



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

HCCA NO. 15 OF 2014

(formally Mombasa HCCA No. 70/14)

BAYA CHARO TSOFA.....1ST APPELLANT

N.A. SHAH.....2ND APPELLANT

=VERSUS=

DAUDI DARA JARA.....1ST RESPONDENT

CHARO KAZUNGU KARISA (*Legal representative of the estate of BAYA CHARO KAZUNGU (Deceased)*).....2ND RESPONDENT

J U D G M E N T

This appeal emanates from the decision of Hon. Nathan Shiundu delivered on 29th April 2014. The grounds of appeal are that the trial magistrate erred in law and fact by holding that the respondents proved their cases on a balance of probabilities, that the appellants' submissions were not considered, that the amount of damages awarded is excessive, that the trial court erred by not assessing damages for the estate of Baya Charo Kazungu, that the trial court's assessment of damage is erroneous and that the trial court erred by not including in its judgment another file number CMCC No. 188 f 2010 which had been consolidated with number CMCC No. 190 of 2010.

Counsel for both parties agreed to determine the appeal by way of submissions. I have read the submissions by Mr. Jengo, counsel for the appellant. The main issues being raised are that the respondents did not prove that case against the appellant. The pleadings indicate that the deceased Baya Charo was walking along the Malindi-Kagoni road yet the evidence shows that he was riding on a donkey cart with other respondent, Daudi Dara Jara. The trial court simply indicated that it had considered the evidence but did not evaluate the evidence.

Counsel for the appellant maintains that the amount of damages awarded for the damages is excessive. The respondent only suffered fractures of 6th, 7th, 8th and 9th ribs plus soft tissue injuries. The trial court awarded Kshs.400,000 general damages which is excessive. It is also submitted that the trial court erred in law by failing to assess the damages for the estate of the deceased victim yet the two cases had been consolidated. Mr. Jengo would like this court to assess the damages.

On his part, Mr. Wambua Kilonzo, counsel for the respondents opposes the appeal. Counsel maintains that the damages awarded by the trial court are not excessive. The survivor of the accident had not fully

recovered four years after the accident. Mr. Kilonzo is of the view that this court should not assess damages but refer the matter to the trial court for finalisation of file number CMCC 188/2010.

The record of the trial court shows that three witnesses testified for the respondents. These were two separate matters. Counsel for both parties agree that CMCC No. 188 of 2010 was consolidated with CMCC No. 190 of 2010. The record shows that PW1, DAUDI DARA SARA was the Plaintiff in CMCC No. 190 of 2010. His evidence is that on 23rd December 2009 at about 5.00 pm he was riding on a donkey cart along Malindi Gongoni road together with Charo Baya Kazungu when they were knocked by a vehicle. The cart was loaded with building materials. The donkey and Charo Kazungu Baya died on the spot. The vehicle came from behind. They were on the side of the road.

It is his evidence that he gained consciousness at a hospital. He was later seen by Dr. Adede who prepared a medical report for him. He blamed the driver of the vehicle registration number KAG 369V for the occurrence of the accident.

PW2 CHARO KAZUNGU is the father of Kazungu Charo Baya who died on the accident. He was the Plaintiff in CMCC No. 188 of 2010. His evidence is that on the material day he heard of the accident. He rushed to the scene and saw his son's body lying about five (5) meters off the road on the grass. His son was already dead. His son was 18 years old and had been employed by the owner of the donkey cart at a monthly salary of Kshs.6,000. He was depending on his son. The deceased was not married and had no wife. His mother also depended on him. His employer was called Hassan.

PW3 PC JOSEPH MWAMBUA was based at the Malindi police station. The accident was reported on 23rd December 2009 and it occurred at Mambrui along Malindi – Lamu road. He visited the scene. The donkey cart was moving from Malindi side towards Lamu direction. The vehicle was also moving towards Lamu direction. He testified that two lorries were chasing each other. The accident lorry, KAG 296 V Mercedes Benz was overtaking the donkey cart when a vehicle came from the opposite direction. The lorry driver tried to move to his lane and knocked the donkey cart. The driver of the lorry was charged in court. The police abstract indicate that he was charged with causing death by dangerous driving.

The appellant did not adduce any evidence. Counsel for the appellant contends that the respondents did not prove their case on a balance of probabilities. According to PW1, they were knocked by a vehicle which came from behind. It is the evidence of PW3 that investigation revealed that two lorries were chasing each other. The accident lorry was overtaking. The driver did not stop at the accident scene as he feared for his life. According to PW2, the deceased's body was about 5 meters off the road.

Given the evidence herein, I do find that the respondents proved their case on a balance of probabilities. PW3 testified that donkey carts are authorised to be on the road. The driver of the lorry came from behind and ought to have seen the donkey cart. I do find that the lorry driver was negligent and did cause the accident. The trial court was correct by holding the appellant 100% liable. There is no evidence giving a different picture other than that of PW1, PW2 and PW3. Although counsel for the appellant contends that the trial court did not evaluate the evidence, the judgment of the trial court shows that the court was satisfied that an accident did occur and that the driver of the accident lorry was speeding and negligent. The trial court was satisfied that the evidence adduced proved negligence on the part of the appellant.

