



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 72 OF 2019

STEPHEN KIVUTI KIURA.....APPELLANT

VERSUS

ANASTACIA MURUGI MUTHUI & ROSEMARY KIITHINJI

(suing as the administrators of the estate of ISMAEL JUMA).....RESPONDENTS

JUDGMENT

1. The appeal herein arose from the judgment of Hon. Omwange dated the 24th day of October, 2019 in Siakago SPMCC No. 6 of 2017 in which the respondents herein sued the appellant claiming both general and special damages following an accident that occurred on the 31st day of July, 2016.
2. The particulars of the cause of action were that; on 31st day of July 2016; the deceased (Ismael Kithinji Juma) was lawfully walking along Embu – Kiritiri road, at Ruika stage when motor vehicle KCD xxxx owned by the appellant was so negligently, recklessly and/or carelessly driven that it knocked down the deceased whereby he sustained fatal injuries and as a consequence, the respondents and the estate suffered loss and damage.
3. The particulars of negligence, loss and damages are set out in paragraphs 5 and 6 of the plaint. The respondents thus claimed damages under both the Fatal Accidents and the Law Reform Acts and also the costs of the suit.
4. In his defence filed in court on the 25th of April, 2017, the appellant denied the respondent's claim and averred that the suit is bad in law, fatal, inept, incompetent and ambiguous and that it does not disclose proper particulars of the claim and/or cause of action and prayed for it to be dismissed. The appellant denied being the driver or owner of motor vehicle registration number KCD xxxx as alleged by the respondents. The particulars of negligence, loss and damage were also denied.
5. Without prejudice to the averments set out in the defence, the appellant averred that if the accident ever occurred, the same was solely caused by the negligence on the part of the deceased. The particulars of his negligence were set out in paragraph 5 of the defence. He urged the court to dismiss the respondent's claim.
6. The matter proceeded to hearing and in its judgement delivered on the 24th day of October, 2019, the learned magistrate found in favour of the respondents and entered judgment on both liability and quantum against the appellant to the tune of Kshs. 2,382,971/= plus interest and costs of the suit.
7. The appellant being dissatisfied with the said judgment moved this court vide a memorandum of Appeal dated the 19th day of November, 2019 wherein he has listed four (4) grounds of appeal as follows: -
 - 1) *That the learned magistrate erred in law and in fact in apportioning 100% liability against the appellant herein.*
 - 2) *That the learned magistrate erred in law and in fact in adopting a dependency ratio of 2/3 without any proof supporting the same.*
 - 3) *That the learned magistrate erred in law and in fact in awarding lose of dependency without any proof from the respondents herein.*
 - 4) *That the learned magistrate failed to deduct the award under the Law Reform Act from the total damages as the dependants were*

the same.

