



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Civil Appeal No.129 Of 2015

MARY KAHAKI KARANJA.....APPELLANT

(Suing as the Legal Administrator of the Estate of the late **LAZARUS KARANJA CHEGE(Deceased)**)

-Versus-

AUTO HAULIERS.....1ST RESPONDENT

JAMES KARIMI NYAGAH.....2ND RESPONDENT

(Being an appeal against the judgment of the Hon. D Mulekyo, Chief Magistrate, In Nakuru CMCC No. 674 of 2011 delivered in the 15th Day of July 2015 between Mary Kahaki Karanja -VS- Auto Hauliers & Another

JUDGMENT

1. This appeal is premised on one main ground, liability as to who between the deceased and the Respondent caused the accident that claimed the life of the deceased who was driving one of the two vehicles. Pick-up registration No. KAN 232A and Mercedes Benz trailer Reg No. KBJ 173B along the Nakuru highway on the 28th August 2010 at about 11.00 pm.
2. The 2nd Respondent being the driver of the trailer who survived the accident blamed the deceased, while the appellant being the legal representative of the deceased's estate, and who did not witness the accident, blamed the 2nd respondent upon evidence of an eye witness **PW2** and the police officer **PW3** who also did not witness the accident nor visited the accident scene.
3. When one of the drivers of accident vehicles is deceased, and when the investigating officer adduces no evidence nor provides the sketch plans or points to the point of impact and where damages to the two vehicles are verified by a competent motor vehicle assessor, then, the court has an uphill task to comb through the evidence to satisfy itself as to how the accident may have happened.
4. That is the duty of the first appellate court, to reconsider the evidence adduced before the trial court and come up with its own findings and conclusion – **Kenya Ports Authority -vs- Kuston (Kenya) Ltd (2009) 2 EA 212.**
5. The appellant blamed the 2nd Respondent as the sole cause of the accident by driving without due care and attention and at excessive speed, and failure to have due regard for other roads users. In their defence, the Respondents while denying all the particulars of negligence and blaming the deceased for the same, they also raised a defence of contributory negligence on the part of the deceased.
6. **PW2 James Njuguna Karigi** testified that he was driving behind the pick up and saw what happened, that the pick up had stopped on the feeder road as its tail lights were red and waiting to enter the main highway when a speeding trailer swerved off the road, hit the pick up and pushed it onto a culvert. After impact, this witness testified that he found the pick up on the feeder road and the trailer on the tarmac. On cross examination, it was his evidence that if the pick up had been on the tarmac road, the impact would have pushed it ahead on the tarmac road, and not off the road into the culvert.
7. **DW2** the driver of the trailer (2nd Respondent) testified that the pick up had joined the highway suddenly and though he tried to avoid hitting it he failed and pushed it to a culvert, while the trailer remained on the tarmac road.
8. If what this driver testified is true it is evident that the pick-up had joined the main highway from the feeder road, hit it with the trailer's left front light, meaning the pick-up should have been hit at the rear right back of the body.
9. It is unfortunate that the investigating officer did not attend court to give a report of his investigations and produce the sketch plan to show the point of impact. The trailer driver was not charged in a traffic court for any offence. The police abstract was of no assistance to the court as it showed that the matter was pending under investigation. No inquest was undertaken though recommended. Given the above

circumstances the trial magistrate came to a conclusion that the appellant did not prove her case upon a balance of probability and dismissed the case with costs.

I note that the trial magistrate stated that it was only the investigating officer, (PW3) who could have explained what transpired.

10. It has been held in many Judicial decisions that whenever two vehicles collide, and there is no enough evidence as to which of the drivers is to blame, none of them can escape liability. The Court of Appeal in **Caroline Anne Njoki Mwangi -vs- Paul Ndungu Muroki (2004) e KLR** held that when a collision occurs, and there is no clear evidence as to which driver caused the accident, both drivers must be held to have contributed to the accident on equal basis. This is so when occurrence of the collision is not denied.

See also **Ephantus Mwangi & Another -vs- Duncan Mwangi Wambugu 1982-99) I KAR 278.**

11. In **Raphael Mwariki Kiboi -vs- Joseph Njogu Kinyua Nbi HCCC NO. 3974 of 1988, Ringera J**, rendered that:

“---I am entitled under Section 119 of the Evidence Act to presume as a likely fact that when two motor vehicles collide on a highway they do so in consequence of either one or both vehicles thereof---”

If the evidence is not sufficiently rebutted then both vehicles must be held to have contributed to the occurrence on equal basis.

12. Having considered the evidence on record, I am not persuaded that there was sufficient rebuttal by either of the parties as to the part each vehicle played in regard to the causation of the accident.

