



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

CIVIL APPEAL NO. 25 OF 2017

JAMES KARANJA.....APPELLANT

VERSUS

JOYCE NJOKI MAINA.....1ST RESPONDENT

KELVIN KIMANI KARIUKI.....2ND RESPONDENT

[An appeal from the judgment of R. N. Oganyo, Chief Magistrate,

in Murang'a CMCC No. 410 of 2014 delivered on 13th June 2017]

JUDGMENT

1. The appellant challenged the decree on the twin issues of liability for negligence and quantum of damages.
2. The parties filed a *consent* dated 2nd June 2020 agreeing that the appeal be determined by way of the written submissions on record; and, that the judgment be transmitted electronically.
3. The appellants' submissions were filed on 9th July 2020 while those by the respondents were lodged on 2nd July 2020.
4. In line with the *consent* and the *Practice Directions* of 17th April 2020 contained in Gazette Notice No. 3137 of 2020, this appeal was heard electronically on 30th July 2020.
5. Being a first appeal to the High Court, it is on both facts and the law. *Peters v Sunday Post Limited* [1958] E.A 424, *Selle v Associated Motor Boat Company Ltd* [1968] E.A 123.
6. It was pleaded in the amended plaint that on 16th November 2013 at about 7:30 in the evening, the deceased, *David Kariuki Mwangi*, was riding his motorcycle registration KMCX 935X along the Kenol Thika Highway. At a place called Kabati Flyover, he crossed the road and stopped on the shoulder separating the dual carriageway. It was alleged that the appellant's motor vehicle KBN 153B was speeding in the opposite direction, veered off the road and knocked him down.
7. The appellant sustained serious injuries and died at Thika Level 5 Hospital the same night. The deceased's wife and son brought proceedings on their behalf and the estate. They blamed the appellant for the accident.
8. By a statement of defence dated 25th November 2014, the appellant denied the claim *in toto*. He also blamed the respondent for contributory negligence to wit: stopping "*at a place where he knew or ought to have known was dangerous*"; failing to keep a proper look-out; and, disregarding traffic rules.
9. The learned trial magistrate found that the appellant was 100% liable in negligence. He awarded Kshs 5,339,206 as damages together with costs and interest.
10. The appellant has lodged a memorandum of appeal dated 30th June 2017. It raises *three* grounds. Firstly, that the finding on liability was *not* borne out by the evidence; secondly, that the damages were *exorbitant*; and, thirdly, that the learned trial magistrate *disregarded* the evidence and submissions by the appellant.

11. The appeal is contested by the respondent. The respondent's submissions were on a two-strand. First, that the deceased was knocked down off the road and bore no liability whatsoever. Secondly, that he was a 47-year-old teacher earning a net salary of Kshs 36,355.60. Accordingly, the award on all the heads of damages is reasonable; and, there is no basis to interfere with the discretion of the learned trial magistrate.

12. I have *re-evaluated* the evidence. The accident took place at 7:30 in the evening. The eye witness was Gerishon Macharia (PW2). He first testified on 20th July 2015. He said that he was standing at the stage on a feeder road next to the highway. He said he saw the deceased cross the highway and make a stop "on the island between the dual carriage way next to the culvert". He said the appellant's vehicle which was heading to Murang'a "lost control and rammed into the person on the motorcycle".

13. But when he was recalled to the stand on 8th September 2016 he admitted that there was "a fly-over but the accident occurred a little bit ahead as one heads to Kenol". He said it was 30 metres from the fly-over bridge. He said the deceased had stopped on "a path on top of a culvert" separating the dual carriage way.

14. The other three witnesses for the respondents were not present when the accident occurred. The deceased's wife (PW1) visited the scene the following day. PW4 arrived at the scene after the accident and helped to evacuate persons who were in the appellant's vehicle. He learnt later that the deceased (who was his brother) had been knocked down by the vehicle and died. PW3 was Police Constable Mugo who produced the police abstract. He was not based in the area when the accident occurred. He said the accident was still under investigation.

15. From the eye witness account, I readily find as follows. It was at night and there were no street lights. The deceased could have used the fly-over bridge that was only 30 metres away to cross the dual carriageway. Instead, he chose to ride across the highway without keeping a proper lookout.

