



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 513 OF 2017

JAMES TENYERA OLUOCH (Suing as the legal administrator of the estate of JACKSON OLUHANO OLUOCH

Deceased).....APPELLANT

VERSUS

GENERAL MOTORS EAST AFRICAN LIMITED.....1ST RESPONDENT

PETER MACHARIA MBOGO.....2ND RESPONDENT

(Being an appeal against the judgment and decree of Hon. A.M. Obura (Mrs.) (Principal Magistrate) delivered on 23rd June, 2016 in MILIMANI CMCC NO. 3073 OF 2012)

JUDGMENT

1. The appellant in the present instance instituted a suit against the 1st and 2nd respondents in his capacity as the legal administrator of the estate of Jackson Oluhano Oluoch (“the deceased”) by way of the plaint dated 8th June, 2012 and sought for reliefs in the nature of general damages, special damages in the sum of Kshs.41, 900/ and interest thereon.
2. The 1st respondent was sued in its capacity as the registered owner of the motor vehicle registration number KBE 041E (“the subject motor vehicle”) while the 2nd respondent was enjoined in the suit as the driver of the subject motor vehicle at all material times.
3. The appellant pleaded in his plaint that sometime on or about the 17th day of June, 2009 at around 6.15 am the deceased was lawfully walking along Outering Road near Kariobangi Market when the subject motor vehicle while being driven by the 2nd respondent veered off the road and knocked down the deceased, thereby causing him to sustain fatal injuries.
4. The appellant attributed the accident and consequent death of the deceased to negligence on the part of the 2nd respondent by setting out its particulars in his plaint.
5. It was pleaded by the appellant that before his death, the deceased was a young and spirited man aged 23 years old who left behind the following dependants:

a) James Tenyera Oluoch	Father
b) Beatrice Wanjiru	Mother
c) Seleh Achando	Sister
6. Upon service of summons, the 1st and 2nd respondents entered appearance and put in their joint statement of defence dated 3rd December, 2012 to deny the appellant’s claim.
7. The respondents admitted the details of ownership and control of the subject motor vehicle as pleaded in the plaint but denied their involvement in the accident as well as the particulars of negligence set out in the plaint.
8. When the suit came up for hearing before the trial court, the appellant testified and called one (1) other witness, whereas the 2nd respondent gave evidence for the defence case.

9. At the close of the hearing, the trial court vide its judgment delivered on 23rd June, 2016 dismissed the appellant's suit with costs.
10. The appellant has now moved this court by way of an appeal against the aforesaid judgment by putting forward the following grounds of appeal in his memorandum of appeal dated 10th March, 2017:
- (i) ***THAT the learned trial magistrate erred in law and fact in finding that the appellant had failed to prove his case on a balance of probabilities against the 1st and 2nd respondents and therefore giving the respondents the benefit of doubt.***
 - (ii) ***THAT the learned trial magistrate erred in law and fact in finding that it was not proved on a balance of probabilities that the motor vehicle registration number KBE 041E hit the deceased despite the evidence given by the 2nd respondent on cross examination that he drove the said vehicle along Outering Road on the material day being the scene where the accident took place.***
 - (iii) ***THAT the learned trial magistrate erred in law and fact in finding that PW2 the eye witness was inconsistent in his testimony with regard to the circumstances relating to the accident and on identification of the offending vehicle yet PW2 clearly stated in open court details relating to what happened on the material day of the accident.***
 - (iv) ***THAT the learned trial magistrate erred in law and fact in finding that the accident that happened on or about the 17th day of June, 2009 was never reported to the police despite the evidence of PW1 and PW2 that they reported the matter to the police on the material day.***
 - (v) ***THAT the learned trial magistrate erred in law and fact in disregarding the evidence of PW1 and PW2.***
 - (vi) ***THAT the learned trial magistrate erred in law and fact in disregarding the evidence of the police abstract when it was not disputed by the respondents.***
 - (vii) ***THAT the learned trial magistrate erred in law and fact in dismissing the appellant's suit in its entirety without due regard to the nature of the case that a life was lost and the pain and suffering occasioned to the deceased's family.***

11. This court called upon the parties to put in written submissions on the appeal. In his submissions dated 9th August, 2019 the appellant argued that the trial court fell into error by disregarding the police abstract which was produced on the basis that the same was obtained on 3rd November, 2009 long after the accident had taken place. According to the appellant, the respondents did not object to the production of the police abstract and police reports without calling their makers, thereby making the abstract unopposed and sufficient proof of occurrence of the accident involving the subject motor vehicle.

