



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 82 OF 2013

NGITARIOUS MWANGI.....APPELLANT

VERSUS

**WASHINGTON ODHIAMBO WANYANG' (suing as legal representative of
the estate of Mary Okello).....RESPONDENT**

***(Appeal against the judgment and decree of Hon. H. Gesora (SRM) in Machakos Principle
Magistrates' Court Civil Case No. 637 of 2012 delivered on 12th April, 2013)***

JUDGEMENT

1. This appeal has been filed on the following grounds:

- i. That the learned magistrate erred in fact and law in basing his findings on irrelevant issues not supported by evidence adduced or the applicable law.
- ii. That the learned magistrate erred in fact and law in failing to accord the evidence of DW1 who is an expert witness due consideration.
- iii. That the learned magistrate erred in apportioning liability of 100% yet the respondent owed other road users road sense.
- iv. That the learned magistrate erred in law and fact in wholly disregarding or failing to accord proper consideration upon the defence witnesses in totality.
- v. That the learned magistrate erred in fact and law in injudiciously, arbitrarily and exorbitantly apportioning and awarding the respondent the quantum of KShs. 4,143,052 plus costs at the rates which is excessive and manifestly high in the circumstances.
- vi. That the learned magistrate erred in fact and law in considering the dependency ration to be 2/3 yet the husband testified that he was self-sufficient and the wife's contribution was half.
- vii. That the learned magistrate erred in fact and law in computing net income at KShs. 36,871/- and ignoring that the respondent's net was KShs. 10,045.15 as indicated in the pay slip which would constitute the portion of the dependency lost.
- viii. That the learned magistrate erred in fact and law in basing his findings on irrelevant issues not supported by evidence adduced or the applicable law as clearly captured in his judgment.

- ix. That the learned magistrate erred in fact and law by failing to deduct the award of KShs. 10,000/- for pain and suffering which is an award under the Law Reforms Act.
- x. That the learned magistrate erred in law and fact in finding that the respondent had proved his case on a balance of probabilities in view of the evidence on record.
- xi. That the learned magistrate erred in fact and law in failing to accord the defendant's submissions due consideration.
- xii. That the learned magistrate's findings on liability and quantum of damages are not supported by facts or law.
- xiii. That the learned magistrate's decision is against the weight evidence adduced in court.

2. The respondent filed Machakos Principle Magistrates' Court Civil Case No. 637 of 2012 as the administrator and personal representative of the estate of Mary Okello (deceased) seeking recovery of damages. His case was that that the deceased was on 16th September, 2009 while lawfully crossing the road at EPZ junction along Kitengela - Namanga road knocked down by the appellant's motor vehicle registration number KAN 098J. It was alleged that the appellant, his driver and or servant drove carelessly and negligently in the circumstances occasioning the accident from which the deceased suffered fatal injury. The respondent claimed for recovery under the Law Reforms Act and the Fatal Accidents Act. That the deceased had left behind three (3) dependants thus himself, Irene Aluoch Odhiambo (daughter) and Joseph Oluoch Odhiambo (son). That at the time of her demise, the deceased was a 44 years old teacher who earned a monthly salary of KShs. 44,462/-. That she was energetic at the time and had a bright future which was cut short by the accident. The respondent claimed that he incurred costs as follows; funeral expenses- KShs. 103,000/-; filing fee for grant – KShs. 1,125/-; official search- KShs. 500/-; police abstract- KShs. 200/- and legal fees for grant of letters of administration- KShs. 25,000/-. The respondent produced grant (P. Exhibit 1), police abstract (P. Exhibit 2), receipt for search (P. Exhibit 3a), Search (P. Exhibit 3b), death certificate (P. Exhibit 4), bundle of 4 receipts (P. Exhibit 5), demand letter (P. Exhibit 6 a), Statutory notice (P. Exhibit 6b), pay slips (P. Exhibit 7) and post mortem report (P. Exhibit 8).

3. It emerged from the evidence of P.C. Sarah Keboi (PW2) who was manning the road on the material day that she witnessed the occurrence of the accident. That the deceased was on the road at the time and was knocked sending her to the left side of the road. She stated that from the skid marks and tyre impression, an inference was drawn that the vehicle was travelling at a speed of over 70 KPH. That the area where the accident occurred was a buildup area and the vehicle was meant to be driven at a speed of 30 – 50 KPH. On cross examination, he stated that the vehicle was on its lane at the time while the deceased was crossing the road. She however stated that the possibility of the deceased emerging on the road was remote since the deceased had walked some steps before the impact.

4. The appellant filed a statement of defence wherein he denied the respondent's claim. P.C. Hussein Mohamed (DW1) who was with PW2 and also witnessed the accident recollected that the vehicle swerved from the left lane to the right lane for the reason that the deceased had suddenly emerged before two motor vehicles as she alighted from a matatu. On cross examination, DW1 stated that the point of impact was in the middle of the road. That the vehicle was approaching the accelerating lane and moved to the right lane. He admitted that the area was a buildup area and the speed limit there was 50 KPH. He also stated that he did not see the deceased alight from a matatu but that he saw her cross the road.

