



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 18 OF 2017

JOHN MWANGI MACHARIA.....APPELLANT

-VERSUS-

JENIFFER KEIYA MUTEGLI.....RESPONDENT

(Appeal from the judgment and decree in Nyeri Chief Magistrates' Court Civil Case No. 443 of 2013 (Hon. C. Wekesa, Senior Resident Magistrate) delivered on 9 December 2015)

JUDGMENT

The respondent sued the appellant in the magistrates' court for damages under the Law Reform Act, cap. 26 and the Fatal Accidents Act, cap. 32. She also sued for special damages, costs of the suit and interest thereon. She instituted her suit in her capacity as personal representative of Peter Mutegei Muthurwa (deceased) and also for the benefit of the deceased's estate.

According to her plaint filed in court on 29 November 2013, the suit arose out of a road traffic accident that is alleged to have occurred along Nyeri-Mathari Road on or about 9 December 2012 at about 10:00 P.M.

The accident involved a motor vehicle, registration number KBX 417X said to belong to the appellant and a motorcycle registration number KMCU 533 K (the motorcycle) of which the deceased was the rider.

It was the plaintiff's contention that at the time of the accident, the motor vehicle was being driven by the appellant himself and that he drove, managed, or otherwise controlled it so negligently that he caused it to hit the deceased as a result of which he sustained injuries to which he succumbed.

It was averred that as a result of the deceased's death, the respondent who was named as his only dependant and his estate suffered loss and damage. Thus the respondent claimed for loss of dependency under the Fatal Accidents Act and damages for pain, suffering, lost years and loss of expectation of life under the Law Reform Act.

In his statement of defence dated 24 January 2014, the appellant denied the respondents' claim in toto and put the respondents to strict to proof thereof. In particular, he denied that he was the owner or the driver of motor vehicle registration number KBH 417X; or that a road traffic accident involving the said vehicle occurred on the alleged date or that he was negligent as alleged or at all.

He further contended that if at all the accident occurred, then it was solely caused or substantially contributed to by the deceased who, as noted was the rider of motor cycle registration number KMCU 533K.

He pleaded the doctrines of *res ipsa loquitur* and *volenti non fit injuria*.

The appellant also disputed the respondent's claim for any sort of damages, irrespective of whether they were special damages or general damages under and the Fatal Accidents Act or the Law Reform Act.

At the conclusion of the trial, the learned magistrate found the appellant to have been largely responsible for the accident and apportioned liability at 80:20% holding that the deceased was partly to blame for the accident because he was carrying excess passengers on his motor cycle. As far as quantum for damages is concerned, she made an award of Kshs. 20,000/= for pain and suffering; Kshs. 100,000/= for loss of expectation of life; Kshs. 2,277,000/= for loss of dependency; and Kshs. 15,000/= as special damages. The respondent was also awarded costs of the suit and interest at court rates to be calculated from the time of delivery of the judgment.

The appellant was dissatisfied with this judgment and so he preferred the present appeal; in his memorandum of appeal dated 2 June 2017 and filed on 8 June 2017, he has raised the following grounds:

1. The learned magistrate erred in law by finding the appellant 100% liable in negligence regardless of the evidence tendered against such a finding 'whilst Kenyan law has not reached the level of liability without fault.'
2. The learned magistrate erred in fact and in law by disregarding the evidence of the defence witness who was the only eye witness in the matter as the plaintiff did not call any eyewitnesses.
3. The learned magistrate erred in law and in fact by failing to appreciate the contributory negligence attributable to the actions by the deceased in causing the accident nor the fact that no negligence was proved against the appellant.
4. The learned magistrate erred in law and in fact by failing to discount the award of loss of expectation of life from the final award thus making a double award to the plaintiff.
5. The learned magistrate erred in law and in fact by adopting a multiplicand of 2/3 while the deceased was unmarried and had no children and thus arriving at an erroneous assessment on the award on loss of dependency.
6. The learned magistrate erred in law and in fact in failing to consider or ever adequately adopt and appreciate the written submissions of the appellant on record.
7. The learned magistrate misdirected herself in law and in fact by failing to be bound by the decision of the Apex Court when faced with similar facts, contrary to the doctrine of stare decisis.

Having held that the deceased contributed to the accident though to a lesser degree, the first and third grounds of appeal are clearly unfounded and ought to be dismissed at the very outset.

This being the first appeal, it is incumbent upon this honourable court to consider the evidence on record afresh and come to its conclusions except that it has to bear in mind it is the subordinate court that had the advantage of seeing and hearing the witnesses. (see **Selle v Associated Motor Boat Co. [1968] EA 123; Kiruga v Kiruga & Another [1988] KLR 348**. In this latter decision, the Court of Appeal held that: -

“An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong.? An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.”

