



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 96 OF 2017

CROWN PETROLEUM CO. LTD.....1ST APPELLANT

JOHN M. WACHIRA.....2ND APPELLANT

VERSUS

JAMES KINYANJUI MWANGI (Suing as the Legal Rep. of the Estate of

ELIZABETH WANGARI MWANGI(DECEASED).....RESPONDENT

(Being an appeal from the judgment/Decree of Hon. Lizah Gicheha, Senior Principal Magistrate, Nakuru, delivered on 23rd March 2017 in Nakuru CMCC No. 554 OF 2015)

JUDGMENT

1. This appeal is against both liability and *quantum* of damages.

The appellants were held wholly liable for an accident that occurred on the 8th March 2014 along Nakuru-Eldoret road between the appellant's motor vehicle registration No. KBV 265 M-ZE 3949 a Trailer and vehicle reg. No. KAU 391T Nissan matatu wherein the deceased was a lawful passenger from which accident she lost her life.

2. At the time of her demise, the deceased a graduate teacher was aged 38 years. She left behind her husband and three children. The trial court upon full trial awarded the respondent as the legal representative of the deceased Estate a total of Kshs.3,412,960/= plus costs and interest.

3. The summarised grounds of appeal are that the trial magistrate misdirected herself in law and fact in making findings on liability that are not supported by the evidence on record, and awarding damages both under the Law Reform Act and Fatal Accidents Act resulting to double compensation, and therefore excessive in the circumstances. This court has been urged to set aside the said judgment.

4. In the Amended plaint dated 26th May 2015, the Respondent(then plaintiff) pleaded special damages of Kshs.131,200/= and General damages under both Acts stated above.

Particulars of negligence of the 2nd appellant as well as particulars pursuant to the Fatal Accident Act were stated.

5. In their defence dated 21st August 2015 the appellants denied the claims by the respondent and in the alternative attributed negligence and blame to the driver of KAU 391T. This driver was not enjoined to the proceedings as a third party, or a defendant.

Issues for determination

(1) Whether the appellants were wholly to blame for the accident

(2) Whether the court erred in awarding damages to the deceased estate under both the Law Reform Act and the Fatal Accidents Act.

(3) Whether the said damages are inordinately too high as to be a wrong estimate of damages.

6. It is trite that a lawful passenger as the deceased was cannot be called upon to shoulder any liability having not been in control of the

accident vehicle. It was not alleged that the deceased was an unauthorised passenger – **Civil Appeal No. 156 of 2010 Israel Mulandi Kiseng' -vs- The Standard Limited & 2 Others (2012) e KLR.**

7. As the first appellate court, it is my duty to consider and re consider and re-evaluate the evidence before the trial court and come up with my own findings – **Selle -vs- Associated Motor Boat Co. Ltd(1968) and Karuga -vs- Kiruga & Another (1988) e KLR.**

8. Liability

The occurrence of the accident is not in dispute nor that the deceased was a lawful passenger in M/V reg. No. KAU 391T. PW1 was travelling in the same vehicle with the deceased who was his wife. His evidence was that the vehicle was knocked from behind by the appellants trailer.

He blamed he trailer driver for negligence, and stated the particulars of such negligence.

9. No other witness testified for the plaintiff/respondent. The defendants/Appellants did not call any witness but both parties filed written submissions.

10. The appellants submissions are that based on the evidence on record, the appellant ought not have been found 100% liable, citing **Section 107(1) of the Evidence Act** that the respondent failed to call any eye witness in court to support his case and that as no traffic police sketch maps were tendered in evidence no corroboration was offered. Citing the case **Ahmed Abubakar Hassan -vs- AG (2013) e KLR**, it was submitted that the circumstances that led to the accident are solely based on what the plaintiff told the court.

11. In response the respondent submits that he produced the police abstract which confirmed the salient facts and that since no objection was raised, the facts stated therein ought to be taken as true – citing the case **Joel Muna Opija -vs- East African Sea Food Ltd KSM Civil Appeal No. 309 of 2010 (2013) e KLR** and further that by failing to call any witnesses or adduce any evidence in support of their defence, the respondents evidence remain uncontroverted.