12. The appellant further argued that the police abstract was corroborated by the evidence of PW2 who witnessed the accident.

13. It was the submission of the appellant that the trial court further erred in disregarding the evidence of PW1 and PW2 without appreciating that their evidence was truthful and reliable in the circumstances.

14. The appellant is of the view that the trial court instead gave the respondents the benefit of doubt by drawing persuasion from the route chart and google maps produced by them to show that the 2nd respondent was nowhere near the scene of the accident on the material day. In this regard, the appellant submitted that the trial court ought to have appreciated that the standard of proof in civil cases is that of a balance of probabilities. The appellant referred this court to the case of **Mary Anyango (Suing as the Administratrix of the Estate of Jared Onyango Onguka) v South Nyanza Sugar Co. Ltd [2019] eKLR** where the High Court sitting on appeal acknowledged that the oral evidence and written statement of a plaintiff was sufficient proof of her case to the required standard.

15. On quantum, the appellant challenged the trial court's award made under the heads of loss of expectation of life, pain and suffering, loss of dependency and the special damages.

16. Under the head of loss of expectation of life, the appellant is of the view that the trial court ought to have awarded a sum of Kshs. 250,000/ upon considering the age of the deceased, the nature of his death and his occupation. For pain and suffering, it was the contention of the appellant that an award of Kshs. 100,000/ would have sufficed since the deceased died within hours of the accident and not immediately thereafter. Under the head of loss of dependency/lost years, the appellant put forth the argument that the trial court ought to have considered the minimum wage for a labourer (Kshs. 8,000/) in the absence of proof of earnings, a multiplier of 37 years and a ratio of 2/3 to be tabulated as follows:

Kshs. 8,000 x 37 x 12 x 2/3 = Kshs. 2,368,000/

17. The appellant urged this court to also interfere with the award made on special damages and substitute it with an award of Kshs. 155,750/.

18. On their part, the respondents through their written submissions dated 9th September, 2019 began by arguing that the appellant's appeal is incompetent since the record of appeal filed is incurably defective in the absence of a certified copy of the decree that the appellant is appealing against, and that the appeal has never been admitted for hearing in accordance with the provisions of Order 42, Rule 13 of the Civil Procedure Rules. On this note, the respondents referred this court *inter alia*, to the case of **Ndegwa Kamau t/a Sideview Garage v Fredrick Isika Kalumbo [2016] eKLR** in which the court determined that the appeal in that instance was incompetent for failure by the appellant to show that he had applied for or filed the decree, consequently striking out the appeal on that basis.

19. On the substance of the appeal, the respondents; in supporting the finding of the trial court; contended that the appellant failed to discharge the burden of proof required under the provisions of Sections 107 and 108 of the Evidence Act, and restated by the Court of Appeal in the authority of **Antony Francis Wareham t/a AF Wareham & 2 others v Kenya Post Office Savings Bank [2004] eKLR** as follows:

“And the burden of proof is on the plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.”

20. As concerns the oral testimonies of the appellant and PW2, the respondents are of the view that not only did the appellant not witness the accident, but PW2 gave contradictory evidence to explain how the accident took place, thereby making his testimony inconsistent and unreliable.

21. On the subject of the police abstract, it was the argument of the respondents that contrary to the submission made by the appellant, its production was objected to at the trial with the insistence on summoning of its maker, but that the trial court overruled such objection and allowed the appellant to produce the same.

22. Regardless, the respondents submitted that a police abstract is simply proof of occurrence of an accident and not proof of liability hence the appellant was still required to bring evidence to prove liability against the respondents but did not. In so submitting, the respondents cited the case of **Kennedy Nyangoya v Bash Hauliers [2016] eKLR** whereby the court rendered that even where a police abstract indicated that a defendant was to blame for an accident, the same would not constitute conclusive proof of liability in the absence of supporting evidence.

23. The respondents contended that in any event, the 2nd respondent has never been charged with or convicted in relation to the accident which goes to show that liability against him has not been established by the appellant. For the foregoing reasons, the respondents urged this court to uphold the decision of the trial court on liability.

