



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 143 OF 2012

SAMUEL MWANGI WAINAINA.....1ST APPELLANT

NATION MEDIA GROUP.....2ND APPELLANT

VERSUS

VIRGINIA NUNGARI KIMANI.....RESPONDENT

(Appeal from the original judgment and decree of A.K. Ndungu (SRM) in Milimani Commercial Courts, CMCC No. 5528 of 2005, delivered on 2nd March 2012)

JUDGEMENT

1. **Virginia Nungari Kimani** the Respondent herein, filed a compensatory suit before the Chief Magistrate's court, Milimani, Nairobi, against **Samuel Mwangi Wanaina and Nation Media Group**, the Appellants herein, for the injuries the Respondent is alleged to have sustained as a result of a road traffic accident which occurred on 1st January 2005 involving motor vehicle registration no. KAS 840M . The Appellants filed a defence to deny the Respondent's claim. **Hon. A.K. Ndungu**, learned Senior Resident Magistrate partly heard and determined the suit. He found the Appellants 100% liable for the accident. The Respondent was awarded ksh 474,000/= as general damages and kshs, 125,830/= as special damages. Being aggrieved by the aforesaid decision, the Appellants filed this appeal to have the same impugned.

2. On appeal, the Appellants put forward the following grounds in their memorandum of appeal:

1. ***The learned trial magistrate erred in law and in holding that the defendant was liable at all for the accident giving rise to this claim.***
2. ***The learned trial magistrate erred in law and in failing to take into account the evidence before him which clearly indicated that the blame in this claim was entirely caused by actions of the deceased.***
3. ***The learned trial magistrate erred in law and in fact in basing his decision on extraneous matters not relevant to the facts in issue.***
4. ***The learned trial magistrate erred in assessing general damages that are grossly so high as to represent an erroneous estimate of the loss suffered.***
5. ***The learned trial magistrate erred in law and in fact in awarding special damages which were strictly not proved as required by law .***
6. ***The learned trial magistrate erred in law and in fact in making an excessive award based on facts which were not pleaded and had no basis on the evidence tendered.***

3. When the appeal came up for hearing, learned counsels appearing in this appeal were directed by the court to file their written submissions. Only the Respondent filed her submissions. I have re-evaluated the

case that was before the trial court. I have also considered the written submissions. The Respondent argued that the evidence of PW2 was convincing and the trial Magistrate rightly relied on that evidence to establish liability against the Appellants. On quantum, she averred that the award was fair since the magistrate took into consideration the fact that the deceased died on the spot and since he was aged 42 years, the sum of kshs 100,000/= was awarded for loss of expectation of life and kshs 364,000 was awarded for loss of dependency as adequate having used a multiplier of 14 years with an income of 6,500/= and the dependency ratio of 1/3. She further asserted that the special damages were proved.

4. The grounds of appeal can be summarised into two grounds, which include whether the Appellants were liable and what quantum is payable. I have examined the evidence tendered before the trial court in respect of liability. The Respondent, testified as PW1. She claimed that she was the mother to the deceased and on the material day she was informed by a good Samaritan about the accident. She stated that the police came and they found him lying on his belly after he was hit by the side mirror of the vehicle. She produced the receipts of the expenses arising from the loss of the deceased. She also called PW2, **Anthony Muturi** who testified that on the material day he witnessed motor vehicle registration number KAS 840M that had lost control veer of the road where it hit the deceased from behind and stopped where he was.

5. The 1st Appellant adduced evidence that he was driving the motor vehicle towards Nairobi having come from Naivasha. He averred that on reaching Wida Highway Motel where there is dual carriage, someone jumped over the wall from the right and since he was in the inner lane he tried to avoid him but hit him with the side mirror and reported the accident to the police. He asserted that he was charged at the Kikuyu Courts but was later acquitted.

6. According to the evidence adduced in the trial court, it is not in contention that an accident occurred that caused the deceased fatal injuries. What is in contention is the circumstances surrounding the accident. PW1 was not at the scene of the accident when it occurred. However, PW2 was present at the time and according to him the 1st Appellant was driving motor vehicle registration number KAS 840M which vehicle lost control and veered off the road hitting the deceased from behind causing him fatal injuries. The 1st Appellant disagreed with the Respondent and contended that the deceased jumped over the dual carriage wall onto his inner lane as a result of which he was fatally injured. He further claimed that he was charged in court but was acquitted since he was not guilty.

