



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 242 OF 2011

ROBERT COLLINS MURIMI.....APPELLANT

VERSUS

BENSON NJIHIA KAMAU.....RESPONDENT

(Suing as the legal representative of the estate of VERONICA NUNU JIHIA Deceased)

(Being an appeal from the Judgment and decree delivered on 26th May, 2011 by Hon. Mr. A.K. Ndung'u, Senior Principal Magistrate in The Chief Magistrate Milimani Commercial Courts in CMCC No.1304 of 2006)

JUDGMENT

1. Vide a plaint dated 14th February, 2006, the Respondent who was the Plaintiff in the lower court filed this suit as the legal representative of the estate of the Late Veronica Nunu Njihia (hereinafter the deceased) who was involved in a Road Traffic Accident on 10th June, 2004 at about 8.30 p.m. along Ngong road. The deceased who was a pedestrian was hit by Motor Vehicle Registration No. KAE 212V which was allegedly registered in the name of the Appellant. The Respondent attributed the accident on the negligence of the motor vehicle's driver.
2. The Appellant who was the Defendant filed a statement of defence and denied the ownership of the motor vehicle. Any negligence on his part was denied. The accident was blamed on the deceased.
3. During the hearing of the case in the lower court, the parties by consent produced as evidence the death certificate, receipts for the sum of Ksh.33,500/=, copy of records in respect of the motor vehicle in question, the deceased's KCSE certificate and a letter from Nazareth Centre, Kikuyu. The evidence of PW2 Susan Wanjiku Njihia who was with the deceased at the material time was that she saw the motor vehicle when it was about 30 metres away but she managed to cross the road when she suddenly heard a bang. When she looked behind she saw the deceased on the ground with the motor vehicle next to the deceased. The deceased was rushed to the hospital but succumbed to the injuries the same night. PW1 blamed the accident on what she stated was the motor vehicle's high speed.
4. DW1 Robert Collins Murimi the driver of the motor vehicle in question testified that he saw the deceased crossing the road and tried to swerve but the deceased was hit by the motor vehicle. The driver blamed the accident on the deceased who he stated was under the influence of alcohol and crossed the road when the motor vehicle was just a metre away.

5. In the trial court's judgment liability was apportioned at 80% against the Appellant and 20% against the Respondent. Judgment was entered in favour of the Plaintiff (Respondent) against the Defendant (Appellant) as follows:

- Pain and suffering	Ksh.20,000/=
- Loss of expectation of life	Ksh.100,000/=
- Loss of dependency	Ksh.2,400,000/=
- Special damages	Ksh.33,500/=
Total	<u>Ksh.2,553,500/=</u>

- Less 20% contribution which came to Ksh.2,042,800/=

6. The Appellant was dissatisfied with the said judgment and appealed to this court on grounds that can be summarized as to who was liable for the accident and the damages to be awarded.

7. During the hearing of the appeal, the parties opted to file written submissions. I have considered the same.

8. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)”.

9. Although PW2 was at the scene of the accident, the deceased was behind her and PW2 could not tell exactly how the accident happened. However, PW2 had seen the motor vehicle before she crossed the road and her evidence was that it was at a high speed. On the other hand, the Defence evidence that the deceased crossed the road while under the influence of alcohol was not supported by any medical evidence or any other evidence whatsoever. He who alleges must prove. Although the driver (DW1) blamed the deceased for crossing the road when the motor vehicle was very near, his evidence fails to show the speed at which he was driving in an area that he described as congested and at a bus stage.

10. The investigations carried out by the police appears to have been inconclusive. The police abstract which was produced as an exhibit reflects that the case is pending under investigation. From the totality of the evidence before the court, my view is that both parties equally contributed to the accident. The deceased appears to have crossed the road without regard for her own safety while the motor vehicle appears to have been at a high speed. I would apportion liability on a 50:50 basis.

11. Turning to the issue of damages, it is noted that the deceased died on the same night of the accident. Death was not instantaneous. The award of Ksh.20,000/= for pain and suffering is reasonable. The deceased was 19 years old. The award of Ksh.100,000/= for loss of life is within the range of similar awards in similar cases.

12. On the loss of dependency, the deceased had completed her secondary school education and was

undertaking a computer course at Nazareth Centre. The trial magistrate applied a multiplier of 30 years. This translates to a work span of up to 49 years of age. Taking into account the vicissitudes of life, this is reasonable. A multiplicand of Ksh.10,000/= is also reasonable even if one takes into account the minimum wages payable under the law.

13. The deceased had no children and was not married. The trial magistrate erred in applying a dependency ratio of 2/3. The deceased left behind a mother and siblings. In the circumstances of this case a 1/3 ratio is reasonable (See for example **Beatrice Waingui Thairu v Honourable Ezekiel Barngetuny & another Nairobi HCC 1638 of 1988** (unreported)). The dependency herein therefore works out as follows:

$$\text{Ksh.10,000/=} \times 12 \times 30 \times 1/3 = 1,200,000/=$$

14. The special damages of Ksh.33,500/= were pleaded and specifically proved as per the receipts produced.

15. With the foregoing, the total is as follows:

a) Pain and suffering	Ksh.20,000/=
b) Loss of expectation of life	Ksh.100,000/=
c) Loss of dependency	Ksh.1,200,000/=
d) Special damages	Ksh.33,500.00/=
Total	Ksh.1,353,500/=
Less 50% contribution	Ksh.676,750/=

16. Consequently, the judgment of the lower court is set aside and substituted with one of Ksh.676,750/=.

17. The costs in the lower court to the Respondent(Plaintiff). The appeal having been partially successful each party to meet own costs of the appeal.

Dated, signed and delivered at Nairobi this 20th day of Sept., 2017

B.THURANIRA JADEN

JUDGE