



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CIVIL APPEAL NO. 4 OF 2011.

AGRICULTURAL DEVELOPMENT CORPORATION ::::::::::::::: APPLICANT.

VERSUS

MOSES CHESEBEN NAIBEI)

MOSES KIRUI) ::::::::::::::: RESPONDENTS.

(suing as joined administrators of the estate of PETER KIRUI SOSSY – DCD)

J U D G M E N T.

This appeal arises from the decision and judgment of the Chief Magistrate at Kitale in CMCC No. 86 of 2010, in which the appellant, **Agricultural Development Corporation Ltd. (ADC)** was sued by the respondents, **Moses Cheseben Naibei** and **Moses Kirui**, being the administrators of the estate of the **Late Peter Kirui Sossy**, who passed away on the 18th May, 2009, due to injuries suffered in a road traffic accident involving his motor cycle Reg. No. KBG 966G TVs Star and a tractor/trailer Reg. No. KBB 248S New Holland belonging to the appellant.

It was averred that on the material date at about 7.30 p.m., the deceased was lawfully riding his said motor cycle along the Kitale-Kisawai road when at a place called Marambachi, the appellant's driver, servant and/or agent so recklessly and carelessly drove, controlled, and/or managed the said tractor without proper light such that its trailer crushed the deceased's motor cycle thereby causing fatal injuries to the deceased who was at the time aged twenty five (25) years, in excellent health and earning a living as a farmer cum motor cyclist at profit of Ksh. 500/= per day.

As a result of the accident, the estate of the deceased suffered loss and damage and filed suit against the appellant praying for special and general damages together with costs and interest.

The appellant filed a statement of defence in which it denied the respondents' capacity to sue and the allegations of negligence made against itself by the respondent and contended that if the accident occurred as alleged, then it was wholly caused and/or substantially contributed to by negligence on the part of the deceased in the manner indicated in the particulars.

The appellant therefore prayed for the dismissal of the suit with costs.

After trial, the learned trial magistrate concluded the appellant was 100% liable for the accident and awarded the respondents damages in the total sum of Ksh. 1,538,250/= together with costs and interest.

Being dissatisfied, the appellant filed the present appeal on the basis of the grounds in the memorandum of appeal filed on and dated 26th January, 2011.

At the hearing of the appeal, learned counsel, **Mr. Akenga**, appeared for the appellant while learned counsel, **Mr. Karani**, appeared for the respondents.

Both counsels agreed to proceed by way of written submissions and in that regard the appellant's submissions were filed on 30th June, 2014, and the respondent's on 1st July, 2014.

Having considered the appeal on the basis of the grounds in support thereof and the submissions by both sides, the duty of this court is to re-consider the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

In brief, the respondent/plaintiff's case was that on the material date, **John Chebangot Ngeiywa (PW3)**, arrived near Marambachi centre from Kinyoro. A tractor was behind him. He moved off the road to give way to the tractor as the road was narrow. The deceased's motor cyclist with his lights on attempted to squeeze along the narrow road as he had no space to pass. In the process, he was hit by the tractor's trailer and fell down. The tractor did not stop and was on the wrong right side of the road when the motorcyclist was hit.

Moses Kirui Sossy (PW1), the second respondent herein, learnt of the accident and proceeded to the scene where he found that the deceased had been hit by a tractor and died on the spot. He arranged for the body of the deceased to be taken to the mortuary and later obtained a death certificate and a limited grant of letters of administration respecting the estate of the deceased which enabled him file this suit against the appellant as the owner of the tractor. He indicated that the deceased was aged twenty-five (25) years, unmarried and earned about Ksh. 300/= per day as a motorcycle operator.

The second respondent (PW1) also indicated that the expenses incurred in the burial of the deceased amounted to Ksh. 48,000/= His evidence was fully adopted by the first respondent, **Moses Cheseben Naibei (PW4)**.

P.C. Joseph Makakha (PW2), of the traffic section Kitale police station, investigated the accident and found that the deceased cyclist collided with the tractor's trailer while by-passing the tractor and having failed to notice that the tractor was pulling a trailer. He (PW2) noted that the width Of the trailer was bigger than the tractor and that the trailer moved in a zig-zag manner. He also noted that the tractor had lights but not the trailer it was pulling. He did not conclude his investigations and left the matter pending.

