



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT MOMBASA**

Civil Appeal 154 & 155 of 1996

**JACKLINE MUENI NZIOKA.....
.....APPELLANT**

AND

**JETHAT RAMJI KERAI.....
RESPONDENT**

(Appeal from judgment and decree of the High Court of Kenya at Mombasa (Lady Justice Ang'awa) dated 23rd May, 1996

IN

H.C.C.C. NO. 263 OF 1995

JUDGMENT OF THE COURT

These two appeals have been consolidated and heard together under rule 100 of the Court of Appeal Rules.

Jackline Mueni Nzioka, the appellant in C.A. NO. 154/96 (hereinafter called “the plaintiff”), sued Jetha Ramji Kerai, the appellant in C.A. NO. 155/96 (hereinafter called “the defendant”), in the superior court seeking to recover damages on behalf of herself and her children following the death of her husband Joseph Nzioka Mwana (hereinafter called “the deceased”) in an accident which occurred on 20th August, 1994, at Kibarani involving a motor vehicle registration number KWP 155 owned by the defendant but at the material time being driven by a driver in the employment of the defendant. According to the averments in the plaint, and the evidence led on behalf of the plaintiff at the trial, the vehicle ran out of control, hit an electric pole on the side of the road which collapsed and hit the deceased and fatally injured him. The accident was therefore attributed to negligence on the part of the defendant’s driver. According to the particulars given by the plaintiff, the deceased was survived by the widow, two sons and three daughters aged between two months and twelve years at the date of filing the suit on 21st April , 1995.

A defence was delivered on behalf on the defendant admitting the occurrence of the accident and the death of the deceased but alleging that the said accident was caused by negligence on the part of the deceased. Particulars of negligence were given which alleged, inter alia, that the deceased failed to take care of his own safety: failed to walk off the road; exposed himself to a danger which he ought to have

reasonably known and anticipated; forced the driver to take evasive action causing him to hit a stationary object resulting in his fatal injuries; and created a peril injurious to his own safety. Even the averment by the plaintiff that she had 5 children was denied.

The case was heard by Ang'awa J. The plaintiff gave evidence and tendered a number of vital documents to the court which included birth certificates relating to 3 of her children, which the judge only marked for identification but for some unexplained reason did not admit them as exhibits in the case. Although we inquired from both counsel how this error could have occurred, they were not able to give us a satisfactory explanation. The defendant did not offer any evidence. The only direct evidence on how the accident happened was given by James Odero Jowi who told the Judge –

“I knew Joseph Nzioka Mwana. He was a driver of a fork lift. He died on 20th August, 1994. On that day a lorry came and knocked a telephone post. The post fell on the deceased. It is a road from Magongo. He was ahead of me. The lorry knocked the pole and fell on him. He then fell down and died. The registration of the vehicle was Mitsubishi KWP 155.”

In cross-examination by Mr. Jiwaji for the defendant, this witness said-

“There were many people who were going to work. It was about 9.30a.m. I had no watch. There were many people on the road as usual. I then went to write a statement to the police.”

As we have already said no evidence was tendered on behalf of the defendant who chose not to call even his driver to give his version of how the accident it occurred if it did not happen the way this eye witness explained to the Judge. She accepted this evidence and held the defendant liable. In the assessment of damages the learned Judge rejected the evidence of income of the deceased and the plaintiff's claim that she had 5 children. She accepted 3 children on the basis that these were the only ones whose parentage was proved by production of the relevant birth certificates.

She made what appears to be a global award of Shs.100,000/-, but denied the plaintiff her costs of the action.

The defendant's appeal is against both liability and quantum. The plaintiff's appeal is against quantum only. We shall deal first with the submissions made by Mr. Jiwaji, for the defendant. He submitted that the finding on liability was erroneous on the grounds that it is based on the testimony of a witness(P.W.2) of doubtful veracity and on an alleged misdirection in the judgment. According to Mr. Jiwaji the evidence of Odero Jowi should not have been believed simply because he had testified that he had gone to the police to make a statement after the accident although he had not in fact done so. Secondly, this witness also said he saw the plaintiff at the scene of the accident yet the plaintiff herself had told the Judge that she received the news of the death of the deceased when she was in Machakos. In relation to the testimony of this particular witness the Judge said-

“The witness for the plaintiff may or may not be credible. Nonetheless the facts are that the lorry hit a pole that fell on the plaintiff's deceased husband. The defendants admit that it is true the lorry knocked the pole but this was all due to the deceased's negligence. The mere fact a lorry hits an electric pole, an object one does not normally find in the middle of the road but on the side of the road is an indication that the said lorry left the road and hit a pole that is normally found on the side of the road.”

The Judge then made the following finding which Mr. Jiwaji vigorously attacked:

“I find to my mind that I am satisfied an accident occurred. That the lorry vehicle (sic) belonged to the defendant. That on the material day it knocked a pole which in turn hit the deceased. This evidence is direct and I would hold the defendant liable of his agent, servant or authorised driver.”

