



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT MOMBASA
Civil Appeal 233 of 2005
COMMERCIAL TRANSPORTERS LTD.....APPELLANT

AND

NZULA KIASYO.....RESPONDENT

**(Appeal from the judgment of the High Court of Kenya at Mombasa
(Khaminwa, J) dated 25th August, 2003**

in

H.C.C.C NO. 179 OF 1996)

JUDGMENT OF THE COURT

On 25th August, 2003, the superior Court (Khaminwa, J) gave judgment in favour of Nzula Kiasyo, the respondent herein, for the sum of Kshs.1,367,600/- pursuant to a suit by her against Commercial Transporters Ltd, the appellant herein, for damages under the Law Reform Act and the Fatal Accidents Act. The appellant was aggrieved, hence the appeal before us.

In her plaint dated 25th March 1996, the respondent had averred that Antony Mwenda Macharia (the deceased) who was her husband, owned a Toyota Saloon Motor Vehicle, Reg No. KJV 449, which he operated as a taxi; that on 19th March 1995, at about 9.30 pm as he drove the said vehicle along Mombasa/Nairobi road, motor vehicle Reg No. KTL 628 ZA 6951, a Mercedes Benz lorry, then owned by the appellant violently collided with his car as a result of which the deceased suffered serious injuries from which he later died. The respondent attributed the accident to negligence on the part of the appellant's driver. In her suit she claimed both special and general damages.

The appellant denied the claim and itself alleged, in a written statement of defence, that the deceased and not its driver was guilty of negligence.

At the hearing of the case liability was apportioned by consent with the respondent conceding 30% contributory

negligence. The hearing of the case was thereafter confined to assessment of damages. In her evidence the respondent stated that upon death her husband was survived by his wife, and 4 children. Before his death he was running several businesses, among them, a Matatu, transport of good business using a canter lorry and a taxi business. The insured value of the taxi was Ksh 60,000. Its salvage value after the accident was Kshs. 5,187/50. That is the money the respondent said she was paid for it.

The deceased also owned two undeveloped plots, one at Mikindani, Mombasa, and the other at Njiru in Nairobi. He was paying school fees for his children. The first one of those children was at the time of his death attending a computer college, the second one was in an Academy at Athi river and a third one was in a boarding school. The deceased's children were born between 1980 and 1987. He was the main bread winner, was paying rent for the house the family was living in at the rate of Kshs 7000 per month, and was also paying the respondent about Kshs 2000 to Kshs 3000 per week to augment her independent income of about Kshs 20,000 a month from a shop business she was running. The money was used for house-keeping.

The respondent did not testify on the arrangement the deceased and herself had on family expenditure. She was however, clear, that it was his responsibility to meet house-keeping expenses. It then follows that the Kshs 2000 to Kshs 3000 she received from the deceased was applied for that purpose.

An issue was raised at the trial about the ownership of three vehicles which we earlier said the deceased was using in business. The respondent's testimony on the issue was that although she did not have the log books of the three vehicles she was sure they belonged to the deceased. Upon his death, she sold all the vehicles and used the proceeds thereof to boost her shop business.

The respondent also gave evidence on the expenses she incurred following the death of the deceased. She spent Kshs 100 to obtain a police abstract report on the accident, Kshs 4500 to obtain a limited grant of Letters of Administration, Kshs 20,000 to transport the deceased's body home for burial and Kshs 3000 on investigation of the accident and a report thereof. Those expenses and the pre-accident value of the deceased's accident vehicle were claimed as special damages and were specifically pleaded.

In her judgment Khaminwa, J found as fact that the deceased was a businessman, that she earned reasonable income which was sufficient to reasonably support his four children, and also paid the respondent at least Kshs 2000 per month as part of housekeeping expenses. She also held that from the evidence adduced it was not possible to ascertain

the deceased's exact income, but that notwithstanding she formed the opinion that at least Kshs 2000 per week was spent by the deceased on house-keeping and Kshs 2000 per month for the education of his children. She took those figures as representing the extent of lost dependency under the Law Reform Act. She assessed loss of expectation of life at Kshs.100,000,. She also awarded the pleaded special damages of Kshs.67,600/=.

On the head of dependency she took Kshs.10,000/= per week as as a basis for arriving at the multiplicand, and 10 as the multiplier. The total came to Kshs.1,200,000/=, which she awarded on this head.

In the appeal before us, the main issue is assessment of damages, more specifically with regard to loss of dependency. In his memorandum of appeal, the appellant complains that there was no basis for finding that Kshs.10,000/= per week represented the loss of dependency in absence of clear evidence to show the deceased's monthly income; there was no basis for finding that the deceased owned motor vehicles; there was no basis for arriving at the figure of Kshs.1,200,000/= for loss of dependency, and that the trial Judge ignored authorities cited to her on behalf of the appellant.

When the appeal came before us for hearing, Mr. Ngeno for the appellant abandoned all grounds except the one challenging the award of a weekly sum of Kshs.10,000/= for loss of dependency. In his submissions before us, Mr. Ngeno urged us to halve the award saying that there was no basis or proper basis for settling for Kshs.10,000/= per week, the trial Judge having found as fact that the income of the deceased was uncertain.

Assessment of damages is a matter within the discretion of the trial Judge. An appellate court will only interfere where the trial Judge in assessing damages either took into account an irrelevant factor or left out a relevant factor or that the award he made is too high or too low as to amount to an erroneous estimate or that the assessment is based on no evidence. (**Kemfro Africa Ltd t/a Meru Express Gathogo Kanini v A.M. Lubia & Anor [1982-88] 1 KAR 727**). In a case like this one the first matter to be considered is the income the deceased was getting before his death. Mr. Ngeno submitted that because the deceased's total income was not established then there was no basis upon which an assessment could be made. It cannot be gainsaid that the deceased had some income. He was living in a rented house for which he was paying a rent of Kshs.7,000/= per month. He had three children in expensive schools. One was in a computer college out of Mombasa. Another child was in a boarding school and yet another in an Academy. To sustain those children in such institutions it means that his income must have been reasonable. It should also be noted that even when he was keeping the children in those schools, he was able to buy immovable property. We do not of course overlook the respondent's contribution. She was also getting reasonable income from her shop business. If we were to

accept Mr. Ngeno's argument, it would depict the deceased as having been a slaggard dependant on his wife. But the respondent did not depict him so. She said he was a hardworking man. He owned vehicles, one of which he operated as a taxi. It is the vehicle he was crushed in. The respondent testified that she sold the wreckage for about Kshs.6,000/=. She would not have sold it if it did not belong to the deceased.

Moreover, even assuming that the taxi business was the only economic activity the deceased engaged in, the income from it would in the circumstances have been reasonable enough for the deceased to spare Kshs.2,000/= per week for his wife and a further Kshs.2,000/= for the education of all his children together. In our view the sum awarded of Kshs.10,000/= per week for loss of dependency was modest and we find no basis for interfering. If we were the ones who handled this matter on first instance, we would have been inclined to give either more. However, as an appellate court we act on settled principles, which we set out earlier.

In the result we find no basis for interfering with the trial Judge's award on dependency, and therefore dismiss this appeal with costs to the respondent.

Dated and delivered at 5th this March day of March 2010.

R. S. C. OMOLO

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JUDGE OF APPEAL

S. E. O. BOSIRE

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JUDGE OF APPEAL

J. G. NYAMU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR