



REPUBLIC OF KENYA

Court of Appeal at Nairobi

Civil Appeal 100 of 2004

KENYA BUS SERVICES LIMITED 1ST APPELLANT

PETER MIRARA KARIUKI 2ND APPELLANT

AND

GITHAE GATURURI RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (M. Ang'awa J) dated 18th December 2002

in

HCC NO. 2330 OF 1998)

JUDGMENT OF THE COURT

The respondent filed a suit in the High Court as the administrator of the estate of his late son, Taratasio Githinji Githae, (the deceased) who died in a road accident on 18th September, 1996. The accident involved a bus KUM 870 (the bus) belonging to Kenya Bus Services Ltd (the 1st appellant) on which he was travelling, driven at the time of the accident by the 2nd appellant and a lorry registration number KXT 825 (the lorry) along Ngong Road, Nairobi. The respondent blamed the driver of the bus for the accident and sought an award of general damages. For their part, the appellants denied liability and instead averred that the accident was caused by the driver of the lorry. As a matter of fact, the appellants took out a third party notice against the owner of the lorry, Njuguna Builders Limited, but later on, the third party notice was abandoned by counsel for the appellants.

The respondent called evidence from four witnesses while the appellants called the bus conductor. The learned judge (Ang'awa, J.) considered the evidence presented before her and in holding that the appellants were liable to the respondent stated as follows:-

“I combine these two issues under special circumstances. First and foremost, the accident is not

denied. The defendants' defence is that negligence is to be blamed on a third party. The defendant had attempted to take out third party proceeding and were indeed given leave to do so on the 18.5.99 by Ojuk J. No action by the defendants was hereafter taken.....When the matter came up for trial the defendant withdrew the third party notice and claim. By doing so the issue No. 3 for determination which states-

'Whether the accident was caused by the driver of the motor vehicle KXT 825' can no longer stand..... It therefore means that the defendant must file another suit against the 3rd party altogether. '

As a court, I am NOT permitted to find contributory negligence against a party who is not named in the plaint but has been merely mentioned by the defendants. As stated elsewhere this is the principle of Audi altercum pastime. (sic) "No man should be condemned without being heard and offer his side of his story."

I would therefore hold that as the defendant failed to join a third party to this suit, they must bear the full liability in this case. I therefore enter judgment on liability at 100% jointly and severally with the defendant No. 1 being vicariously liable for the acts of his agent and or servant defendant No. 2."

With that, the learned judge awarded Kshs. 870,000/- in general damages under the Law Reform Act. The appellant thereafter preferred this appeal challenging that decision on the following condensed grounds:-

- i) That the learned judge erred in finding that the appellants were liable simply for the reason of their failure to join a third party.
- ii) That negligence on the appellant's part was not proved.
- ii) That the evidence pointed to the negligence of a third party.
- iv) That the court failed to determine issues No. 2 and 3 as to whether the accident was caused by the 2nd appellant or whether it was caused by the driver of the lorry – KXT 825.
- v) That the judge failed to appreciate that the appellants had a defence to the claim that was independent of the claim against the third party.
- vi) That no evidence was produced to support the court's decision on the quantum based on a multiplicand of Kshs. 20,000/= and;
- vii) That the claim for lost years was too speculative in the absence of evidence to show that the deceased was a college student.

These grounds were canvassed before us by learned counsel for the appellants who urged us to allow the appeal and set aside the judgment and decree dated 18th December 2002. On the other hand, learned counsel for the respondent argued that the High Court properly found that the appellants were to blame for the accident; that third party proceedings having been withdrawn by the appellants, there was no basis for the trial judge to make a finding of liability against the third party. On quantum, counsel submitted that the trial judge, relying on the decision of **Sheikh Mushtaq Hassan v. Nathan Mwangi Kamau Transporters & 5 others**, (1982 – 88) 1KAR 946, was satisfied with the evidence that the deceased was a student, awarded damages for 'lost years' and therefore committed no error.

We have duly considered these submissions together with authorities cited by both sides and hold the following view of the matter. The respondent pleaded that the 2nd appellant was negligent for:-

- i) driving without due care and attention,
- ii) driving at a high speed,

- iii) failing to have regard to the safety of passengers on the bus,
- iv) failing to keep a proper look out for traffic on the same road, and
- v) failing to control or to manage the bus in order to prevent the accident.