Mr. Jiwaji submits that this finding is unsustainable on the evidence but with respect we cannot agree. The plaintiff put forward a version of events regarding the occurrence of the accident which if the defendant disputed, or felt was untrue, he could have rebutted by simply calling the driver to rebut it but

he chose not to do so. Mr. Jiwaji submitted that he was under no obligation to call the driver as a witness because the defendant had no burden of proof. Of course, everybody knows he had none, but if the plaintiff advanced an account which he felt was inaccurate, it was in his own interest to put forward his version. To do so, would not, in our judgment, shift the burden of proof as contented by Mr. Jiwaji. The Judge had credible evidence before her which she had no reason to disbelieve, and, quite properly, accepted, and made the anchor of her finding. The appeal against liability must fail and it is dismissed.

As regards the appeal against quantum the complaint by both counsel before us was that the learned Judge disregarded all the settled principles pertaining to assessment of damages in arriving at the figure of Shs.100,000/-. For the defendant, Mr. Jiwaji submitted that this resulted in an exorbitant award. Mr. Kenzi, for the plaintiff, on the other hand, argued that it had resulted in an inordinately low award.

The principles to be observed by an appellate court in deciding whether it is justified in distributing the quantum of damages awarded by a trial judge are that it must be satisfied that either that 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. See Ianga v Manyoka, (1961) E.A. 705 at pages 709 and 713. The learned Judge did not explain how she arrived at the sum of Shs.100,000/-. The award was made in two sentences at the end of her judgment in the following terms-

“I would also find that the plaintiff was able to mention (sic) herself and three children as opposed to five as dependency. I would give relief that is just in the circumstances of this case at shs. 100,000/- together with interest at court rates from today’s date.”

It is plainly obvious from this passage in her judgment that the learned Judge did not apply the correct principles in arriving at the award she made. So she could not have determined the correct estimate of the damage. The claim was brought under both the Law Reform Act (Cap 26) and the Fatal Accidents Act (Cap 32) for the benefit of the estate and the dependants of the deceased. The trial court, therefore, was under a duty to assess damages under both Acts but bearing in mind that the net benefit inherited by the dependants under the Law Reform Act must be taken into account for the damages awarded under the Fatal Accidents Act, because the loss suffered under the latter Act must be offset by the gain from the estate under the former Act. See Kemfro Africa Ltd. v A.M. Lubia & Another (1988) 1 KAR 727.

An award should have been under the Law Reform Act for the benefit of the estate of the deceased for pain and suffering and for loss of expectation of life. Since the death was instant it is to be assumed that the deceased did not suffer any pain. But the estate is entitled to an award in respect of loss of expectation of life which we assess at shs.70,000/-. An award would have been made to cover funeral expenses but there is evidence that the defendant out of his good nature met these expenses.

We now come to the claim under the Fatal Accidents Act for the benefit of the defendants. The plaintiff was 35 at the date of trial. The deceased was 40 at the date of his death and was said to be in good health. According to his widow he was a fork lift driver in receipt of a salary of shs.4,000/- per month. There is a misconception in personal injuries claims that the dependency is rigidly fixed at two-thirds of the net income of the deceased. Fortunately, this misconception has been laid to rest by the decision of this Court in the case of Jane Chelagat bor v Andrew Otieno Onduu & Others, (1990) 2 KAR 288, where Hancox CJ after tracing the genesis of this so called rule said at page 291-

“The one thing that emerges from all these decisions is that there is no two-thirds rule as Mrs. Aluoch supposed in Rispa’s case. It was made perfectly clear in the Privy Council decision of Kassam v Kampala Aerated Water Co. Ltd., which was binding on the Court of Appeal for East Africa, that dependency is a question of fact. Kneller JA took the same view in Hassan’s case when he said (at 949):

“the sum to be awarded is never a conventional one but compensation for a pecuniary loss.”

I think this had to be right. The fact that in many of these cases the trial judge thought that the

dependency rate should be two-thirds in the case of a married man with children, means simply that was his or her assessment of the pecuniary loss suffered by the dependants because of their father's death, and not that there was any rule to that effect."

We think that a realistic dependency in this case on an undisputed income of Shs.4000/- per month would be Shs.2,000/- per month or Shs.24,000/- per year. The deceased was aged 40 at the date of death and a multiplier of 12 would be reasonable in the circumstances making a total of Shs.288,000/-. We accept that the deceased left 5 children because that was the undisputed evidence of the plaintiff. That averment did not require to be supported by the production of relevant birth certificates as Mr. Jiwaji thought. As the widow could well remarry, he would reduce the award under the Fatal Accidents Act to Shs.280,000/-. The total award under the two Acts therefore is Shs. 350,000/-.

The plaintiff was entitled to the costs of the suit and the Judge should have made an order in her favour. We think that the only reason she failed to do so was purely due to oversight on her part.

The other matter we must deal with is the failure to admit as exhibits the documents tendered by the plaintiff. The learned Judge marked these for identification but forgot to have them admitted as exhibits. The documents in question could properly be put in by the plaintiff and there was clearly no need to mark them for identification. We think counsel are also not entirely blameless for this failure which in the event, has not occasioned any miscarriage of justice.

In the final analysis, we dismiss the defendant's appeal against liability and quantum with costs to the plaintiff and we allow the plaintiff's appeal against quantum with costs. We enter judgment for the plaintiff for Shs.350,000/- with interest at court rates from 23rd My. 1996, together with costs in the superior court. Costs of the appeal to the plaintiff.

Dated and delivered at Mombasa this 24th day of January, 1996.

J. E. GICHERU

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JUDGE OF APPEAL

R. O. KWACH

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JUDGE OF APPEAL

R. S. C. OMOLO

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JUDGE OF APPEAL