



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL DIVISION

CIVIL APPEAL NUMBER NO. 104 OF 2018

BETWEEN

LEONARD WANGANGA NGARA.....1ST APPELLANT

KIMANI OLIVE.....2ND APPELLANT

KIMANI JOHN.....3RD APPELLANT

AND

JOYCE WARURII NDUNG'U.....1ST RESPONDENT

HELLEN NJERI KINYANJUL.....2ND RESPONDENT

MAVJI DEVJI PATEL.....3RD RESPONDENT

(Being an appeal from the judgment of Hon. H. I. Mwendwa, Resident

Magistrated dated 10th August, 2016 in Kikuyu PMCCivil Case No. 137 of 2018)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. The three appellants were the first, second and third defendants in the court below while the first and second respondents were the plaintiffs. The third respondent was the fourth defendant in the court below, but from the record this third respondent did not enter appearance and as such interlocutory judgment was entered against him on 3rd December, 2014.

2. The first and second respondents brought a suit against the appellants as well as the third respondent claiming damages under both the Fatal Accidents Act and the Law Reform Act following the death of the deceased in a Road Traffic Accident which occurred on or about 14th January, 2013 when Motor Vehicle Registration Number KXB 909 which was being driven by the deceased and being towed by the motor vehicle registration number KBL 996 M, being driven by the first appellant, rolled when the wires joining the two vehicles for towing purposes snapped and as a consequence thereof motor vehicle registration number

KXB 909 overturned allegedly due to the negligence of the appellants. The deceased suffered fatal injuries from which he died on the spot. The plaintiffs in the court below held the appellants as well as the third respondent liable in negligence for the accident. The third respondent was the registered owner of motor vehicle registration number KBL 996M.

3. The appellants filed a joint defence in which they denied all the allegations in the plaint and also averred that if any accident occurred which they denied then the same was due to or substantially contributed to by the deceased.

Judgment of the Trial Court

4. The learned trial court heard evidence from the three witnesses for the first and second respondents. Neither the appellants nor the third respondents tendered any evidence. After carefully considering the evidence, the law and the submissions the learned trial court entered judgment for the first and second respondents as follows:-

- *Liability at 90% to 10% against the appellants.*

- *Loss of dependency - Kshs 2,140,840.00*

- *Loss of expectation of life - Kshs 100,000.00*

- *Pain and suffering - Kshs 10,000.00*

- *Funeral expenses - Kshs 29,000.00*

- *Special damages - Kshs 16,000.00*

Plus costs and interest. The general damages awarded were subject to 10% contribution.

The Appeal

5. Being dissatisfied with the whole of the said judgment the appellants brought this appeal on grounds:-

1. THAT the learned trial magistrate erred in fact and law in finding and apportioning liability in the ratio of 90:10 in favour of the respondents as against the appellants.

2. THAT the learned trial magistrate erred in fact and in law in finding that the oral and documentary evidence provided by the plaintiffs' witnesses proved liability on the part of the appellants.

3. THAT the learned magistrate erred in fact and law by awarding a total of Kshs 2,196,040.00 as loss of dependency which amount is excessive and inordinately high.

4. THAT the learned magistrate erred in law and in fact by failing to make a concise statement of the case, the points of determination and reasons for his decision in his judgment.

5. THAT the learned magistrate wholly erred in law and fact in arriving at his said decision.

6. The appellants pray that this appeal be allowed and that this honourable court be pleased to assess downwards the quantum of damages awarded to the respondents. The appellants also pray for costs of the appeal and such other relief as may appear just to this court.

7. This is a first appeal and in this regard this court is under a duty to reconsider and evaluate the whole of the evidence with a view

to reaching its own conclusions in the matter, save to remember and make an allowance for the fact that it has no opportunity of seeing and hearing the witnesses who testified during the trial. In this regard the Court of Appeal decision in *Selle & others -vs- Associated Motor Boat Company & others [1968] EA 123* is relevant.

The Appellants Case

8. As indicated earlier in this judgment the appellants did not offer any oral evidence during the trial. They therefore relied on their written statement of defence and on their written submissions in the lower court. What this means is that the twin issues of liability and quantum were not controverted thereby leaving the respondents' evidence at the trial unrebutted. In support of this point the respondents' relied on *Kisii High Court Civil Appeal No. 113 of 2012 – Makario Makonye Monyancha -vs- Hellen Nyanjera (unreported)* where Sitati J. noted at paragraph 18 of the judgment thus:-

“The defendant/appellant by failing to call evidence to the contrary to counter the evidence by the plaintiff/respondent makes it difficult for them to contest the issue of liability which cannot be contended in submissions as is being insinuated by counsel for the defendant/appellant herein. These are issues of facts which must be rebutted by facts.”

The Respondents Case

9. PW1 was Joyce Warurii Ndungu, wife to the deceased, Richard Kamande Kinyanjui who was aged 37 years at the time of his death. She did not witness the accident but got information of the deceased's death the next day after he died in the night of 14th January, 2013. She testified that the deceased was survived by two children a wife and his mother. PW1 produced a limited grant for purposes of filing suit, a letter from her chief and certificate of death as exhibits. She also produced a bundle of 5 receipts in respect of funeral expenses totaling Kshs 29,500/=. PW1 testified further that the deceased worked as a driver of a lorry registration number KXB 909 and that he earned Kshs 18,000/= per month though there was no evidence for the alleged salary amount. The accident was later reported to Kikuyu police station and a police abstract consequently issued to PW1.

10. PW1 also produced search certificate, in respect of motor vehicles registration numbers KXB 909 and KBL 996 M. It was PW1's testimony that the deceased was the sole breadwinner for his family and accordingly urged the court to award her damages for his untimely death.

