



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO 147 OF 2011

MONICAH HARDWARE LIMITED.....1ST
APPELLANT

JOHN WAIGANJO KAMAU.....2ND
APPELLANT

VERSUS

CECILIA MUTIO KINGOO (Suing as the
Legal Adminstratrix of the Estate of

Kingoo Kakeu(Deceased).....RESPONDENT

(An Appeal arising out of the judgment of Hon. N.N. Njagi PM delivered on 25th August 2011 in Makindu Principal Magistrate’s Court Civil Case No. 121 of 2008)

JUDGMENT

Introduction

The Appellants were the original Defendants in Makindu Principal Magistrate’s Court Civil Case No. 121 of 2008, and have appealed against the judgment of the learned trial Magistrate, which was delivered in the said suit on 25th August 2011. The Respondent was the original Plaintiff in the said suit and sued in his capacity as the legal adminstratrix of Kingoo Kakeu who is deceased (hereinafter referred to as “the deceased”), who died in an accident that occurred on 9th May 2007. The learned magistrate in his judgment found the apportioned liability for the accident on the basis of 50% each as between the Appellants and Respondent, and awarded the Respondent a total award of Kshs 665,325/= as general and special damages.

The Appellants subsequently moved this Court through a Memorandum of Appeal dated 19th September 2011 as amended on 22nd November 2011 in appealing against the said judgment. The grounds of appeal raised by the Appellants are as follows:

1. THAT the judgment arrived at by the learned Magistrate was against the weight of evidence.
2. THAT the learned Magistrate erred in law and fact by apportioning liability in the ratio of 50% against the Appellants while negligence against the Appellants had not been properly established.
3. THAT the learned Magistrate erred in law and fact by failing to find that the

Plaintiff/Respondent had not established her case on a balance of probability

4. THAT the learned Magistrate erred in law and in fact in failing to apply proper legal principles regarding negligence and thus arriving at a bad decision.

5. THAT the learned Magistrate erred in law and in fact in failing to consider and appreciate the 2nd Appellant's uncontroverted evidence on negligence.

6. THAT the learned Magistrate erred in law and in fact by failing to appreciate the totality of the evidence before him and in not considering the submissions on behalf of the Appellants.

7. THAT the learned Magistrate erred in law and in fact by failing to follow and be bound by the principle of *stare decisis* expounded in **Nairobi HCCC No. 2775 of 1991 -Rahab Miciere Murage-Vs-The Attorney General & Anor; Nairobi HCCC No. 349 of 2004 -John Mwenda Mbaabu-Vs-Arcade Stationers Ltd. & Anor; and Nairobi HCCC No. 284 of 2000 - Benedict Mwazighe-Vs-Bandari Transporters Ltd.& Anor.**

8. THAT the learned Magistrate erred in law and in fact by making an award on general damages which was manifestly excessive and inordinately high.

9. THAT the learned Magistrate erred in law and in fact by failing to take in to account the evidence and the submissions on quantum of damages given on behalf of the Appellants while considering his judgment.

10. THAT the learned Magistrate erred in law and in fact by awarding special damage in the absence of proof thereof.

11. THAT the learned Magistrate erred in law and in fact by disregarding the evidence of the Appellants and considering extrinsic matters thereby basing his judgment on the same thus failing to judiciously exercise his discretion.

12. THAT the learned Magistrate erred in law and in fact in awarding costs to the Plaintiff when demand and notice had been denied and not proved in evidence.

The Appellants are praying that the Lower Court's judgment on liability be reversed liability be apportioned, general and special damages be re-assessed, and the suit therein be dismissed with costs. The Appellants also prayed that they be awarded the costs of this appeal.

The Facts and Evidence

It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts, and come up with its findings and conclusions. See in this regard the decisions in this respect **Jabane vs. Olenja [1986] KLR 661** , **Selle vs Associated Motor Boat Company Limited [1968] EA 123** and **Peters vs. Sunday Post [1958] E.A. 424**.

I will therefore firstly proceed with a summary of the facts and evidence given in the trial Court. The Respondent instituted a suit in the lower court by filing a Plaint dated 3rd July 2008 which was amended on 2nd February 2010, wherein she claimed that on or about 9th May 2007 the deceased was lawfully cycling along Nairobi-Mombasa road at Kiboko Bridge, when the 2nd Appellant negligently drove, managed and/or controlled motor vehicle registration Number KAV 398T belonging to the 1st Appellant, and hit the deceased causing him fatal injuries. Further that the 1st Appellant was thereby vicariously liable for the negligence of the 2nd Appellant.

