



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 155 OF 2010

FRANCIS NZIVO MUNGUTI)

SOUTH SIOUX FARM) APPELLANT

VERSUS

**AGNES NECHESA PRESTON (SUING AS AN ADMINISTRATOR OF THE ESTATE OF
PRESTON JUMA (DECEASED)) RESPONDENT**

***(Being an Appeal from the Judgment and Decree of the Senior Resident Magistrate Honourable N.
SHIUNDU (SRM), in ELDORET CMCC No. 710 of 2007, dated 26th July, 2010)***

JUDGMENT

1. The appellants were the defendants in Eldoret Chief Magistrate's Civil Case No. 710 of 2007. They had been sued by the respondents then the plaintiffs in their capacity as the legal representatives of the Estate of the late *Preston Juma* who died following injuries sustained in a road accident on or about 29th May, 2006 while travelling as a passenger in motor vehicle registration number KAV 249 K. In their plaint dated 22nd August, 2007, the respondents prayed for general and special damages under the *Law Reform Act* and the *Fatal Accidents Act*. They also prayed for costs of the suit and interests.
2. It was the respondent's case that the fatal road accident was caused by the sole negligence of the 1st appellant who was the driver of motor vehicle registration No. KAD 986U ZB 3262 which was owned by the 2nd respondent.
3. In the statement of defence dated 23rd April, 2008, the 2nd appellant admitted that it was the owner of motor vehicle registration No. KAD 986U 2B 3262 which was being driven by the 1st appellant when it was involved in a collision with motor vehicle registration number KAV 249 K on 29th May, 2006. The appellants however denied that the accident was caused by the negligence of the 1st appellant and averred that the driver of the other vehicle was to blame for the accident.
4. In his judgment dated 26th July, 2010, the learned trial magistrate held the appellants liable at 100% and awarded the respondents a total sum of Kshs.784,284 in general and special damages together with costs and interest.
5. The appellants were aggrieved by the trial court's decision. They lodged the instant appeal relying on nine grounds which can be condensed into five main grounds as follows; That the learned trial magistrate erred in law and fact in holding the appellants a 100% liable on the basis of insufficient evidence; that the trial magistrate erred in awarding damages that had no legal basis and which were inordinately high; that

the trial magistrate erred in awarding damages for loss of consortium; that the trial magistrate erred in assessing damages for loss of dependency and in failing to dismiss the respondents claim for lack of merit.

6. By consent of the parties, the appeal was prosecuted by way of written submissions; those of the appellants were filed on 2nd November, 2015 while those of the respondents were filed on 22nd October, 2015.

7. This is a first appeal to the High Court. I am aware of the duty of the first appellate court which is to re-evaluate the evidence tendered before the trial court to draw my own independent conclusions regarding the validity of the learned trial magistrate's decision. In undertaking this task, I should be careful to remember that I did not have the advantage of hearing or seeing the witnesses and give due allowance to that disadvantage;

See: **Williamson Diamond Ltd V Brown (1979) EA I; Sumaria & Another V Allied Industrial Ltd (2007) 2 KLR I.**

8. It must however be remembered that as a general rule, an appellate court should be slow to interfere with the findings of fact or decision of the lower court and can only do so if it is satisfied that the decision was not based on any evidence or was based on a misrepresentation of the evidence or upon considering extraneous matters or if it was based on wrong legal principles:-

See; **Makube V Nyamoro (1983) KLR 403; Kiruga V Kiruga & Another (1988) KLR 348.**

9. Guided by the above principles, I will now proceed to address the issues raised in this appeal. From the memorandum of appeal and the submissions filed by the parties, I find that the issues raised in this appeal are twofold; namely, whether the learned trial magistrate erred in law in his finding on liability and secondly, whether he erred in the assessment of damages awarded to the respondents.

10. In order to determine the issue of liability, it is necessary to revisit the evidence adduced before the trial court. The respondents called a total of four witnesses but only two of them gave evidence that was material to the issue of liability. These were PW3 and PW4. PW3 was an eye witness to the accident. He testified that on 29th May, 2006 at around 5.30 a.m, he was travelling as a fare paying passenger in motor vehicle registration No. KAV 249 together with the deceased. They were travelling to Webuye from Mombasa. He was seated next to the bus driver when at Burnt Forest, he saw an oncoming trailer encroach on the lane the bus was lawfully being driven. The trailer was being driven at a high speed and in a zigzag manner. The bus driver tried to avoid it without success. It hit the bus on the side forcing it to overturn. He then lost consciousness. He regained consciousness while at Moi Teaching and Referral Hospital where the deceased was also hospitalized for two weeks before he succumbed to his injuries.