24. On the subject of quantum, it was the submission of the respondents that the appellant would only be entitled to the special damages both pleaded and proved, nothing more. The respondents also challenged the appellant’s submission on the award under the head of loss of dependency in the absence of proof of any earnings.

25. I have carefully considered the contending submissions on appeal alongside the authorities cited. I have equally re-evaluated the evidence placed before the trial court. It is clear that the appeal lies against the trial court’s decision to dismiss the appellant’s suit as well as the assessment that would have been made on damages.

26. Further to the foregoing, I note from the record that when the parties attended court on 7th November, 2019 this court directed that the issue of competency of the appeal which was raised by the respondents and further addressed in an application subsequently filed by the appellant be determined as one of the issues in the appeal.

27. It therefore follows that the appeal will be determined under the three (3) limbs hereunder. Beginning with the **first** limb to do with competency of the appeal, I note that the respondents challenged both its admission and the absence of the certified copy of the decree.

28. On the question on whether the appeal was admitted, upon perusal of the record, I established that contrary to the averments made by the respondents, the appeal was admitted for hearing on 8th July, 2019 pursuant to the provisions of Section 79B of the Civil Procedure Act.

29. This brings me to the record of appeal. The provisions of **Order 42, Rule 13 (4) (f)** of the **Civil Procedure Rules** are clear that the decree or order being appealed against ought to form part of the record of appeal. The respondents went a step further in citing the decision by the High Court in the case of **Ndegwa Kamau t/a Sideview Garage v Fredrick Isika Kalumbo [2016] eKLR** that failure to include a decree in the record of appeal is fatal.

30. Upon perusing the record of appeal filed by the appellant herein, I note that the decree is evidently missing from the record of appeal. However, I also note that the appellant subsequently filed a further supplementary record of appeal dated 14th October, 2019 to include a certified copy of the decree issued by the lower court on 30th January, 2017, which the appellant later sought to be deemed as having been properly filed pursuant to an order for enlargement of time to file the same being granted, vide his Notice of Motion dated 14th October, 2019.

31. The record shows that the aforementioned Motion was opposed by the respondents.

32. Upon considering the rival positions taken by the parties on this subject, I am aware that the issue of competency of the appeal on the above ground was raised at the point of conclusion of the appeal. Be that as it may, while I acknowledge the legal position on the failure to include the decree being appealed against, I appreciate that in the present instance, the appellant filed a certified copy of the decree albeit at the last stages of the appeal and has sought leave of this court to enlarge the time required for such filing.

33. The provisions of **Order 95** of the **Civil Procedure Rules** grant courts the power to exercise their discretion in enlarging the time required for the performance of any act.

34. Upon considering the foregoing, I am persuaded to apply the rules of substantive justice and the overriding principles in extending the time required for the appellant to comply with the rules of procedure. In any event, the respondents have not demonstrated any prejudice they

stand to suffer if time is extended to ensure the appellant's compliance. In finding so, I am supported by the case of **Peter Obwogo O & 2 others v H O Suing as Next Friend of P O (Minor) & another [2017] eKLR** in which the Court of Appeal held thus:

“The omission to include a certified decree can be cured by the filing of a supplementary record which act will not occasion any undue prejudice to the respondents. Any prejudice likely to be suffered can be compensated by an award of costs.”

35. Having therefore enlarged the time required as indicated above, I find on this issue that the appellant's further supplementary record of appeal is properly filed.

36. This brings me to the **second** limb of the appeal essentially touching on the dismissal of the suit by the learned trial magistrate. I will address this limb in two (2) facets.

37. The first facet touches on the evidence of PW1 and PW2 versus that of DW1. On his part, the appellant who was PW1 stated in his evidence that the deceased who was his son was knocked down and killed on the material day while walking and that he received a phone call from his brother, Jackson Oluhano Atieno, informing him of the accident. The appellant stated that the deceased was crossing the road when he was hit.

38. In cross examination, the appellant testified that he was not at the scene of the accident but that he reported the matter at Pangani Police Station and was issued with a police abstract and further given an OB (Occurrence Book) number.

