of action arose out of an accident that was alleged to have occurred on the 3rd day of July 2010 involving CM (deceased) who was a minor and motor vehicle registration Number KBJ 317J. The said accident is said to have occurred along the Outering Road, near Caltex Petrol Station.

On the said date, the deceased was a pedestrian who was said to have been carefully and lawfully walking along the Outering road near Caltex Petrol Station, when the aforesaid motor vehicle was so negligently and/or carelessly driven, that it lost control and veered off the road thereby knocking down the deceased as a result of which he sustained severe injuries which he succumbed to, while undergoing treatment.

The particulars of negligence on the part of the 1st and the 2nd Respondents are set out in paragraph 5 of the plaint. The Appellants also pleaded the doctrine of *Res Ipsa Loquitur*.

It was pleaded that the deceased was 13 years old and a student with a lot of expectation in his life and that by reason of his death, the dependants were subjected to loss and suffering. The particulars of dependants and those of special damages are set out in paragraph 9 of the plaint.

The first respondent filed a defence on the 20th May, 2015, in which it denied the Appellant's claim. It denied being the registered owner of the subject motor vehicle at the material of the accident, it also denied, the occurrence of the accident and the particulars of negligence. Without prejudice, the first Respondent averred that, if the accident occurred, but which is denied, it was wholly caused or substantially contributed to, by the negligence of the deceased's minor. The particulars of negligence of the deceased are set out in paragraph 7 (a) – 7(k) of the plaint.

Further and without prejudice, the first defendant averred that if the accident occurred, but which is denied, the same was caused or substantially contributed to, by the negligence of the parents and/or guardians of the deceased. The particulars of negligence are set out in paragraph 8 of the defence.

The 1st Respondent also denied the particulars of loss and damage allegedly suffered by the estate of the deceased. A reply to defence was filed on 27th May 2015 which joins issues with the first Respondent's statement of defence filed on 20th May, 2015.

In it, the appellants denies the averments contained in the defence.

At the hearing, the Appellants called three witnesses in support of their case; P.C. Douglas Musyimi testified as PW1. He was at the material time attached to Buruburu police Station traffic department. It was his evidence that a report was made at the station of an accident that occurred around 3.30p.m. at Caltex Petrol Station, Donholm, along Outering Road, which involved motor vehicle KBG 317J, Mitsubishi Lorry and a minor, namely Charles Mutua, a street boy.

According to him, the driver of the lorry was coming from the petrol station and there was a salon car parked at the parking lane where the minor was about to cross from right to left side when he was pushed by the lorry's body on the right side and was ran over by the rear right side wheel. He died on the spot. He stated that according to the Report, the accident was inside the petrol station. He produced a copy of the Occurrence Book extract as an exhibit.

Juliana Kasalu testified as PW2. He is the father to the deceased whom he said was aged 13 years at the material time. He stated that the deceased was schooling at Reuben Primary School in class 6. He produced a letter dated 17th October, 2014 from the said school as an exhibit. He was informed by friends to the deceased that he had been hit by a vehicle at Donholm, Outering Road and was given the registration number of the motor vehicle as KBJ 317J. On visiting the scene, he was told the deceased had died and the body was taken to the City Mortuary. He stated that when he saw the body, it was badly injured and he could not recognize his son and a DNA test had to be carried out. He produced the limited grant of letters of administration, a receipt of Kshs.1,690 which he paid to obtain the letters of administration and two receipts of Kshs.500 each, for obtaining two copies of records for motor vehicle KBJ 317J.

Christian Urbanus Mutinda testified as PW3. She is an aunt to the deceased and a co-administrator to the estate of the deceased. She stated that though the suit was filed out of time, they obtained leave of the court to file the same. She could not tell how the accident occurred.

The defendant called one witness, John Njuguna Thumba. It was his evidence that on the material day, he was driving from Kenol Petrol Station to join Outering Road heading to the Airport and he was driving at a minimum speed. He saw a motor vehicle on his right and he was stopped and told he had hit a child. He got out and saw a street boy injured. He went to Buruburu police Station and later to the Airport after which he went back to the station and recorded his statement. He was taken to Makadara Court where he paid cash bail of Kshs.10,000/-. According to him, the deceased could have hanged on the vehicle because he never saw him in front of the vehicle. He was run over by the rear right wheel. He blamed the boy for the accident.

After hearing the case, the learned magistrate apportioned liability equally between the deceased and the first Respondent and awarded general damages of Kshs.650,000/- and special damages of Kshs.2,690/- subject to contribution.

The Appellants filed the Appeal herein as they were dissatisfied with the judgment. In their memorandum of Appeal dated the 24th day of July, 2017, they have listed seven(7) grounds of appeal. The same was disposed off by way of written submissions which, the court has duly considered. This being the first Appellate court, I am enjoined to re-evaluate and reconsider the evidence that was adduced before the trial court as enunciated in the case of **Selle & Another Vs. Associated Motor Boat Company Limited & others (1968) EA 123**.

