REPUBLIC OF KENYA

High Court at Eldoret

Civil Appeal 149 of 2011

CHABBDIYA ENTERPRISES LIMITED.....APPELLANT

VERSUS

JAMES KARANJA MUHUHU (Suing as personal representative of the estate of late SUSAN WAMBUI MWAURA (Deceased).....RESPONDENT

(Being an appeal from the Judgment and decree of Hon. Mrs. A. Onginjo (Principal Magistrate) delivered on 29th July, 2011 in Eldoret CMCC. No. 740 of 2009)

JUDGMENT

The Respondent herein filed the suit before Chief Magistrate's Court in Eldoret, being Civil Case No. 740 of 2009 in his capacity as a personal representative of the estate of **SUSAN WAMBUI MWAURA** – deceased, for the following reliefs:-

(a) Special damages of Ksh. 128,750/=.

(b) General damages under the Law Reform Act (Cap 26) Laws of Kenya and the Fatal Accidents Act (Cap 32) Laws of Kenya.

(c) Costs of the suit.

(d) Interests on the above reliefs at court rates.

The Respondent was the husband of the deceased Susan Muthoni Mwaura. The deceased died through a road accident on 18th September, 2009 along Nakuru – Eldoret Road near State Lodge junction. She was travelling in motor vehicle registration number KAS 442 W Toyota Station Wagon when the driver of motor vehicle registration number KAQ 571 W owned by the Appellant Company allegedly caused or permitted the same to collide, roll or crash with motor vehicle Registration No. KAS 442 W as a result of which the deceased suffered fatal injuries.

The Respondent wholly attributed the accident to the negligence of the driver, servant and/or agent of the Appellant Company. Such particulars of negligence were given in paragraph 4 of the plaint.

The deceased was survived by four dependants namely:-

(i) James Karanja Muhuhu – husband

(ii) Teresia Rose Wanjiku – daughter

(iii) Peter Muhuhu Karanja – son

(iv) Faith Wanjiku Muhuhu – daughter

The Respondent averred that as a result of the death of the deceased the dependants have lost a source of income and livelihood and have therefore suffered loss and damages.

The particulars of special damages were given in paragraph 6 of the plaint.

The learned Magistrate entered Judgment on liability at the ratio of 40:60% against the Defendant. To be specific the plaintiff was to bear 60% liability.

She then proceeded to award the damages as follows:-

(a) Pain and suffering …... Ksh. 20,000/=

(b) Loss of expectation of life …. Ksh. 100,000/=

(c) Loss of dependancy. This was calculated using a multiplier of two thirds (2/3) of Ksh. 5,500/= as minimum wage earned per month and a multiplicand of 20 years. This brought a figure of Ksh. 5,500 x 12 x 20 x 2/3 = Ksh. 880,000/=.

(d) Special damages …. Ksh. 40,100/=

Sub-Total …..... Ksh. 1,040,000/=

Less 60% contributory negligence of Ksh. 624,060/=, leaving a balance of Ksh. 416,040/= as the total awarded.

It is against this Judgment that this appeal is brought. Suffice it to say, the Respondent also cross-appealed.

The Memorandum of Appeal raises seven grounds of appeal as follows:-

1. That the learned trial Magistrate erred in law and fact in apportioning liability and/or holding the appellant liable at all contrary to the evidence on record.

2. That the learned trial Magistrate erred in law and fact in failing to consider the evidence on record and failing to hold that the respondent had not proved his case against the appellant thereby dismissing the claim.

3. That the learned trial Magistrate erred in law and fact in holding the appellant 40% liable or at all, without the respondent providing his case against the appellant.

4. That the learned trial Magistrate erred in law and fact in failing to consider the evidence on record.

5. Notwithstanding the aforegoing the learned Magistrate erred in law and fact in making an award on damages that was so excessive as to amount to an erroneous estimate of loss or damages suffered by the respondent.

6. That the learned trial Magistrate erred in law and fact in failing to take into account and deducting the damages awarded under the Law Reform Act.

The said grounds of appeal can be summarized into three as follows:-

(a) That the Respondent did not prove liability against the Appellant, hence no liability should have been apportioned against the Appellant.

(b) That the damages awarded were excessive in the circumstances.

(c) That the learned Magistrate applied the wrong principles in computing the damages awarded.