39. Chrispinus Ongudi who was PW2 stated that he knew the deceased as they worked together at Twiga Construction in Westlands area. He went on to state that on the material day, he and the deceased were waiting for the company vehicle to take them to work when the subject motor vehicle approached them from behind while speeding and moving in a zigzag manner, eventually hitting the deceased while the rest of the pedestrians managed to escape.

40. According to the witness, the deceased was hit on the left side of the road and that he clearly saw the registration details of the subject motor vehicle before it sped off.

41. In cross examination, PW2 testified that the deceased was hit from the side while he was at the stage and that it was drizzling at the time. He further testified that he was not aware of the deceased's presence at the stage until the accident occurred.

42. The witness also gave evidence that the company vehicle was behind the subject motor vehicle at the time of the accident.

43. During re-examination, it was the testimony of PW2 that he witnessed the accident and that he phoned the brother to the deceased's father to inform him of the same.

44. On his part, the 2nd respondent in his evidence as DW1 stated that he worked for the 1st respondent as a driver at all material times and that he was arrested by the police on the material day in relation to the accident. He went on to state that he did not drive along Kariobangi North Road on the material day and produced records to show the route used together with a google maps document of the route used as D. Exh 1 and 2 respectively.

45. The 2nd respondent testified that he was not involved in any accident on the material day, neither was he charged or convicted in relation thereto.

46. In cross examination, the 2nd respondent gave evidence that at the time of the accident, he was driving the subject motor vehicle but denies any involvement with the same.

47. On her part, the learned trial magistrate reasoned that there were inconsistencies in the testimony of PW2 and the contents of his witness statement and that there is no indication that he either reported the matter or recorded a witness statement with the police. The learned trial magistrate also doubted that the witness was able to identify and memorize the registration details of the subject motor vehicle going by his evidence in court, therefore terming his testimony unreliable and choosing to give the respondents the benefit of doubt.

48. From my re-evaluation of the evidence tendered before the trial court, I note that it is not in dispute that the subject motor vehicle was being driven by the 2nd respondent on the material day and that the said respondent was an employee of the 1st respondent. Further to this, while the 2nd respondent denied ever being at the scene of the accident, I am doubtful of this averment since it does not explain the manner in which the subject motor vehicle was identified as being involved in the accident.

49. Suffice it to say that, the key issue has to do with negligence giving rise to liability. Going by the evidence on record before the trial court, it is clear that PW2 indicated that he actually witnessed the accident. Upon studying both his witness statement and his oral evidence, I note various inconsistencies which the learned trial magistrate pointed out. On the one hand, PW2 mentioned that he did not see the subject motor vehicle approaching but only heard a loud bang only to later realize that it is the deceased who had been hit, while on the other hand he mentioned that he saw the said vehicle approaching from behind and moving in a zigzag manner before knocking down the deceased.

50. The witness further testified on the one hand that he saw the subject motor vehicle speed away while rushing to see who had been hit, while on the other hand he indicated that he was able to note down the registration details of the said vehicle and in fact chased after it.

51. It is also apparent from the record that PW2 did not bring any credible evidence to show that he reported the matter to the police and recorded a statement with them.

52. Further to the foregoing, I note from the police abstract that the only witness indicated was the investigating officer yet the appellant did not summon her as a witness to shed light on the result of the investigations on how the accident occurred. In any event, the police abstract which was produced indicated that the matter was pending under investigations and there has been no disclosure on the result of such investigations, if any.

53. In the premises, I would agree with the reasoning of the learned trial magistrate that given the grave inconsistencies in the testimony of the only supposed witness to the accident, PW2, his evidence was unreliable in the absence of any corroborating evidence.

54. As concerns the 2nd respondent, while in my view he did not bring any credible evidence to support his averment that the subject motor vehicle was not in the vicinity of the accident on the material day, I recognize the legal position that the burden of proof primarily rests with the appellant to prove that the accident was the result of negligence on the part of the 2nd respondent; I therefore agree with the learned trial magistrate that the burden of proof was not discharged by the appellant, unfortunately.

55. The second facet under this limb of appeal concerns the police abstract. The trial court record shows that the police abstract was produced by the appellant as P. Exh 4(a) at the time of giving his testimony, which production was objected to by the respondents' advocate. At the trial, the learned trial magistrate overruled the objection while noting that the police abstract was duly issued to the appellant together with a receipt, and that the respondents never demanded that its maker be summoned.