The respondent testified that the deceased was her son and that she came to learn of his death a day after he had been fatally injured in a road traffic accident. She immediately proceeded to the police station where she reported the accident.

It was also her evidence that prior to his death, her son operated a motor cycle passenger transport business, popularly referred to as 'boda boda' in the course of which he was involved in the fateful accident at Mathari Junction in Nyeri. She testified further that her son was aged 18 and was single. Out of his business, he would give Kshs. 500/= every month.

Besides the support she received from her son, the respondent testified that she was an ayah and earned approximately Kshs. 4000/= per month.

Her witness was police constable Joseph Ringera (PW2) who produced a police abstract showing that the accident in question occurred on 9 December 2012 at 10:50 PM and it involved the appellant's motor vehicle registration number KBH 417X and the deceased's motor cycle registered as number KMCU 533K. He testified that the deceased and his three passengers who included the deceased perished in the accident.

The investigations of the accident established that the appellant was to blame for the accident and therefore he preferred a charges of causing death by dangerous driving against the appellant; as at the time he testified the case against the appellant was pending for determination in court.

Elijah Watata Kimondo (DW1) testified that he was the driver of the vehicle in question at the material time. It was his evidence that the accident occurred because the deceased was overtaking and, in any event, he was carrying three people instead of one. He admitted however that he was not only charged but that he was also convicted of the offence of causing death by dangerous driving; he paid a fine of Kshs. 20,000/=.

As earlier noted, amongst the documents produced in support of the respondent's case was a police abstract. It showed that the accident involved motor vehicle registration number KBH 417 X and a motorcycle registered as number KMCU 533 K occurred on Nyeri-Mathari Road on 9 December 2012; it was reported and entered in the occurrence book at Nyeri police station, traffic unit, on the same day.

The abstract also shows that the appellant was identified as the owner of the motor vehicle which was covered by Madison Insurance Company under policy number NYR/701/370423/2012/COMP. The deceased was indicated as among four other people, who perished in the accident.

Thus, as much as the appellant denied in his pleadings that a road traffic accident occurred as alleged by the respondent, the evidence showed an accident involving his motor vehicle occurred as a result of which there was not just one fatality but four of them. As far as the present

appeal is concerned, the respondent produced a certificate certifying her son's death. Ultimately, if the appellant's evidence is anything to go by, there wasn't much dispute about the material issues on whether a traffic accident occurred; whether it involved the appellant's car and whether the deceased perished in that accident.

The primary contention is whether the appellant was responsible for the accident to the extent to which he was held liable and whether the learned magistrate correctly assessed the damages due to the respondent.

In addressing the twin questions, I must start by noting that the question of whether the appellant was liable for the accident arose in a similar appeal in High Court Civil Appeal No. 10A of 2017 where the appellant in the present appeal was also the appellant in that appeal which I will henceforth refer to as 'the previous appeal'. The respondents were the administrators of the estate of one Christine Nkirote Muriungi who, it has now emerged, was one of the passengers riding pillion on the deceased's motor cycle and who, as noted also perished in the accident. The respondents in that appeal were represented by the firm of Messrs. Andrew Kariuki & Company Advocates which is the same firm of advocates that is on record for the respondent in the present appeal.

I find it rather disturbing that despite the fact that the appellant and counsel for the respondent were all along aware that two appeals arose out of a trial that was triggered by the same set of circumstances, none of them bothered to bring this information to the attention of the court; whether it was by design or inadvertent, by suppressing this information, both parties exposed the court to the risk of making conflicting factual conclusion over the same set facts.

That said, I am prepared to consider the present appeal on its own merits but cautious that I may as well be bound by some, if not all, of my findings on issues that are common to both this appeal and the previous appeal. At the risk of sounding repetitive, I will adopt here my pronouncements in the previous appeal on these common issues.

Just like in the present appeal, the issue of an eye witness was raised in the previous appeal; it was argued that there was no eye witness and in the absence of such a witness, the respondent could not have proved how the accident occurred; in other words, they could not prove negligence on the part of the appellant.

The appellant urged, and indeed it was true, that the 1st respondent did not witness the accident and having been the only person who testified, there was no eyewitness account of how the accident occurred. However, I dismissed this argument on the ground that no evidence was called on the appellant's behalf to demonstrate that the accident was not as a result of his negligence taking into account that the respondent had pleaded the doctrine of *res ipsa loquitur*. The respondent having pleaded this doctrine, the burden was always on the appellant to explain that he was not negligent for the accident and that despite the efforts he may have made to avoid it, the accident did happen anyway.

