



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 96 OF 2019

JORAM KAMAU MUKUHA.....1ST APPELLANT

KAMAU MUKUHA STEPHEN.....2ND APPELLANT

VERSUS

STEPHEN MURIUKI 'MWITARI.....RESPONDENT

(Suing as the Legal Administrator of the Estate of Faith Gatwiri)

(Being an appeal against judgment/Decree of the Chief Magistrate's Court at Thika by Honourable N. M. Kyanya Nyamori (SRM) delivered on 22nd May 2019 in Thika, CMCC No. 853 of 2017)

JUDGMENT

1. The subordinate court by its judgment of 22nd May 2019 found the appellant 80% liable for the fatal accident of 28th March 2016, involving **Faith Gatwiri (deceased)** and the vehicle driven by the appellant, being motor vehicle registration number KAR 565 X. By that judgment, which was later the subject of review on 2nd August 2019 the trial court awarded the estate of the deceased for pain and suffering KSh.50,000, on loss of expectation of life KSh.50,000 and under Fatal Accident Act KShs.4,220,000. For those amounts the contribution of 20% was deducted representing the respondent's negligence.

2. The appellant being aggrieved by the trial court's finding on contribution and the award of damages under the Fatal Accident Act filed this appeal. The appeal is opposed by the respondent.

3. This is the first appellate court. The duty of this court is to re-evaluate and consider afresh the evidence tendered before the lower court and this court is then expected to draw its own conclusions remembering that unlike the trial court it did not have the benefit of seeing or hearing the witnesses who testified: see the case **Mwana Sokoni -v- Kenya Bus Service Ltd (1985) KLR**.

ANALYSIS AND DETERMINATION

4. Having considered the appellant's appeal and the parties written submissions I come to a conclusion that there are two issues for determination before me. They are:

(a) Whether the trial court erred in determining liability; and

(b) Whether there was an error on the determination of damages under the Fatal Accident Act.

5. ISSUE (a)

Stephen Muriuki M'Witari (Stephen) was the father of Faith Gatwiri (deceased). He filed the case before the subordinate court, suing on behalf of the estate of Faith Gatwiri (deceased). Stephen is the respondent in this appeal.

6. On 2th March 2012, at about 5.15. – 5.30 p.m. **Joram Kamau Mukuha** (Joram), the 1st appellant was driving car registration number KAR 565X. That car was registered in the name of Joram's father, **Kamau Mukuha Stephen** the 2nd appellant in this appeal.

7. Joram on the material date was driving the subject vehicle on Nairobi/Thika highway. He stated in his evidence that he was headed to Nairobi from Nyeri. When he reached Kwa Kairu area, along the Thika highway, and while driving in the center lane on that highway, at a speed of 60 – 70 km per hour a female "darted" from the left side of his vehicle going towards the right. In his statement Joram further

stated:

“I swerved to the right but due to the short distance involved the pedestrian was hit by the left side rear view mirror and fell on the tarmac.”

8. Joram stated that he was unable to stay at the scene of accident because he noticed hostile boda boda operators approaching him. He drove and reported the accident at Ruiru police station.

9. His car was subjected, by the police, to examination at the government vehicle inspection unit and a report in that regard was exhibited before the trial.

10. Stephen, the father of the deceased did not witness the accident, he was informed of the accident while he was in Meru. He however did state, and so did his other witness **Robert Munene Anampiu** (Robert) that the deceased was taken to Kenyatta National hospital, following the accident, but that she was pronounced dead on arrival at the hospital. Stephen also called a third witness **P.C. Nelson Otieno Okumu**. This police officer produced the police abstract. Although the court did not mark that exhibit on it being produced I can confirm that the respondent had, amongst the documents he filed together with the plaint, a police abstract dated 30th August 2017. That abstract indicated the accident occurred on Thika highway at Kimbo area and in brackets it is stated (**service lane**).

11. The police officer blamed Joram, the driver, for the fatal accident. Further the officer stated that at Kimbo area, of Thika highway, there is no pedestrian crossing and the nearest footbridge is 6 km away. Further that the speed limit of that service lane is 8 per hour.