7. I note that the evidence adduced in court for purposes of establishing liability was the evidence of the 1st Appellant against that of PW2 who happened to be the only eye witness called to adduce evidence. They each narrated their versions of how the accident transpired. PW2 is an independent eye witness who claims to have been at the scene of the accident. While I have no reason to doubt his evidence, some twist was introduced by the Appellant who gave a different version of the accident. The Respondent did not call the police or another eye witness to corroborate the evidence of PW2, which would have shed more light on how exactly the accident happened especially given the fact that the 1st Appellant's version of the accident is also plausible. It is for this reason that given that these was a road accident where either party could be blamed, then the most appropriate way to handle liability would be for each party to equally bear liability. After a careful re-evaluation of the evidence, I am convinced that each of the parties should shoulder 50:50% liability for the accident.

8. The Appellants have also challenged the decision on quantum. The Appellants are of the view that the general damages of kshs 474,000/= and special damages of kshs 125,830/= awarded is too high. The Respondent has urged this court not to interfere with the decision of the trial court on quantum because the award was fair in the circumstances considering the age of the deceased and the injuries suffered. I have carefully examined the record of the Trial Court. The Court awarded pain and suffering of kshs 10,000/=, loss of expectation of life of kshs 100,000/=, loss of dependency kshs 364,000/= and special damages of kshs 125,830/= that brought the total to kshs 599,830/=

9. I will tackle each head. On the head of pain and suffering and loss of expectation of life, it is evident that the deceased died immediately after the accident while at the scene of the accident. The generally

accepted principle is that very nominal damages will be awarded on this head claim if death followed immediately after the accident. Higher damages will be awarded if the pain and suffering was prolonged before death. In this case suffering was not prolonged since he died immediately after the accident and I therefore find the award of kshs 10,000/- to be a fair amount and loss of expectation of life of kshs 100,000/= to be adequate as awarded in the trial court. I rely on the case of **Benedeta Wanjiku Kimani v Changwon Cheboi & another [2013]eKLR** where the deceased who died at the age 44 years was awarded loss of expectation of life of kshs 100,000/= and Kshs 200,000/= for pain and suffering having spent 4 months in hospital.

10. On the head of loss of dependency, the Trial Magistrate took into consideration the age of the deceased which was 42 years, used a multiplier of 14 years taking into account that the deceased would have worked until the age of 60 years old and that he also used to earn a salary of kshs 6,500/= while alive. The learned Magistrate also appreciated that the deceased left a mother and used a ratio of 1/3. It is trite law that this court can only interfere with the discretion of the magistrate if the sum awarded was inordinately low or excessively high. I have carefully examined the record of trial court and it is clear to me that the learned Resident Magistrate considered all the relevant factors and decisions in respect of similar cases. With respect, the decision on quantum on general damages of the learned Resident Magistrate cannot be faulted.

11. On the head of special damages. It is evident that as per the plaint the Respondent pleaded a sum of kshs 125,830/= and attached receipts displaying the funeral expenses incurred, the death certificate and the police abstract to prove this sum which she did satisfactorily.

12. In the end, the appeal is allowed. The order holding the 1st Appellant wholly liable is set aside and is substituted with an order apportioning liability at 50%. The decision on quantum by the trial court to be subjected to 50% liability as follows:

General damages

Pain and Suffering	Ksh. 10,000/=
Loss of expectation of life -	Kshs 100,000/=
Loss of dependency	Kshs 364,000/=
<u>Special damages</u>	<u>Kshs. 125,830/=</u>
Grand Total	Kshs 599,830
Less 50% liability	(Kshs 299,915)
<u>Net total</u>	<u>Kshs 299,915</u>

13. The Respondent to have costs of the suit and that of the appeal.

Dated, Signed and Delivered in open court this 27th day of May, 2016

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellants

..... for the Respondent