



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL APPEAL NO. E3 OF 2020

CIVISCOPE LIMITED..... APPELLANT

VERSUS

GILBERT KIMATARE NAIRI & LILIAN NAPUDOI NAIRI (Suing as Personal

Representatives of the estate of JACKLINE SEIN LEMAYIAN(DECEASED).....RESPONDENTS

(An appeal from the judgment and decree (Hon. Nthuku, SRM) dated 25th February 2020 in SRMCC No. 19 of 2019 at the Senior Resident Magistrate's Court at Loitokitok).

JUDGMENT

1. The respondents filed a suit before trial court on behalf of the estate of the late **Jackline Sein Lemayian** who died in a road accident that occurred on 13th March 2019 along Loitokitok-Emali road. The deceased was a pillion passenger on motor cycle registration No, KMCT 263V which was involved in an accident with motor vehicle registration No. KCN 504G and she died on the spot.
2. The appellant filed a statement of defence dated 9th September 2019, denying the respondents' claim. It denied occurrence of the accident, or that the deceased was a pillion passenger. The appellant asserted that the vehicle was being driven and or managed properly. It pleaded in the alternative, that the accident was caused by the negligence of the rider of the motor cycle and particularized acts of his negligence.
3. The suit was heard by **Hon. N. Nthuku (SRM)** and in a judgment delivered on 25th February 2020, the driver of the vehicle was blamed for the deceased's death because she was a pillion passenger and had nothing to do with occurrence of the accident.
4. On quantum, the trial court awarded Kshs. 20,000 for pain and suffering; Kshs. 100,000/= for loss of expectation of life and Kshs. 600,000/= for loss of dependency. The trial court also awarded special damages of Kshs. 50,000/= for funeral expenses.
5. The appellant was aggrieved with the trial court's judgment and lodged a Memorandum of Appeal dated 19th October 2020 and raised the following grounds, namely:
 - 1. That the learned trial magistrate erred in law and fact by misapprehending the principles under a global sum and awarded the respondent excessively instead of using government basic minimum wage to calculate loss of dependency.*
 - 2. The learned trial magistrate erred in law and in fact in awarding general (sic) for loss of dependency without any prove(sic) of dependency whatsoever or at all*
 - 3. The learned trial magistrate erred in law and in fact by failing to appreciate the guiding principles in determining quantum of damages thereby importing her own standards which guided the judgment in error.*
 - 4. In arriving at his decision, the trial magistrate did so in speculative and cursory manner not guided by any set of principles and failed to exercise her discretion within the applicable principles of assessment of damages and her failure to adhere to the foregoing has occasioned a serious miscarriage of justice and ought to be reversed.*
 - 5. The learned trial magistrate erred in law and in fact in finding the appellant liable when there was no evidence linking the appellant to the respondent's injuries.*
6. Parties agreed to dispose of this appeal by way of written submissions.

Appellants submissions

7. The appellant filed written submissions dated 24th January 2021. It submitted that the deceased was a pillion passenger on motorcycle KMCT 263V which was involved in a collision with motor vehicle KCN 504G and she died on the spot.
8. The appellant argued that the award of Kshs. 20,000/= for pain and suffering was on the higher side given that the deceased died on the spot. It relied on the cases of Harjeet Singh Pandal v Hellen Aketch Okudho [2018] eKLR and Florence Awour Owuoth v Paul Jackton Ombayo [2020] eKLR where Kshs. 10,000 was awarded under this head.
9. On loss of expectation of life where the trial court awarded Kshs. 100,000/=, the appellant argued that the award was inordinately high. It relied on the Florence case where Kshs. 80,000/= was awarded in 2020 and Godana Guyo Halake & Another v Patrick Ndeli Ndoli & Another [2017] eKLR, where an award of 70,000/= was made under this head.
10. Regarding loss of dependency where a global award of Kshs. 600,000/= was made, the appellant argued that this was also inordinately high given that there was no evidence of earning. According to the appellant, although the trial court correctly analysed the evidence and adopted the best approach in awarding damages, it should have awarded Kshs. 500,000/= under this head. The appellant relied on the decision in M'rarama M'ntherieri v Luke Kiumbe Murithi [2015] eKLR where Kshs. 500,000/= was awarded.

