



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO.163 OF 2016

NGOTHO GACHANJA.....1ST APPELLANT

JOSEPH NGUGI.....2ND APPELLANT

-VERSUS-

MARY WANGUI WANYOIKE (suing as the legal

representative of the estate of GERALD ITHAGU.....RESPONDENT

(Being an appeal from the judgment of Hon. B. Mararo Principal Magistrate delivered on 30th November 2016 in Nakuru CMCC No.975 of 2014)

JUDGMENT

INTRODUCTION

1. This appeal arises from suit filed by the respondent/plaintiff seeking special and general damages against the appellants/defendants for the death of her son **GERALD ITHAGU** who died while travelling in the 1st appellant/defendant's motor vehicle registration number KAA 860T driven by the 2nd Appellant/defendant which was involved in an accident on 17th June 2014 along Nakuru –Bahati road.

2. The trial magistrate apportioned liability at 50:50 as between the plaintiff and defendants and assessed damages as follows:-

i. loss of dependency..... kshs 2,356,000

ii. pain and suffering..... kshs 20,000

iii. Special damages kshs 35,600.

3. The appellant being dissatisfied with the said decision, filed this appeal on the following grounds:-

i. That the trial magistrate erred in law and fact by failing to determine the issues for determination before him.

ii. That the trial magistrate erred in law and fact by using the sum of kshs 15,500 as the salary of the deceased in awarding the respondent, a sum which was not pleaded by the respondent; and for relying in the figure of kshs 15,500 instead of the would be net salary.

iii. That the trial magistrate erred in law and fact by disregarding the evidence on record that the deceased was to be blamed for the accident and would have been charged in court if he never passed on; and apportioning liability at 50:50 when there was clear evidence on record that the deceased was unlicensed rider and the one to blame for the accident.

iv. That the trial magistrate erred in law and fact by using a multiplier of 38 years, which resulted in inordinately high award of kshs 2,356,000.

v. That the trial magistrate erred in law and fact by failing to appreciate that the plaintiff/respondent failed to prove her case on balance of probabilities.

vi. That the trial magistrate erred in law and fact by failing to consider appellant's filed submissions together with issues raised

therein.

APPELLANT'S SUBMISSIONS

4. The appellant urged court to reevaluate evidence adduced in the lower court, this being the first appellate court. Counsel for the appellant submitted that evidence adduced in the lower court is that deceased who was a motor rider was 22 years old and was working in a butchery at Kiti earning salary of kshs 15,000 per month. He submitted that no copy of pay slip was produced to prove his earnings. He submitted that the appellants in defence denied that the deceased was earning kshs 15,000 per month.
5. Counsel further submitted that PW2 a cousin and employer to the deceased never produced any document to prove that the deceased worked for him and was earning kshs 500 per day. He urged court to apply minimum wage of kshs 5,000.
6. He further submitted that the police abstract produced in court showed that the deceased was to blame for the accident and that his motorcycle was not insured.
7. Appellant submitted that in the trial court he indicated that he was turning left and suddenly a motor cycle hit his tyres.
8. On liability, the appellant submitted that the appellant had already entered the feeder road when the deceased hit his vehicle and that plaintiff and her witnesses who said they were not at the accident scene did not rebut the evidence.
9. On multiplier of 38 years and ratio of 1/3, the appellant submitted that evidence showed that the deceased was unmarried man aged 22 years and in applying multiplier of 38 years, the court failed to consider vicissitudes of life and assumed that he would have lived up to 60 years. Appellant's counsel cited the case of **Julius Mokuwa Ongeru Vs Esther Njoki Gichari[2006]eKLR** where the deceased was 22 years old and the court adopted multiplier of 20 year and the case of **Robina Mabeya & others Vs Evanson Ngugi and Another HCCC No.1409 of 1984** where the deceased was 23 years and the court applied multiplier of 20 years.

