REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 299 OF 2006

JAMES CHEGE KAGIA

(Suing as the personal representative of theestate of

CHARLES WATURU NJOROGE-Deceased).....APPELLANT

-VERSUS-

FREDRICK KIMANI GITAU.....1ST RESPONDENT

PATRICK NJOROGE MUNGAI.....2ND RESPONDENT

(Being an appeal from the judgment delivered by Honourable C.O.Kanyangi

(Mr.) (Senior Principal Magistrate) on 26th March, 2003 in Thika CMCC NO. 12 OF 2000)

JUDGMENT

1. The appellant in his capacity as the personal representative of the estate of Charles Waturu Njoroge *("the deceased"*) filed the plaint dated 11th January, 2000 against the respondents herein Thika CMCC NO. 12 OF 2000, claiming general and special damages in the sum of Kshs.13,595/= plus costs of the suit and interest thereon.

2. The appellant pleaded that sometime on or about the 18th day of March, 1999 while the deceased was lawfully crossing the Ruiru-Kiganjo Road at Karangi Coffee Estate, the 2nd respondent being at all material times the driver of the motor vehicle registration number KAK 127N *("the subject motor vehicle"*) negligently and/or recklessly drove the same and hit the deceased, resulting in fatal injuries to his person. The particulars of negligence were set out in the plaint. The 1st respondent was sued as the registered owner of the subject motor vehicle at all material times and vicarious liability was pleaded against him.

3. It was also pleaded in the plaint that at the time of his death, the deceased was a healthy, young man aged 25 years and that he was earning a daily salary of Kshs.93/= and due for an increment to Kshs.137/= per day. The appellant further pleaded that the deceased was survived by the following dependants who relied on about two-thirds of his salary:

(i) Njoroge Chege (Father)-66 years

(ii) Mary Wanjiku (Mother)-56 years

(iii) Mary Wambui (Wife)-24 years

(iv) CM(Son)-4 years

(v) SNW (Son)-5 months

4. Upon being served with the summons to enter appearance and the pleadings, the respondents entered appearance and filed a joint statement of defence on 9th March, 2000 by and large denying *inter alia*, the *locus standi* of the appellant to file the suit on behalf of the deceased's estate in the absence of letters of administration. The respondents admitted to the occurrence of the accident but denied that the same was the result of negligence on their part, pleading instead that it is the deceased's negligence that resulted in the accident; the particulars of which were pleaded.

5. In response, the appellant filed a reply to defence reiterating the contents of the plaint.

6. At the hearing, the appellant called three (3) witnesses in support of his case while the respondents opted to close the defence case without calling any witnesses.

7. At the close thereof, parties filed written submissions before the trial court which, vide its judgment delivered on 26th March, 2003 dismissed the suit on the basis of lack of proof on a balance of probabilities.

8. Being dissatisfied with the aforesaid judgment, the appellant has now lodged the appeal to which this decision relates. His memorandum of appeal dated 25th February, 2005 is premised on the following grounds:

> ***(i) THAT the learned trial magistrate erred in law by finding that there was no proof that the respondents were in any way negligent despite the evidence of PW2 on how the accident occurred.***
>
> ***(ii) THAT the learned trial magistrate misdirected himself in law and in fact by finding that the 1st respondent was not negligent whereas no such issue had arisen or evidence tendered to that effect.***
>
> ***(iii) THAT the learned trial magistrate misapprehended the evidence of PW2 on how the accident occurred.***
>
> ***(iv) THAT the learned trial magistrate erred in law and in fact by finding that the accident was caused by failure of the deceased to exercise any care at all while crossing the road yet from the evidence, the deceased was knocked by the subject motor vehicle while he was 3 feet off the road.***
>
> ***(v) THAT the learned trial magistrate erred in finding that PW2's evidence could not be fully relied upon without giving reasons and grounds upon which he so held.***
>
> ***(vi) THAT the learned trial magistrate erred in law by dismissing the case with costs to the respondents.***

9. The appeal was disposed off by way of written submissions though it is noted that the respondents did not participate in the appeal proceedings or file their submissions. On his part, the appellant submitted that the learned trial magistrate failed to consider the oral evidence offered by PW2 indicating that the deceased was knocked down after he had crossed the road and that the subject motor vehicle was being driven at a high speed at the material time. The appellant further contended that the respondents did not call any witnesses to shed light on how the accident took place which goes to show that the evidence of PW2 was uncontroverted.