5. The appellant (DW2) testified that there were oncoming vehicles and one of them indicated to signal that it was entering EPZ which was on his left. He was behind a lorry when suddenly the deceased crossed the road running. He attempted to avoid the accident and the vehicle moved to the right and hit her. On cross examination, the appellant admitted that he was the owner of the vehicle. That he had not done an official transfer as he had not completed paying the seller. He stated that he was driving at a speed of 40 KPH and hit the deceased who was crossing the road from left to right. He stated that he applied emergency brakes but he hit the deceased. That he had seen the deceased a meter away. He also

stated that the area is a busy area.

6. Samuel Mutia Kanuku (PW3) who was a motor vehicle inspector produced a report (D. Exhibit 1) which revealed that the vehicle had been damaged on the front face, offside bumper, windscreen, off side driver's door, rear lump. That the reflections were faded and left rear tire worn out unevenly.

7. It was the appellant's submissions that DW1's evidence corroborated PW2's evidence that the point of impact was in the middle of the road. That the trial magistrate failed to consider that the evidence on record exonerated the appellant from liability. It was submitted that to expect a driver to anticipate by sitting on the cutting edge of every moment while driving would create havoc with the laws of probability. Citing sections 107, 108 and 109 of the Evidence Act and **Eastern Produce (K) Limited v. Christopher Astiado Osiro (2006) eKLR**, the appellant argued that onus was on the respondent to prove negligence but which he failed to prove. That the deceased was the sole cause of her misfortune since she crossed the road without ascertaining clearance.

8. On quantum, it was submitted that the magistrate erred in placing dependency at 2/3 since the deceased was not the sole breadwinner. **F.M.M. & Another v. Joseph Njuguna Kuria & another eKLR** was cited in reliance.

9. The respondent's first contention was on the record of appeal. It was argued that the record of appeal was fatally defective since there was no decree and or order attached to it. It was stated that the said omission was fatal. The respondent relied on Rule 85 (i) and 85 (2A) of the Appellate Jurisdiction Act. He further cited **Ndegwa Kamau T/A Side View Garage v. Fredrick Isika Kalumbo (2016) eKLR**, **Kulwant Singh Roopra v. James Nzili Maswili (2014) eKLR** and **Salama Beach Hotel Limited & 4 others (2016) eKLR**. It was submitted that it is not in dispute that the deceased was knocked in the middle of the road but that the issue was whether the appellant was liable for the accident. It was submitted that the appellant had responsibility to be vigilant and exercise caution on the road to provide a safe environment to all road users including pedestrians. On quantum, it was submitted that the respondent was clear that they divided their financial obligations and the trial court did not find it difficult to discern that the deceased catered for the most crucial aspect of family life, being payment of fees for their son and catering for all the subsistence. It was submitted that the trial court observed the principles of applying multiplier and multiplicand in awarding damages.

10. This is a first appeal and this court is therefore called upon to re-evaluate the facts afresh, re-assess this case and make my own independent conclusions. See: **Peters v. Sunday Post (1958) E.A. 424 at 429** where Sir Kenneth O'Conner held:

"It is a strong thing for an appellate court to differ from the finding on a question of fact, of the Judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion."

11. I have given due consideration to the appeal herein and find that the following issues fall for determination:

- a) The effect of failure to attach a copy of decree and or order in a record of appeal.
- b) Whether or not liability as apportioned by the trial magistrate was proper.
- c) Whether or not multiplier, multiplicand and award of pain and suffering were excessive in the circumstances.

12. The substantive law on the first issue is to be found in Section 79 G of the Civil Procedure Act and Order 42 rule (2) and Order 42 rule 13 (4) of the Civil Procedure Rules. The said provisions stipulate as

follows:

Section 79 G

“79G. Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

Order 42 rule 2

Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such a time the court may order, and the court need not consider whether to reject appeal summarily under section 79B of Act until copy is filed.

Order 42 rule 13 (4)

Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say:

a. The memorandum of appeal;

b. The pleadings

c. The notes of the trial magistrate made during the hearing;

d. The transcript of any official shorthand, typist notes, electronic recording or palantypist notes made at the hearing;

e. All affidavits, maps and other documents whatsoever put in evidence before the magistrate;

f. The judgment, the order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:

Provided that-

i. a translation into English shall be provided of any document not in that language;

ii. the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).

13. From the above provision, it is clear that a decree or order appealed from is a pertinent part of an appeal filed in the High Court no wonder section they are couched in mandatory terms. It follows therefore that a record of appeal without such decree or order is incompetent.

