



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**Coram: D. K. Kemei - J**

**CIVIL APPEAL NO. 6 OF 2009**

**CLEMENT MATIVO KINYILI.....APPELLANT**

**VERSUS**

**THOMAS M. KASIMU.....RESPONDENT**

*(An appeal from the whole of the judgement of Machakos Chief Magistrate*

*F.N. MUCHEMI dated 10/12/2008 in civil suit no. 756 of 2006).*

**CLEMENT MATIVO KINYILI.....PLAINTIFF**

**VERSUS**

**THOMAS M. KASIMU.....RESPONDENT**

**JUDGEMENT**

1. The Appellant herein appeals against the judgement of Hon. F.N Muchemi, dated 10/12/2008 in Machakos CMCC No. 756 of 2006. In that suit, the Appellant sued the Respondent for both general and special damages arising from a road traffic accident in which Caren Ndanu Mativo (Deceased) died. The Appellant is the Legal Representative of the estate of the said deceased. The Deceased was one of the passengers in the Respondent's motor vehicle Registration number KAM 506Q at the time of the accident. The Respondent was the registered owner of the subject motor vehicle and was sued under the doctrine of vicarious liability. The learned trial magistrate dismissed the appellant's suit thereby precipitating the present appeal.

2. Aggrieved by the judgement, the appellant filed his memorandum of appeal dated 9.1.2009 where he raised the following grounds of appeal:

***a) The learned Chief Magistrate erred in both law and fact in finding and holding that liability against the respondent had not been proved, when the evidence of Pw3 (a passenger in the accident vehicle), clearly pointed to negligence on the part of the driver of motor vehicle registration number KAM 506Q.***

***b) The learned Chief Magistrate erred in both law and fact in discarding the evidence of Pw3 on account of the evidence of Pw2, and failing to take cognizance of the fact Pw3 was a passenger in the accident vehicle registration KAM 506Q and witnessed the occurrence of the accident, while Pw2 arrived at the scene of the accident after it had occurred.***

***c) The learned Chief Magistrate erred in both law and fact in failing to decide the case before her on a balance of probability.***

***d) The learned magistrate erred in both law and fact in failing to find and hold that the evidence by the appellant and his witnesses particularly Pw3 had not been rebutted or controverted by the respondent.***

The appellant therefore prayed that the appeal be allowed and the judgement dated 10.12.2009 be set aside and that the respondent be held liable for the accident and to compensate the appellant. The appellant also prayed for the costs of the appeal.

3. The facts of the accident as set out in the Plaintiff is that on or about 7th day of August 2004 the deceased was lawfully travelling in a motor

vehicle registration number KAM 506Q Mitsubishi Mini Bus along Nairobi-Mombasa Highway when the Respondent's driver so carelessly and negligently drove the said vehicle, that he caused it to swerve out of its lawful course and collide with motor vehicle Registration number KAN 044R, fatally injuring the deceased.

4. The Appellant then pleaded for general damages for pain, suffering and loss suffered upon the estate of the deceased, special damages of KShs 10,300/-, interest on the above and costs of the suit.

5. On 10<sup>th</sup> January, 2007 the Defendant (now Respondent) filed its defence denying the contents of the Complaint and putting the Plaintiff (now Appellant) to strict proof and praying that the suit be dismissed with costs to the defendant.

The suit proceeded for hearing on the 13<sup>th</sup> June 2008.

6. **PW1** who was the **Plaintiff (now Appellant)** stated that on or about 07/08/2004 his wife, Caren Ndanu (the deceased) was a fare paying passenger on motor vehicle registration number KAM 506 Q Mitsubishi Mini Bus belonging to Thomas M. Kasimu who is the Defendant (now Respondent). The deceased died in a road traffic accident at a place after Machakos turn-off along Nairobi-Mombasa Highway.

On Cross-Examination, PW1 stated that the deceased was in the motor vehicle KAM 506 Q which was involved in an accident with motor vehicle KAN 044R.

On Re-Examination, PW1 stated that he had married the deceased in the year 2003 and they had one female child. He further stated that the deceased played a potential role in the family finances.

7. **PW2, Justus Ndeve Mwala**, was the passenger in the motor vehicle bearing a registration number plate KAM 506 Q Mitsubishi Mini Bus belonging to Thomas M. Kasimu. He stated that the accident happened on the left side of the road. He met the Appellant at the Hospital where the deceased was receiving treatment before her death and that they are also neighbors. He further stated that he sustained injuries on the head, finger and the legs and was admitted at the Machakos General Hospital for one week. He also added that the driver of the bus died on the spot.

8. On Cross-Examination, PW2 stated that he was called to testify by the Plaintiff (now Appellant) because he was involved in the accident and witnessed how it occurred. He further stated that the bus was overtaking dangerously and that had it not been for his carelessness the accident could have not occurred. He maintained that motor vehicle of registration number KAM506Q was being driven on the right side of the Nairobi-Mombasa Road as one faces Nairobi. He further added that the police have never called him to testify in a traffic case and that he recorded a statement with the police.

