



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
HIGH COURT CIVIL APPEAL NO. 43 OF 2012

KIRANGA GATIMUAPPELLANT

VERSUS

LAYO ABDI AZIZ (Suing as a personal
representative of the Estate of the

Late Abdi Aziz Roba)RESPONDENT

**(Being an appeal from the Judgment delivered on 20th January, 2012 by Hon. Mr. S.N. Riechi
(Chief Magistrate) Milimani Commercial Courts in CMCC No.1842 of 2009)**

JUDGMENT

1. Vide a plaint dated 25th March, 2009 the Respondent Layo Abdi Aziz Roba (Suing as a personal representative of the estate of the late Abdi Aziz Roba) who was the Plaintiff in the lower court instituted a suit against the Appellant, Kianga Gatimu. The Plaintiff as the Administratrix of the estate of the late Abdi Aziz Roba (Deceased) filed the suit on behalf of the estate of the deceased under the provisions of the Fatal Accidents Act (Cap 32 Laws of Kenya) and under the provisions of the Law Reform Act (Cap 26 Laws of Kenya).
2. The Plaintiff's claim was for damages arising out of a Road Traffic Accident which occurred on 9th April, 2004 involving the deceased and motor vehicle registration No. KAN 588Y. The Defendant was sued as the owner and/or driver of the motor vehicle. The Plaintiff blamed the accident on the alleged negligent manner in which the motor vehicle was being driven at the material time.
3. The Defendant filed the statement of amended defence dated 29th March, 2010 and denied the claim. The Defendant averred that the claim was time barred and stated that the Plaintiff had no *locus Standi* to file the suit. In the alternative, the Defendant blamed the accident solely on the deceased or contributed to by the deceased's negligence.
4. The Plaintiff filed a reply to the defence and denied the allegations of negligence attributed to the deceased.
5. The Plaintiff called four witnesses in support of her case. The Plaintiff's case was that the deceased was walking off the road when the motor vehicle in question lost control and went to where the deceased was and knocked him down.

6. The Defendant closed his case without adducing any evidence.
7. The trial magistrate entered judgment in favour of the Plaintiff for the total sum of Ksh.2,331,960/=.
8. The Appellant was dissatisfied with the judgment of the lower court and appealed to this court on the following grounds:

- 1. The learned Magistrate erred in law and fact in holding the Defendant/Appellant liable for a claim that had been statutory barred.**
- 2. The Learned Magistrate erred in law and fact by not adjudicating that the claim was filed out of time.**
- 3. The Learned Magistrate erred in law and fact by rejecting the preliminary objection raised by the Defendant/Appellant on the issue of limitation of time.**
- 4. The Learned Magistrate erred in law and fact by not deciding that the failure to file the claim within three years by the Plaintiff was not due to material facts of a decisive character being outside her knowledge whether actual or constructive.**
- 5. The Learned Magistrate erred in law and fact by not finding that leave to file the suit herein out of time was given by the court in circumstances that did not warrant so.**
- 6. The Learned Magistrate erred in law and fact by not finding that the deceased was contributorily negligent by crossing the road when it was unsafe to do so.**
- 7. The Learned Magistrate erred in law and fact in awarding the Plaintiff/Respondent Ksh.2,331,960/= plus interests and costs which is excessive taking into account the circumstances of the accident.**
- 8. The learned Magistrate erred in law and fact by finding that the Defendant was totally to blame for the accident.**
- 9. The Learned Magistrate erred in law and fact by not holding that the Defendant/Appellant had taken all reasonable steps in law to ensure that the accident did not occur.**
- 10. The learned Magistrate erred in law and fact in holding the Appellant/Defendant liable in negligence against the weight of the evidence.**

9. The Appellant prayed as follows:

- (a) The appeal be allowed.**
- (b) The judgement delivered in favour of the Plaintiff on 20th January 2012 and the resultant decree be vacated and replaced with an order dismissing the Plaintiff's claim.**
- (c) The Respondent do pay the Appellant the costs of this appeal and the costs of the suit in the subordinate court.**

10. The appeal was canvassed by way of written submissions. I have considered the submissions and the authorities cited.

11. 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)”.

12. The grounds of appeal fall in three broad clusters. That is whether the suit was filed out of time, the question of liability and the quantum of damages.

13. It was pleaded in the plaint that the accident occurred on 9th April, 2004 (The Plaint was amended orally in court on 1st December, 2010). The plaint was filed on 25th March, 2009. That is a period of about five years. Clearly the plaint was filed outside the three year period provided under Section 4 (2) of the Limitation of Actions Act Cap 22 Laws of Kenya which provides for a time limit of three years for claims based on tort.