11. PW4 was a police officer from Tarakwa police station. She produced the original police record pertaining to the accident in which the deceased sustained fatal injuries. The records indicated that the driver of motor vehicle registration No. KAD 986 U caused the accident by overtaking when there was an oncoming vehicle; that he was charged in Eldoret Traffic case No. 1495 of 2006 with the offence of causing death by dangerous driving but he absconded his trial.

12. The appellants on their part did not call any witness. This means that the evidence adduced by PW3 and PW4 regarding the circumstances surrounding the occurrence of the accident was not controverted by any evidence to the contrary. From the evidence of PW3 who was an eye witness to the accident, there is no doubt that the 1st appellant was solely to blame for the accident. And since the 2nd appellant had admitted that it was the owner of the vehicle which was being driven by the 1st appellant at the material time, I cannot fault the learned trial magistrate's finding on liability. The said finding is consequently upheld.

13. Turning to the appeal on quantum, I wish to start by stating that it is settled law that the award of

damages is always at the discretion of the trial court and an appellate court can only interfere with that discretion in certain circumstances. These circumstances have been established over time through case law. In ***Kemfo Africa Limited t/a Meru Express Services (1976) & Another V Lubia & Another (1987) KLR 30***, the Court of Appeal held as follows:-

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held to be that; it must be satisfied that either the judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or that short of this the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage...”

14. Similarly in ***Mariga V Musila (1984) KLR 251***, the same court held that

“The assessment of damages is more like an exercise of discretion and an appellate court is slow to reverse a lower court on the question of the amount of damages unless it is satisfied that the judge acted on a wrong principle of law or has for these or other reasons made a wholly erroneous estimate of the damage suffered. The question is not what the appellate court would award but whether the lower court judge acted on the wrong principles..”

15. I now wish to consider whether the learned trial magistrate erred in assessing the damages that were awarded to the respondents. I will start with the damages awarded under the *Law Reform Act*.

Under the head of pain and suffering, the deceased’s Estate was awarded general damages of Kshs.60,000. There is undisputed evidence that the deceased died after being hospitalized at the Moi Teaching and Referral hospital for two weeks. The copy of his death certificate confirms that he passed away on 12th June, 2006. Damages under this head are usually awarded based on the length of time the deceased endured pain and suffering before death. The deceased in this case must have experienced a lot of pain and suffering for the two weeks he was undergoing treatment before he passed on. Contrary to the appellant’s submissions that the award of Kshs.60,000 was inordinately high, it is my view that this award was quite low given the length of time the deceased endured pain and suffering but since I cannot substitute my discretion with that of the learned trial magistrate, I will not disturb that award.

The same is hereby upheld.

16. Regarding damages for loss of expectation of life, the appellants conceded that the deceased was 51 years at the time of his death. They claimed that the award of Kshs.100,000 awarded under this head was inordinately high and proposed a sum of Kshs.30,000. Given the age of the deceased and the fact that his life was cut short by the occurrence of the accident there being no evidence that he was in poor health or that he was exposed to any life threatening circumstances, I find that a conventional award of Kshs.100,000 was reasonable. The award is therefore affirmed.

17. Another of the appellant’s complaints were that the learned trial magistrate erred in law in awarding damages for loss of consortium. The appellants submitted, and correctly so in my view, that such an award is only available to a person whose spouse had been injured and was consequently unable to perform spousal duties; that once the spouse dies, the right of the surviving spouse to recover damages for consortium was extinguished. The respondents chose not to make any submissions on this ground of appeal.

18. On this point, I will do no more than to reproduce my findings in ***Jeremiah Njuguna & another V Anagleta J. Yator & Edel J. Biwott(suing as the administratrix of the estate of the late Paul K. Kiplagat Eldoret Civil Appeal No. 119 of 2008 (2016) eKLR*** where I held as follows;

“In my view, there is no law that provides for an award of damages to the spouse of a deceased person for loss of consortium. The Law Reform Act and the Fatal Accidents Act are to my mind the only statutes that govern the award of general damages in fatal accident claims. Those

statutes only recognize the award of damages under three heads and loss of consortium is not one of them. These are damages for pain and suffering, loss of expectation of life and loss of dependency as well as sums for reimbursement of funeral expenses. As I stated in Innocent Ketie Makaya Denge V Peter Kipkore Cheserek & Another Civil

Appeal No. 96 of 2013, a claim for loss of consortium can only be incorporated within a claim for loss of amenities in an action instituted by a survivor of an accident in which it is claimed that due to the injuries sustained, the claimant was incapable of enjoying consortium with his or her spouse and that therefore, his or her quality of life had as a result been diminished. It is therefore my finding that the award of loss of consortium by the learned trial magistrate in this case was made contrary to the applicable law and the same is hereby set aside.

