



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 32 OF 2019

MARTIN MWENDA Alias MWENDA MARTINAPPELLANT

VERSUS

MARY WANJA M'AMANJA Alias MARY WANJA

(Suing as the legal representative of JULIUS NKUNJA M'NCHEBERE Alias

NKUNJA KUGUNDU deceased) RESPONDENT

(Being an appeal from the judgment and decree of Hon. Maroro PM. in Meru CMCC No. 218 of 2016 made on 20/2/2019)

J U D G M E N T

1. On the morning of 15/3/2015, **Julius Nkunja M'Nchabere (“the deceased”)** was walking along the Meru – Nkubu road when he was hit at Ng’onyi by motor vehicle registration no. KBV 075Q (“the subject vehicle”) owned and driven by the appellant. The said vehicle thereupon rolled several times and rested on a ditch. The deceased died on the spot.
2. The respondent who is the widow of the deceased was called to the scene and saw that her husband had died out of that accident. She would later sue the appellant for damages for the said death. In his defence, the appellant denied every allegation made against him and averred that the deceased was the author of the accident or substantially contributed to the same.
3. After trial, the appellant was held to be 100% liable for the accident and the trial Court awarded the respondent at total of Kshs.1,447,400/-. The appellant was aggrieved by the said decision and has appealed to this Court against both liability and quantum. He has set out four grounds of appeal.
4. As a first appellate Court, I am duty bound to re-assess the evidence afresh and come to my own independent findings and conclusions. I have however to note that I never saw the witnesses testify. **See Selle & Another v. Associated Motor Boat Ltd [1968] EA 123.**
5. The appellant was not at the scene. She was only called by **PW2** to come and see that her husband had been run over by the subject vehicle. She told the Court that her husband was a guard working at Meru Homes Ltd and was earning Kshs.13,000/- per month. He also used to farm and get Kshs.20,000/- per month out of which he would give her Kshs.15,000/-. She spent a total of Kshs.138,600/- for his funeral.
6. **PW2 Jamleck Kathini M’Mukira** was at the scene. He saw the deceased walking from the direction of Meru while he, **PW2** was from the direction of Nkubu. He knew the deceased as he was a tenant in his grandfather’s premises. The deceased was still in his guard uniform and was coming from his night duty. The subject vehicle hit the deceased and rolled into a ditch. There were no other vehicles on the road at the time.
7. The appellant admitted that at the material time, he was driving the subject vehicle from the direction of Meru towards Nkubu. When he reached at the scene, there was a sharp bend. There was an oncoming vehicle which was being overtaken by a saloon car. He then swerved to his left to avoid a head on collision. When he was swerving back he noticed a pedestrian who run across the road onto his lane. It is then that he overrun him and rolled.
8. In cross-examination, he admitted that when he swerved to avoid the head on collision, he lost control and rolled. That the deceased was on his right side of the road and that he never contributed to the occurrence of the accident in any way. That he, the appellant, had been was charged with a traffic offence but was discharged under **section 87 (a) of the Criminal Procedure Code.**
9. It is on the foregoing evidence that the trial Court held the appellant 100% liable and awarded the respondent Kshs.1,477,400/- as damages.

