



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 4 OF 2019**

**KENYA REDCROSS HEADQUARTERS.....1<sup>ST</sup> APPELLANT**

**ABDULAZIZ ISHMAEL ..... 2<sup>ND</sup> APPELLANT**

**VERSUS**

**WILSON ODHIAMBO ONG'ALE AND NEREA SHIKUKU ANDABWA(Suing as**

**the administrators of Estate of Phelesia Achieng – Deceased.....RESPONDENT**

(Being an Appeal from the Judgment and decree delivered on the 18<sup>th</sup> day of April, 2018 by the Hon. Muholi SPM in Chief Magistrate Court at Nairobi CMCC NO. 5566 of 2016) and reviewed by the same court on the 21<sup>st</sup> June, 2018)

**JUDGMENT**

This appeal arises from the Judgment of the lower court delivered on 18<sup>th</sup> April, 2018. The respondents herein had sued the appellants for damages following a road traffic accident involving motor vehicle registration No. KCA 016W and a pedestrian Felecia Achieng who died as a result of that accident. The respondents are named as administrators of the estate of the deceased. In their plaint in the lower court the respondents blamed the accident on the negligence of the 2<sup>nd</sup> appellant who was the driver of the motor vehicle owned by the 1<sup>st</sup> appellant.

The appellants denied the respondents' claim in their defence but after the trial, the lower court found in favour of the respondents on full liability and proceeded to make an award of a total of Kshs. 1,303,219/=. It is that judgment that aggrieved the appellants leading to this appeal.

In the memorandum of appeal, the appellants faulted the lower court for holding the appellants 100% liable for the accident without any blame on the pedestrian. Further, the evidence of the eye witness was uncorroborated, and also that the court acted on wrong principles by shifting the burden of proof. On quantum, the lower court was criticised for applying a higher multiplier against the principles of law, and also that the rate of dependency was unreasonable.

I have the duty to evaluate the evidence adduced before the trial court with the view to arriving at independent conclusions. There was only one witness to the accident, and that was P.W. 3 who was with the deceased at the time. P.W. 1 who produced the police abstract was not the investigating officer neither did he visit the scene. He was called to produce a copy of the accident abstract and the Occurrence Book. P.W. 2 on the other hand was the father of the deceased who produced the documents relating to special damages.

According to P.W. 3, she was with the deceased when they decided to cross Ring road at a zebra crossing. A motor vehicle came from behind and while she stepped back, the deceased was knocked down. She blamed the driver of the motor vehicle for driving on the wrong side of the road. She remained firm that there was a zebra crossing at the scene, but this detail was not included in her statement.

The motor vehicle that knocked the deceased was an ambulance and it was the evidence of P.W. 3 that it was not sounding its siren. The appellants called one witness, an emergency medical technician, but this witness was not in the vehicle at the time of the accident, and whatever she told the court was mostly procedural and not connected to the accident in question.

It is important to note however, she said the driver was to transfer a patient from Alliance Medical Centre in Eastleigh to Guru Nanak Hospital. Ordinarily, a siren is sounded when a patient is unstable and drivers are trained on safety. The use of the wrong side of the road cannot occur when the siren is off.

After analysing the evidence on record the lower court concluded as follows,

**“I am convinced that the motor vehicle KCA 016W was being driven on the wrong lane. It was rushing to take a patient to Guru Nanak. It failed to sound the siren and knocked the deceased who was crossing the road at a designated crossing place. There was no warning sounded to the deceased. Ambulances are not exempt from traffic rules, they must observe other road users like pedestrians. You cannot go around as a driver knocking pedestrians and causing fatal injuries just because you have right of way. He also must have been at high speed to have caused fatal injuries. Being on the wrong lane, he shouldered a high responsibility of care, because naturally no one is expecting a motor vehicle on that side going in the wrong direction. The plaintiff’s evidence as to how the accident occurred has not been refuted the fact that there was a patient on board does not mean that the others did not matter. The driver the only person could who have shed light on the circumstances and how the accident occurred has not been called to testify. It is therefore my finding that no wrong doing has been proved towards the deceased. Consequently the 2<sup>nd</sup> defendant is 100% to blame. The 1<sup>st</sup> defendant being the owner and employer of the 2<sup>nd</sup> defendant is vicariously liable.”**

The above extract of the judgment captures the scene, the event and the fatal consequences. The evidence of P.W. 3 was not corroborated in material particulars. If there was a zebra crossing then the pedestrians had the right of way. It is hard to tell if the ambulance was being driven on the right or the wrong side of the road. It is also hard to know if the siren was on. What is clear however is that, just before the impact P.W. 3 stepped back but the deceased was not fortunate enough and was therefore knocked down.

I consider it necessary to observe that the deceased could have taken the same evasive action just like P.W. 3. In that regard therefore, it is my finding that she contributed to the fatal consequences but not to the extent of the driver of the motor vehicle. If the driver noticed the pedestrian in good time he could have hooted, slowed down, applied brakes or swerved to avoid the impact with the deceased.

It is important however to note that, whereas the pedestrian have the right of way at a zebra crossing, it is common knowledge that drivers have little or no respect for such road signs. In my judgment I assign 90% liability on the part of the driver of motor vehicle registration No. KCA 016W while the deceased shall bear 10% contributory negligence.

The deceased was rushed to hospital after the accident according to P.W. 3. After the accident according to the evidence of P.W. 1 the deceased was rushed to Guru Nanak hospital, and later referred to Kenyatta National hospital. She however died while undergoing treatment. On quantum, the lower court cannot be faulted for awarding Kshs. 20,000/= for pain and suffering.

The deceased was 46 years old and there is no evidence to show she was in poor health and the award of Kshs. 100,000/= for loss of expectation of life cannot be faulted.

The lower court on the issue of loss of dependency, applied the minimum wage of Kshs. 10,954/= in the absence of any proof as to the earnings of the deceased. She was single and had no children to look after. However, her father P.W. 2 said she used to support the family.

As a single person living in Nairobi, she must have been spending some money on rent, transport, food and clothing. In that case therefore, she must have been spending 2/3 of her earnings on herself and spared 1/3 for her family. The trial court applied a multiplier of 12 years. The deceased could have died of many other risks which included, but not limited to, the unfortunate accident that claimed her life. I believe the correct multiplier should have been 10 years.

In that case therefore, loss of dependency would work out to Kshs.  $10,954 \times 12 \times 10 \times 1/3 =$  Kshs. 438,160 which shall be subject to 10% contributory negligence on the part of the deceased leaving a balance of Kshs. 394,344/=. Special damages pleaded and proved amounted to Kshs. 131,635/=.

In the end this appeal is allowed and there shall be judgment for the respondents as follows;

a. Pain and suffering	Kshs. 20,000/=
b. Loss of expectation of life	Kshs. 100,000/=
c. Loss of dependency	Kshs. 394,344/=.
d. Special damages	<u>Kshs 131635/=</u>
TOTAL	<u>Kshs. 645,979/=</u>

The respondents are entitled to costs in the lower court but in this appeal each party shall bear their own costs.

**Dated, signed and delivered at Nairobi this 19<sup>th</sup> Day of December, 2019.**

**A. MBOGHOLI MSAGHA**

**JUDGE**