Respondent's submissions

11. The respondents adopted their written submissions in Civil Appeal Nos. 11 of 2020 where they are the appellants and urged that the appeal be dismissed with costs. In that appeal (No. 11 of 2020), the respondents (appellants in that appeal), filed written submissions dated 10th September 2020. They submitted that the trial court in finding (in SRMCC No. 21 of 2019) that both the driver of the motor vehicle and the motor cycle rider were equally to blame for the accident, it failed to give due considerations to submissions as well as their evidence especially that of PW2 who witnessed the occurrence of the accident. PW2 had testified that the motor vehicle was being driven at high speed and was overtaking another lorry when it collided with the motor cycle carrying the deceased. The respondents maintained that the appellant's claim that it was the motor cycle that rammmed into the motor vehicle was not true. They faulted the trial court for failing to properly analyze the evidence and was therefore wrong in apportioning liability at 50:50.
12. According to the respondents, the scene of the accident was at a shopping centre with a speed limit of 50km/h and blamed the trial court for holding that there was no independent witness when PW2 was an independent witness. They urged this court to find that the driver of the motor vehicle was 100% to blame for the accident.
13. On quantum, the respondents faulted the trial court for allowing an inordinately low award. They argued that the trial court should have allowed Kshs. 50,000 for pain and suffering instead of Kshs. 20,000. Regarding loss of expectation of life, they argued that they had prayed for Kshs. 150,000 based on the deceased's age (31 years) but the trial court awarded Kshs. 100,000 which was low.
14. On loss of dependency, the respondents argued that the deceased was a farmer and business lady who earned Kshs. 50,000 from employment. and at least Kshs. 90,00 from the business. They had proposed minimum wage of Kshs. 12,000 and multiplicand of 29 years since the deceased would have worked up to 60 years. In their view, the trial court was in error when it awarded a lump sum of Kshs. 600,000 for loss of dependency. It also erred by finding that there was no evidence of dependency. They relied in Jacob Ayiga Maruja v Simeon Obayo [2005] eKLR to argue that it is not a must that earning is only to be proved through documentary evidence. They prayed for Kshs. 2,784,000 (12,000 x 29 x 2/3).
15. I have considered this appeal, submissions and the decisions relied on. I have also perused the trial court's record and the impugned decision. This being a first appeal, it is the duty of this court as the first appellate court, to re-evaluate, reconsider and reanalyse the evidence and come to its own conclusion on it. The court should however bear in mind that the trial court had the advantage of seeing the witnesses testify and give due allowance for that.
16. In Gitobu Imanyara & 2 others v Attorney General [2016] e KLR, the Court of Appeal held:
- [A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.***
17. In Peters v Sunday Post Ltd [1958] EA 424, the Court stated:
- Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide.***
18. The 1st respondent, father in law to the deceased, testified adopting his witness statement dated 8th April 2019, that on 13th March 2019, the deceased a pillion passenger on Motorcycle Registration No. KMCT 263V along Emali- Loitokitok road died in a road accident involving the appellant's motor vehicle registration No. KCN 504G. The vehicle was negligently and carelessly driven and caused that accident. The witness stated that the deceased who was 31 years old was worked and earned Kshs. 50,000 per month from employment and Kshs. 90,000 per month from business. According to the witness, the deceased left behind two daughters and himself she was taking care of. He produced grant of letters of administration, demand letter, death certificate, police abstract, post mortem report and receipts for burial

expenses as exhibits.

19. PW2 **David Mungai Mundia** testified, adopting his witness statement dated 26th September 2019, that on 13th March 2019 at about 7.15 Pm, the motor vehicle was being driven at a high speed from Loitokitok towards Kimana direction. It was overtaking another lorry but it did not manage to overtake the other lorry. It collided with the motor cycle which was on the last lane and was being ridden by the deceased's husband with the deceased as a pillion passenger. The motor cycle was travelling in the opposite direction. The vehicle hit the deceased's husband and their child. The rider was thrown on the side of the road while the front wheel of the vehicle crushed the deceased and the child. The driver of the lorry alighted and ran away.

