



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO.226 OF 2013

JOSEPH GITAU NGANGA.....APPELLANT

-VERSUS-

MARY NGAGUTHI MUNGA (Suing as personal representative

Of DANSON NDERITU MUNGA (Deceased).....RESPONDENT

(An Appeal from the judgment of resident magistrate’s court at Naivasha by

Hon.S. Muchungu Rm delivered on 15th November 2013 in Naivasha PMCC NO.132 OF 2006)

JUDGMENT

1. This appeal arise from a suit filed by the respondent against the appellant for general and special damages following the death of **Danson Nderitu Mungai** who collided with the appellant’s motor vehicle registration number KAG 068P. The trial magistrate apportioned liability at 5:95 in favour of the plaintiff. She was awarded damages as follows:-

- 2. Pain and suffering.....10,000
- 3. Under fatal accidents act
(6,000 x 20 x 1/2 x 12)..... 720,000
- 4. Loss of expectation of life..... 60,000
- 5. Special damages..... 27,120
- Less 5% contribution.....(40,356)
- NET.....766,764

2. The appellant being aggrieved filed appeal on the following grounds:-

- 1) That the learned trial magistrate erred in law and fact in holding that the Respondent herein had *locus standi* to continue with the proceedings commenced by the personal representative of Danson Nderitu Munga despite the fact that she was not the personal representative of the deceased the subject of this suit and no grant of personal representative for Danson Nderitu Munga was issued to the Respondent herein.
- 2) That the learned trial magistrate erred in fact and law in failing to hold that PW2 was not an eye witness in view of the glaring contradictions of her evidence with that of the previous PW2 in the ex-parte proceedings in the suit.
- 3) That the learned magistrate failed to appreciate that there was no evidence on the actual earnings of the deceased and the damages awarded on quantum by the court were excessive in the circumstances of the case.

SUBMISSIONS BY APPELLANT

3. Counsel for the appellant submitted that the suit was instituted by David Munga Mungatu (Deceased) who obtained limited grant for

purpose of filing the main suit; but he unfortunately passed on before the suit was concluded. He submitted that the suit abated on 9th February 2009 but the respondent herein later successfully revived the suit.

4. He argued that the respondent proceeded without obtaining letters of administration to enable her appear as personal representative of Danson Munga; that she instead obtained a grant for David Munga Mungatu who did not have a suit of his own; that in her evidence in court, the respondent stated that she had not obtained grant to represent the estate of her son Danson Nderitu Munga.

5. Counsel cited the case of **Rajesh Pranjiva Chudasama** where the court held that an administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception.

6. Appellant further submitted that the respondent seemed to have confused *locus standi* and cause of action and cited the case of **Alfred Njau & Others vs City Council of Nairobi** where court differentiated two by defining cause of action as fact or combination of facts which give rise to right to sue and *locus standi* as the right to appear or be heard.

7. He submitted that it mattered not whether the respondent had a cause of action but cannot be heard; that the respondent was a stranger to the suit and the suit should have been dismissed.

8. Appellant further submitted that the initial PW2 in exparte proceedings Benard Njoroge contradicted PW2 the sister of the deceased. He said during the exparte hearing the deceased's sister was not called to adduce evidence. He argued that the said Benard Njoroge testified as eye witness and said there was no other person who witnessed the accident while the deceased's sister who testified as PW2 inter parties hearing could not have witnessed the accident and her evidence is hearsay.

9. He submitted that it is only evidence of an eye witness which can help the court determine particulars of negligence.

10. In respect to quantum, the appellant submitted that the respondent did prove that the deceased was working as she said she could not tell whether the deceased was employed.

RESPONDENTS SUBMISSIONS

11. Respondent submitted that the plaintiff was the mother of deceased Danson Nderitu Munga and confirmed that David Munga Mungatu the plaintiff's husband instituted the suit. That the plaintiff applied to substitute her husband so that she could continue with the suit. He submitted that the plaintiff is the dependent of the deceased as pleaded in amended plaint. He submitted that the suit was commenced as representative suit as both plaintiff and her late husband. That in particulars of pursuant to fatal accidents Act it is indicated that the plaintiff brings the suit on their own behalf and on behalf of of the following persons:-

1. David Munga Mungatu father 66 years

2. Mary Nyaguthi Munga mother 60 years

12. Counsel cited section 7 of the Fatal accidents Act which provide as follows:-

“If at any time, in any case intended and provided for by this Act, there is no executor or administrator of the person deceased, or if no action is brought by the executor or administrator within six months after the death of the deceased person, then and in every such case an action may be brought by and in the name or names of all or any of the persons for whose benefit the action would have been brought, if it had been brought by and in the name of the executor or administrator, and every action so brought shall be for the benefit of the same person or persons as if it were brought by and in the name of the executor or administrator.”

13. Respondent argued that by virtue of the above provision, the plaintiff had a right to take over the matter. That the same is given credence by her testimony to the effect she was dependent on the deceased.