13. **For the above reasons, I find that the accident that claimed the deceased's life was contributed to by both drivers, on equal basis. I therefore allow the appeal, set aside the trial court's judgment dismissing the appellant's case and substitute the same with a finding that each of the two drivers were equally to blame for the accident, and therefore liable in compensatory damages to the deceased's estate at 50% by the Respondents.**

14. **General and special damages.** The trial court stated what it would have awarded.

I have considered the award under the **Law Reform Act**. I find no fault in the awards. I uphold the same.

15. **Damages under the Fatal Accidents Act** are awarded to the dependants of the deceased, in this case the wife and children whose details are not in dispute, as it is a matter of fact. The deceased was 51 years old, a practicing Architect having obtained a Bachelor of Architecture Degree, University of Nairobi in 1986. However, his income was not stated nor proved.

The trial court rightly applied the government salary scale then, and adopted 10,000/= contrary to what was proposed by the appellant in the submissions being Kshs.20,000/= per month against a multiplier of 9 years and a multiplicand of 2/3, thus arriving at a sum of

Kshs.10,000 X 12 X 9 X 2/3 = 720,000/=.

16. The court on appeal is normally very slow in upsetting a trial court's discretion in the assessment of damages unless it can be shown that in assessing such damages it failed to consider relevant factors, - **Kemfro Africa t/a Meru Express and Another -vs- A.M. Lubia & Another (1982-88) I KAR 72** and **Butt -vs- Khan(1981) KLR 349**. In adopting an income of Kshs.10,000/= for a practicing Architect for the only reason that no proof of income was tendered I am persuaded that the court's discretion was not properly exercised, and by terming it an *ex gratia* award, was not in line with precedent and had no legal basis.

17. Even if no documentary proof was tendered of the deceased's income, the court ought to have considered that it is not always the only proof of income that a court should adopt, but ought to have taken into account that a lot of people earn very decent income which is not documented at all.

18. For a professional Architect of twenty-four years practice and experience facts not rebutted, it would be an absurdity if all he could make and take care of his family of a wife and four children, who were in good schools was only Kshs.10,000/= per month! – **Ahmed Butt -vs- Uwais Ahmed Butt (1982-88), KAR5**. There must be other ways and methods of ascertaining the income.

The appellant had proposed Kshs.100,000/= per month as income but produced no evidence of the same. The Respondent proposed the Kshs.10,000/= adopted by the trial court.

19. Taking the totality of evidence adduced before the trial court, I am persuaded that the trial court's adoption of Kshs.10,000/= as monthly income for the deceased was inordinately low to represent a fair estimate - See **Siyaram Enterprises & Another -vs- Samuel Nyachani (2015) e KLR** and **Jacob Agiya Maruja and Another -vs- Simeane Abeyo Civil Appeal No. 107 of 2002 (2005) e KLR** – where the Court of Appeal held that it would cause a lot of injustice to Kenyans if the courts were to hold that only documentary evidence was the only proof of one's income. See also **John Wamae & 2 Others -vs- Jane Kituku Nziva & 2 Others (2017) e KLR**.

20. In **Beatrice W. Murage -vs- Consumer Transport Ltd and Another (2014) e KLR**, the court had this to say

“ordinarily if one does not prove what the deceased earned, the court would base the earning on the minimum wage ---”

The deceased being a professional was not subject to the Government Minimum Wages. Perhaps the Public Service pay structure for the period would have been more appropriate. None was however produced to the court, and the court did not bother to check it up.

21. By all standards and common sense I find the sum of Kshs.10,000/= as miserably low, and without basis unless the deceased was not involved in any gainful venture which is not the case. I shall in my discretion increase the income to the sum of Kshs.40,000/= net per month, as a more realistic estimate of income. Loss of dependancy would work out as follows.

$$40,000 \times 12 \times 9 \times \frac{2}{3} = \text{Kshs.2,880,000/=}$$

The above amount shall be reduced by 50% being contributory negligence, leaving a sum of Kshs.1,440,000/= to the appellant.

22. The the total awards are adjusted as follows:

- **Pain and Suffering** - **Kshs. 20,000/=**
- **Loss of Expectation of life** - **Kshs.100,000/=**
- **Special damages** - **Kshs. 43,000/=**
- **Loss of dependancy** - **Kshs.2,880,000/=**

Total **Kshs.3,043,000/=**

Less 50% thereof - **Kshs.1,521,500/=**

23. The above sums shall accrue interest at court rates from the date of the trial court's judgment, save for special damages that accrues interest at court rates but from the date of filing of the primary suit.

Costs of the appeal shall go to the appellant.

Orders accordingly.

Dated, Signed and Delivered this 28th Day of November 2018.

J.N. MULWA

JUDGE