



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 413 OF 2009**

**HUDSON DUMISI MUNGAFU.....APPELLANT**

**VERSUS**

**KENYA BUILDERS AND CONCRETE LIMITED.....1<sup>ST</sup> RESPONDENT**

**PETER NGOTTA SAMBAYA.....2<sup>ND</sup> RESPONDENT**

**(Being an appeal against the ruling delivered by Hon. Mokaya P.M. on the 16<sup>th</sup> day of July 2009 at the Chief Magistrate's Court at Nairobi in Civil Case No. 2072 of 2007)**

**JUDGEMENT**

**Introduction:**

1. This appeal arises from the judgment of the Senior Resident Magistrate Hon. Mrs. Mokaya made on the 16<sup>th</sup> of July, 2009, being an appeal from Civil Case No. 2072 of 2007 between Hudson Dumisi Mungafu (the Administrator of the estate of Luke Mung'afu Mumeno and Kenya Builders & Concrete Limited and Peter Ngota Sambaya).
2. The appellant is the Administrator of the late Lucas Mung'afu Mumeno and he brought the suit in the lower court in his capacity as such against the respondent via a plaint dated 12<sup>th</sup> March 2007 and filed in court on 14<sup>th</sup> March 2007.
3. The respondent is the registered owner of motor vehicle registration number KAR 080M.
4. The appellant's claim arises from a fatal accident that occurred on 5<sup>th</sup> July, 2006, involving Lukas Mung'afu Mumeno (deceased) and motor vehicle registration number KAR 080M that was being driven by the respondent's authorized driver, agent and/or servant.
5. The appellant averred that the accident was caused by the negligence of the respondent's authorized driver, agent and/or servant and particulars of negligence were set out in the plaint and gave evidence in this regard at the hearing. The respondent on the other hand denied that an accident occurred as alleged and denied the aforementioned motor vehicle was being driven by their servant.
6. They further claimed that if indeed an accident occurred then it was substantially contributed to by the negligence of the deceased and they set out particulars of negligence in their defence and gave evidence to that effect at the hearing.
7. The parties were heard and judgment delivered in chambers by the lower court on 16<sup>th</sup> July 2009, whereby the court entered judgement on liability in the ratio of 50:50, pain and suffering at 50,000/= and 70,000/= for loss of expectation of life and awarded the appellant half the costs.
8. Appellant being aggrieved by the decision of trial court lodged instant appeal and set out the following grounds:-
  - (1) That the learned magistrate erred in law and fact by finding that the deceased was 50% liable for the accident.
  - (2) That the learned magistrate erred in law and fact by failing to appreciate that based on the evidence the respondents were 100% liable for the accident.
  - (3) That the learned magistrate erred in law and fact by failing that the deceased never contributed to the accident in any way.

- (4) The learned magistrate erred in law and fact by delivering a judgment that was against the weight of evidence.
- (5) The learned magistrate erred in law and fact by failing to appreciate that the respondent did to prove contributory negligence on the part of the deceased.
- (6) That the learned magistrate erred in law and fact by failing to find that the evidence of the defence was contradictory riddled with falsehoods and ought to be disregarded.
- (7) The learned magistrate erred in law and fact by giving an award that was too low in the circumstances.
- (8) That the learned magistrate erred in law and fact by failing to award special damages even proposed by the defence in their submissions.
- (9) That the learned magistrate erred in law and fact by failing to award funeral expenses and other justifiable, legitimate and expected expenses that abide by the death of the deceased.
- (10) That the learned magistrate erred in law and fact by holding that the appellant had failed to prove loss of dependency.
- (11) That the learned magistrate erred in law and fact by failing to make an award for loss of dependency.
- (12) That the learned magistrate erred in law and fact by failing to appreciate that the appellant evidence on dependency had not been challenged in cross examination and submissions.
- (13) That the learned magistrate erred in law and fact by disregarding the appellant's evidence and submissions.
- (14) That the learned magistrate erred in law and fact by delivering a ruling that was against the weight of evidence.
- (15) That the learned magistrate exercised her discretion capriciously but not judiciously by apportioning liability at 50% between the parties and awarding law general damages.
- (16) That the learned magistrate erred in law and fact by awarding the appellant half of the costs instead of full costs.
- (17) That the judgment and decree in the sub ordinate court is illegal and amounts to a travesty of justice.
- (18) That the learned magistrate's award is unfair and without legal justification.

9. Parties were directed to canvass appeal via submissions.

**Appellant's submissions:**

10. The 18 grounds of appeal enumerated in the memorandum of appeal dated 3<sup>rd</sup> August, 2009 and argue them under 4 distinct heads, as set out herein below:-

- i. Whether the learned magistrate erred in law and in fact by awarding liability in the ration of 50:50 between the parties instead of 100% liability on the part of the respondent;*
- ii. Whether the learned magistrate erred in law and fact by failing to award special damages;*
- iii. Whether the learned magistrate erred in law and in fact by awarding too low costs in the circumstances; and*
- iv. Whether the learned magistrate erred in law and in fact by failing to make an award for loss of dependency.*

11. On liability the appellant submitted that the learned magistrate in her judgment erred in law and in fact by apportioning liability at 50%, yet the respondent had failed to prove contributory negligence on the part of the deceased. During the hearing at cross examination the respondent's witness gave conflicting evidence on how the accident occurred. At first the witness stated that the deceased was running then later stated that he was jumping and further stated that he did not see the deceased as he was crossing the road.