10. The first complaint was that the trial Court erred in holding the appellant 100% liable yet there was evidence that the deceased was solely to blame for the accident or substantially contributed to the same.
11. The testimony of **PW2** was that the deceased was on the left side of the road walking towards the direction of Nkubu. That he was off the road when the subject vehicle run over him. The appellant himself admitted as much. That he lost control of the subject vehicle when he allegedly tried to avoid an on-coming vehicle that was overtaking on a sharp bend. That the deceased did not at all contribute to the accident.
12. If the appellant swerved to his left to avoid an on-coming vehicle whereby he hit the deceased, that, in the Court's view should be his problem. He should have enjoined the owner and driver of the alleged overtaking vehicle for contribution and not the deceased who was innocently walking home to meet his family after a night out duty. Having not enjoined the offending motor vehicle, he cannot seek to extort contribution from the deceased who was innocently walking on his right lane not expecting to be run over.
13. In view of the foregoing, the trial Court has been wrongly criticized for having held the appellant 100% liable for the accident. The trial Court was right and that ground is rejected. The invitation to apportion liability at 50/50 basis has no basis and is rejected.
14. The second ground was that the trial Court was wrong in adopting a multiplicand of Kshs.12,800/- which was not sufficiently proved. The evidence before the court was that the deceased was employed by Meru Homes Ltd. **PW2** was categorical that he saw the deceased both before and after he was hit by the vehicle. The deceased was wearing his official uniform as he was coming from his night duties. That evidence was not seriously challenged or altogether displaced.
15. **PW1** produced salary vouchers for the months of April, 2015 and September, 2015. They showed that the deceased was being paid Kshs.12,800/- net per month. The said salary vouchers were vouched for by **PW1** as belonging to the deceased and the trial Court believed her. They were all shown to have been signed for by the deceased. There was no suggestion or allegation that the salary vouchers were not genuine or that they were forgeries.
16. There was impeccable evidence that the deceased was gainfully employed. The deceased's place of employment was not only known, but the same as well his alleged monthly salary was disclosed to the appellant at the time the suit was filed. The subject salary vouchers were supplied with the original documents that were filed in Court with the plaintiff.
17. The case was tried between 23/5/2017 and 3/9/2017. The aforesaid documents had been served way back in September, 2016. The appellant had over 8 months to do his investigations and verify the veracity of the documents served upon him, if he was minded.
18. The purpose of total disclosure of one's case from the onset is to give the adverse party an opportunity to investigate and verify the veracity or otherwise of the evidence sought to be relied on. To my mind, the salary vouchers were not challenged and displaced, and they were adequate proof of what the deceased was earning each month. Accordingly, the trial Court cannot be blamed for having relied on the sum of Kshs.12,800/- as the multiplicand. That ground is rejected.
19. Accordingly, on the evidence on record, the trial Court was right in relying on a multiplicand of Kshs.12,800/-.
20. The last complaint was that the trial Court erred in adopting a multiplier of 12 years which was inordinately excessive. The proved and/or undisputed age of the deceased as at the time of the accident was 48 years. He was gainfully employed at the time of his demise. The age of retirement in Kenya is known to be 60 years.
21. The appellant invited the Court to adopt the principle of a global award of Kshs.400,000/-.
22. The trial Court considered that had the deceased survived, he would have retired at 60 years. It is on that basis that the trial Court adopted the multiplier at 12 years. The appellant did not, either before the trial Court or before this Court suggest what he considered to be the multiplier as he preferred the application of the principle of global sum.
23. In **Monica Muthoni Mwangi v. Peterson Wanjohi & Another [2004] eKLR** the Court adopted a multiplier of 2 years for a 58 year old. In **Joseph Kahiga Gathii & Another v. World Vision Kenya & Others [2010] eKLR**, the Court adopted a multiplier of 8 years for a 57 year old. In **Sokoro Plywood Limited & Another v. Njenga Wainaina [2007] eKLR**, a multiplier of 10 years was adopted for a 60 year old. In **Hardev Kaur Dhanoa v. Multiple Hauliers (EA) LTD [2013] eKLR**, a multiplier of 6 years was adopted for a 62 year old. And, in **David Bore v. Johnson Masika [1998] eKLR**, the Court adopted a multiplier of 5 years for a 62 year old.
24. As stated above, the deceased was gainfully employed and was in good health. He was at the time aged 48 years. He would have continued to work up to the age of 60 years. Life expectation for men in Kenya according to the World Health Organization is 65 years. I find nothing untoward in the trial Court having adopted a multiplier of 12 years. I reject that ground.
25. In the premises, I find that on the basis of the evidence before the trial Court, it arrived at the right decision. In the circumstances, the appeal lacks merit and is hereby dismissed with costs.

DATED and DELIVERED at Meru this 30th day of January, 2020.

A. MABEYA

JUDGE