The Respondent claimed that before his death, the deceased was a hardworking security man, husband and father of ten children with future prospects, and that his estate and dependants have suffered loss and

damage.

The Respondent sought general damages for pain and suffering and under the Fatal Accidents Act and the Law Reform Act, as a dependant of the deceased' estate. She also sought special damages of Kshs 65,325/= which she particularized in the Plaint.

The Appellants filed a defence dated 26th February 2009 wherein they denied the allegations of an accident having occurred, and put the Appellant to strict proof. They also denied that they caused any such accident by negligence, and averred that in the alternative, it was the deceased who intentionally threw his bicycle on the road to force the driver to stop with the intention of carjacking him.

From the record of the trial court proceedings, the suit proceeded to full hearing on 7th April 2011, when two witnesses gave evidence for the Respondent. The Respondent testified as PW1, and stated that she is the wife of the deceased and was informed of his death by the police, and went to Makindu mortuary where she identified the deceased and took his body and buried him after procuring a burial permit. She produced receipts of the burial expenses as exhibits. PW1 further testified that her husband was employed as a watchman at Mitendeu Primary School and was earning a salary of Kshs 2,500/= per month, and that they had ten children. PW2 also produced as exhibits a letter from the said primary school on the deceased's salary, and a search certificate showing ownership of the said motor vehicle registration KAV 398T which she testified caused the accident in which the deceased died.

The second witness (PW2) was P.C David Nderitu who testified as to the fatal accident that occurred at Kiboko Bridge on Mombasa Nairobi involving motor vehicle registration number KAV 398T and a pedal cyclist who was the deceased, who was crossing the road at the time and who died on the spot. Further, that the accident was reported at Makindu and the driver of the motor vehicle was not charged, and the court at Makindu ordered that the file be closed . PW2 produced the police abstract as an exhibit.

The Appellants called one witness to testify namely John Waiganjo (DW1), who stated that on 9th May 2007 he left Nairobi at 9pm for Mombasa, and that he was driving motor vehicle registration number KAV 398T. Further, that at Kiboko Bridge he saw a pedal cyclist cross the road on his side of the lane and tried to avoid him but the deceased hit the motor vehicle. According to PW2, the headlights of the motor vehicle were on, but that deceased pedal cyclist was not wearing a reflective jacket and his cycle had no lights. He then reported the accident to the police and was later released that night.

The Issues and Determination

The Appellants and Respondent canvassed this appeal by way of written submissions. The Appellants' learned counsel, Kinyanjui Njuguna & Co. Advocates, filed submissions dated 15th February 2016. It was argued therein that there was no evidence of negligence adduced against the Appellants to hold them liable for the accident.

The Appellants relied on the decision in **Kiema Muthuku vs Kenya Cargo Services Ltd, (1991) KAR 464** and section 107(1) of the Evidence Act for the position that the Respondent had the burden of proving the negligence alleged

It was also argued that the deceased was not careful in cycling in the middle of the road and had no regard for other road users. The decisions in **Wanjiru Nganga & Another (Suing on their own behalf and as administrators of the estate of the late Michel Ng'ang'a Wanyoike) vs Paul Kinuthia Mungai, (2015) e KLR** and **William Momanyi vs Zipporah Kwamboka Abunda, (2010) e KLR** were cited in support of his argument. Lastly, it was argued that the special damages pleaded needed to be proved and revenue stamps affixed to the receipts for them to be accepted as evidence.

The Respondent's learned counsel, Onguti & Company Advocates, filed submissions dated 13th June 2016, wherein reliance was placed on the doctrine of *res ipsa loquiter*, and that the 2nd Appellant admitted that he hit the deceased who was cycling awfully on the road. It was submitted that the

Respondent had discharged the burden of proof on the balance of probabilities

From the grounds of, and relief sought in this appeal, and the submissions made thereon by the parties, it is evident that there are three issues raised that require determination. The first is whether there was a basis for finding the Appellants 50% liable for the accident that occurred on 9th May 2007. The second issue is whether the general damages awarded against the Appellants were justified; and lastly, if the special damages awarded against the Appellants were proved.

On the issue of liability, I have evaluated the evidence given in the trial Court, and note that the Respondent in her Amended Complaint alleged that the Appellant's driver was driving with excessive speed, and failed to brake, swerve, or control the motor vehicle and that there was sufficient evidence to show on a balance of probability that the Appellants were to blame for the accident. They have relied on the doctrine of *res ipsa loquitur*. This doctrine is applicable where a party claims that the fact of the accident happening speaks for itself. The party must however prove the facts which gave rise to inference of the doctrine.

