



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT NAIROBI**

**CIVIL APPEAL NO. 418 OF 2011**

**WANJIRU NG'ANG'A and PATRICK WANYOIKE NG'ANG'A**

(Suing on their own behalf and the administrators of the estate of the late

**MICHAEL NG'ANG'A WANYOIKE).....APPELLANTS**

**VERSUS**

**PAUL KINUTHIA MUNGAI.....RESPONDENT**

*(An appeal from the original judgment and decree in Gatundu RMCC No. 300 of 2010*

*delivered on 9<sup>th</sup> August, 2011 by Hon. Mr. Karani (R.M.)*

**JUDGMENT**

1. The Appellants sued the Respondent claiming compensation for fatal injury suffered by the deceased following a road traffic accident which occurred on 29<sup>th</sup> May, 2009 at 3:00 p.m. when the deceased was riding motor cycle KBG 040P along Kibendrea-Ruiru Road when he was hit by motor vehicle registration number KTM 127. The Learned trial magistrate heard the matter and dismissed the claim.

2. Being dissatisfied with the trial court's judgment, the Appellants filed this appeal on the grounds that:

***i. That the Learned trial Magistrate erred in law and in fact in failing to appreciate that the Plaintiff had proved his case on a balance of probabilities.***

***ii. That the Learned trial Magistrate erred in law and in fact in failing to address his mind on the evidence adduced and hence made an erroneous finding dismissing the suit.***

***iii. That the Learned trial Magistrate erred in law and in fact in making a finding that the Defendant's evidence was not challenged.***

***iv. That the Learned trial Magistrate erred in law and in fact in making a finding that the Plaintiff's witness evidence was inadmissible.***

***v. That the Learned trial Magistrate erred in law and in fact in failing to consider the parties written submissions.***

***vi. That the Learned trial Magistrate erred in law and in fact in failing to set out the issues for determination and in failing to make specific and concrete findings on the issues in dispute.***

***vii. That the Learned trial Magistrate erred in law and in fact in failing to make complete, clear and intelligible record of the proceedings and thereby deprived the appellant his right to a fair trial.***

3. This being a first appeal, it is my duty to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion taking into account the fact that I did not have the advantage of hearing the witnesses testify. (See: **Peter v. Sunday Post (1958) at pg. 429**). The Appellants' gravamen is on the issue of liability.

4. PW1, P.C. Macdonald Ngoloma confirmed the occurrence of the accident and produced a police abstract and investigation report as P. Exhibit 1 and 2.

5. PW2, Newton Kuria Gichani testified that a lorry veered off its correct side on the road and hit the deceased who was riding a motor cycle. He stated that the deceased died instantly. On cross-examination, PW2 stated that he could not tell exactly what happened. He heard a bang and turned.

6. PW3, Wanjiru Ng'ang'a who was the deceased's wife testified that she was informed of the occurrence of the accident. She visited the scene where she found the deceased had died. She and the deceased had children particularized in the plaint three of who were in secondary school at the time of the demise. She stated that the deceased was aged fifty four years at the time of his death. That besides being a *boda boda* operator, he was a farmer and used to make about KShs. 30,000/= monthly.

7. DW1, Paul Kinuthia Mungai, who was the owner of motor vehicle registration number KTM 127 stated that his son Duncan Njoroge Kinuthia reported to him that a motor cyclist had slid under the lorry and was run over. He reported to Ruiru police station then proceeded to the scene. He stated that the lorry had been inspected and produced an inspection report (D. Exhibit 1) to support that statement.

8. DW2, Duncan Njoroge Kinuthia who was the driver stated that the deceased emerged from a corner suddenly and hit the lorry and slid under it. That he applied brakes and stopped. That when the deceased spotted the lorry, he let go of the handle bars and held his head. He stated that the lorry was stationary when the motor cycle hit it. He testified that he has never been charged with a traffic offence over the accident. On cross-examination he stated that the road was narrow. That the deceased was cycling in the middle of the road. He stated that he did not take evasive action. On re-examination he stated that the deceased emerged at a high speed.