8. When the appeal came up for hearing, the court gave directions on filing submissions and following he said directions, the appellant did file his submissions but the respondent did not file any submissions despite having been served with a mention notice notifying their counsel to do so.
9. The court has considered the submissions by the appellant and the pleadings that were filed in the lower court. I have also re-evaluated the evidence as its required of this court being the first appellate court. The appeal herein turns on both the issue of liability and the quantum of damages.
10. The appellant in his submissions, has submitted that the respondents did not bring forth any eye witness to give an account as to how the accident occurred and that they did not produce the police abstract to indicate how the accident occurred.
11. The appellant made reference to the case of **Rahab Wanjiru Nderitu Vs Daniel Muteti & 4 others [2016] eKLR** on the burden of proof and submitted that the respondents failed to discharge the same. They also relied on the case of **Lilly Muthoni Vs Kenneth Muchangi & Kenya Bus Services** in which the respondent failed to produce an eye witnesses leading to the dismissal of the case.
12. It is clear that the respondents' cause of action is based on the tort of negligence. Under Section 108 of the Evidence Act, the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. Under Section 107, whoever desires the court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts, must prove that those facts exist.
13. In his submissions, counsel for the appellant averred that the respondents failed to call an eye witness and that they did not produce the police abstract. This court has perused the record of the proceedings. The respondents called three witnesses in support of their case, one of whom was an eye witness. PW2, (Musa Kariuki Ngari), testified that he is a boda boda rider and a farmer. That on the 31st day of July, 2016, he witnessed the accident and blamed the driver of the motor vehicle for causing the accident, since the deceased was outside the road and the motor vehicle veered off the road and knocked him down. That the deceased stood about 10 metres away from where he was.
14. PC Benedict Kyule from Kiritiri police station testified as PW3 and produced the police abstract as exhibit 2. It was his evidence that the driver of motor vehicle KCD xxxx was charged for causing death by dangerous driving but the case was withdrawn under Section 87(a) of the Criminal Procedure Code. It is not therefore true as alleged by the appellant that the respondents did not call an eye witness and that the police abstract was not produced as an exhibit.
15. On his part, the appellant who testified as the sole witness told the court that he was driving along Embu – Kiritiri road on 31st July, 2016, at Ruika when he heard a loud bang and he stopped the motor vehicle. That upon checking, he found a person had been knocked by a motor vehicle and was lying on the ground next to the road. He stated that he did not see him but blamed him for the accident. In cross-examination he stated that he did not see the deceased... he jumped to the road... I only heard a bang and the motor vehicle stopped. He admitted that he was charged with causing death by dangerous driving but the case was withdrawn as there were no witnesses.
16. Considering the evidence on record on liability the court notes that the accident occurred during the day at around 5.30 pm. PW2 who witnessed the same blamed the appellant for veering off the road and knocking down the deceased. This evidence was not controverted by the appellant who was driving the subject motor vehicle. The only thing he told the court was that he heard a bang and when he came out to check he found a person lying on the side of the road. The only logical conclusion that the court can make is that he was either not a truthful witness or that he was not careful otherwise, he could have seen the deceased beforehand and try to avoid the accident. The evidence by PW1 is that he was driving at high speed when he veered off the road.
17. In the circumstances, I find that the appellant is to blame for the accident and the learned magistrate was right in holding him 100% liable for the same.
18. On the quantum of damages, the appellant took issue with the award under loss of dependency and the 2/3 ratio which the learned magistrate adopted. The appellant has also challenged the learned magistrate's failure to deduct the award under the Law Reform Act from the total damages as the dependants are the same.
19. In the plaint filed in court, the deceased was aged 36 years at the time of death. He was said to be a farmer earning Kshs. 30,000/= per month out of which 2/3 went to the wife and other family members for their upkeep. He was survived by the wife and four (4) children as stated in paragraph 5 of the plaint. It was her evidence that the deceased was a peasant farmer who was capable of supporting his family. She, however, did not produce any evidence of earnings or led any evidence to prove that the deceased was earning any income from the farming that he was engaged in. In the case of **Beatrice Wangui Thairu Vs Hon. Ezekial Bargetuny & Another (HCCC No. 1638 of 1988 (UR))** the court had this to say about the loss of dependency;

The principles applicable to an assessment of damages under the Fatal Accidents Act are too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net-earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature.

20. In the case herein, the respondents did not tender any evidence on income so as to assist the court in determining a reasonable multiplicand. Similarly, they did not prove dependency. It is trite law that dependency is a matter of fact and evidence has to be adduced to

prove the same. Though the respondents listed the dependants, no birth certificates were produced or at the very least, a letter from the chief to show that the children exist.

21. The wife did not tender any evidence to show that she was married to the deceased either under the statute or under customary law. See the case of **Rahab Wanjiru Nderitu Vs Daniel Muteti & 4 others [2016] eKLR.**

22. To that extent, I find that no dependency was proved and no award ought to have been made under that head.

23. However, the awards for pain and suffering and loss of expectation of life are upheld and so are the special damages.

24. In the end, the appeal partly succeeds.

25. Each party shall bear its own costs of the appeal.

26. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 27TH DAY OF SEPTEMBER, 2021.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent