



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 209 OF 2013

EXPRESS KENYA LIMITED

KIBARGOI AGENCIES LIMITED.....APPELLANTS

-VERSUS-

GEOFFREY LEKUT OLAGUI(suing as the legal representative of the

estate of the late Olagui Koriwai Olendoiga).....RESPONDENT

(An appeal from the Judgment of Hon. Nyagah, Principal Magistrate,

in Molo SMPCC No.419 of 2013 delivered on 8th October, 2010)

JUDGMENT

1. This appeal is against the whole of the trial court's judgment delivered on the 8th October 2013 in **Molo SPMCC No. 419 of 2013**, following a fatal road accident whereof the deceased was held to have contributed to the occurrence of the accident involving the appellant's motor vehicle registration No. KAT 257 B/ZC 0805 on the 30th May 2010 along the Nakuru-Eldoret Highway and the deceased, pedestrian, at 50:50 basis.

The court awarded the deceased's estate Kshs.640,000/= under the Fatal Accidents Act and Kshs.25,000/= special damages plus costs and interest.

2. The appellant's grounds of appeal in summary are that the award on special damages was erroneously granted as no valid Letters of Administration *Ad Litem* were obtained, and that the award on loss of dependancy was excessive as no proof of income was demonstrated. The Appellant too was dissatisfied with the apportionment of liability. I have been urged to set aside the entire judgment and dismiss the primary suit with costs.

3. Parties filed written submissions on the appeal. I have considered the pleadings, evidence as well as the submissions.

4. Liability

The deceased was 75 years old (PEX 2) when he met his death. On the fateful day he was crossing the highway on the extreme right, at about 7.30 p.m. (Ext 4) when the appellant's trailer (lorry) knocked him down. He died on the spot. **PW2 Dominic Lemiso** was an eye witness. His evidence was that the lorry driver was overtaking and over speeding when he knocked him down and fled from the scene. No other person was called to testify as to the occurrence of the accident.

The police investigation officer was not called.

5. The driver of the accident vehicle testified as **DW1**. His evidence was that the deceased appeared suddenly within 6-7 metres away and despite breaking and hooting, he could not avoid hitting the deceased by the left side of the vehicle.

He denied having been over speeding, but did not state what speed he was driving at the time of the accident.

6. Going by the above brief evidence, the trial court acknowledging the rival pleadings and evidence found that each of the two contributed

equally to the accident more so that the driver of the vehicle testified that he hit the deceased by the left side of the lorry while on the fast lane, and therefore on the extreme right. He denied having been overtaking, or driving on the wrong side of the road.

7. As the first appellate court, I am under a duty to reconsider and re-evaluate the evidence adduced and come up with own findings and conclusion. - **Kiruga -vs- Kiruga & Another (1988) KLR 348.**

If I find that the trial court's findings are based on the evidence as adduced, and taking into account that the trial magistrate had the advantage of seeing and hearing the witnesses testify, then it is of paramount importance that such findings ought not to be disturbed.

8. I have stated that very scanty evidence was adduced by the respondent. No investigation report was produced to the court to show the point of impact which is of paramount importance. However, the driver of the accident vehicle admitted having knocked down the pedestrian on the extreme right side of the road, by the left rear of his vehicle. That piece of evidence cannot be ignored.

9. It is trite that there is no liability without fault -**Kiema Mutuku -vs- Kenya Cargo Hauliers Services Ltd.** A pedestrian is under a duty to take care of himself as well as other road users. **PW2** the only eye witness testified that the driver was overtaking and in the process knocked down the pedestrian.

The driver denied having been overtaking but by his evidence it was clear that he could only have been overtaking, and short of that, then, and as found by the trial magistrate, was driving on the wrong side of the road.

10. In my view and having taken into account the available evidence, the pedestrian was to blame for attempting to cross the highway at night (7.30p.m.) without confirming that it was safe to do so. The accident vehicle driver too was to blame for his failure to take due care and attention to other road users and specially the deceased who was walking on the extreme right of the road. - **Joseph Mututi Koimburi -vs- Mary Wahaki Mugo (2006) e KLR and Waidindi -vs- Pharmaceutical Manufacturing Co. Ltd (1986)KLR** where in very similar circumstance, liability was apportioned. In the circumstances, I decline to disturb the trial court's finding on that both parties share the blame equally.

