IN THE HIGH COURT OF TANZANIA

AT MTWARA

CIVIL APPEAL NO. 4 OF 1995
ORIGINAL MASASI DISTRICT COURT
CIVIL CASE NO. 2 OF 1995

FR. SYLVESTER HITTU.......APPELLANT

versus:

MR. YOHANA JUMA..........RESPONDENT

JUDGMENT

MOSHI, J.

The respondent, Yohana s/o Juma, was the successful party in a suit he preferred against the appellant, Father Silvester Hittu, at the district court of Masasi, for a compensation of shs. 480,400/=, in respect of his two adult cows and a calf knocked to death by a motor vehicle driven by the appellant. The appellant felt aggrieved, not so much by the finding of liability, but by the quantum of the compensation. Hence this appeal.

Both parties entered appearances in court when the appeal was called up for hearing, and conducted their respective sides of the matter themselves.

These were the facts established in evidence. In the evening of 22 December 1994, at about 5.00 pm, the appellant was driving a motor vehicle registration number MT 2323, make Landrover 110, from Ndanda to Masasi, along the Mtwara-Masasi tarmac road. Upon arriving at Mtendi village, the vehicle, for reasons the appellant did not tell the trial court, left the road and knocked down the respondent's two adult cows and a calf which were grazing off the left side of the road at a distance of not less than twenty paces away. The animals were fatally injured, and a veterinary officer Yared Chiza PW2 and a policeman PC Benson PW3, who promptly arrived there, directed their immediate slaughter and sale of their meat. PC Benson PW3 also directed the respondent to go to Masasi police station the next day with information about what the sale of the meat had realized to enable him prepare an inventory. The animals were slaughtered and the respondent sold the meat and ate some, but it was not until 5 January 1995 that he reported to PC Benson PW3 at the police station with information that the sale of the meat had realized shs. 32,000/= only.

According to the respondent, the two cows and the calf were worth shs. 210,000/=. He had bought the two cows in 1980 at shs. 80,000/= each, which meant, shs. 160,000/= for both. One had delivered a female calf, and was at the time of the accident producing 9 litres of milk per day and, at shs. 140/= per litre, his daily income from milk sales was shs. 1,260/=. The expected period of lactation was eight months, and this made his expected income from milk sales for that period to be shs. 302,400/=. A total sum of shs. 512,400/= is arrived at when the value of the three animals (shs. 210,000/=) is added, and the amount of shs. 480,400/= sued for, and granted, remained when the sum of shs. 32,000/= from the sale of the meat is deducted.

The appellant did not give any explanation before the trial court. He did not say how the accident had occurred. He did not even file a written statement of defence. When called upon to present his own side of the case he said:

> "I have nothing to say in my defence. It is upon this court to decide and make its verdict."

With respect, I am satisfied that the finding by the trial court on the question of liability for the accident could not be faulted. This was a fit case for the application of the doctrine of res ipsa loquitur. The action was founded on negligence, and although it is always for the plaintiff to prove negligence, the doctrine of res ipsa loquitur is one which a plaintiff, by proving that an accident occurred in circumstances in which an accident should not have occurred, thereby discharges, in the absence of any explanation by the defendant, the original burden of showing negligence on the part of the person who caused the accident. In the words of Sir Charles Newbold, P. in the case of Embu Road Services V. Riimi (1968) E.A. 22:

> "When the circumstances of the accident give rise to the inference of negligence then the defendant, in order to escape liability, has to show that there was a probable cause of the accident which does not connote negligence or that the explanation for the accident was consistent only with an absence of negligence."

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The essential point, therefore, is the explanation by the defendant for the accident, and this, as already said, totally lacked in this case. The circumstances of this case, I am satisfied, gave rise to the inference of negligence on the part of the appellant. In the absence of any explanation for the accident by the appellant, it could not have been presumed that the accident was unavoidable or that it happened through causes beyond his control. I am satisfied, and hereby find, that the trial court's finding that the appellant was negligent, and therefore liable in damages for the accident, was justified on the facts and sound in law.

I pass on to consider the issue of the quantum of damages awarded as compensation. The appellant strongly feels that the compensation of shs. 480,400/= was unduly excessive and, for reasons I shall give, I tend to agree. The object of an award of damages is to give the victim some compensation for the damage, loss or injury which, as nearly as possible, puts him in the same position in which he was before such damage, loss or injury. It was said in the case of Livingstone V. Rawyords Coal Co. (1988) 5 App. Cas. 25, at page 39:

> "Where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."

I am mindful that an appellate court must only interfere with the assessment of damages by a lower court where such lower court has acted on a wrong principle or has otherwise plainly gone wrong. The Privy Council laid down this rule in the case of Nance V. British Columbia Railway Co. Ltd (1951) 2 All E.R. 448, which was cited with approval by the Court of Appeal for Eastern Affrica in the case of Ilanga V. Manyoka (1961) E.A. 705, at page 713, in the following terms:

"The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case in the first instance. Even if the tribunal of first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied that either that judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is so inordinately low or inordinately high that it must be a wholly erroneous estimate of the damages."

In the present case, in assessing the damages, the trial magistrate accepted without any qualms, and wholly acted upon, all that the respondent had told him about the worth of the cattle, production of milk and its price and duration, and the money realised from the sale of the meat, and so forth. At no stage was the magistrate critical or sceptical of the narration of the respondent. He had clearly failed to take into account quite a number of relevant factors, and he had also acted upon speculation and conjecture. The cows were bought over fourteen years back, and they were therefore of advanced age, and this factor ought to have been considered when the assessment of their worth and the production of milk was made. Their breed was not given, and in the absence of evidence or indication to the contrary, they must have been of local breed which are generally not held to high yields of milk, and certainly not anything close to Nine litres of milk per day per cow. It was taken for granted, and assumed, that the cow would have constantly produced Nine litres of milk every day for the whole period of eight months, but this most certainly could not have been the case. That assumption was in complete disregard to the forces of depreciation. The period of lactation of eight months itself was a mere guesswork. It was not based on any expert opinion. The money purportedly realised from the sale of the meat was, by far, on the lower side when considered against the purported value of the animals. On account of the

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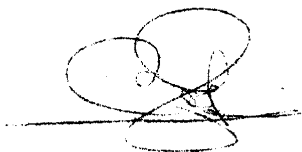
foregoing, the amount awarded, in my view, turned out to be so inordinately high that it must be a wholly erroneous estimate of the damage. In consequence, I am satisfied that this is one of those cases in which an appellate court would be justified in interfering with the assessment of damages by a lower court.

Accordingly, on a careful consideration of all the relevant factors, and doing the best I can on the evidence on record, I feel that a fair assessment would be about one sixth (1/6) of the amount assessed by the lower court. I would, therefore, and hereby do, assess the damages at shs. 80,067.00 (eighty thousand sixty seven shillings).

To that extent, this appeal succeeds, and the respondent shall have half his costs in this court and in the court below.



B. P. MOSHI

JUDGE.

MTWARA.

22 August 1995.

For Appellant: Present in person.

For Respondent: Absent.