A cross appeal was filed by the Respondent on 6th December, 2011. It raises two grounds of appeal as follows:-

(a) That the learned trial Magistrate erred in law and in fact in making a finding that the Plaintiff/Cross Appellant be held contributory negligent when sufficient evidence on record had proved on a balance of probability that the Defendant/Appellant ought to be held 100% liable.

(b) That the learned trial Magistrate erred in law and in fact in awarding the plaintiff Kshs. 880,000/= (read Eight Hundred and Eighty Thousand Only) on loss of dependency from the fatal injuries proved whereas the learned trial Magistrate ought to have awarded the plaintiff Kshs. 1,300,000/= (One Million Three Hundred Thousand Only) on 100% liability as prayed in the plaintiff's submissions dated 18th April, 2011.

The said cross-appeal basically faults the learned Magistrate in apportioning liability to the Respondent whereas the case was proved on a balance of probability at 100% and that the figure of Ksh. 880,000/= awarded for loss of dependancy was erroneous as a figure of Ksh. 1,300,000/= was the appropriate award under this head.

I will consider the issues raised both in the appeal and the cross appeal simultaneously.

It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions – see **STANLEY MAORE -VS- GEOFFREY MWENDA – NYERI CIVIL APPEAL NO. 147 OF 2002 – "the duty of the Appellate court is to re-evaluate the evidence, assess it and make its own conclusion as if it has not seen or heard the witnesses."**

LIABILITY

In considering whether the trial court properly arrived at a finding on liability, it must be borne in mind that an appeal court "**will not normally interfere with a finding of a fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles" - EPHANTUS MWANGI AND GEOFFREY NGUYO NGATIA -VS- DUNCAN MWANGI WAMBUGU (1982-1988) 1 KLR, 278**.

The Plaintiff (Respondent) called two witnesses while the defence called none. PW1 was the plaintiff himself. He produced grant of Letters Ad Litem that gave him the mandate to file the suit on his behalf and on the behalf of the estate of his deceased's wife. A Certificate of Grant of Letters of Administration Ad Litem was produced as P. Exhibit No. 1.

PW1 was not present at the scene of the accident. All he testified was that motor vehicle registration number KAQ 571 W collided with the deceased's car at about 2.00 p.m. on 18th September, 2002. He produced her death certificate as P. Exhibit 3. He also produced certificates of birth of their children as P. Exhibits (a), (b) and (c) respectively. It is uncontroverted though, that PW1 was the husband to the deceased and that the deceased left behind three issues named in paragraph 5 of the Plaint. What is in contention is who caused or was to blame for the accident.

PW2 Police Corporal Ayub Pache of Eldoret Police Station produced before court as P.Exhibit 6 the police abstract. According to him, as at the time he testified, that is, on 16th November, 2010, the matter (accident) was still under investigations. His testimony was that the accident was investigated by one

Sergent Elvis Kemboi who had been transferred from the station.

On cross-examination, he confirmed that he had with him the police file under which the accident was investigated. According to him measurements at the scene were taken and a sketch map drawn. He said that the investigating officer concluded that the deceased was to blame for the accident and recommended that the matter be disposed of by way of a public inquest.

It is not clear in my mind why the police file was produced as a defence exhibit during the cross-examination of PW2. I opine probably both counsel on record consented to this. This is not procedural but being a technical hitch cannot bar the court from considering such exhibit as both parties consented to its production. Indeed all the documents comprising the police file were exhibited and are contained on pages 38 to 57 of the Record of Appeal. Paragraph 7 of the police abstract shows that the case was under investigations as at the time of its issuance. The covering report written by the investigating officer gives the following comments as findings:-

"**the accident occurred at day time when visibility was clear. The accident occurred when there was little rain hence the road was wet. It is clear from the sketch plan that E1 was overtaking hence an accident occurred e.g. the road mark or rather the brake plus the debris were on the other lane (opposite lane). She could all along have avoided the accident. The accident occurred at a corner/junction. So the idea of overtaking was not supposed to arise. D1 has clearly explained that the accident occurred as a result of overtaking by E1".**

In conclusion he made the following recommendation:-

"**Although life was lost ….. the deceased contributed to her death…... the file be disposed of by way of an inquest by a competent court"**

Reference of D1 in this report points to the driver of motor vehicle KAQ 571 W. He recorded his statement on 20th September, 2006 at 11.35 a.m. His testimony was that he was driving from Timboroa to Webuye and was transporting logs. That on arrival at the state junction the deceased suddenly started overtaking at a high speed as a result of which she hit the front driver's bumper.