RESPONDENT'S SUBMISSIONS

10. The respondent submitted that PW4 testified as eye witness and stated how the accident occurred; that in his testimony he said the subject motor vehicle overtook the deceased's motorbike and suddenly turned without indicating; and as a result, the motor cycle hit the body of the lorry and the vehicle run over the motor cyclist. Further that, the respondent availed one witness who was driving the vehicle at the material time; that the witness blamed the deceased for the accident; and said he was not charged with a traffic offence.
11. Respondent submitted that there are two versions on how the accident occurred and that the appellants did not call an independent witness; that the trial court did not err in apportioning liability at 50:50.
12. On quantum, the respondent submitted that the trial court appreciated that there was prove of employment by the letter produced in court and adopted earnings of kshs 15,500 per month.
13. As to whether the deceased was lawfully riding the motor cycle, the respondent submitted that the police visited the scene if the allegation was true, police would have indicated in the police abstract; that the allegation is an afterthought as it was not pleaded in defence filed.
14. On earnings, the respondent submitted that a letter was produced to prove earnings and even where there is no proof, the court can proceed to award earnings; further that the appellant did not prove that the respondent would be visited by any vicissitudes and cited the case of **Julian Njeri Muriti vs Veronica Njeri Karanja Nairobi HCCC No.932 of 2000** where multiplier of 30 was applied for deceased aged 38 years

ANALYSIS AND DETERMINATION

15. This being the first appellate court, I am required to reevaluate evidence adduced before the trial court and make an independent determination. I am however minded of the fact that unlike the trial court, I never got opportunity to take evidence first hand and observe demeanor of witnesses. For that I will give due allowance.
16. On perusal of the lower court, record I note that during cross-examination, the plaintiff/respondent confirmed that the police abstract indicated that the accident was under investigation but the motorist was to blame.
17. In respect to blame, PW4 said that the lorry driver overtook the motor cyclist before turning to the left. He also said the lorry was moving at high speed. PW2 who was a police officer was not of much help to the court as he said the accident was still under investigation and he was not the investigating officer and therefore never visited the scene; that didn't know how the accident occurred.
18. I however note that the lorry driver had seen the motor cyclist before the collision; he saw him when overtaking, he cannot be absolved from the blame because he has not demonstrated that he made any efforts to avoid collision yet he had seen the deceased. My view is that the trial magistrate did not err in apportioning liability at 50:50.
19. On quantum, under lost earnings, I note that PW2 said that he wrote the letter of employment on 23rd July 2014 yet he said the deceased started working in his butchery in 2011. The accident occurred on 17th July 2014; the letter of employment was therefore written after the accident. It is evident therefore that the letter was written for this case and there was no prove that the deceased was employed by PW2 and

was earning kshs.15,000 as alleged. The court should have therefore applied minimum wage for year 2014 for general laborer in 2014, which was kshs 9,024.15 for Municipalities.

20. On multiplier, 38 years for a person who died at 22 years show that the court presumed he would have lived up to 60 years; the fact is there are many unforeseen factors, which can cut short a person's life. There can never be certainty that a young person would live to attain age of retirement. In my view, the multiplier applied is high. For a person aged 22 years, a multiplier of 28 years in my view would be appropriate.

21. From the foregoing, I dismiss appeal on liability and allow appeal on quantum to the extent stated above.

22. FINAL ORDERS

a. Appeal on liability is hereby dismissed.

b. Appeal on quantum partly succeed. Under loss of dependency, multiplier is reduced to 28 years and monthly earnings reduced to 9,024.15 multiplicand of 1/3 to remain.

i. Thus $9,024.15 \times 28 \times 12 \times 1/3 \dots \dots \dots$ kshs 1,010,704.80

c. Awards under pain and suffering and special damages to remain.

d. Each party to bear own costs Appeal.

Judgment dated, signed and delivered at Nakuru this 30th day of January, 2020

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Schola/Jenifer - Court Assistant

Ms. Sambu holding brief for Mr. Matiri Counsel for appellant

Ms. Kiberenge Counsel for respondent