9. This appeal was canvassed by way of written submissions. it was the Appellants' submissions that since the deceased and the driver of the lorry were headed to different directions, the driver of the lorry owed a greater duty of care as he was driving a lethal machine. On that point the Appellants relied on the case of **Francis K. Righa v. Mary Njeri (Suing as the legal representative of the estate of James Kariuki Nganga (2014) eKLR** where it was stated:-

***"I agree with the submission by the respondent that the appellant, as the driver of a motor vehicle, owed a greater duty of care than the cyclist to look out for other road users. This is so because he had under his control a more lethal machine than the bicycle. See: Wambua v. Patel & another (1986) 341 where Apaloo J. (as he then was) quoted the observation of Chesoni J.A. in Malele v. Karanju C.A. No. 50 of 1981 thus:-***

***'Isabella (meaning the driver) had under control a lethal machine when Washington (the pedestrian) had none and all things being equal, she was under an obligation to keep a greater look-out for other road users than Washington's.'***

10. The Applicant also quoted the definition of negligence as per the Black's Law Dictionary 2<sup>nd</sup> Edition that negligence is the failure to exercise the standard of care that a reasonable prudent person would have

exercised in a similar situation. It was submitted that as a prudent driver, he was expected to slow down when he approached the corner in the event that a person crossed the road, or the presence of oncoming traffic. It was submitted that the driver did not take any evasive action and was thereby to blame for the occurrence of the accident.

11. On the issue of quantum, the Appellants cited **Nairobi HCCC No. 2409 of 1998., David Ngunje Mwangi v. The Chairman of the Board of Governors of Njiri High School** and suggested general damages for pain and suffering of KShs. 10,000/=, **Nakuru HCCC No. 373 of 2008., Benedeta Wanjiku Kimani (suing as the administrator of the estate of Samwel Njenga Ngunjiri (deceased) v. Changwon Cheboi & Anwarali & Brothers Ltd** and suggested KShs. 100,000/= for Loss of expectation of life. As for loss of dependency, it was submitted that a net income of KShs. 10,000/= per month be used since no evidence was tendered to prove that the deceased used to make KShs. 30,000/=. A multiplier of eleven (11) years and dependency ratio of  $\frac{2}{3}$  was suggested.

12. For special damages it was submitted that the Appellants pleaded KShs. 98,400/= and produced receipts for KShs. 50/= for death certificate, KShs. 20,000/= for coffin, KShs. 77,000/= for funeral transport expenses, KShs. 1,150/= for letters of administration and KShs. 200/= for police abstract.

13. The Respondent on the other hand cited **Section 107 (1) and 109 of the Evidence Act Cap 80 Laws of Kenya, Karugi & Another v. Kabiya & 3 Others (1987) KLR 347, Kirugi v. Kiruga & Another (1988)KLR, 348, Eastern Produce (K) Limited (Kaitet Estate) v. Joseph Lemiso Osuku (2006) eKLR and Makario Makonye Monyancha v. Hellen Nyangena (2014) eKLR** and submitted that the burden was on the Appellants to prove their case. It was submitted that DW2's evidence remained unchallenged considering that PW1 and PW2 did not witness the accident. That the Appellant has not demonstrated that the trial court's findings were not based on the evidence nor that the magistrate misapprehended the evidence or that he acted on wrong principles thereby this court cannot interfere with the trial court's findings.

14. I have considered and re-evaluated the evidence, the submissions tendered on behalf of both parties. The issues falling for this court's determination are who was culpable for the occurrence of the accident and whether or not the award of the trial court was high.

15. It was the driver's evidence that the deceased emerged from a corner suddenly and at a high speed, at the same time he stated that the deceased was cycling in the middle of the road. My re-evaluation of that evidence is that it is not clear how he could have seen all that if in deed the deceased suddenly emerged from a corner as alleged. The driver of the lorry must have been in fact driving at a high speed for him to have been unable to control the vehicle to avoid the accident. On the other hand the motor cyclist should have been watchful on the road. In the circumstances, liability should have been apportioned at the ratio of 50:50 between the driver and the deceased.

16. I have considered the submissions with regard to quantum and see no reason to interfere since I note no error in principle with it save that the same shall be subject to apportionment of liability at 50:50 ratio. Since the appeal is partially allowed each party shall bear its own costs.

Dated, Signed and Delivered in open court this 20<sup>th</sup> day of February, 2015.

J. K. SERGON

**JUDGE**

In the presence of:

Ndungu for the Appellants

Marete for the Respondent