12. It is trite that if there is no rebuttal of evidence by a party that evidence remains uncontroverted – See **Linus Nganga Kiongo & 3 Others -vs- Town Council of Kikiyu (2012) e KLR** was held

“---where no witness is called on behalf of the defendant and no evidence is adduced by the defendant the evidence tendered on behalf of the plaintiff stands uncontroverted.”

13. The events following the accident are also not controverted. In the case **Board of Governors of Kangubiri Girls High School and Another -vs- Jane Wanjiku Muriithi** that legal principle was reiterated that when a vehicle is proved to have caused damage by negligence a presumption arises that the owner is responsible for the driver's liability.

14. In **Simba Commodities – Ltd -vs- Citibank NA (2013) e KLR** the court held that failure by a party to call and avail its testimony of such witness gives rise to an interference that the witnesses could not sustain the contention of such party – See also **Nakuru Civil Case No 34/2014 Brian Muchiri Waihenya -vs- Others (2017) e KLR (Mulwa J).**

15. The appellants vehicle knocked the Nissan *matatu* from behind. The driver of the appellants vehicle did not challenge that evidence other than in the statement of defence.

It is trite that if no evidence is tendered to support averments in a pleading, in this case the defence, such averment stands as such, mere statements.

16. I agree with the trial Magistrate's findings that by ramming into the rear of the *matatu* the defendant was negligent as he ought to have braked or in any other way controlled the said trailer so as to avoid the accident. No evidence was adduced of any evasive action by the driver to avoid the accident.

The circumstances in the case cited by the appellant - **Grace Kanini Muruini -vs- KBS & Another HCCC 4708/1989 and cited in M'mbula Charles Muthini Mwalimu -vs- Coast Broadway Co. Ltd (2012) e KLR** are different. There was a collision of two vehicles and the plaintiff did not adduce any evidence beyond stating that the accident was reported to the police. **Ringera J** held that it was probable that the accident could have been caused by either drivers and added that without evidence he could not have decided which probability concided with the truth.

17. The above is distinguishable with the present appeal where the respondent testified that the appellant's trailer rammed on the rear of the *matatu*. As the appellant failed to contravert that evidence, I too come to the conclusion that it is more probable than not that the appellant's driver was negligent and wholly caused the accident. No act of negligence was demonstrated on the part of the *matatu* vehicle.

I cannot find any reason to come to a finding that the respondent who was a passenger contributed to the occurrence of the accident as urged on a 50:50 basis or at all.

18. The appellant did not enjoin the driver/owner of the Nissan *matatu* into the proceedings though it pleaded contributory negligence. It can only blame itself for the the failure.

- See **Brian Waihinya case (Supra)**. It is trite that there can be no liability without fault and a plaintiff must prove some negligence on the part of a defendant where the claim is based on negligence.

In the case **Mwania -vs- Kenya Bus Service Ltd C.A No. 302 of 2002** and cited in **A.I.C Health Ministries -vs- Solomon Ndegwa Ng'ang'a and Another Nakuru Civil Appeal No. 80 of 2010 (Mulwa J)** the respondent did not testify and the issue of 3rd party proceedings were never taken up by the defendant hence such assertion remained as mere allegation by the defence.

19. The totality of the evidence coupled with the trial magistrates analysis and findings persuade to me to come to findings that the appellants driver was wholly to blame for the accident.

I uphold the trial magistrate's findings on liability and therefore the Appeal fails on the matter of liability.

20. Quantum of Damages

Assessment of damages is at the court's discretion. To interfere with that discretion an appellate court ought to be persuaded that the trial court did not take all relevant factors into account, short of that, that the awards are either too high or too low to be a wholly erroneous estimate of the damages - **Kemfro Africa Ltd -vs- Lubia & Another (1982 – 88) KAR 777**.

21. The appellant challenges the awards and specifically on the **income** of the deceased, **dependency ratio** as too high, and that the trial court awarded damages under the **Law Reforms Act** as well as under the **Fatal Accidents Act**, thus **double compensation**.

22. Damages under the Law Reform Act

As the trial court's awards are not contested, I uphold the same.

23. Damages under the Fatal Accidents Act

The deceased was a 35 years old graduate teacher from Mount Kenya University (December 2013). Her dependants were stated as the respondent husband and three children.

