

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 43 OF 2017

JOSEPH WAMBUTSI SHIKHOBA (suing as *personal*

representatives and or administrators of the estate of EMMANUEL

NYAROTSO WAMBUTSI, deceased).....APPELLANT

VERSUS

IMA HAULIERS LIMITED.....RESPONDENT

(An appeal arising from the judgment and decree of the Hon. MI Shimenga Resident Magistrate in Butere SPMCCC No. 76 of 2015 of 16th March 2017)

JUDGMENT

1. The appellants lodged herein a memorandum of appeal dated 13th April 2017, in which it is averred that the trial court imposed a higher degree of standard of proof than that required for ordinary civil cases, had dismissed the appellant's claim despite him pleading *res ipsa loquitor* and adducing evidence that raised the rebuttable presumption that it was the respondent's driver who ran over the deceased, and erroneously concluding that the deceased was an inexperienced and unqualified motor cycle rider. It is sought that the decree of the trial court be set aside, and replaced with a judgement in favour of the appellant for Kshs. 2, 045, 750.00 together with costs.

2. The factual background to the matter is that the deceased herein met his death on 30th April 2014 through a motor traffic accident. He was travelling on motor cycle registration mark and number KMCT 698J along the Busia-Mumias road, when the same had an accident at the Lairi area within Kakamega County, following a collision with motor vehicle registration mark and number KBN 291N/ZD 5494 occasioning on the deceased fatal injuries. The suit at the trial court was by the plaintiff who accused the respondent of causing the said death by the negligent manner in which the respondent's motor vehicle in question was handled by the person who had control of it. He sought damages, both general and special, under the Law Reform Act Cap 26, Laws of Kenya and the Fatal Accidents Act, Cap 32, Laws of Kenya. The respondent countered the claim by attributing negligence, whether wholly or in part, to the deceased, accusing him of failing to give way to motorized traffic, failing to heed warning to give way, permitting the accident to happen, obstruction and repairing a puncture on the road. There is also an accusation of fraud, that it was misrepresented that an accident had occurred and false documents had been obtained to support the case.

3. The trial court took evidence from the appellant and her witnesses on 21st July 2016 and 1st September 2016. No counter evidence was presented by the respondent. Judgment was subsequently delivered on 16th March 2017. The suit was dismissed on the basis that the appellant had failed to establish the cause of the accident, and by extension had not proved that the respondent was negligent.

4. Although directions had not been given for filing of written submissions, the parties had each filed their respective written submissions. I have perused through them and noted the arguments advanced.

5. The appeal turns primarily on the issue of liability. There is ample material from the record that an accident did occur on the said date involving the deceased and a vehicle belonging to the respondent. The fact of the accident is not disputed. The only issue is as to whether it was caused by the respondent's driver. In other words, whether the same resulted from the negligence of the respondent's driver. The appellant called an eyewitness, a person who alleged to have been a passenger in the accident vehicle. He testified that he witnessed the accident and gave details thereof. He talked of the vehicle being driven at a high speed and of sweeping off the road and hitting the motor cycle in question. A police witness also confirmed that there was such an accident, and that a driver of the respondent was facing a traffic charge of causing death by dangerous driving arising from the said accident. The respondent did not call any witnesses, and therefore the appellant's case was uncontroverted. I believe that, there was evidence on a balance of probability that the accident was caused by the sole negligence of the respondent's driver. He should have been found to have been 100% liable for the accident.

6. The trial court indicated in its judgement that it would have awarded Kshs. 2,000,000.00 plus special damages, but it did not indicate how it arrived at that figure. The deceased died at the scene of the accident and therefore he suffered little pain, so I would award Kshs. 30, 000.00 for pain and suffering. The conventional figure to award for loss of expectation of life is Kshs. 100, 000.00. Funeral expenses were not specifically proved, but conventionally the courts award what is reasonable. The appellant prayed for Kshs. 30, 000.00 in his written submissions, and I hereby award the same under that head. On loss of dependency, not enough was led on his earnings. There was some evidence that he was a family man, so he must have been working to support his family. In the absence of concrete proof, I would estimate his monthly income to have been Kshs. 4, 000.00 at the very minimum. Given that he had a spouse and children, two thirds of it must have spent on them. The certificate of death on record put his age at 36. The age of retirement is 60, so he would have continued working for another 24 years. A multiplier of 24 would be suitable in the circumstances, but after taking into account imponderables, I would reduce it to 18. Loss of dependency should work out as follows - $4,000 \times 18 \times \frac{2}{3}$ which makes Kshs. 576,000.00, less Kshs. 100, 000.00, which would make it Kshs 476, 000.00

7. In the end I shall allow the appeal, and set aside the judgement of the trial court. I shall enter judgment for the appellant in the sum of Kshs. 30, 000.00 for pain and suffering, Kshs. 100, 000.00 loss of expectation of life, Kshs. 576, 000.00 for loss of dependency and Kshs. 30, 000.00 special damages. The same totals to Kshs. 736, 000.00. After deducting the award for loss of expectation of life, the total comes down to Kshs. 636, 000.00. The respondent shall have costs of the suit at the lower court. Interest on the amount of damages here above shall be charged from the date of delivery of the judgment at the lower court. Each party shall bear their own costs on the appeal.

8. Should any party be dissatisfied with the outcome of these proceedings, there is leave to appeal against the same at the Court of Appeal within twenty-eight (28) days.

DATED, SIGNED and DELIVERED at KAKAMEGA this 3RD DAY OF DECEMBER 2018

W. MUSYOKA

JUDGE