The appellants in their defence denied the above allegations and asserted instead that the accident was solely caused by the driver of the lorry, who they blamed for:-

- i) driving without due care and attention,
- ii) failing to stop, slow down, control or swerve in order to avoid a collision with the bus, and
- iii) failing to keep a proper look out for other road users.

There is evidence on record that the deceased was a fare-paying passenger on the bus. From the foregoing averments of the appellants, the deceased was not blamed in any way for the occurrence of the accident. Again, we are satisfied that the collision in which the deceased died involved the bus and the lorry. The two eye witnesses for either side of the dispute gave conflicting accounts of the accident. The brother of the deceased, PW4 Jackson Mwai Githae (Jackson), who was travelling with the deceased on the same bus, for example, was categorical that as the bus drove down a steep corner, he noticed the lorry approach from the opposite side and suddenly there was a crash. In his opinion, it was difficult to apportion the blame as the collision was in the middle of the road. He, however concluded that none of the drivers was careful. For his part, Stephen Muge Nderitu (Nderitu), the conductor on the bus insisted that a fast moving lorry travelling towards the opposite direction hit the bus which was on its correct lane. The lorry did not stop. He explained that upon seeing the lorry, the bus driver stopped. In other words, according to him, the bus was stationary on its lane when it was hit by the lorry. The bus driver did not testify. Like the trial judge, we find the version given by Jackson credible in the absence of the bus driver's account. It is, in our view, doubtful that Nderitu, as a bus conductor was able, in view of his engagement, to witness the accident.

We therefore come to the conclusion that the respondent proved the particulars of negligence as pleaded. In any case, the fact that the deceased was a passenger on the 1st appellant's public carrier cast a duty on the 1st appellant to carry the deceased safely as far as reasonable care and forethought could attain. If indeed a third party was involved, the appellants ought not to have abandoned the third proceedings.

On quantum, the law is well established that an appellate court will only disturb an award of damages made by a trial court if it is satisfied that the award by the trial court was inordinately too low or too high that it represents an entirely erroneous estimate or that the trial court proceeded on a wrong principle or misapprehended the evidence in some material respect. See **Roger Dainty v. Mwinyi Omar Haji** and another Civil Appeal No. 59 of 2004. The only issue taken by the appellant with regard to the trial court's award of damages is that there was no basis for applying the multiplicand of Kshs. 20,000/= since there was no evidence that the deceased was a college student. We do not, with respect, agree. The burden on the respondent was only to demonstrate, on a balance of probability, that the deceased was a student at the Kenya Polytechnic for a graphic design course and upon graduation was likely to earn monthly income of Kshs. 20,000/= We are convinced from the evidence on record that three days before he met his death, the deceased had been admitted at the Polytechnic.

That burden, we hold, was discharged. The principles on which damages for lost years under the Law Reform Act are assessed were articulated by Lord Scarman in **Gammell v. Wilson** [1981] 1 ALL ER 578 at page 593 paragraphs g – j thus:-

“The problem in these cases, which has troubled the judges since the decision in *Pickett's* case, has been the calculation of the annual loss before applying the multiplier (i.e. the estimated number of lost working years accepted as reasonable in the case). My Lords, the principle has been settled by the speeches in this House in *Pickett's* case. The loss to the estate is what the deceased would have been likely to have available to save, spend or distribute after meeting the cost of his living at a standard which his job and career prospects at time of death would suggest he was reasonably likely to achieve. Subtle mathematical calculations, based as they must be on events or

contingencies of a life which he will not live, are out of place; the judge must make the best estimate based on the known facts and his prospects at time of death.

To ascertain the reasonable multiplier or multiplicand in each case, the court would have to consider such relevant factors as the income or prospective income of the deceased, the kind of work the deceased was engaged in, the prospects of promotion and his expectation of working life.

It has not been shown that in the circumstances of this case the learned judge either erred in law or proceeded on a wrong principle or that she misapprehended the evidence in some material respect. There is, in our view, no justification for interfering with her determination of the reasonable multiplicand and even multiplier. With that, this appeal fails and we accordingly dismiss it with costs to the respondent.

Dated and delivered at Nairobi this 12th day of April 2013.

M. K. KOOME

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

/mgkm