



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO.5 OF 2012

MAC SERVICE STATION.....1ST APPELLANT

VERSUS

ANNAH KWAMBOKA BATASI.....1ST RESPONDENT

MICHAEL OTIENO GUDA.....2ND RESPONDENT

(Being an appeal from the Judgment delivered on 13th December, 2011 by Hon. S. Soita, Principal Magistrate in Molo SRMCC No. 133 of 2005)

JUDGMENT

The 1st Respondent is the widow of the late Wilfred Batasi Boruma who died after a traffic accident along the Nakuru- Eldoret road. The widow had sued the Appellant and the 2nd Respondent for damages arising out of the fatal motor vehicle road accident and judgment was entered in her favour and she was awarded damages in the sum of Kshs.486,000/=.

The Appellant being dissatisfied has appealed against the judgment that was delivered, in its entirety.

There are nine (9) grounds of appeal set out the Memorandum of Appeal dated 10th January, 2012 which are inter alia;

- i. That the Learned Trial Magistrate grossly misdirected himself in treating the evidence and submissions on liability and quantum before him superficially and consequently coming to a wrong conclusion on the same.
- ii. That the Learned Trial Magistrate did not in the alternative consider or sufficiently consider the demand of contributory negligence based on the evidence adduced and the submissions filed by the Appellant
- iii. That the Learned Trial magistrate failed to consider the evidence adduced by the 1st Defendant establishing that it was not the registered and/or beneficial owner of the subject motor vehicle material to the suit and as a result arrived at an extremely erroneous finding/judgment.
- iv. That the Learned Trial Magistrate misdirected himself in ignoring the principles applicable and the relevant authorities cited in the written submissions presented and filed by the Appellant
- v. That the Learned Trial Magistrate erred in not sufficiently taking into account all the evidence presented before him in totality and in particular the evidence presented on behalf of the Appellant.
- vi. That the Learned Trial Magistrate erred in failing to hold that the Respondent had failed to prove negligence on the part of the Appellant while the onus of proof lay with the Respondent.

- vii. That the Learned Trial Magistrate misdirected himself in not taking into consideration the nature of the Respondent's injuries (if any) at the time of assessing damages.
- viii. That the Learned Trial Magistrate proceeded on wrong principles when assessing the damages (if any) to be awarded to the Respondent.
- ix. That the Learned Trial Magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstances that it represented an entirely erroneous estimate vis-avis the Respondent's purported injuries and consequences arising therefrom

ISSUES FOR DETERMINATION

I have read the written submissions filed by Counsels for both parties together with the annexed authorities and the issues found for determination

- i. Whether ownership of the motor vehicle was established;
- ii. Liability
- iii. Quantum

ANALYSIS

This being the first appellate court it is incumbent upon this court to re-assess and re-evaluate the evidence on record and arrive at an independent conclusion. Refer to the case of **Arrow Car Ltd V. Bimomo and 2 others**, (2004) 2KLR 10.

OWNERSHIP AND LIABILITY:

The Appellant claims that the 1st Respondent failed to prove that the Appellant was the owner of motor vehicle registration number KAN 125L. They contend that no sufficient evidence was produced by the 1st respondent.

At the trial hereof, the 1st respondent produced a police abstract and copy of records as the evidence of ownership of the motor vehicle. Upon perusal of these documents, the police abstract states the owner of the subject motor vehicle is **Paragon Global Agencies**, while the copy of record reads **Paragon Global Limited**.

The 1st respondent testified that she sued Mac Service Station because it was one and the same as Paragon Global Limited.

On the other hand, the appellant's witness at the trial herein also produced a copy of records which indicated that it was not the registered owner of the subject motor vehicle.

In his judgment the Learned Magistrate found that the Paragon Global Limited and Mac Service Station were one and the same entity. It appears that the reason for this conclusion was the fact that the 2nd Respondent was at the time of the accident an employee of the 1st Respondent. This is also the reason put forward by the 1st Respondent in their submissions herein.