9. On Re-Examination, PW2 stated that he had sued the Mini Bus owner here at Machakos through Mungata Advocates and was paid Kshs 300,000/- in damages.

10. **PW.3 Musyoka John Muindi**, was the passenger in the motor vehicle bearing a registration number plate KAM 506 Q Mitsubishi Mini Bus belonging to Thomas M. Kasimu. He stated that the motor vehicle was relatively moving at a high speed. He further stated that he was also involved in the accident and was taken to Machakos General Hospital.

On Cross-Examination, PW3 stated that he was a passenger in the Mini bus bearing registration number plate KAM 506Q and pointed out that the accident occurred on the right side of the road. He further stated that he had no receipt to show that he was a passenger in the said vehicle and that he saw the driver of the bus was beheaded as the body was leaning outside without the head.

On Re-Examination, PW2 stated that the bus was on the middle of the road and that the motor vehicles that collided were stuck to each other almost blocking the whole road.

The learned trial magistrate found that the appellant's evidence had not been controverted by the respondent in any way but nonetheless went ahead to find that the witnesses had contradicted themselves. She proceeded to dismiss the appellant's case. The learned magistrate further went ahead to assess the quantum of damages due to the appellant had his case succeeded.

11. The appeal was canvassed by way of written submissions. It is only the appellant's counsel who filed submissions dated 12.6.2020. Learned counsel relied on the grounds of appeal and submitted that the trial court did not properly consider the case and that in the event of two possibilities, the said court ought to have decided on a balance of probability. Counsel cited the case of **Kanyunyu Njogu vs. Daniel Kimani Maingi (2000) eKLR** that stated "when the court is faced with two probabilities, it can only decide the case on a balance of probability if there is evidence to show that one probability was more probable than the other."

*Learned counsel urged the court to consider that the respondent did not controvert the evidence which ought to have been allowed and hence the appeal should be allowed.*

12. I have given due consideration to the appeal as well as the record and the submissions. I find the following issues necessary for determination:

***i. Whether the Respondent's driver is liable for the accident that occurred on the material date and whether the respondent is vicariously liable in damages to the appellant.***

***ii. Whether the Appellant is entitled to general and special damages sought.***

13. The answer to any of the above issues will depend on the amount of evidence adduced by a party having the legal burden to do so. See section 107,108 and 109 of the Evidence Act, Chapter 80 of the Laws of Kenya that place the burden of proof of a fact on the person who wishes the court to believe in the existence of such fact. The learned author WVH Rodgers, Winfield and Jolowicz on tort 17<sup>th</sup> Edition Sweet and Maxwell, 2006 at 132 as well as case law stated that the elements of negligence remain this:

*a) there is a duty of care owed by a defendant-*

*i. The defendant would foresee the reasonable possibility of his conduct injuring and causing him loss;*

*Overseas Tankship (UK) Ltd vs. Morts Dock and Engineering Co. Ltd or Wagon Mound (No.10 (1961)1 ALL ER 404 and*

*ii. the defendant would take reasonable steps to guard against such occurrence; and*

*b) the defendant failed to take such steps.*

*In assessing whether the defendant took reasonable steps, the court will consider:*

*i. The degree or extent of the risk created by the actor's conduct.*

*ii. the gravity of the possible consequences if the risk of harm materializes.*

*iii. the utility of the actor's conduct; and*

*iv. the burden of eliminating the risk of harm.*

14. The Appellant had sought general and special damages at the trial court, together with costs and interests, arising out of an accident that occurred on or about the 7th day of August, 2004 involving the Appellant. The Appellant claimed to have been a fare-paying passenger in the Respondent's motor vehicle registration mark and number KAM 506 Q, and that the accident occurred along the Nairobi-Mombasa road, where the Respondent's driver/servant and/or agent, so negligently, recklessly and/or carelessly drove and as a consequence led to the death of Caren Ndanu Mativo (the Plaintiff's wife).

15. This being a first appeal, I am bound by certain principles. Firstly, as a first appellate court, I have a duty to examine matters of both law and facts and subject the whole of the evidence to afresh and exhaustive scrutiny, drawing a conclusion from that analysis bearing in mind that this court did not have an opportunity to hear the witnesses first hand and test the veracity of their evidence and demeanor. This is captured by **section 78 of the Civil Procedure Act, Cap 21, Laws of Kenya**, which espouses the role of a first appellate court as to '..... re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions.' The principles were buttressed by the Court of Appeal in the case of **Peter M. Kariuki vs. Attorney-General [2014] eKLR** where the court stated that:

*" We have also, as we are duty bound to do as a first appellate court, reconsider the evidence adduced before the trial court and reevaluated it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence".*

16. In **Selle & another vs. Associated Motor Boat Co Limited & others (1968) EA 123** stated the duty of the court in a first appeal to be as follows:

*"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An 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 allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."*