10. It was also the appellant's submission that the learned trial magistrate arrived at the finding that PW2's evidence could not be fully relied upon without giving reasons.

11. Further to the foregoing, the appellant argued that the learned trial magistrate was wrong in failing to find the 1st respondent vicariously liable and yet he was at all material times the registered owner of the subject motor vehicle. The appellant went ahead to submit that the said magistrate was equally wrong in finding that the deceased did not exercise due care while crossing the road despite PW2's testimony that he was knocked off-road. Ultimately, it is the appellant's submission that the learned trial magistrate erred in dismissing his suit.

12. I have taken into consideration the appellant's submissions in respect to the grounds of appeal raised. I have equally re-evaluated the evidence placed before the trial court as well as the submissions. I cannot fail to mention that I have also studied the impugned judgment.

13. I note that the six (6) grounds of appeal relate to the evidence of PW2 and the finding on negligence. I will therefore address the grounds under these two (2) heads, beginning with *grounds (i), (iii) and (v) of appeal* touching on the testimony of PW2.

14. Turning to the evidence tendered before the trial court, as earlier mentioned, the plaintiff's case was supported by the evidence of three (3) witnesses. PW1 who is the appellant in this instance testified that he was the deceased's brother and that he had taken out letters of administration which he went ahead to produce. The appellant also stated that following the accident, the deceased sustained injuries to the head and that the investigating police had visited the scene, adding that he was involved in the funeral arrangements.

15. During cross examination, the appellant testified that he did not witness the accident and therefore relied on information provided to him.

16. Mary Wambui who was PW3 gave evidence that the deceased was her husband and that he died instantly from the accident, leaving her with two (2) children to take care of, alone.

17. Of particular importance, however, is the evidence of PW2, Francis Ng'ang'a Kihingu. He testified that he knew the deceased and that on the material date, they had boarded the same vehicle before the deceased alighted at Karangi and crossed the road to the right. This witness stated that the deceased had finished crossing the road when he was hit by the subject motor vehicle, further stating that the road was very straight at that point therefore the driver of the subject motor vehicle, who was driving at a high speed, ought to have seen the deceased. He ascertained that the accident occurred at about 4.00p.m.

18. Upon being cross examined, PW2 gave evidence that he was observing the deceased at the time the accident took place, adding that the vehicle he was in, was heading downhill while the subject motor vehicle was climbing uphill at the material time. The witness stated that the deceased was 3 feet off the road when he was hit, admitting that he has not been called to give evidence in any other case.

19. In his judgment, the learned trial magistrate reasoned that since PW1 and PW3 did not witness the accident, they cannot testify as to the allegations of negligence on the part of the respondents. As concerns PW2's testimony, the Learned Magistrate arrived at the finding that the same cannot fully be relied upon to prove negligence.

20. Having taken the above into account, I now wish to offer my view. Going by the evidence on record, I am in support of the learned trial magistrate's analysis that the evidence of PW1 and PW3 could not offer any guidance in determining whether or not the accident was as a result of negligence on the part of the respondents, since neither of them witnessed the accident.

21. As concerns PW2, I have appreciated his evidence as to witnessing the accident. Nevertheless, I did note a few discrepancies in his testimony which were not considered by the learned trial magistrate. For instance, during examination in chief, he testified that the road was straight and hence the deceased should have been visible to the driver of the subject motor vehicle. On cross examination, however, he stated that at the time of the accident, the vehicle he was in was going downhill whereas the subject motor vehicle was climbing uphill; this contradicts his earlier evidence. Also, the witness testified in chief that upon occurrence of the accident, the vehicle he was in took off soon thereafter and he only had the opportunity to write down the number plate details for the subject motor vehicle. However, during cross examination, he mentioned that after the accident, he alighted from his vehicle and went over to try and assist the deceased.

22. It is thus clear from the above that the evidence of PW2 was met with certain inconsistencies, thus making it difficult to ascertain exactly what took place. That being the case, I would agree with the learned trial magistrate that the witness testimony could not have fully been relied upon.