I adopt those findings in this appeal and find that the learned trial magistrate erred in law in awarding the respondent's damages for loss of consortium in circumstances which were not authorized by the law. The said award in the sum of Kshs.100,000 is consequently set aside.

19. With respect to damages for loss of dependency, the appellants' grievance was confined to the multiplier used to calculate the award. The appellant was happy with the dependency ratio of 2/3 and the multiplicand of Kshs. 6,250. With regard to the multiplier, the trial magistrate took judicial notice that the retirement age in Kenya was 60 years and used a multiplier of 9 years to compute the length of dependency. The appellant has challenged the computation of the award claiming that the learned trial magistrate ought to have taken judicial notice that the amendment to the retirement age for civil servants took place in 2009 when the matter was already in court; that given this fact, the appropriate multiplier in this case was four years. The respondents did not make any submissions to counter these submissions by the appellants.

20. Having considered the appellant's submissions, I find that the trial magistrate was right to take judicial notice that the retirement age for public servants by the time he was delivering his judgment had been enhanced to 60 years as this was a matter that was in the public domain. The trial magistrate must have had in mind the circular from the Office of the President dated 20th March, 2009 which increased the retirement age of all public servants from 55 years to 60 years with effect from 1st April 2009.

21. The deceased died at the age of 51 years on 12th June, 2006. This means that had he not died as a result of the accident, and assuming that all other factors remained constant, he would have been about 54 years and would not have attained the retirement age of 55 years by 1st April, 2009 when the aforesaid circular came into effect. He would still have been in the employment of Webuye Municipal Council and would have benefitted from the enhanced retirement age meaning that he would have retired at the age of 60 years. This in effect means that he would have worked for a further nine years or less given the vagaries of life.

22. In view of the foregoing, I am unable to accept the appellant's submission that the appropriate multiplier in this case was 4 years. There is a possibility that the deceased would have worked for more than four years given the enhancement of the retirement age to 60 years. Similarly, given the vicissitudes of life, there was no guarantee that he would have worked for the remaining nine years before reaching retirement age. In deciding on the multiplier to apply in this case, the learned trial magistrate ought to have taken into account that there was no guarantee that the deceased would have worked till he attained retirement age. It is therefore my view that he failed to take some relevant factors into account in assessing damages for loss of dependency and this justifies my intervention. I thus set aside the multiplier adopted by the trial court and taking into account the vagaries of life, I substitute it with a multiplier of 7 years. The damages for loss of dependency would therefore work out as follows:

$$6,250 \times 7 \times 12 \times \frac{2}{3} = 350,000.$$

23. On the award of special damages, I agree with the appellant's submissions that special damages must not only be pleaded but must also be strictly proved. In this case, the respondents pleaded special damages in the sum of Kshs.204, 674 made up as follows;

- (a) Police abstract - Kshs. 200
- (b) Treatment expenses - Kshs. 84,284
- (c) Death Certificate - Ksh. 190
- (d) Funeral expenses -Ksh. 100,000
- (e) Advocates fees for obtaining

Grant of letters of administration - Ksh. 20,000

24. In his judgment, the learned trial magistrate awarded special damages in the sum of Kshs.84,284 which must have been in respect of treatment expenses. I am satisfied that the respondents strictly proved having expended Kshs.84, 284 on the deceased's treatment by producing a copy of the certificate of clearance from Moi Teaching and Referral Hospital proving that the said amount of money had been paid on 14th June, 2006 to settle the deceased's hospital account. I consequently find no reason to disturb the award on special damages. The same is hereby upheld. The trial magistrate was right in failing to make any award on the other claims of special damages since they were not specifically proved.

25. In the end, the appeal partially succeeds to the extent that the awards for loss of consortium and loss of dependency have been set aside. All the other awards have been confirmed. Consequently, I set aside the judgment of the trial court and substitute it with a judgment for the respondents against the appellants jointly and severally in the total sum of Kshs.594,284. The amount shall attract interest at court rates from the date of judgment of the lower court until full payment.

26. The appellant shall bear the respondent's costs in the lower court but as the appeal has partially succeeded, each party shall bear its own costs of the appeal.

27. It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 6th day of October, 2016

In the presence of:

Mrs. Khayo for the Appellant

No appearance for the Respondent

Naomi Chonde – Court clerk