Quantum of Damages

11. Special damages:

The award of Kshs.25,000/= being court fees on filing Letters of administration is not supported by any evidence. It is trite that special damages must be pleaded and strictly proved. No court fees receipt was produced to prove that indeed the said sum was court fees.

And even if such receipt was produced, the court having rejected the Letters of Administration *Ad Litem* as invalid then, no reimbursement could be ordered. The trial magistrate was right in rejecting the said *Ad Litem* grant as valid having been obtained from a Magistrate's Court contrary to **Rule 36(3) of the Probate and Administration Rules.**

I proceed to set aside the said award.

12. **Award Under the Fatal Accidents Act** Damages for Loss of dependency are awarded to the deceased's dependants. In this instance, the deceased was 75 years old. He left behind his wife and children whose ages were stated under particulars pursuant to statute in the Amended Plaintiff dated 22nd November 2011.

13. **PW1** the deceased's son told the court that this father was a herdsman at Deloraine farm and was earning Kshs.10,000/= per month, having retired and became a herdsman. A letter to that effect was produced (PExt. 3) It was stated that one of his sons **Denis** 21 years was waiting to go to college. This evidence was not challenged in cross examination, save that **PW1** stated that the deceased was a casual worker.

14. I agree with the trial magistrate's findings that even at old age, one does not cease to provide for his family – as is a responsibility placed on every parent. There was no dispute as to whether or not the deceased was supporting his wife. The trial court applied a multiplicand of 2/3 and multiplier of 10 years upon a salary of Kshs.8,000/=:, which the appellant submits is not appropriate.

15. I have earlier stated that no objection to the Letter of Employment (PExt 7) was raised by the appellant in court. Having been admitted without any objection, it cannot be brought up on appeal.

16. If there was no proof of income which is not the case in this appeal, I agree with the appellant's submission that the Regulation of Wages (General Amendments Order, 2010) would have been reverted to – **Nyamira Tea Farmers Sacco -vs- Wilfred Nyambati Keraita and Another (2011) e KLR.**

17. I do not agree with the appellant's submissions that a person cannot be engaged in gainful ventures after the retirement age of 60 years. It is not uncommon to find older persons, beyond 75 years in very engaging income generating businesses and ventures, including herding cattle and small scale farming.

18. I am minded that **Sections 107 -109 Evidence Act** places a heavy duty upon the person who asserts to prove, especially in the matter of dependency. See **Gerald Mbae Mwea -vs- Kariko Kihara & Another (1997) e KLR.** It was held that the issue of dependency is a question of fact to be proved by he who asserts it.

19. I am persuaded that the issue was duly proved not only by **PW1** evidence and also by the Chief's letter -PEX - which once again was admitted in evidence without any objection by the appellant. To that end there is no issue as to whether or not dependency was proved. The ratio of dependency adopted by the trial court appears to me to be proper. I have no reason to depart from it.

20. On the matter of the multiplier, I find the figure of 10 years adopted by the trial court to be on the higher side.

A multiplier should bear a relation to the expectation of the earning life of a deceased and expectation of life of the dependants. The Appellant has urged adoption of two years (2) as the multiplier. The court was not told that the deceased was not of good health. Being old is not a disease.

21. By the fact that the deceased was working as a herder at 75 years, it shows that he was healthy and could have continued in gainful and fruitful venture for a longer period save for the accident.

22. I am persuaded that a multiplier of **5 years** would be more appropriate.

Thus, I shall upset the trial magistrates findings on loss of dependency, guided by the holding in **Chunibhai Patel and Another -vs- PF Hayes and Others (1957) A 748-749** and **Kemfro Africa Ltd t/a Meru Express Service -vs- A.M. Lubia and Another (1982-88) L KAR – 729-** and adopt an income of Kshs.8,000/= Per month, against a multiplicand of 2/3 and a multiplier of 5 years, thus,

$$12 \times 8,000 \times 5 \times \frac{2}{3} = \text{Kshs.}320,000/=$$

The above is to be subjected to a 50% reduction in contributory negligence thus Kshs.160,000/=.

23. For the above reasons, the appeal succeeds partially. The trial court's judgment is adjusted as follow:

(a) Liability - 50:50

(b) Special damages - Nil

(c) Loss of dependency - 160,000/=

(d) Interest at court rates shall apply to (c) above from date of the trial court's judgment.

(e) Costs of the Primary suit shall be paid by the appellant while each party shall bear own costs of the appeal.

Dated, signed and delivered this 6th Day of December, 2018.

J.N. MULWA

JUDGE