12. The appellant's 2<sup>nd</sup> witness who saw the accident gave an account of what transpired on 5<sup>th</sup> July 2006, the witness testified that on the said date he was waiting to cross the road when he saw the respondent's vehicle which was speeding hit the deceased who was about to cross the road.

13. the learned magistrate held this to be of less probative value and only relied on the evidence of the respondent's witness who was the authorized driver of the respondent, despite the fact that the respondent's witness had given contradictory evidence and as shown above, therefore the respondent should have been held solely liable as was held by **Odunga J** (as he then was) in the case of **Rosemary Wanjiru Kungu vs Elijah Macharia Githinji & Another [2014] eKLR**.

14. In *Meru Packers Limited vs Hebert Liatema Omwaka Civil Appeal No. 78 of 2001*, it was held that, “where a moving vehicle crashes against another which is stationary and in a parking bay it is the culprit of the accident. Similarly, where a vehicle crashes a pedestrian in a parking bay, in the absence of an explanation coming from the driver of that vehicle, it is my view that the driver ought to be held liable. It follows that the next issue – whether the appellant proved her case to the required standards – must similarly be answered in the affirmative.”

15. The appellant urges this court to set aside the lower court’s decision and award liability at 100% against the respondent.

16. On special damages, in her decision the learned magistrate did not even look at special damages at all yet both parties submitted on special damages in their submissions. The learned magistrate ignored the fact that there were some expenses that were incurred such as the funeral expenses and hospital bills and should have awarded special damages to the appellant. Enough evidence was produced in court to show that the appellant did incur expenses.

17. Special damages must not only be strictly pleaded but must also be strictly proven. The appellant did prove special damages by tendering copies in court for the expenses incurred which the learned magistrate did acknowledge at the beginning of her decision, but failed to award the same.

18. The appellant therefore urges the court to award him special damages in the sum of 72,100/=. The appellant is guided by the case of *Silas Muthuri Muraga & Another vs Margaret Mwangwa Munene [2015] eKLR* where the court held as follows:-

**“...I have carefully considered the receipts tendered in evidence and I am satisfied that the receipts produced in court are for a sum of Kshs.17,581/= and not Kshs.8,181/= or Kshs.17,63/= as submitted by the appellant and respondent respectively. I therefore, substitute the award of Kshs.17,631/= with an award in the sum of Kshs.17,581/= as special damages.”**

19. The learned magistrate awarded too low damages citing the fact that the deceased was 63 years old and past the retirement age. Yes the deceased was 63 years of age but he was self-employed meaning he still had the energy and would have lived up to 80 years of age, making his own money.

20. The appellant prays that the court sets aside the award granted in the lower court and award the appellant reasonable damages as was held by **Madan J** in the case of *Ugenya Bus Service vs James Kongo Gachohi* which was considered by the court when faced with a similar task of awarding damages, in the case of *Sarah Naviso Muciiri vs Thomas Kamau [1986] eKLR*, the court held:

**“General damages for personal injuries are difficult to assess accurately so as to give satisfaction to both parties. There are so many incalculables. The imponderables vary enormously. It is a very heavy task. When I pondering struggle to seek a reasonable award I do not aim for precision....”**

21. On loss of dependency, the learned magistrate in her decision held that the children of the deceased were all grownup thus there was no need to award loss of dependency. The learned magistrate failed to appreciate that the deceased had a widow who was dependent on him as such should have made an award for loss of dependency.

22. The appellant seeks for there to be equality and for this court to place the parties herein in equal footing as was held in the case of *Harit Sheth Advocate vs Shamas Charania – Civil Appeal No. 68 of 2008* which was quoted in the case of *Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others [2014] eKLR* as follows:

**“The principal aims of the overriding objective include the need to act justly in every situation; the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing.”**

#### EVIDENCE ADDUCED:

23. There is no dispute that there was an accident on the material date when the deceased who was a lawful pedestrian walking along Mbagathi Way was hit by motor vehicle in question driven by the 2<sup>nd</sup> defendant and owned by the 1<sup>st</sup> defendant. The death certificate produced by the appellant confirmed that the deceased died as a result of multiple injuries due to a road traffic accident.

24. The appellant also produced the postmortem report and receipts of expenses incurred subsequent to this accident at the Kenyatta National Hospital where deceased was attended to before he succumbed to death and receipt for the funeral expenses in further proof of the claim herein.