As rightly quoted by the 1st Respondent in her submissions, Section 8 of the Traffic Act provides that;

“the person in whose name a vehicle is registered shall, unless the contrary is proved be deemed to be the owner of the motor vehicle”.

The Appellant is not the registered owner of the motor vehicle as proven by the copy of records produced. Further the police abstract also shows that the Appellant is also not the beneficial or insured owner of the subject motor vehicle.

The only other evidence produced was that of the 1st respondent's testimony at trial wherein she stated

that both companies were one and the same. This was however not corroborated by any evidence from the Registrar of Companies.

The fact that the 2nd Respondent was an employee of the Appellant is not sufficient evidence that the Appellant was the owner of motor vehicle. No sufficient evidence was adduced to show the *nexus* between the subject motor vehicle and the Appellant.

It is trite law that in order to infer vicarious liability for the negligence of the driver it is necessary to show that there is a legal relationship between the driver of the vehicle and the owner of the vehicle. Refer to the case of **Hassanali Yusuf V. John Muhaki**, [2006] eKLR.

This court reiterates that the 1st Respondent failed to attribute ownership of the subject motor vehicle on the Appellant. Further she did not prove that at material time the 2nd Respondent was the Appellant's driver or servant or that he was acting as an agent or at the behest of the Appellant so as to fix liability upon it for the negligence of its purported driver.

Since ownership of the motor vehicle has not been proved, the grounds of appeal that the trial magistrate arrived at an erroneous finding on the issue of ownership and liability are found to have merit and are hereby allowed.

I am required to give the findings I would have given on quantum:-

The test on whether an appellate Court should disturb an award of damages is set.

As was held by Law, J.A in **Butt v. Khan** [1977] 1 KAR:-

“An appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high low.”

Similarly, the Court of Appeal in **Kemfro Africa Ltd T/A Meru Express Service Gathongo Kanini V. A. M. Lubia & Olive Lubia**, (1982- 1988) 1KAR 727 held that :-

“An appellate court can only interfere with the quantum of damages awarded by a trial Judge, where it is satisfied that the Judge in assessing the damages took into account an irrelevant factor or left out of account a relevant factor, or that the amount awarded is inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

With the principles set out in the aforementioned cases, I will proceed to address the different awards given for quantum by the trial Court.

Loss of dependency under the Fatal Accidents Act;

The issue in contention herein is the multiplicand used by the Court. The 1st Respondent testified that her late husband was a teacher at the time of his demise. She testified that he earned Kshs.20,000/=, however she did not prove any evidence to back this up.

I find that the deceased's salary was not proved. Further I find that he would have been retired at the time of his death as the retirement age for teachers at the time was 55 years. The only evidence produced as to proof of employment was a letter dated 1986. The 1st respondent should have at least produced a letter from the school where the deceased was allegedly working at the time of his demise.

In the upshot, I shall go by the minimum wage for a general laborer at the time of the deceased's demise which according to The Regulation of Wages and Conditions of Employment Act 2003 is Kshs.3,905/=.

With regard to the multiplier of 5 years, I do not find the same to be too high as to warrant interference. The same goes for the dependency ratio as the deceased was married with children.

Loss of dependency would therefore work out thus:

$$3905 \times 12 \times 5 \times \frac{2}{3} = \text{Kshs.}156,200/=$$

$$\text{less } 10\% \text{ contribution - Kshs.}140,180/=$$

The awards given under Loss of expectation of life and for pain and suffering are reasonable.

FINDINGS

For the reasons set out above, this court makes the following finding;

- a) This court finds that the trial magistrate arrived at an erroneous finding on the issue of ownership and liability.
- b) The court finds that the trial magistrate misdirected himself on quantum and arrived at a wrong conclusion on the issue of quantum.

DETERMINATION

The appeal is found to be meritorious and is hereby allowed.

The judgment entered in SMRCC No. 133 of 2005 Molo is hereby set aside and substituted with a judgment dismissing the suit with no order as to costs.

Each party to bear its/their own costs of the appeal.

Orders accordingly.

Dated, Signed and Delivered at Nakuru this 11th day of February, 2015.

A. MSHILA

JUDGE