



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL APPEAL NO. 20 OF 2016

(Being an appeal arising from judgment and Decree in Kitale Chief Magistrate's Court in CMCC No. 73 of 2013 delivered by Hon. P.C. Biwott Senior Principal Magistrate on 14/7/2016)

CMC MOTORS GROUP LTD.....1ST APPELLANT

LUCAS WANYAMA2ND APPELLANT

VERSUS

SIMON PETER MAPESA KHAOYA (*Suing as Administrator of the*

***Estate of Peter Mapesa Khaoya – Deceased*).....RESPONDENT**

JUDGMENT

1. The facts and issues herein are clear and straight forward. The deceased Peter Mapesa Khaoya was aged 21 years at the time of his death. The death occurred as a result of a road traffic accident that occurred on 27/7/2012 around 4.30 pm along Kitale – Webuye road at Kiminini bridge area. He died on the spot.
2. His father the Respondent filed suit claiming general and special damages on his behalf and on behalf of his estate. The respondent called 2 witnesses, first being himself and the 2nd a police officer. On its part the Appellants called 3 witnesses who included a police officer who came and produced the police file in respect to the accident.
3. The trial court at the conclusion found the appellants 80% negligence against the deceased 20%. He awarded the respondent Kshs 2,110,660 being general and special damages.
4. The Appellants being dissatisfied with the said judgment has appealed to this court on both negligence and damaged.
5. The court directed that the appeal be disposed by way of written submissions which I have extensively perused them together with the annexed authorities.
6. The question of negligence in my view is what ought to be determined as of first instance. As stated above the trial court did apportion the same on 80:20% basis.
7. This court shall only interfere with the findings of the trial court if it misdirected itself in some matter and thus arrived at a wrong decision or the court exercised its discretion erroneously and thus resulted in miscarriages of justice. ***See Mbogo & Another Vs Shah (1968) E.A. 93.***
8. It is equally expected that at all times the burden of proof shall be upon the one that alleges. See Section 107 and 108 of the Evidence Act Cap 80 Laws of Kenya.
9. The burden of proof is on a balance of probability as is the case in such civil matters.
10. In respect to the case at hand, there was no eye witness called by the Respondent. The only person who came closer to the matter is PW2 Jentrix Naliaka Wangwe who produced the police abstract. There was however no conclusion on the part of the police as who caused the accident. As a matter of fact there were no skid marks on the road. The matter was left unconcluded by the police.
11. On its part DW1 and DW2 testified that the deceased simply jumped onto the vehicle without any apparent reason. PW1 stated that the road was very clear and without any potholes and the visibility was very good. He said that he was driving at about 50 Km/Hr.

12. According to the appellants the deceased seemed a disturb person since subsequently as they recorded statements at the police station a witness who was with the deceased said that he had some love affair gone soar with one Celestine. There was therefore every probability that he was mentally disturbed.

13. This position was buttressed by DW2 evidence in chief when he stated that;

“ I was not charged for causing death by dangerous driving. The deceased committed suicide. The road had no potholes. I was not avoiding any . I was not at high speed. The deceased ran into my motor vehicle. I slowed down on seeing him. I was careful.”

14. DW3 the police officer testified that according to the traffic police investigation though incomplete, the deceased was to blame for the accident.

15. From the record of the police file produced by DW3, there is a statement of one Jane Nasimiyu Masinde, the deceased mother who stated that she was called by some lady to go and solve some problems between her son and some lady. She went with one Nasimiyu. She went on the state.

“ On arrival I did not find the owner of the house, I only found my late son sleeping on the bed inside the lady's house. I called him several times. Without any response and asked him what he was doing inside a lady's house and he answered me that without that lady he was not willing to live any longer. He woke out (sic) walked away crying. I and Mama Caro (Namonye) followed him from behind but we were unable to catch up with him.”

16. She later received information regarding his death.

17. Though she was not called to testify, the report made by the deceased mother lends credence to the assertion by DW1 and DW2 that the deceased was suicidal and there was every possibility that he run into the moving vehicle deliberately.

18. In the absence of any eye witness to the incident I find that there was no sufficient evidence of negligence against the 2nd appellant. Infact it appears that there were no skid marks on the roads and the deceased died almost within 6 metres on the spot of impact and on the 2nd appellant lane. If the appellant was driving at an excessive speed, there would have been a possibility that there was going to be skit marks or at least the deceased body would have been far from the point of impact.

19. In the premises I do agree with the submissions by the appellant that no sufficient negligence was proved against the appellant. PW1 and PW2 were not at the scene. It was therefore incumbent upon the Respondent to establish that the accident at least was not caused by the deceased.

20. On that score alone I would allow the appeal. On the question of damages I have relooked at the award by the trial court and I respectively do not see any erroneous conclusion. The deceased who was a casual labourer was 21 years, young and energetic and he would obviously have lived longer to utilise his potential. The earnings of kshs 9000/- per month was within the range of the Labour Laws in Kenya and the 34 year multiplier was reasonable in the circumstances.

21. In the premises were I to allow the appeal I would not have disturbed the trial court's findings on general and special damages.

22. Be it as it, may the central issue of such tort is on negligence. The same was not established on a balance of probabilities. The two witnesses who included the Respondent did not help much. This is an adversarial system and it is not enough to throw everything at the court and tell it to scrap through and arrive at a favourable decision. It must be persuaded. The Respondent did not offer much to persuade that the appellant was negligent.

23. The appeal is hereby allowed, and the lower court judgment is set aside.

24. Each party shall bear its own costs both in the lower court and on this appeal.

Orders accordingly.

Delivered, signed and dated at Kitale this 30th day of January, 2019.

H.K. CHEMITEI

JUDGE

30/1/19

In the presence of:

Mr Barongo for Onyinkwa for the Appellant

No appearance for the Respondents

Court Assistant – Kirong

Judgment read in open court.