The appellant/defendant's case was that the driver of the tractor, **Martin Kipkorat Kemboi (DW1)**, was driving towards Bondeni to the ADC farm at Olgatongo in the company of his turn boy **Eric Langat (DW2)**. Their tractor was Reg. No. KBB 248S and on the way they found another tractor also belonging to ADC blocking the way. They stopped to enquire but were immediately confronted by a mob of motor cyclists who attacked them alleging that they had killed a person. They were forced to go back to Marambachi before the police arrived at the scene.

The driver (DW1) indicated that his tractor was pulling a trailer but contended that he did not notice when the accident occurred or anything unusual. He thus implied that he was not to blame for the accident. The turn boy (DW2) did not also know what had happened prior to seeing many motorcyclists approaching them from Marambach. It is when they were stopped by the cyclists that they were told that they had hit a person who died. He (DW2) indicated that he was behind the trailer but did not witness any accident at Marambachi although the motor cyclists claimed that they had killed a man. He then hid in a shamba.

The learned trial magistrate considered all the foregoing evidential facts and concluded that the respondents had proved their case against the appellant on the basis of the evidence of John Chebangot Ngeiywa (PW3), who was found to be a credible witness as compared to the appellant's witnesses.

The learned trial magistrate found as a fact that the driver of the tractor (DW1) was moving at a high-speed and that is why the tractor and its trailer moved in a zig-zag manner. That, the driver drove the tractor carelessly on potholed narrow road at a high speed at night.

Consequently, the appellant was found 100% liable for the accident.

In this court's opinion, the occurrence of the accident was not clearly explained by the key independent witness (PW3). The driver (DW1) and his turn boy (DW2) indicated that they did not know how the accident happened and were not even aware of it until a mob of motor cyclists confronted them as they proceeded with their journey.

John Ngeiywa (PW3) clearly indicated that the road was narrow such that he moved off the road to give way to the tractor. He indicated that the tractor took the whole road leaving a small space on the right side of the road such that the deceased motor cyclist attempted to squeeze on the narrow space and was hit by the tractor's trailer. He (PW3) did not say that the tractor was moving at a high speed but indicated that it was running down hill and that the accident occurred at a steep slope.

Although he (PW3) blamed the driver of the tractor for the accident in that he (driver) took the whole road and left a narrow space for other road users, he (PW3) also blamed the deceased motor cyclists for not giving way and instead squeezed on to the narrow space and was hit by the tractor's trailer whose width according to the investigating officer (PW2) was larger than that of the tractor.

Indeed, the death certificate (P. Exh. 2) showed that the deceased died from severe head injury due to high speed impact meaning that he was riding his motor cycle at a high speed and most probably without a protective helmet.

Liability in the circumstances, could not have been fully shouldered by the appellant as the learned trial magistrate found. Instead, it would have been apportioned as between the respondents and the appellant.

In that regard, this court finds it proper to apportion liability at 60% against the appellant and 40% against the respondent.

With regard to the quantum of damages, the sum of Ksh. 100,000/= for loss of expectation of life and the sum of Ksh. 20,000/= for pain and suffering as awarded by the learned trial magistrate was reasonable and adequate.

With regard to loss of dependency, the deceased was aged twenty five (25) at the time of his death and unmarried. It was indicated that he assisted his parents in paying school fees for his sister and that his daily wage was Ksh. 300/= from his employment as a motor cycle rider. No evidence was however led to establish the fact.

The learned trial magistrate agreed with the respondent's legal counsel and adopted a multiplicand of Ksh. 10,000/=, a multiplier of thirty five (35) years and a dependency ratio of Ksh. 1/3rd and awarded a sum of Ksh. 1,399,999/= for loss of dependency.

Counsel for the appellant had proposed a sum of Ksh. 240,000/= to wit $20 \times \frac{1}{3} \times 3000 \times 12$.

In the opinion of this court, a multiplicand of Ksh. 6,000/= was more appropriate calculated at a daily wage of Ksh. 300/= excluding weekends. The amount represented the monthly earning which when applied to a multiplier of 20 years and a dependency ratio of 1/3rd would come to $Ksh. 6,000/= \times 25 \times 12 \times \frac{1}{3} = 600,000/=$.

Consequently, this appeal is allowed to the extent that the judgment of the trial court be and is hereby set aside and substituted for a judgment on liability at 60% against the appellant and 40% against the respondents and a judgment on quantum at a total sum of Ksh. 720,000/= in favour of the respondents less 40% contributory negligence i.e. Ksh. 432,000/= together with costs and interest.

The appellant shall have the costs of the appeal.

Ordered accordingly.

[Delivered and signed this 15th day of July, 2014.]

J.R. KARANJA.

JUDGE.