12. I have considered the evidence adduced before the trial court. The trial court after considering that evidence found liability to be 80:20 in favour of Stephen (the plaintiff, now the respondent in this appeal).

13. The only eye witness and the one who testified about the accident was Joram. The police officer however on testifying, on behalf of the investigating officer, stated that the accident occurred on a service land where there was no foot bridge, for pedestrians, in close proximity. There are different police abstracts that were produced before the trial court. The first in time was the one produced by Joram. It is dated 17th May 2016. This abstract, which clearly relates to the subject accident, indicates the accident occurred at Kwa Kairu along Thika highway. The second in time, the police abstract produced by Stephen is dated 30th August 2017. This abstract indicates the accident occurred on the service lane at Kimbo area along Thika highway.

14. The respondent, Stephen needed to explain the anomalies between the two police abstracts. But perhaps more importantly the trial court had an obligation to interrogate that anomaly of having two police abstracts which seem to place the scene of accident at different places.

15. If the court had interrogated the above anomaly it would have made use of the evidence of the insurance investigator, **Stephen Mwangi Muchoki** (Muchoki) who investigated the accident on behalf of the insurance. Muchoki produced as an exhibit his investigative report. Muchoki questioned Joram and also attended the Ruiru Police station. He confirmed the accident was reported at that police station and that report showed that it occurred at Kwa Kairu area along Thika highway. The report also showed that there was a pedestrian cum vehicle over pass a few meters from the accident scene which the investigator stated was used by pedestrians to cross over Thika highway.

16. How does one resolve two police abstracts, issued on different dates, relating to the same accident but which place the point of accident at entirely different points. The first police abstract issued a few months after the accident showed the point of accident was at an area called Kwa Kairu. That abstract showed the accident occurred along Thika highway. The second police abstract issued one year and five months after the accident, which was relied upon by the respondent showed the accident occurred at Kimbo area along Thika highway on the service lane. This latter police abstract was produced by the police officer who failed to produce a copy of the occurrence book (O.B.). If he had done so the court would have known exactly where the accident occurred.

17. Joram stated in evidence that the deceased suddenly appeared in his lane and he tried to swerve to the right and to brake but because of the close proximity the front near side rear view mirror struck the deceased who fell on the tarmac and died before reaching the hospital. Joram's evidence in this regard was wholly supported by the government inspection report, after the subject vehicle was subjected to inspection. The report is dated 30th March 2016 and it reveals that the near side rear view mirror of the subject vehicle was ripped off. Presumably due to its impact with the deceased. That evidence, that the deceased, was hit by that mirror support's Joram's evidence that he took evasive measures to try to avoid hitting the deceased. That evasive action was to no avail. The deceased was hit by the near side rear view mirror.

18. Bearing the above discussion on issue (a) I do find that there was error in finding that Joram was 80% liable for the accident. There is clear evidence of the investigator which shows that there was a close by an over pass, or foot path which the deceased failed to use but instead used the highway which had three fast moving lanes to cross. That choice by the deceased shows negligence on her part. It is to large extent that decision to not use the foot path which contributed to the fatal accident. Accordingly my finding is that the trial magistrate erred to find Joram 80% liable. I am inclined to accept the submissions of the appellant and I do find that the appellant and the deceased were 50% liable for the occurrence of the fatal accident. I will therefore substitute that liability with the one found by the trial court.

ISSUE (b)

19. This issue calls upon this court to consider whether the trial court erred in the amount awarded on the Fatal Accident Act.

20. The respondent proved that the deceased worked as shop assistant earning KSh.18,000 per month. Of that amount the deceased supported her father with KSh.10,000 per month.

21. In considering the question of dependency I am guided by the Court of Appeal case, **Dickson Taabu Ogutu (Suing as the legal representative of the estate of Wilberforce Ouma Wanyama v Festus Akolo & another [2020] Eklr** thus:

“From the record, it is clear that in the Plaintiff that the appellant pleaded that the deceased took care of their aged parents and his daughter. The only mention of a wife, came up during cross examination. It is trite law that reliefs sought from court can only flow from the pleadings. As was indicated in THETA TEA COMPANY LIMITED & ANOTHER V FLORENCE NJAU NJAMBI [2002] eKLR;

“We may usefully start by quoting the words of Lord Goddard, C.J in BONHAM CARTER V HYDE PARK HOTEL LTD, (1948) 64 T.L.R 177, which were cited with approval by this Court in KENYA BUS SERVICES & ANOTHER V FREDRICK MAYENDE (1988-92) 2 KAR, 232. Lord Chief Justice Goddard said:

“Plaintiffs must understand that if they bring actions for damages, it is not enough to write down particulars and, so to speak, throw them at the head of the court, saying 'this is what I have lost, I ask you to give me the damages'. They have to prove it.”