14. The question that begs is whether such incompetence is reason enough to have it struck out. I respectfully detach myself from the reasoning that such absence is enough to have a record of appeal struck out. I say so considering the circumstances of this case and bearing in mind the overriding objective in civil litigation and the provision of Article 159 (2) (d) of the current Constitution. While the Respondent faults the record of appeal herein, I note that they were present in court at the time directions were taken. They however failed to disclose to the court the discrepancy at that point. I therefore

associate myself with the reasoning of Musinga J (as he then was) in **South Nyanza Sugar Co. Ltd v. Daniel Obara Nyandoro (2010) eKLR** where he held:

"In my view, it will amount to miscarriage of justice for this court to strike out the appeal for the reason as advanced by Mr. Ogweno when the appeal had already been admitted and directions taken in presence of counsel for both parties. In any event, the lower court record is before this court and no prejudice will be occasioned to the Respondent by reference to the same. In addition, it will be against the spirit of overriding objectives of the Civil Procedure Act as stated under Section 1A and 1B for this court to summarily reject the appeal for want of decree."

15. On liability, it emerged from the record that the deceased was knocked down in the middle of the road while crossing. The said happened near a junction and on a buildup area as admitted by the appellant. The deceased being a pedestrian, was under duty to be on the look-out while crossing the road. On the other hand, the appellant must have been driving at a high speed to be unable to control the vehicle to avoid the accident. Having been driving near a junction and on a buildup area, the appellant ought to have been careful. In my view both the deceased and the appellant did not exercise due care. The appellant being a driver of a lorry was handling a lethal machine and should have been cautious see, **Isabella Wanjiru Karanja v. Washington Malele., Nairobi Civil Appeal No. 50 of 1981 (1982-1988) 1KAR 186** where it was held:

"What I find makes the distinction in their blameworthiness is the fact that Isabella had under her control a lethal machine when Washington had none and all things being equal she was under an obligation to keep a greater lookout for other road users."

16. In the circumstances of this case, the safe apportionment would have been 50:50.

17. On the issue of quantum, I am guided by the pronouncement in **Loice Wanjiku Kagunda v. Julius Gachau Mwangi C A No. 142 of 2003 (UR)** where the Court held:-

"We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence, an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those or other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (See Mariga –vs- Musila (1984) KLR 257.)

18. The respondents argued the trial magistrate failed to deduct KShs. 10,000/- for pain and suffering which was an award under the Law Reforms Act. The generally accepted principle is that very nominal damages will be awarded on this head if death followed immediately after the accident. In the case at hand, the death certificate reveals that the deceased died on the date of the accident. Chances that she suffered severe pain are minimal. In common law, the courts have evolved two principles, *loss of expectation of life and pain and suffering*. Under the head pain and suffering court award a conventional sum which has increased over the years from KShs. 10,000/= to KShs. 100,000/=. Both parties did not however have an issue with the said sum and I have no reason to interfere with the award of KShs. 10,000/-. I am of the view that a conventional figure of KShs. 120,000/= for loss of expectation of life suffices. It must however be noted that the estate does not benefit twice from the same death under the Fatal Accidents Act and the Law Reforms Act. The award of KShs. 10,000/- should therefore have been deducted as correctly argued by the appellant.

19. Under the head of loss of dependency, it was argued that the respondent and the deceased shared responsibility. It must be noted that the family relied on her income and I find no fault in the trial magistrate's decision.

20. On multiplicand, I find no fault in the trial magistrate's court finding. The deceased's earning was proved by a pay slip which revealed that she earned a gross salary of KShs. 44,462/-. In calculating a multiplicand, statutory deduction is normally taken into account and as correctly calculated by the trial magistrate it amounts to KShs. 36,871/- thus (44,462-statutory deduction of 7,591/-). Other deductions

were for the benefit of the family and they ought to be taken into account in calculating the multiplicand. Special damages of Kshs. 103, 500/= remains undisturbed.

21. The respondent's loss of dependency therefore works as follows:

Kshs. $36,871/= \times 12 \times 14 \times \frac{2}{3} =$ KShs. 4,129,552/=. In the end, the appeal partially succeeds. The trial court's finding on liability is set aside and substituted with an order of liability at the ratio of 50:50 between the appellant and the respondent.

22. The Plaintiffs' award in total is made as hereunder:

Pain and suffering	KShs.	10,000/=
Loss of expectation of life	KShs.	120,000/=
Loss of dependency	KShs.	4,129,552/=
Special damages	Kshs.	103, 500/=
Sub-total	KShs.	4,363,052/=
Less	KShs.	10,000/=
<u>Total award</u>	<u>KShs.</u>	<u>4,353,052/=</u>
Less 50%	<u>KShs.</u>	<u>2,176,526/=</u>

The appellant shall bear the costs of the appeal and the respondent shall have costs in the lower court.

Orders accordingly.

Dated at **Machakos** this 29th day of September, 2017.

D. K. KEMEI

JUDGE

In the presence of:

No Appearance for the Appellant

Kyalo for Ogeti for the Respondent

Kituva: C/A-