The sketch plan does clearly show the point of impact on the lane heading towards Eldoret town. This is the lane on which the lorry was being driven.

It then begs more questions than answers why the learned Magistrate concluded that the Appellant would shoulder any liability. Liability would be apportioned to the Appellant only if the point of impact is marked in the middle of the road, in which case both motor vehicles would be to blame for closely pulling towards each other. Unfortunately this is not the case. The point of impact is inside the lane headed towards Eldoret town.

Therefore the findings of the trial court on liability, in my view were based on no evidence or facts on record. She also would have given a benefit of doubts to the defence if the police file was not produced in court.

Fortunately it is from the police file that, without a shred of doubts, what transpired on the road is discernible. In arriving at her finding on liability, the learned Magistrate had this to say:-

"**Although the sketch plan on sub file B is not indicated as rough or fair and both don't have legends and measurements, there is a smooth corner, it is showed that point is very much near middle of the road and the accident motor vehicle landed on the left as one faces Nakuru direction. If the lorry was moving slowly because it was transporting logs as in the statements of drivers and the investigating officers, then one would have expected driver of the lorry to apply breaks and avoid collision. Indeed the investigation officer has said deceased contributed greatly and would take that to mean driver of lorry contributed 40%, I do find defendant liable to that extent and enter judgment against defendant infavour of plaintiff at 40%. The**

deceased will bear 60% liability.

I fault her findings on the following grounds. First, even if the point of impact was "**much nearer the middle of the road**", it is clearly marked inside the lane heading towards Eldoret. That alone is evidence that the deceased had pulled into the lane of motor vehicle KAQ 571 W at the time of the collision.

Second, no onus lay on the driver of the lorry to apply brakes as he was slowly driving on his lane. Even if he braked, the deceased would nonetheless have collided onto his vehicle as she was overtaking dangerously at a corner.

Third, it is not true that the investigating officer apportioned any blame on the part of the lorry driver. His findings were that the deceased was the author of her own fate and he recommended disposal of the file by way of conducting an inquest.

The learned Magistrate ought to have relied on evidence contained in the police file as none of the witnesses were either present at the scene of the accident or gave evidence as to how the accident occurred. The police file gave conclusive evidence on what transpired at the scene. She shifted blame on the Appellant's driver based on misapprehension of the evidence on record.

I do accordingly conclude that none of the particulars of negligence alleged against the Appellant's driver were proved. As rightly submitted by counsel for the Appellant and emphasized in the case of **FLORENCE REBECCA KALUME -VS- COASTLINE BUS SAFARIS AND ANOTHER (1996) e KLR "court cannot infer negligence where none exists".**

Further in **KIEMA MUTHUNGU -VS- KENYA CARGO HANDLING SERVICES LIMITED KAR (1991) 2 258** there can be "**no liability without fault and a plaintiff must prove some negligence on the part of the Defendant where the claim is based on negligence**".

Having said this, it is my candid view that it does not serve any purpose to delve into issues raised on quantum awarded. I must however point out that it is important that the court gives the basis upon which each head of damages is awarded. For instance under the Law of Reform Act, the following heads are awardable:-

- Pain and suffering
- Loss of Expectation of life
- Lost years

Under the Fatal Accidents Act, the damages for loss of dependancy are warded.

In the former, court must explain the basis upon which say, the sum for pain and suffering is given. For instance, it must explain the length of time it took the deceased to die and therefore quantify the figure based on the pain suffered before death.

As for loss of expectation of life, a conventional figure obtains.

As for loss of dependancy the court must justify why a certain multiplicand is used and also why it thinks a certain percentage of the deceased income determines how much the dependants benefited from him/her. No such explanation was given by the trial court giving a lacuna on how the learned Magistrate arrived at a figure of Ksh. 5,500/= (multiplicand) and 2/3 multiplier. But as I have not found for the Respondent on liability, I will not tabulate what figure under each head I think the Respondent would be entitled to.

In the result I make the following final findings:-

1. The main appeal is allowed with costs to the Appellant. The Judgment of the lower court is set aside and the Respondent's suit dismissed with costs.

2. The Cross appeal is also dismissed with no orders of costs.

DATED and **DELIVERED** at **ELDORET** this 9th day of May, 2013.

G. W. NGENYE - MACHARIA
JUDGE
In the presence of:

Miss Omwasa Advocate for the Appellant

No appearance for M/s. Kigen & Co. Advocates for the Respondent