22. In this case Stephen, father of the deceased, stated that the deceased at the time of her death supported “us and her siblings.” There was no further said of who was the “us” nor her “siblings” were. It needs to be stated that the dependency contemplated under the Fatal Accident Act is that of deceased’s spouse, children and parents.

23 In this case the deceased was a 20-year-old single girl. Although it was pleaded in the plaintiff that she supported her mother and father and siblings. There was no evidence given on that issue by Stephen when he testified. Stephen did however state that he was the deceased’s father and the deceased’s employer testified that he used to send KSh.10,000 out of the deceased’s salary to Stephen for upkeep. A case in point is **H. Young & Co. E.A Limited v Lawrence Ayako Orero Legal Representative Of The Estate Of Dominic Cornel Moemi (Deceased) & another [2019] eKLR**

“19. The question of the dependency ratio and multiplicand applicable in any given case is a question of fact. The level of dependency is affected by the number of the deceased’s dependants as contemplated under Section 4(1) of the Fatal Accident’s Act which includes the deceased’s wife, husband, parent and children. In this case, the evidence adduced indicated that the deceased had only one dependant, being his father the 1st respondent. The 1st respondent stated that the deceased was the youngest of his 3 sons and that his elder sons also provided for his needs. I am thus convinced that dependency ratio adopted by the trial court was excessive and a dependency ratio of 1/3 would suffice.”

24. The trial court in this case used multiplier of ?. Since the respondent, Stephen, did not prove that the deceased’s mother was indeed alive and dependent on the deceased, and because siblings were not proved to exist and in any case they are not considered dependents I am of the view that correct ratio should have been ?. I therefore substitute this ratio with the one considered by the trial court.

25. Although the appellant hereof submitted that the correct multiplier ought to have been 26 years, I am not convinced that is the appropriate multiple. The deceased in this case was 20 years old. She worked as a shop assistant and also helped her employer do house work, in the house where she also resided. Considering the standard of life in Kenya and that the life expectancy in Kenya has reduced due to many factors such as HIV amongst other, I will consider the multiplier on the basis the deceased would have retired at age 50 years. Accordingly I regard 30 years appropriate. Accordingly the respondent is entitled to an award for loss of dependence made up as follows:

10,000 X 30 X 12 Months x ? = 1,200,000

26. Since the other awards of the trial court were not challenged in this appeal it follows that the trial court’s judgment is partially set aside and there shall therefore be judgment for the respondent, **Stephen Muriuki M’Mwitari** (suing as the legal administrator of the estate of Faith Gatwiri deceased) as follows:

| | | |
|----------------------------------|---|---------------------|
| a) Pain and suffering | - | Ksh.50,000 |
| b) Loss of expectation of life | - | Ksh.50,000 |
| c) General damages of dependency | – | Ksh.1,200.00 |
| d) Special damages | - | Ksh. 149,010 |
| Grand total | - | Ksh. 1,449,010 |
| Total less 50% | - | <u>Ksh. 724,505</u> |

The respondent is awarded under (a) to (d) **Ksh. 724,505**

e) The respondent is awarded costs of the trial court and the appellant is awarded half the costs of this appeal.

f) The respondent is awarded interest on special damages from the date of filing suit and on general damages from the date of the trial court’s judgment.

SIGNED AND DELIVERED VIRTUALLY THIS 18th DAY OF MARCH 2021.

MARY KASANGO

JUDGE

18th March 2021

Before Justice Mary Kasango

C/A - Kevin

For the Appellant – Ms Ochieng

For the Respondent – Mr. Musyoka Holding brief for Mr. Munene

COURT

Judgment virtually delivered in their presence.

MARY KASANGO

JUDGE