What facts were proved by the Respondent from the evidence presented in the trial Court? Firstly, that the deceased died as a result of an accident involving him and motor vehicle registration number KAV 398. Secondly, that the said motor vehicle was owned by the 1st Appellant. Thirdly, that the accident occurred when the deceased was hit by the said motor vehicle as he was crossing the road on his bicycle. Do these facts then speak to the allegations of negligence on the part of the Appellants? In my view a reasonable man would answer in the affirmative, particularly in light of the evidence by DW1 that his headlights were on at the time, and so he ought to have seen the deceased and tried to avoid the accident. The trial Court therefore did not err in inferring some negligence on the part of the DW1 from these facts.

As regards the apportionment of negligence, it is noted that in the decisions relied on by the Appellants in Wanjiru Nganga & Another (Suing on their own behalf and as administrators of the estate of the late Michel Ng'ang'a Wanyoike) vs Paul Kinuthia Mungai, (2015) e KLR and William Momanyi vs Zipporah Kwamboka Abunda, (2010) e KLR, apportionment was held to be on a 50:50 basis in similar circumstances.

As regards the last issue on damages, It is an established principle of law that that the Appellate court will only interfere with quantum of damages where the trial court either took into account an irrelevant factor or left out a relevant factor, or where the award was too high or too low as to amount to an erroneous estimate, or where the assessment is not based on any evidence (see Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727, Peter M. Kariuki v Attorney General CA Civil Appeal No. 79 of 2012 [2014]eKLR and Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5).

The Appellants in this respect contest the award of general damages on the ground that it was inordinately high. It is however noted that the damages awarded by the trial Court for pain and suffering and for loss of expectation of life of Kshs 10,000/= and Kshs 80,000/= were in this regard reasonable. On the damages for loss of dependency, this Court is guided by the manner of assessment of damages for loss of dependency under the Fatal Accidents Act. The applicable method was aptly explained by Ringera J. (as he then was) in Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another, Nairobi HCCC No. 1638 of 1988 as follows;

The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and

would if wisely invested yield returns of an income nature.”

In the present appeal, a multiplicand of Kshs 5,000/= minimum wage per month and a multiplier of 12 years was used by the trial Court, on the basis that this is the minimum wage the deceased should have been earning at the time of his death. However, the evidence by PW1 was emphatic even upon cross-examination that the deceased was earning Kshs 2,500/= per month at the time of his death and she provided proof to this effect. There was therefore no basis for application of a multiplicand of a minimum wage in light of evidence as to the actual wages earned by the deceased. The trial Court also adopted a dependency ratio of 2/3 and a multiplier of 15 years. While the dependency ration is reasonable, I find that as regards the multiplier, the deceased died at the age of 32 of years. He therefore lost at least 23 years of working life, and the said multiplier used by the trial Court was on the lower side.

I therefore find that there were errors in the assessment of loss of dependency which is hereby revised as follows- $Kshs\ 2500 \times 12 \times 23 \times \frac{2}{3} = Kshs\ 460,000/=$.

Lastly, the Appellants contested the award of special damages of Kshs 65,325/= on the ground that it was not pleaded and proved. The principle of law in this regard is that special damages must first be specifically pleaded, and then strictly proved. See in this regard the decisions in **Kampala City Council vs. Nakaye [1972] E.A 446** and **Hahn vs. Singh [1985] KLR 716**.

The Respondent did plead special damages of Kshs 65,325/=. She provided evidence of receipts with revenue stamps for burial expenses totaling to 59,935/=: a receipt for payment of Kshs 500/= for a copy of the registration records of the accident motor vehicle, and of a grant of letters of administration for which she claimed Kshs 1075/=. She was therefore able to prove special damages of Kshs 61, 510/=: and the trial magistrate therefore erred in awarding special damages of 65,325/=:

This appeal therefore partially succeeds on the issue of quantum of damages, and I accordingly set aside the award in the trial court in this respect, and substitute it with a total award of Kshs 305,750/= which has been computed as follows arising from the findings in the foregoing:

(a) Pain and suffering	10,000.00	
(b) Loss of expectation of life	80,000.00	
(c) Loss of dependency	460,000.00	
(d) Special damages	<u>61, 500.00</u>	
	<u>611,500.00</u>	
Less 50% contribution	305,750.00	
Total		<u>305,750.</u>
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Each party shall bear their costs of the appeal.

It is so ordered.

DATED AT MACHAKOS THIS 20TH SEPTEMBER 2016.

P. NYAMWEYA

JUDGE