20. The witness who was about 50 meters away rushed to the scene and identified the victims. He called police officers at Kimana police station and the accident was reported at Loitokitok police station. The driver of the lorry was arrested and placed in the cells. He told the court that the driver of the lorry caused the accident. According to the witness, the deceased was an employee of Ngong Vegetables where she used to harvest French beans. In cross examination, the witness admitted that there were other vehicles on the road and that there was darkness at the time of the accident but it was not very dark.

21. **DWI Eric Omondi Ochieng**, the driver of the motor vehicle, testified that on the material day, 13th March 2019 at about 7.30 pm, he was driving the subject motor vehicle from Loitokitok to Nairobi. Before reaching Kimana, he saw lights ahead of his vehicle. He deemed his lights, reduced speed and put on hazard. There was another vehicle with one light on. He also realized that a motor vehicle with both lights on wanted to overtake the vehicle with one light and indeed overtook it. The vehicle with one light on turned out to be a motor cycle. The motorcycle rammed onto his vehicle's tyre while his vehicle was on its lane. In cross examination, he told the court that he tried to avoid the accident by giving way to the other motor vehicle and the motorcycle. He denied that he was overtaking when the accident occurred. He blamed the motorcycle rider for the accident.

22. The trial court considered the evidence from both sides and held that the deceased, a pillion passenger on the motor cycle, had nothing to do with the occurrence of the accident. It also found that although PW2 blamed the driver of the motor vehicle, the driver of the vehicle (DW1) on his part blamed the motor cycle rider. The trial court also noted that the police officer who investigated the case was not called to testify and that the police abstract indicated that the matter was still under investigations. The trial court was of the view, that since the deceased was only a pillion passenger on the motorcycle, the driver of the motor vehicle was wholly liable for her death. It awarded Kshs. 20,000 for pain and suffering and Kshs. 100,000 for loss of expectation of life.

23. On dependency, the trial court found that there was no evidence of earning and for that reason, it could not use the multiplicand and multiplier as a basis for determining quantum under this head. The court relied on Mary Khayesi Awalo & Another v Mwilu Mulungi & Another [1999 eKLR] and Albert Odawa v Gichimu Gichenji [2007] eKLR and awarded a global figure of Kshs. 600,000.

24. The appellant faulted the trial court's decision on several grounds as contained in the memorandum of appeal. From these grounds of appeal, the issues that arise for determination are whether the trial court apprehended the principles for making a global award and whether awards were excessive. The appellant also blamed the trial court for awarding damages for loss of dependency without any proof of dependency.

25. It is settled law that an appellate court will not interfere with the exercise of discretion by a trial court unless it is satisfied that its decision is clearly wrong, because the trial court has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. (See Mbogo v Shah [1968] EA 93.

26. *On assessment of damages, it is equally settled that an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and in doing so arrived at a figure which was either inordinately high or low.* (Butt v Khan [1981] KLR 349; Gitobu Imanyara & 2 others v Attorney General [2016] e KLR).

27. The issues raised in this appeal, were raised in Civil Appeal No. 11 of 2020 between the same parties in reverse where the appellant herein is the respondent and the respondents the appellants. In that appeal this court rejected the arguments that he awards were either inordinately low or high as parties had argued. It is noteworthy that the appellant herein supported the trial court for applying the global approach in assessing loss of dependency as the proper approach. It is now difficult to understand why the appellant has now changed position and attacked the trial court for applied the global approach in awarding loss of dependency. The appellant is clearly approbating and reprobating at the same time which is unacceptable.

28. *The appellant also argued that the trial court erred in finding the appellant liable when there was no evidence linking it to the respondents' injuries (loss).* This argument does not also take the appellant far. Although the appellant filed a defence denying occurrence of the accident and ownership of the vehicle, the trial court found as a fact that the accident occurred involving the motor vehicle. I have on my part perused the document produced and in particular the copy of record which shows that the motor vehicle belonged to the appellant at the time of the accident. The appellant's argument therefore has no basis and is rejected.

29. Having considered the appeal and parties' arguments, and bearing in mind what the court has stated in Civil Appeal No. 11 of 2020, I find no merit in this appeal and it is dismissed. Each party shall bear their own costs of the appeal.

DATED, SIGNED AND DELIVERED AT KAJIADO THIS 25TH DAY OF JUNE, 2021.

E. C. MWITA

JUDGE