56. Moreover, upon hearing the parties, the learned trial magistrate found that though the police abstract was produced in court, the same did not amount to conclusive evidence that the subject motor vehicle was involved in the accident.

57. From the foregoing, it is apparent that the police abstract was not only produced but its contents were considered by the learned trial magistrate. The challenge lies in the absence of reliable independent evidence to show that the driver of the subject motor vehicle; namely the 2nd respondent; was primarily to blame for the accident, in the absence of the evidence of the investigating officer coupled with the inconsistent evidence of PW2 who supposedly witnessed the accident.

58. Ultimately, for the above reasons I am of the view that while there was prima facie evidence to show that the subject motor vehicle was involved in the accident as shown in the police abstract which was not countered, the learned trial magistrate upon considering the evidence which was tendered before her, arrived at a proper decision of dismissing the appellant's suit for lack of proof of negligence on a balance of probabilities. I see no reason to interfere with her finding.

59. This leads me to the **second** limb on appeal to do with a re-examination of the assessment that the learned trial magistrate would have made under the following heads.

a) General damages

(i) Pain and suffering

60. Under this head, the appellant urged the trial court to award a sum of Kshs. 100,000/ while the respondents did not make any proposals. The learned trial magistrate indicated that she would have awarded a sum of Kshs. 20,000/.

61. Going by the evidence on record, the deceased died shortly after arriving at Kenyatta National Hospital before he could be attended to. The courts have been known to award lesser damages under this head where a deceased person dies immediately or soon after the accident.

62. The death certificate shows that the deceased herein died on the date of the accident. In the premises, I find that the award of Kshs. 20,000/ indicated by the learned trial magistrate would have been reasonable.

(ii) Loss of expectation of life

63. Under this particular head, the appellant suggested an award of Kshs. 250,000/ and cited the case of **Richard Macharia Nderitu v Phillemon Rotich Langas [2013] eKLR** in which the court awarded a sum of Kshs. 100,000/. The respondents did not suggest any sums to award. The learned trial magistrate mentioned that she would have awarded a sum of Kshs. 100,000/ and which sum I find to be reasonable and in tandem with conventional awards made.

(iii) Loss of dependency

64. On his part, the appellant was of the view that an award of Kshs. 2,368,000/ would suffice as tabulated hereinabove in his submissions before this court. On their part, the respondents submitted to the trial court that the appellant was not entitled to an award of damages under this head. In the end, the learned trial magistrate would have awarded a global sum of Kshs. 1,000,000/.

65. The evidence shows that the deceased was aged 23 years when he died. The appellant further produced a copy of a letter dated 27th November, 2009 from his then employer, Twiga Construction Co. Limited indicating that the deceased worked as a labourer; the nature of his occupation was confirmed in the death certificate tendered at the trial.

66. If I were to award damages under this head, I would have taken a multiplier approach as opposed to the global approach that the learned trial magistrate took. I would have applied a multiplier of 20 years similar to that applied in the case of **Ireru Moses v Peter Mutugi Muthike (suing as the legal administrator of Estate of the Late Mary Njeri Muthike (Deceased) [2019] eKLR** to the estate of a deceased bearing similar age to the one in the present instance. I would have also applied a dependency ratio of 1/3 since the deceased would

naturally have supported his parents in some way. In the absence of proof of earnings, I would have applied the sum of Kshs. 13,572.90 as the minimum wage for a general labourer, tabulated as follows:

Kshs. 13,572.90 x 20 x 12 x 1/3 = Kshs. 1,085,832/

b) Special damages

67. The appellant sought for the sum of Kshs. 115,700/ and the learned trial magistrate would have awarded a sum of Kshs. 41,900/. Upon re-evaluation and with due consideration to the legal principle that special damages must be specifically pleaded and strictly proved, I am satisfied that the learned trial magistrate's award would have sufficed.

68. In the end, therefore, the appeal is lacking in merit and the same is hereby dismissed with costs to the respondents. The decision of the trial court is upheld.

Dated, Signed and Delivered at Nairobi this 23rd day of July, 2020.

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L. NJUGUNA

JUDGE

In the presence of:

..... **for the Appellant**

..... **for the 1st and 2nd Respondents**