16. PW2 claims the deceased stopped "on the island between the dual carriage way next to the culvert". But I have juxtaposed it against the evidence of the appellant (DW1). He said he was driving at between 80 to 90 KPH towards Kenol when the deceased crossed the road on his motorbike. He thought the deceased would give way. He did not and he ran him over.

17. From that evidence, both parties were *equally* to blame. The deceased contributed to the accident by failing to use the flyover bridge to cross a busy highway at night. PW2 admitted in further cross examination that the point at which the deceased was trying to cross "is not a designated footpath though people use it". The appellant on the other hand saw the motor cycle in good time but failed to take evasive action. His vehicle was obviously at a high speed, hit the culvert and overturned.

18. I thus respectfully disagree with the learned trial magistrate that the appellant was wholly to blame. I set aside that finding. I hold that the appellant and the deceased contributed to the accident and shall each bear liability at 50%.

19. I will now turn to the quantum of damages. As a general rule, an appellate court will *not* interfere with quantum of damages unless the award is *so high* or *inordinately low*; or, founded on *wrong* principles. **Butt v Khan** [1982-88] KAR 1, **Arkay Industries Ltd v Amani** [1990] KLR 309.

20. Both parties accepted that the deceased was employed as a school teacher; was 47 years old; and, earned a net salary of Kshs 36,355.60. The court below adopted a multiplier of 18 years arguing that "later he [deceased] may have ventured into business after retiring as a civil servant. So he may have been active until the age of 70".

21. I think that was too speculative and generous in the circumstances. In assessing damages under the **Fatal Accidents Act**, the court must be guided by the age of the deceased, life expected, vicissitudes of life and the acceleration of the lump sum payment. See **Kemfro v Lubia** [1982-88] KAR 727.

22. The lower court correctly found that the deceased was expected to retire at 60 years of age. The certainty of his proved earnings would end there. True, he may have remained an active citizen thereafter but it was highly speculative to say he would have earned the Kshs 36,355.60 until 70. The appellant's counsel proposes a multiplier of 9 years which in my view is also unfair. Based on the facts, the age of the deceased and the vicissitudes of life, the more accurate multiplier is 13 years.

23. I agree that the dependency ratio of 2/3 was reasonable. The arithmetic on this head of damages ends up as follows: Kshs 36,355.60 x 12 x 13 x 2/3 = Kshs 3,780,982.40 less 50% liability.

24. I will turn to the other heads of damages. According to PW2, the deceased suffered severe injuries and was "not talking" after the accident. It is not clear if he died on the spot. But he was certified dead the same night at Thika Level 5 Hospital. He obviously experienced gruesome pain. Although the appellant's counsel submitted for a revision of the award to Kshs 10,000, I find no reason to disturb the award of Kshs 20,000 for pain and suffering.

25. I also find no grounds to interfere with the award of Kshs 50,000 for loss of expectation of life. Lastly, both learned counsel accept that the special damages of Kshs 34,000 were specifically pleaded; and, strictly proved.

26. The upshot is that this appeal *partly* succeeds. The decree of the lower court is *set aside*. There shall now be judgment in the following terms:

General damages for pain and suffering.....Kshs 20,000.

Loss of expectation of life.....Kshs 50,000.

Loss of dependency.....Kshs 3,780,982.40.
Special damages.....Kshs 34,000.
Subtotal.....Kshs 3,884,982.40.
Less 50% contributory negligence.....Kshs 1,942,491.20.
Net Award.....Kshs 1,942,491.20.

27. The upshot is that the appellant shall pay to the respondent Kshs 1,942,491.20. I grant the respondent interest on the sum from 13th June 2017, the date of the original decree, up to 22nd August 2017 when a security deposit of Kshs 2,600,000 was ordered and paid into the High Court. It would be unjust to condemn the appellant to any further interest after that date.

28. Costs follow the event and are at the discretion of the court. I grant the respondents costs in the *lower court*. Each party shall however bear its own costs in this *appeal*.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 21st day of September 2020.

KANYI KIMONDO

JUDGE

ORDER

Notice of delivery of this judgment was transmitted to the parties' email addresses. Pursuant to the Practice Directions of 17th April 2020 in Gazette Notice No. 3137; and, the joint consent dated 2nd June 2020, this judgment has been delivered to the parties by electronic mail. Both parties have accordingly waived compliance with Order 21 Rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

KANYI KIMONDO

JUDGE

Judgment read in chambers in the presence of:

Ms. Dorcas Waichuhi, Court Assistant.