23. Further to the above, I noted that the investigating officer was not called to give evidence despite the indication that he or she had arrived at the scene of the accident and undertook investigations on the same. The evidence of such officer would have assisted in corroborating the accounts given by PW2; it is rather unfortunate that his or her evidence was not sought after. In the circumstances and whereas I would opine that the learned trial magistrate did not expound on his position, I am inclined to agree with him that there was really no basis on which PW2's evidence could be relied upon in the absence of corroborating evidence. The three (3) grounds mentioned hereinabove cannot therefore stand.

24. I am now left with *grounds (ii), (iv) and (vi) of appeal* which are essentially premised on the grounds I have just addressed. I have already established that the evidence tendered before the trial court was limited and therefore not sufficient in establishing the circumstances that led to the accident, noting that the burden of proof lay with the appellant at all material times. Going by the facts of the case as it is, there is truly no way of telling with a level of certainty who was to blame for the accident. Be that as it may, I am satisfied that on a balance of probabilities, the appellant did not prove negligence on the part of the respondents. In the end, the learned trial magistrate's decision to dismiss the appellant's case was proper.

25. Before I pen off, however, I noted that the learned trial magistrate did not address himself on the subject of quantum. That being the case, I take it upon myself to offer a determination of what I would have awarded in the event that the appeal succeeded.

a) Pain and suffering

26. In his submissions before the trial court, the appellant proposed the sum of Kshs.15,000/= on the basis that the deceased died shortly after the accident. I have re-evaluated the evidence adduced at trial and noted that it is not clear how soon the deceased died following the accident though there is indication that he was taken to hospital. In the circumstances, I would have found an award of Kshs.10,000/= to be reasonable.

b) Loss of expectation of life

27. Under this head, the appellant proposed the sum of Kshs.100,000/= which I would have deemed reasonable.

c) Loss of dependancy

28. The factors to be considered in making an award under this head were discussed in ***Avtar Singh Bhabra & another v Geofrey Ndambuki [2014] eKLR*** as follows:

> ***"In assessing loss of dependency under the fatal Accidents Act the principles on which damages should be assessed is set out in the case of Radhakrishen M Khemaney v Mrs Lachaba Murlindar [1958] EA 268 where the Court of Appeal held that, "in considering the award of damages under the fatal accidents Act the court should ascertain the age, expectation of working life, wages and expectations of the deceased and what proportion of his net income the deceased would have made available for his dependants from which the annual value of the dependency would be calculated ,the annual sum should then be capitalised by multiplying it by a sum representing so many years ,purchase, having regard to the expectation of earning life of the deceased and the expectation of life and dependency of the widow and children ……" "***

29. On the multiplier, evidence was adduced to show that the deceased was 25 years of age at the time of his death. The appellant proposed a multiplier of 23 years and cited an authority which I consider comparable. I would therefore have applied a reasonable multiplier of 23 years.

30. The appellant urged the trial court to apply a dependency ratio of 2/3. PW3 who was the deceased's wife testified that she did casual jobs and relied on the deceased for financial support for her and their two (2) young children. In the circumstances, I would have found the dependency ratio of 2/3 to be reasonable.

31. On the multiplicand, the evidence adduced before the trial court indicated that the deceased was a casual labourer prior to his death

earning about Kshs.127/= per day which amounts to Kshs.2,540/= in a month. This was confirmed by the letter dated 12th June, 1999 from Socfinaf Co. Limited constituting the appellant's list and bundle of documents.

32. In that case, the damages under this head would have been tabulated as follows:

2,540 x 23 x 12 x 2/3 = 467,360/=

d) Special damages

33. The appellant sought for 13,595/= in his plaint. Based on the documentation availed before the trial court, I would have awarded Kshs.13,495/= as pleaded and proven.

34. The awards would have appeared as follows:

(i) General damages

a) Pain and suffering	Kshs.10,000/=
b) Loss of expectation of life	Kshs.100,000/=
c) Loss of dependency	Kshs.467,360/=
(ii) **Special damages**	Kshs.13,495/=
TOTAL	Kshs.590,855/=

35. However, as earlier indicated, I find the learned trial magistrate's decision to be proper for the reasons given above and see no reason to interfere with the same.

36. Consequently, the appeal stands dismissed and the judgment delivered on 26th March, 2003 is hereby upheld. The respondents shall have the costs of the appeal.

Dated, signed and delivered at NAIROBI this 26th day of September, 2019.

.....

L. NJUGUNA

JUDGE

In the presence of:

……. for the Appellant

……. for the Respondents