Unlike in the previous appeal, the record in the present appeal shows that there was evidence in the appellant's behalf; one Elijah Watata Kimondo is recorded to have testified in that regard. According to his witness statement, he was the one who was driving the accident motor vehicle at the material time. He had borrowed it from the appellant. In his brief answer to questions put to him during cross-examination he stated as follows:

"I do not have a witness to support my testimony. Police came and I am charged with the offence of causing death by dangerous driving. Case proceeded and I was fined 20,000/=. I did not appeal."

It is worth remembering that Police constable Joseph Ringera (PW2) had stated in his evidence that he charged the driver of the vehicle with the offence of causing death by dangerous driving. The testimony of Kimondo confirms that he was the driver that constable Ringera was talking about; it further confirms that the driver was not only charged but he was also convicted of the offence with which he was charged.

It follows that as much as no evidence was called for the appellant in the trial that occasioned the previous appeal, the evidence presented in his behalf in the trial out of which the present appeal arose was of no value to him as far as the resolution of the question of liability is concerned; if anything, it was more damning and placed him in no better position than he would have been if he had not called any evidence at all. I say so because under section 47 A of the Evidence Act, cap. 80, a conviction in any criminal proceedings is conclusive evidence that the convict is guilty of the offence charged. That section reads as follows:

47A. Proof of guilt

A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.

So with the conviction of the driver of the appellant's motor vehicle and in the absence of any appeal against the conviction, the issue of whether he was negligent or not was not subject to any further debate more so when the standard of proof required in a criminal trial is higher than that warranted in civil proceedings.

I would have been prepared to find the appellant solely responsible for the accident if the respondent had cross-appealed. With the conviction of the appellant's driver, and the driver himself having admitted that he did not prefer any appeal against his conviction, there was no basis for apportionment of liability. But since the respondent appears to be content with the apportionment I have neither a reason nor any basis of disturbing the learned magistrates' holding on this issue.

On the final question of assessment of damages, the general principle is that while such assessment is a function of the discretion of the trial

court, the appellate court will be called upon to interfere with it if, in the exercise of its discretion, the lower court either took into account an irrelevant factor or left out a relevant factor or that the award it made was too high or too low as to amount to an erroneous estimate, or, that the assessment is based on no evidence, in any event. The Court of Appeal in **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5** said of the discretion of the trial court in assessing damages in the following terms: -

"An appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low."

The fourth ground of the appellant's appeal is that the learned magistrate made what he described as a double award because she made an award under the Law Reform Act and under the Fatal Accidents Act yet the beneficiaries of both awards are the same people. According to the appellant, the final award ought to have been discounted.

As I noted in the previous appeal, this question was addressed in **Kemfro Africa Limited t/a Meru Express Service, Gathogo Kanini versus A.M. Lubia & Olive Lubia (1982-88) 1KLR 727** where it was held, *inter alia*, that where the *net benefit will be inherited by the same dependants under the Law Reform Act, that must be taken into account in the damages awarded under the Fatal Accidents Act because the loss suffered under the latter Act must be offset by the gain from the estate under the former Act.*

This position was also referred to in **Asal versus Muge & Another (2001) KLR 202** where the same Court sitting at Kisumu cited its earlier decision in **Maina Kaniaru & Another versus Josephat Muriuki Wangonde, Civil Appeal No. 14 of 1989** (unreported) where it said: -

The rights conferred by section 2(5) of the Law Reform Act (Cap 26, Laws of Kenya) for the benefit of the estates of the deceased persons are stated to be "in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accidents Act." This does not mean that damages can be recovered twice over but that if damages recovered under the Law Reform devolve on the dependants the same must be taken into account in reduction of the damages under the Fatal Accidents Act..."

I understand these decisions to say that, in fatal accidents, damages are recoverable under the distinct heads of the **Law Reform Act** (under section 2(1)(5) thereof) and the **Fatal Accidents Act** (under section 4(1) thereof). These provisions of the law starting with Section 2(1) (5) of the **Law Reform Act** read as follows: -

2.(1) Subject to the provisions of this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of his estate:

Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims for damages on the ground of adultery.

(2)...

(3)...

(4)...

(5) The rights conferred by this Part for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accidents Act or the carriage by Air Act, 1932, of the United Kingdom, and so much of this Part as relates to causes of action against the estates of the deceased's persons shall apply in relation to causes under those Acts as it applies in relation to other causes of action not expressly excepted from the operation of subsection (1).(underlining mine).