11. Number 83728 PC Nancy Chemutai testified as PW2. She produced the abstract report concerning the accident on 14th January, 2013 in which the deceased died. She testified that she together with her colleague PC Osoro were the first officers to visit the scene of the accident. PC Chemutai also testified that motor vehicle KXB 909 was carrying stones. PW2 also produced original OB number in court and stated further that thereafter both vehicles were inspected.

12. The investigating officer number 78793 PC Alex Osoro who testified as PW3 recollected the information given to him as to how the accident occurred when he visited the scene together with PC Nancy Chemutai. According to PW3, motor vehicle KXB 909 was found lying in the middle of the road with both deceased and the turn boy one Wilson Maina Mbugua trapped inside. He made arrangements to remove the victims from inside the vehicle and for towing of the two vehicles to the police station to await inspection. PW3 produced the inspection report dated 15th January, 2019 for both vehicles. He also produced the original police file.

13. The evidence of PW3 marked the close of the respondents' case.

Submissions

14. This appeal proceeded by way of written submissions. The appellants' submissions dated 22nd August, 2019 were filed in court on 23rd August, 2019. The supporting authorities are annexed.

15. The 1st and 2nd respondents' submissions dated 5th September, 2019 were filed on the same date. I have carefully read through the two sets of rival submissions together with the supporting authorities.

Issues for Determination

16. Upon analysis of the evidence, the judgment of the learned trial court as well as the rival submissions two issues arise for determination

a. Whether the trial court's apportionment of liability was proper and,

b. Whether this court should interfere with the award of damages.

Analysis and Determination

17. It is trite that he who alleges must prove what he alleges. In this case, the appellants filed their statement of defence in which they alleged at paragraph 8 thereof that if any fatal accident occurred involving the deceased, an allegation which they denied then such accident was solely caused by the negligence of the deceased. Particulars of negligence on the part of the deceased were stated as follows:-

a. Knowingly putting himself in harm's way by allowing himself to be towed in a defective motor vehicle.

b. Failing to take due care in ensuring his safety in the towed motor vehicle registration number KXB 909.

c. Failing to fasten his seatbelt while driving the towed motor vehicle registration No. KXB 909.

d. Failing to take any adequate precaution for his safety while in the towed vehicle registration number [KXB 909].

18. It is on record that none of the appellants gave evidence in court to support the above stated allegations of negligence. The law is clear that pleadings are not evidence and as such the trial court had to use its own discretion in apportioning liability. The evidence shows that the appellants dispatched motor vehicle KBL 996 M to tow motor vehicle registration number KXB 909. By doing so the appellants held out motor vehicle KBL 996 M as a suitable vehicle for the task that lay ahead: towing the lorry KXB 909 which was loaded with stones. Although none of the respondents witnessed the accident in question the appellants who laid blame for the accident upon the deceased were under a duty to prove those allegations. The respondents' evidence on the other hand pointed to the negligence of the appellants who provided an unsuitable motor vehicle and weak wires for towing a vehicle which they knew was a heavy vehicle. As an appellate court, I find no good reason to interfere with the appointment of liability as between the appellants and the respondents.

19. The second issue is whether this court should interfere with the award of damages given by the learned trial court. The appellants have submitted that though the trial court was inclined towards awarding damages to the respondent it erred in adopting a multiplier of 23 years purely on the ground that the retirement age in public service is 60 years. It was the appellants' contention that the learned trial court should have taken into account the vicissitudes of life and adopted a multiplier of 12 years in keeping with the appellants' submissions during the trial. The appellants placed reliance on the following cases:-

i. Josphine Njeri Tarino -vs- Narok County Council & Another -Nakuru High Court Case NO. 289 of 1998 and

ii. Nairobi HCCC No. 4580 of 1987 – Christine Shoi & another

-vs- East African Cement Co. Ltd & another.

20. In the *Christine Shoi case (above)*, the learned Judge stated that though he was in agreement with counsel for the plaintiff that the plaintiff could have worked up to age 55, there were also chances that due to vagaries of life, the plaintiff could have died earlier.

21. With regard to this issue, the respondents submitted, and rightly so, that the award of general damages is always within the discretion of the trial court and an appellate court will not disturb the award unless it is so inordinately high or low as to present an entirely erroneous estimate. So, in the present case, the appellants must show that in awarding damages, the trial could proceed on

wrong principles or that it misapprehended the evidence in some material respect and so arrived at a figure which is either inordinately high or low.

22. After analyzing the evidence and the various authorities set out in the rival submissions I would agree with appellants' counsel, that though the deceased could have worked up to 60 years the trial court forgot to consider the fact that due to vagaries of life the deceased could have died earlier than age 60. In this regard, and unlike the proposal made by the appellants of 12 years, I would apply 15 years as the more appropriate multiplier. The award would thus be as follows:-

Kshs 11,935.00 x 12 x $\frac{2}{3}$ x 15 = Kshs 1,434,200.00

23. As to costs, I find nothing faulty with the trial court's judgment in awarding costs and interest to the respondents.

Conclusion

24. In the final analysis the appeal is allowed to the extent that the multiplier of 23 years is set aside and its place a multiplier of 15 years shall apply. Accordingly the judgment of the court is as follows:-

a. Liability 90:10 in favour of the respondents.

b. Loss of dependency Kshs 1,434,200.00

c. Loss of expectation of life Kshs 100,000.00

d. Pain and suffering Kshs 10,000.00

e. Funeral expenses Kshs 29,000.00

f. Special damages Kshs 16,000.00

Total Kshs 1,589,200.00

25. The above amounts, are subject to 10% contribution. The 1st and 2nd respondents shall have the costs of this appeal.

26. It is so ordered.

Judgment written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Kiambu on this 11th day of June, 2020.

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CHRISTINE W. MEOLI

JUDGE



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