The accident herein involved motor vehicle KBJ 317J and a minor pedestrian. The Appellants contend that the learned magistrate misconstrued the evidence and facts presented before her. As rightly put by the Appellant, the Appeal is on both liability and quantum of damages awarded to them. It was contended that the learned magistrate disregarded the principles enunciated in respect of liability of a minor, the general principle being that, a minor cannot contribute to the occurrence of an accident unless it had been proved that he had road sense. The Appellants, relying on the evidence of PW2 in the O.B. extract which was produced as an exhibit, submitted that the minor was hit crossing the road but was not hanging on the lorry as alleged by DW1. They also took issue with the evidence of DW1, who though he claimed that the minor was hanging on the lorry he did not mention that to the police or write it in his statement.

The 1st Respondent on its part submitted that the Appeal on liability should fail as the evidence on record warranted a finding on liability at 50:50 between the deceased and the 1st Respondent's driver in that the deceased had a duty to check carefully to ensure the road was safe before crossing the road. It was also argued that since the accident occurred at a petrol station, the driver could not have been overspeeding. Further, that the deceased though a minor aged 13 years was capable of knowing what was right or wrong as he had run away from home to become a street boy and therefore he had a road sense.

From the evidence on record, it is clear that an accident occurred on the 3rd July 2010 involving the deceased and motor vehicle KBJ 317J along Outering Road at Caltex Petrol Station. The Appellants insist that the deceased was crossing from right to the left side of the road. The driver on the other hand states that the deceased may have been hanging on the back of the lorry because he did not see him in front of the vehicle.

With regard to liability, the evidence of PW1 was that the juvenile was about to cross from right to left side when he was pushed by the right side of the lorry's body and was ran over by the rear right side wheel and died on the spot. He produced an O.B. extract as exhibit 2 which shows as much. DW1 on his part stated that as he was leaving the petrol station there was a vehicle that was parked on the right. He was then stopped and informed that he had hit a street boy. Though he stated in court that the deceased was a street boy and that he was hanging from the back of the vehicle, this is not captured in his statement which was adopted as his evidence in chief. I also note that his evidence was that the boy may have been hanging from the back of the lorry and not that the boy was hanging from the back of the lorry. The evidence of PW1 that the boy was pushed by the lorry's body on the right side and was ran over by the rear right side of the wheel is more probable than that of DW1 who told the court that he was stopped and informed that he had hit a street boy. He was not even aware that he had caused an accident. He stated that though the vehicle's side mirrors were in good condition as far as he was concerned, side mirrors are only used when a driver is changing lanes or reversing which clearly meant that he did not use them at the material time and that may explain why he did not realize that the right side of the lorry had hit the deceased.

In view of the evidence on record on liability, I find that the driver of motor vehicle KBJ 317J was 100% to blame for the accident. The

evidence of PW1 being that the deceased was about to cross the road meaning that he had not started crossing and that explains why he was hit by the side of the vehicle and not by the front.

On quantum of damages, the only award in dispute is that of lost years. The Appellants submitted that the award of Kshs.650,000 under this head was disproportionate in light of the authorities relied on. They had proposed a figure of Kshs.1,800,000 and relied on the case of **Nahason Gitau Vs. FWH (2016) eKLR** where a minor aged 4 years was awarded kshs.5,000,000/- and that of **Kenya Breweries Limited Vs. Saro (1999) eKLR** where the court observed that in awarding general damages in a case involving a minor who dies in an accident, the age of such a minor is a material consideration.

According to the first Respondent, the court's assessment of damages under this head was right because it was not possible to know what the deceased wanted to become at 13 years. The case of **Ali Almu Samey Vs. Mohammed Bakari NRB. HCCC No. 2225 of 1993** cited in the case of **Abdi Kadir Mohammed Vs. John Wakaba Mwangi** where a victim aged 10 years was awarded a sum of Kshs.100,000/- .

I have considered the parties' arguments with regard to the damages which ought to have been awarded to the deceased minor. In my view, since the deceased had not yet earned any income that would have guided this court in determining a multiplicand and a multiplier, it is only fair that the court awards a global sum. In this proposition this court gets support in the case of **Oshivji Kuvenji & Another Vs. James Mohammed Ongenge (suing as a representative of the Estate of Samuel Ongenge (2012) eKLR** where a sum of kshs.320,000 was awarded to the estate of a minor who was aged 7 years and the case of **Regina Wambui Njenga V. R.K. Obura & Another (2009) eKLR** where a sum of kshs.350,000 was awarded as loss of dependency for a minor who was aged 13 years at the time of death. I therefore find that a sum of Kshs. 650,000 as a global sum is reasonable.

There was no contention as far as the other awards were concerned. The tabulation remains as awarded in the lower court as follows:-

Liability – 100%	
(a) Lost years – 650,000/-	
(b) Loss of expectation of life – 100,000/-	
(c) Pain and suffering -	50,000/-
(d) Special damages -	<u>2,690/-</u>
Total	<u>802,690/-</u>

Special damages to earn interest from the date of filing and general damages from the date of the judgment.

Costs of the suit and the Appeal are awarded to the Appellants.

Dated, Signed and Delivered at Nairobi this **11th** day of **October, 2018**

.....

L. NJUGUNA

JUDGE

In the presence of:-

..... **For the Appellant**

..... **For the Respondents**