It is apparent that any cause of action for the benefit of the deceased's estate and thus any award that may ensue therefrom is not in substitution of or an alternative to the right that accrues to the deceased's dependants under the **Fatal Accidents Act**.

The **Fatal Accidents Act** itself makes it clear as to who should benefit from any action taken under it; section 4(1) thereof states: -

4.(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; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct:

Provided that not more than one action shall lie for and in respect of the same subject matter of complaint and every such action shall be commenced within three years after the death of the deceased person.

(2) In assessing damages, under the provisions of subsection (1), the court shall not take into account-

(a) any sum paid or payable on the death of the deceased under any contract of assurance or insurance, whether made before or after passing of this Act;

(b) any widow's or orphans pension or allowance payable or any sum payable under any contributory pension or other scheme declared by the Minister, by notice published in the Gazette, to be a scheme for the purpose of this paragraph.

Whereas an action is maintainable under the **Fatal Accidents Act** for the benefit a deceased person's wife, husband, parent or child is beyond dispute; where such an action is viable, the trial court has the discretion, as is always, to determine the amount of damages payable; in exercising this discretion, the Act under **subsection (2)** provides a guide of what ought not to be considered in assessment of damages under this head. It does not, however, provide any general or specific guidelines of what should be considered; I suppose this omission is deliberate so as to leave it to the trial court with sufficient latitude within which it can exercise its discretion in assessing the damages considering the peculiarity of the cases that come before it.

It is upon this understanding that while an award under this head may be "reduced" as was suggested by the **Court of Appeal in Maina Kaniaru & Another versus Josephat Muriuki Wangondu (ibid)** because an award has been made under the **Law Reform Act** it cannot be done away with altogether. The fact that those who are likely to benefit from the deceased's estate are the same persons who will benefit from any claim under the **Fatal Accidents Act** is only factor to be considered in the extent of damages to be made; it is not a reason to reject a claim for an award under this head.

Based on this understanding, there is no merit in the appellant's argument that that the learned magistrate made a double award.

There is, however, a concern here that is similar to one I found in the previous appeal on assessment of damages under the head of loss of dependency under the Fatal Accidents Act. The learned magistrate adopted a multiplier approach yet there was no evidence of how much the deceased earned. In adopting this approach, the learned magistrate noted as follows in her judgment:

"I find the proposed minimum wage by counsel for the plaintiff to be reasonable i.e. Kshs. 9,900, the same is adopted."

There is no evidence presented to demonstrate that the figure adopted was the 'minimum wage' and therefore it was nothing more than a speculative figure.

A useful guide on application on the multiplier approach was given by Ringera, J., in **Mwanzia v Ngalali Mutua and Kenya Bus Services (Msa) Ltd & Another** which was quoted with approval in **Albert Odawa v Gichimu Gichenji NKU HCCA No. 15 of 2003[2007] Eklr**. The learned judge noted as follows:

"The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency are known or are knowable without undue speculation where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do."

The same principle was adopted in **Mary Khayesi Awalo & Another v Mwilu Malungu & Another ELD HCCC No. 19 of 1997 [1999] eKLR** where Nambuye J., stated that: -

"As regards the income of the deceased there are no bank statements showing his earnings. Both counsels have made an estimate of the same using no figures. In the court's opinion that will be mere conjecture. It is better to opt for the principle of a lump sum award instead of estimating his income in the absence of proper accounting books."

It follows that this was a proper case for making a global award. According to the deceased's mother, the deceased was aged 18, though it was pleaded in the plaint that he was 20; he was single and his support to his mother was minimal; she stated that he would give her Kshs. 500/= per month. In these circumstances and doing the best I can, and considering that the respondents and the rest of the beneficiaries will benefit from the award made under the Law Reform Act, I would make an award of Kshs. 900,000/= as a global award under the head of loss of dependency.

Apart from the question of double award which I have since disposed of, I didn't find any controversy over the awards made on the rest of the heads; they will be retained as ordered by the learned magistrate. For avoidance of doubt the final award made by the learned magistrate is varied as follows:

(a) Pain and suffering	Kshs. 20,000
(b) Loss of expectancy of life	Kshs. 100,000
(c) Loss of dependency	<u>Kshs. 1,000,000</u>
Total	Kshs. 1,120,000
Less 20% contribution	<u>56,000</u>
Net amount	Kshs. 1,064,000

The Parties shall bear their respective costs of appeal. The respondent shall, however, have costs in the lower court as ordered by the learned

magistrate.

Signed, dated and delivered on 26 June 2020

Ngaah Jairus

JUDGE