14. Appellant added that section 4 of fatal accidents act further provide in section 4 that every action shall be for the benefit of wife, husband, parent and child of the person whose death was caused and that action shall be brought I the name of the executor subject to section 7 of the Act.

15. Appellant further submitted that the issue was deliberated in the lower court when the appellant objected to respondent's application to continue with the suit. He said the objection was dismissed vide ruling on page 115 of the record of appeal which has not been appealed against.

16. Appellant submitted that the respondent being legal representative of her late husband and dependent her late son is properly before court. He submitted that the case of Rajesh is purely on on inheritance and does not come within the armpit of fatal accidents Act.

17. On liability, the respondent submitted that pw2 a sister to the deceased testified having been with him at free area where the deceased was hit as they tried to to cross the road. That her evidence was not controverted neither was a different version given. He added that from police abstract the accident occurred at 5.30pm and report was booked at 21hrs; that it was unlikely that eyewitness would have remained at police station up to that time especially PW2 who had lost a brother.

18. On lost earnings, the respondent urged court to note that no pay slips were issued in matatu industry and that most people do informal

work to earn a living. Respondent urged court to dismiss the appeal.

ANALYSIS AND DETERMINATION

19. In respect to liability, I have perused the court record and note that in the application dated 13th July 2010 the respondent sought to substitute David Munga Mungatu. Counsel for the appellant opposed the application on the ground now raised; that respondent obtained letters to administer the estate of David Munga Mungatu and not the deceased herein. The issue was determined by court in the ruling delivered on 23rd February 2011. The appellant's objection was dismissed. No appeal was filed against the ruling. The matter proceeded for hearing. The appellant had opportunity to file appeal and if he opted not to do so, it should not be raised at this stage.

20. Further from the pleadings, I note that the initial plaintiff who is the husband to the respondent filed this suit for his own benefit and for the benefit of the respondent. Section 7 allow a beneficiary to be named if there is no executor. When the plaintiff passed on, the only other surviving beneficiary was the respondent. Record show that the deceased herein was 23 years old when he died, was not married, and never had children. She applied for letters to manage the estate of her deceased husband who was one of the beneficiaries in this case. The Grant gave her capacity to manage his liabilities and assets. The claim for damages are to benefit both her and her deceased husband. It is not therefore correct to say that she did not have capacity to continue the suit.

21. On contradiction of evidence, I have perused the court file and note that PW2 who is the sister to the deceased testified as eyewitnesses. The questions that however arise is why she is not listed as a witness in the OB and police abstract. According to PW3 a police officer who produced police abstract one IP Matoke said the matter was still under investigations was the eye witness but he could not explain why the police file was missing. Appellant/defendant never availed a witness in the lower court.

22. From evidence adduced, there is no doubt that an accident occurred involving the deceased and motor vehicle registration number. It is however doubtful that PW2 who is the deceased's sister witnessed the accident. Police were not helpful either in that they failed to avail their investigation findings to court; the police abstract they availed did not list PW2 as a witness and the person listed never testified. Defence besides denying the accident never gave their part of the story. None was helpful to court.

23. From the forgoing, my view is that liability should have been apportioned equally.

24. In respect to quantum, the court found that there was no documentary evidence that to prove that the deceased was earning kshs.10,000 to 12,000. Court however agreed that he was a driver. I note from record that PW2 said the deceased was first a tout then he became a driver. She however did not know which vehicle the deceased drove; she further said she had not seen him drive neither had she seen his driving licence. PW1 said he was a tout. Clearly show that there was no prove that the deceased was a driver.

25. There is no doubt however that the deceased must have engaged in some form of employment to earn a living and support his parents. My view is that a minimum wage for a casual laborer at the time he died should have been applied. He died in the year 2003. Minimum wage for a general laborer at the time was kshs.3,913. The trial magistrate applied kshs 6000 for a driver. Multiplier of 20 years is reasonable. I also retain multiplicand

26. The above would therefore affect damages under fatal accidents Act as follows:-kshs 3,913 x 20 x 12 x 1/2=469,560

27. The other awards remain. Quantum assessed as follows:-

1. Pain and suffering.....	10,000
2. Loss of expectation of life.....	60,000
3. Special damages.....	27,120
4. Loss of dependency.....	469,560
Grand total.....	566,680
Less 50%.....	408,560
NET.....	283,340

28. FINAL ORDERS

1. Appeal on liability is allowed. Liability apportioned at 50:50
2. Appeal on assessment of damages succeed to the extent shown above.
3. Judgment delivered on 11th March 2008 set aside and I do hereby enter judgment for respondent/plaintiff against the defendant for kshs 283,340 plus interest from today's date
4. Costs of trial court to the respondent/plaintiff

5. Each party to bear own costs of appeal.

Judgment Dated, signed and delivered at Nakuru this 23rd day of May 2019.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Jared/ Schola Court Assistant

Mawenzi holding brief for Walutoo Counsel for Appellant

Waigonjo Counsel for Respondent