25. The appellant further produced the limited grant he obtained from the High Court giving him authority to file this suit on behalf of the estate of the deceased.

26. An eye witness by the name of James Mwangi testified on what transpired on the material date, but in view of the fact that he was not cross examined, then not much reliance can be placed on his evidence.

27. The other witness who testified in favour of the appellant’s case was PC Charles Karumba who produced the Occurrence Book and police abstract issued at Kilimani police station confirming the occurrence of this accident. This witness was not able to explain how this accident occurred because he said he was not involved in the investigation and according to the records held at the police the matter was

pending for investigations.

28. In giving his evidence before the court, the 2<sup>nd</sup> defendant who was driving this motor vehicle stated how this accident occurred. He said the deceased ran into the road and hit or collided with the lorry at the near right side. He said the deceased was crossing the road when this incident occurred.

29. The 2<sup>nd</sup> defendant blamed the deceased for the accident claiming that the deceased had the option of crossing the road at the flyover. He maintained that the deceased collided with the lorry and fell under the lorry causing the lorry to run over him. The witness accepted that he was the one who reported the incident to the police but said that he had not been charged for any offence.

#### ANALYSIS AND DETERMINATION:

30. From the evidence it is apparent that the only evidence on record as to how the accident occurred is the evidence of DW2 who was the driver of the motor vehicle in question. The appellant's evidence and the evidence of PC Karumba cannot be relied on in this instance because both witnesses were not at the scene and are not able to give an account of what could have transpired. The trial court was only left with the evidence of DW2 and when It considered the same analytically It found that both the deceased and DW2 were equally to blame for this accident.

31. From what DW2 stated it was not clear how the deceased appeared on the road, but if the deceased was attempting to cross then he had an obligation of ensuring that he did so when the road was clear.

32. On the other hand DW2 had the obligation of exercising due caution, given that the road where he was driving on was a busy road which was under construction. For DW2 to hit the deceased and then ran over him shows that he too was probably driving at a speed that was not recommended at the time given the condition of that road.

33. On the above basis it was rational to apportion liability in the ratio of 50:50 between the deceased and DW2. This court upholds the trial court finding on liability and apportionment thereof.

34. On quantum, I note that the deceased died aged 63 years and was in hospital a few hours after the accident before he succumbed to the injuries. He must have undergone a lot of pain and suffering and to that end It was not erroneous for trial court to award damages of Kshs.50,000/= under this limb for pain and suffering.

35. As relates to loss of expectation of life, It was also reasonable to award a conventional sum of Kshs. 70,000/=.

36. On the issue of loss of dependency claimed under the Fatal Accidents Act, It was evident that the so called dependents of the deceased listed in the plaint other than his widow were all adults and could not in such circumstances be said to be dependents upon their father. The letter exhibited from the Chief of West Maragoli has listed all the dependents of the deceased indicating their respective ages. The youngest on that list is aged 24 years old.

37. I refuse to accept as true that all the 7 children of the deceased aged between 40 years and 24 years were dependents on their father who was aged 63 years old. It is ridiculous to think that these children still depended on their father and not in line with the traditional customs. If anything it would be expected that the deceased was the one dependent on his children and not vice versa.

38. On the other hand, the appellant did not avail any receipts or evidence to show that the deceased was engaged in any business or the other. The appellant did not disclose the nature of business the deceased was engaged in, other than stating that he was earning 9000/= a month.

39. Taking into account the age of the deceased, It would appear that he was not in any gainful employment nor no material was availed to court to support his earnings if any.

40. The trial court held that, at age 63, the deceased had clearly out lived his gainful working period and given that the official retirement age is 60 years. Thus the court did not know what multiplicand could be used. If the deceased was a professional such as a professor, doctor, judge e.t.c it would be possible to consider that he would have been able to work gainfully upto about 70 years, but this was not the case here.

41. In view of the fact that no concrete evidence was availed, in his age the trial court was not able to make a finding on damages under loss of dependency. This court agrees with the aforesaid finding thus to that extent the appellant's claims failed.

42. However judgement on liability was validly entered in the ratio of 50:50, damages for pain and suffering was allowed at 50,000/= and 70,000/= for loss of expectation of life. As for special damages the appellant is entitled to prove specials vide receipts. Special damages must not only be strictly pleaded but must also be strictly proven. The appellant did prove special damages by tendering copies in court for the expenses incurred which the learned magistrate did acknowledge at the beginning of her decision, but failed to award the same.

43. The court is thus inclined to award him special damages in the sum of 72,100/=.As for the costs of the suit, the appellant will get costs for the awarded amount plus interest at court rates.

44. Thus the appeal succeeds to that extent with no orders as to costs.

**i. Final award is thus Ksh. 192,100 less 50% = Ksh. 96,050/=.**

**ii. Costs of the suit are awarded for the Ksh. 96,050/=.**

**iii. No orders as to costs in appeal.**

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF NOVEMBER, 2019.**

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**C. KARIUKI**

**JUDGE**