These facts are not disputed save for her salary and the dependency ratio.

24. Income

The trial court applied a salary of Kshs.27,759/= less statutory deductions leaving a **Net salary of Kshs.24,545/=**.

The deceased's salary as shown in the payslip for March 2014 being her last salary – Teachers Service Commission was Kshs.27,759, (PEXt 6). Statutory deductions are shown as P.A.Y.E Kshs.2894/50 and N.H.I.F Kshs.320/=. Other deductions went to various Saccos.

25. My opinion is that the deductions to Saccos were part of her earnings and for her families advancement. The balance paid as salary for March 2014 Kshs.11,468/60 can not legally be construed as the deceased's income. - See **Nakuru Civil Appeal No. 2 of 2014 Hellen Gesare Ayoti** (suing as the Legal Representative of the Estate of Justus **Momanyi Ayoti, (2016) e KLR and Beatrice Wangui Thairu -vs- Hon. Ezekiel Bargetuny & Another Nairobi HCCC No. 1638 of 1998** where Ringera J (as he then was) and Mulwa J respectively rendered as above.

I find that the trial court did not err in any manner by applying an income of Kshs.24,545/=. I uphold the finding.

Multiplier of 16 years adopted by the court is not challenged. It is adopted.

26. Dependency Ratio

The trial court adopted 2/3. It is on record that the respondent/husband of the deceased was also a teacher. In challenging the ratio the appellant submits that as both husband and wife were working, both contributed to the families welfare equally.

That could be so, and therefore it is suggested that the Dependency ratio ought to have been ½.

27. I have considered the case cited for the above proposition being **Regina Wangechi -vs- Eldoret Express Co. Ltd HCCC No. 44 of 2007** where the court used a ratio of ½. In this case the deceased was the only bread winner.

It is important to note that the deceaseds children were minors 12 and 9 years old – as opposed to the deceased children in the **Regina Wangechi case (Supra)** who were adults. The Court of Appeal in the **Board of Governors of Kangubiri High School case(Supra)**, held that the choice of a dependency ratio is entirely in the court's discretion, and depends on the circumstances of each case.

28. The deceased had her particular and special role in the support of her family just as the husband. In **Civil Appeal No. 248/2007 Jackson Mutyetumo t/a Paju Investments and Another -vs- Mary Menze Mathuku and Another (2009) e KLR**, just as in the case of **Mwita Nyamohanga & Another -vs- Moharia** (suing on behalf of the **Estate of Joseph Tagare Mwita** (deceased), a conventionally accepted dependancy ratio of 2/3 is reasonable. I concur with the learned Judge, Okwengu J (as she then was) that the fact that the deceased wife (in this case the husband) was employed was not sufficient to negate the generally accepted dependancy ratio. I find no reason to depart or vary trial courts 2/3 dependancy ratio.

29. **Damages under the two Acts:**

Is it double compensation?

In my view this issue was settled by the **Court of Appeal in Hellen Waruguru Waweru -vs- Kiarie Shoes Stores Ltd (2015) e KLR** when it rendered that

“Under Section 2(5) of the Law Reform Act a party entitled to sue under the Fatal Accidents Act has the right to sue also under the Law Reform Act in respect of the same death and that the words “to be taken into account and to be deducted are two different things ---”

30. It continued that

“It is sufficient if the judgment 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. That there is no requirement in law or otherwise for him to engage in a mathematical deduction.”

31. There is therefore no requirement nor is it mandatory that an award under the Law Reform Act, which ordinarily minimal, be deducted from the award under the Fatal Accident Act, notwithstanding that the beneficiaries may be the same. In my opinion, that can not be considered to be double compensation – **James Wanjiru Muturi & Kenya Power & Lighting Co. Ltd -vs- Samuel Irungu Nguri & Another – Nakuru Civil Appeal No. 105 of 2013 (2017) e KLR**.

32. For the above reasons, I find no merit in the entire appeal.

The trial court's judgment delivered on the 23rd March 2017 is upheld.

Accordingly the Appeal is dismissed with costs to the respondent.

Dated, signed and delivered this 13th Day of December 2018.

J.N. MULWA

JUDGE