17. On whether the Respondent's driver was vicariously liable for the accident that occurred on the material date, parties agreed by a consent judgement entered on the 13.6.2008 that liability established in the case was to apply in **civil suit No. 757 of 2006**. It is noted that the respondent did not tender evidence in support of his defence or to controvert that of the appellant. The respondent's defence sought to blame the driver/owner of vehicle registration number KAN 044R for the accident. There is no evidence that the respondent ever took out a third party notice and joined the said third party for indemnity and or contribution. Even though one of the appellant's witnesses gave contradictory evidence, that did not dislodge the fact that the appellant was a passenger in the respondent's vehicle and that it was the duty of the respondent's driver to ensure the appellant's safety as she had no control over the manner the vehicle was controlled. It was up to the respondent to present evidence shifting liability to a third party. The evidence of Pw3 who was a passenger in the respondent's vehicle gave a vivid account of how the accident took place as he himself got injured and hospitalized. I believe his testimony since Pw2 had just come to the scene after the accident. The version of events as narrated by Pw3 ought to have been accepted by the trial court. Since the respondent failed present evidence to controvert that of the appellant and also failed to rope in the third party, then I have no doubt that the appellant had proved his case on liability which I attribute it at 100% against the respondent. To that extent, I find that the learned trial magistrate went into error in rejecting the appellant's case and this calls for the setting aside of the judgement on liability.

18. On the issue of vicarious liability, this court in **Jane Wairumu Turanta vs. Githae John Vickery & 2 others [2013] eKLR**, cited the celebrated case of **Morgan vs. Launchbury (1972)2 All ER 606**, where the doctrine of vicarious liability was expounded, and stated that:

**“...to establish agency relationship it was necessary to show that the driver was using the car at the owners request express or implied or in his instruction and was doing so in the performance of the task or duty thereby delegated to him by the owner... The case of HCM Anyanzwa & 2 others –vs-Lugi De Casper & Anor (1981) KLR 10 stated that “vicarious liability depends not on ownership but on the delegation of tasks or duty.”**

19. Going by the foregoing, it can be said that the suit motor vehicle was being driven by the Respondent’s driver or servant or agent in the normal course of his duty and the said driver or agent or servant was under instructions from the respondent. It therefore follows that any act or omission of negligence by the respondent’s driver or servant or agent makes the Respondent 100% vicariously liable

20. On whether the Appellant was entitled to general and special damages sought I note that the deceased died on the spot while at the prime age of 25 years and was a primary school teacher at a private academy earning Kshs 6,000/ per month which she used to support her family. As the deceased was in good health I find that a multiplier of twenty-seven years is reasonable and that a dependency ratio of 2/3 would suffice. Special damages of Kshs 10,300 were pleaded and proved. I have looked at the amounts awarded by the trial court and find them to be reasonable and within the conventional limits and that the trial court took into account all the circumstances. I do not see any erroneous factor that merits intervention by this court. Consequently, I endorse the trial court assessment as the same is reasonable and is in tandem with the cited authorities reproduced hereinabove and is as follows;

(i) **Pain and Suffering**-the deceased died on the spot, I would award her Kshs. 20,000/-

(ii) **Loss of expectation of life**- I would award her Kshs. 100,000/- which is the conventional award given by the courts.

(iii) **Loss of Dependency**- Loss of dependency is a claim that arises from the Fatal Accidents Act. Section 4 of the Fatal Accident Act provides: *“Action to be for benefit of family of deceased (1) Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought...”*

It would be expected that the deceased would retire at the age of 55 years. The trial court was right to adopt the multiplier of 27 years to give room to natural or accidental contingencies. The multiplicand of 6000/ per month is reasonable as the deceased was a teacher at a primary school academy and used to support her family as is wont of a mother. The dependency ratio of 2/3 is reasonable. The computation is as follows:  $6000 \times 27 \times \frac{2}{3} \times 12 = 1,296,000/-$

(iv) **Special Damages**=10,300/- which was pleaded and proved by production of receipts.

21. **Total award** standing at 1,426,300/-plus costs of the suit. The sum of Kshs 100,000/ will be discounted to prevent the appellant from getting a double compensation under the same estate.

22. For the reasons set out above, the Appellant has satisfied this court that the learned trial magistrate applied the wrong principles and erred in not finding the Respondent vicariously liable for the negligence of his driver. In the circumstance the trial court’s judgement must be interfered with.

23. In the result it is my finding that the appellant’s appeal has merit. The same is allowed. The trial court’s judgement dated 10.12.2008 is hereby set aside and substituted with judgement being entered in favour of the appellant as against the respondent as follows:

a) Liability at 100%

b) Pain and suffering.....Kshs 20,000/

c) Loss of expectation of life.....Kshs 100,000/

d) Special damages.....Kshs 10,300/

e) Loss on dependency.....Kshs 1,296,000/

TOTAL.....KSHS 1,426,300/

Less discounted on loss of

Expectation of life..... Kshs 100,000/

NET .....**KSHS 1,326,300/**

f) Costs of the suit and interest.

The appellant is also awarded costs of the appeal.

It is so ordered.

Dated and delivered at **Machakos** this **22<sup>nd</sup>** day of **February, 2021**.

**D. K. Kemei**

**Judge**