14. The issue of limitation of time was not canvassed in the lower court during the trial. Although the Defence was amended to include the averment that the suit was time barred, I have not seen any entries in the proceedings challenging the leave granted to file the suit out of time (see for example the Court of Appeal exposition in the case of **Mbithi v Municipal Council of Mombasa & another EALR 1990-1994; Oruta & another v Hyamato Civil Appeal No. 96/84**).

15. Although in the judgment the trial magistrate referred to the issue of the leave granted, he observed that there was no evidence before him to determine whether the leave to file suit out of time had been properly granted. The replying affidavit sworn on 27th November, 2009 was in response to the application dated 23rd October 2009 which sought orders for the amendment of the defence to include the pleading that the suit was time barred. The evidence adduced by the Plaintiff’s witnesses reflect no challenge was raised on the issue of leave to file the suit out of time. That ground of appeal therefore has no merit.

16. On liability, the evidence of PW3 Ali Boro Abukula was that he was with the deceased at the material time and that he witnessed the accident. The evidence of PW3 is that together with the deceased, they were walking towards the entrance of Kahawa Garrison. That just as they were approaching the gate the motor vehicle in question which was heading towards Thika town direction lost control and went to where they were. PW3’s further evidence was that the deceased was not walking on the road. During cross examination, PW3 maintained his line of evidence and stated that they were about 2 metres away from the tarmac.

17. The evidence of PW3 that the deceased was off the road when the accident occurred was corroborated by that of PW1 P.C. Florence Anyim of Pangani Police Station where the accident was reported. It was the evidence of the said police officer that the entry in the Occurrence Book reflected that the motor vehicle lost control and also hit a motor vehicle that was parked off the road and also hit the deceased who was off the road. The police officers produced a police abstract which reflects that the accident is pending under investigations. The police abstract reflects the name of the driver of the motor vehicle as Kiranga Gatimu (Appellant).

18. PW4 the widow of the Deceased (Plaintiff/Respondent) produced the marriage certificate in court and stated that she had four children with the deceased. She produced a copy of records from Kenya Revenue Authority which reflects the owner of the motor vehicle as Kiranga Gatimu the (Defendant/Appellant).

19. The Appellant’s side closed their case without the calling of any witnesses. The evidence of the aforesaid witnesses from the Respondents side therefore remained uncontroverted by any other evidence. I find the said evidence cogent and credible. The said evidence has established that the

Appellant was the registered owner of the motor vehicle. It is also abundantly clear from the said evidence that the deceased was on the road side and that the motor vehicle lost control and hit the deceased. I find the driver of the motor vehicle was 100% to blame for the accident.

20. On quantum, the deceased died on the spot according to the evidence of the Plaintiff's witnesses. The Appellant in his submissions has no quarrel with the Ksh.10,000/= awarded for pain and suffering. Similar awards were made in the following cases:

(a) Laban Njogu Wainaina v David Kariuki Kingori & another HCCC No. 4148/1989 where a sum of Ksh.10,000/= was awarded for pain and suffering where the deceased died the same day.

(b) Eva Benta Okembo v Kimotho Kibira Nbi. HCCC No. 2399/1989 where a similar amount was again awarded.

21. The trial magistrate awarded Ksh.100,000/= for loss of expectation of life. The same is within the range of similar awards and ought not to be disturbed although the Appellant submitted for a figure of Ksh.80,000/=. Similar awards were made in the following cases:

a) Marwa R Rwebi v BAT kenya Limited Kisii HCCC No. 11 of 1992 wherein a sum of Ksh.100,000/= was awarded for loss of expectation of life.

b) Henry Odima Omolo v James Ngatia mwatha HCCC No. 4696 of 1990 wherein a sum of Ksh.100,000/= was awarded for loss of expectation of life.

c) Kenya Breweries Limited v Ali Kahindi Saro Civil Appeal No. 144 of 1990. The court awarded Ksh.100,000/= for loss of expectation of life for a six (6) year old child.

22. The deceased was 39 years old at the time of the accident according to the death certificate produced. From the evidence of PW3 and PW4 (widow) it is clear that the deceased was married with four children. The evidence of the widow is that the family depended on the deceased. The evidence established that the deceased worked with the Kenya Army and the trial magistrate used a multiplicand of ksh.21,365 and a multiplier of 13 years with a dependency ratio of 2/3. The loss of dependency was assessed at Ksh.2,221,960/=. The Appellant's counsel submitted that the multiplier of 8 years ought to have been applied. However, the multiplier of 13 years applied by the trial magistrate takes the productive life of the deceased to 52 years. This is reasonable taking into account the mandatory retirement age of 60 years.

23. With the foregoing, I find no merits in the appeal and dismiss the same with costs.

Dated, signed and delivered in Nairobi this 22nd day of Nov., 2017

B. THURANIRA JADEN

JUDGE