On the issue of liability, the medical report by Dr. Ajoni Adede dated 29th September 2010 indicates that Daudi Dara sustained fracture of three left ribs, cut on the forehead and blunt injury to the chest and left shoulder. Permanent partial disability of the rib cage was assessed at 2%. The victim was also examined by Dr. Udayan R. Sheth on 30th November 2010. The same injuries were noted. The respondent complained of chest pains.

The trial court awarded Kshs.400,000 as general damages for pain and suffering. Counsel for the appellant relies on the case of **Mathew Nyando V Hassan HCCC No. 712 of 1986**.

The court in that case awarded Kshs.75,000 for fracture of four ribs in 1997. Counsel also relies on the

case of **Mohamed Abdul Mohamed V Mawingo Bus Services Ltd HCCC No. 947 of 1988** where Kshs.60,000 was awarded for fracture of three ribs. Counsel submitted that an award of between Kshs.130,000 to Kshs.180,000 is sufficient.

Counsel for the respondent relied on the case of **Francis Ngewa Mutuli V John Kitheka Kwara & Another**. In that case the plaintiff suffered fracture of the left and right femur, concussion, fracture of unspecified rib, cut wounds on the head. He was hospitalised for four months. The right foot was shortened after recovery.

I do find that the trial court did not rely on comparative cases when assessing general damages. The amount awarded is excessive. The authorities cited by counsel for the appellant, although quite old, give comparative injuries. I do set aside the award of Kshs.400,000 and replace it with an award of Kshs.250,000.

The trial court did not assess damages payable to PW2 as a result of the death of his son. The record shows that file number 188/2010 could not be traced when the court was writing its judgment. I do agree with counsel for the appellant that the best way forward is for the court to assess the damages. An error was committed by the trial court and it is not prudent to refer the file back to that court.

The deceased was 18 years old. He died on the spot. According to PW2, he was earning Kshs.6,000 per month. He was employed by the owner of the donkey cart. PW1 had hired the donkey cart and loaded his goods. It is clear to me that the deceased was earning his living through the use of the donkey cart. It is impossible to expect the deceased to have had a payslip or employment letter as contended by counsel for the appellant. The evidence on record does prove that the deceased was gainfully employed. Kshs 6000 per month is not excessive as it is within the minimum salary range. That gives an estimate of about Kshs.200 per day for a 30 day shift.

The deceased was not married and had no child. PW2 testified that the deceased used to assist him and his mother. Counsel for the respondent submitted for Kshs.100,000 as damages for pain and suffering, Kshs.200,000 for loss of expectation of life and Kshs.1,680,000 for loss of dependency. Loss of dependency is assessed at $Kshs.5,000 \times \text{a multiplier of } 42 \text{ years} \times \frac{2}{3}$.

Counsel for the appellant urged the court to make a global award of Kshs.150,000 as damages for loss of dependency, Kshs.10,000 for pain and suffering and Kshs.80,000 for loss of expectation of life. Counsel relies on the case of

Section 4 of the Fatal Accidents Act includes a parent as one of the beneficiaries of his/her deceased child. The respondent, PW2, is the father of the deceased. I do find that the deceased's parents are his beneficiaries and entitled to claim loss of dependency.

The deceased died on the spot. That does not mean that he did not suffer pain before he died. Every death is painful to a deceased. I will assess damages for pain and suffering at Kshs.40,000. The deceased died while working. I will award Kshs.100,00 for loss of expectation of life. His young life was recklessly taken away.

With regard to loss of dependency, I do find that a multiplier of 42 years is quite excessive. This means that the deceased would have worked up to 60 years. I will reduce it to 25 years. I will adopt the sum of Kshs.5,000 as monthly income offered by the respondent's counsel. The deceased's parents have other children and they should not claim that they were going to depend on him entirely for the period of 25 years. I will reduce liability to only $\frac{1}{3}$. Loss of dependency is therefore assessed at $Kshs.5000 \times 25 \times \frac{1}{3} = 500,000$.

PW2 did not indicate how much he spent for his son's burial. His counsel is also seeking Kshs.35,000 as fees for obtaining a limited grant. I do find that amount to be excessive. Since the deceased was definitely buried, I will award Kshs.20,00 as burial expenses and Kshs. 5,000 as costs of obtaining the limited grant. I do note that there is no claim for this amount in amended Plaintiff.

In the end, I do allow the appeal partially with respect to the award in CMCC No. 190/2010. The award for general damage is reduced to Kshs.250,000. For CMCC No. 188/2010, I award damages as follows:-

Pain and suffering-	Kshs.40,000
Loss of expectation of life	Kshs.100,000
Loss of dependency	Kshs.500,000
special damages	<u>Kshs. 25,000</u>
Total	Kshs.665,000

The respondents shall have costs awarded by the trial court. There shall be no costs for this appeal.

Dated and delivered in Malindi this **9th** day of March, 2016.

S.CHITEMBWE

JUDGE