REPUBLIC OF KENYA

KENYA LAW

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 41 OF 2013

(AN APPEAL FROM THE JUDGMENT OF THE AG. PRINCIPAL MAGISTRATE, RUNYENJES IN CMCC NO. 36 OF 2011)

NANCY MARIGU GABRIEL..... APPELLANT

(SUING AS LEGAL REPRESENTATIVE OF

THE ESTATE OF LINUS NJERU MARIGU (DECEASED)

VERSUS

DAVID KIMANI……..….....RESPONDENT

J U D G M E N T

This is an appeal against the judgment of Runyenjes Ag. Principal Magistrate in CMCC No. 36 of 2011 where the appellant was the plaintiff and the respondent was the defendant. The appellant instituted the suit for general and special damages arising out of a road traffic accident which occurred along Embu – Meru road at Riagicigi area.

The trial court entered judgment in favour of the appellant against the respondent at 70% liability. The appellant was to bear 30% liability. The net total of damages awarded to the appellant was KShs.406,819/= plus costs of the suit.

This appeal was disposed of by way of written submissions. The appellant filed her submissions through her advocate Mr. Mugambi Njeru & Company. While those of the respondents were filed by Mugambi Mungania & Compay.

The appellant was dissatisfied with the judgment in regard to apportionment of liability and the multiplier. The grounds of appeal were essentially on the issue of liability. In her submissions the appellant urged the court to enhance the multiplier to 25 years.

The appellant submitted that the respondent did not call for any evidence to counter the evidence of the appellant and her witness. The magistrate therefore erred in apportioning liability in the ratio of 70:30 against the deceased. The evidence of PW2 was that the deceased was knocked while off the road. For that reason liability ought to have been 100% in favour of the deceased.

It is further argued that the multiplier of 15 years adopted by the magistrate was erroneous. The deceased died at the age of 33 years and would have worked actively up to the age of 55 years. A multiplier of 25 years would have been appropriate.

On the dependency ratio it was argued that the magistrate erred in his observation that the appellant had not proposed any dependency ratio in his submissions. This was not correct because the appellant proposed dependency ratio is contained in her submissions on quantum of damages.

The appellant's evidence on liability was that the deceased who was her son was involved in a fatal road traffic accident on 20/8/2010 along Meru – Embu road. She called PW2 who was an eye witness to testify. She told the court that on the 20/8/2010 around 2.00 p.m. she was walking along Embu – Meru highway on left side of the road facing Embu. She was passed by a vehicle which immediately lost control and hit the deceased. The deceased was walking on the right side of the road facing Embu while the motor vehicle was being driven from Meru

direction going towards Embu. It was her evidence that the deceased was walking off the road when the accident occurred. The motor vehicle was speeding at the time of the accident. It lost control and veered off the road. There were no other motor vehicles at the time of the accident.

In his statement of defence the defendant denied liability. However, he did not call any evidence to support the denial. He was represented in court by an advocate throughout the proceedings.

In his submissions the respondent opposed the appeal and urged the court to dismiss it and uphold the judgment of the lower court. It was argued that the judgment was based on record. However, the respondent relied on the case of ***NATION MEDIA GTOUP & ANOTHER VS DAVID MBUGUA GACHII CA No. 2 of 2007 [2013] eKLR*** to reiterate the principle that an appellate court should be slow in interfering with the finding of the trial court.

It was further argued that the finding of the trial court was based on evidence. The appellant failed to establish that the respondent was 100% liable. The failure to call police officer to tender evidence as to who was to blame did not work in her favour.

The appellant failed to fill a reply to the respondent's defence and this leads to the conclusion that the denial of liability was admitted. In support of this argument, th respondent relied on the case of ***UNITED MILLERS LTD VS BENJAMIN OKARI OIGO CA No. 82 of 2006 [2010] eKLR.*** It was held in that case:-

> "*The respondent did not file a reply to the defence and as such he is deemed to have admitted the contents in the defence particularly with regard to negligence."*

It is the respondents prayer that the appeal be dismissed with costs.

The first issue for determination is whether the appellant proved full liability against the respondent on a balance of probability as required by the law. The second issue is whether the multiplier of 15 years was appropriate in the circumstances.

In the case of ***JOHN KANYUNGU NJOGU VS DANIEL KIMANI MAINGI [2000] eKLR*** the Court of Appeal in explaining the term "balance of probability" held that when the court is faced with two probabilities, it can only decide the case on a balance of probability if there is evidence to show that one probability is more probable than the other.

The only evidence before the court was only that of the appellant's witness which consisted of the following facts:-

1. *That the deceased was walking on the right side of the road facing Embu along Meru –Embu highway.*
2. *That PW2 was walking on the left side of the road facing Embu.*
3. *That the motor vehicle was being driven from Meru towards Embu.*
4. *That the vehicle lost control and hit the deceased who was on the right side of the road off the tarmac.*
5. *That the point of impact was on the left lane as one faces Embu was on its correct lane.*
6. *That there were no other vehicles on the road at the material time.*

From the evidence on record, it appears that the motor vehicle was on its right lane at the time of the accident. The deceased must have

crossed the road and encroached on the rightful lane of the motor vehicle. He had a duty to ensure that the road was safe for him to cross. The driver of the motor vehicle was said to be speeding at the time of the accident. There was no evidence from the driver of the motor vehicle to show whether he applied brakes, swerved or slowed down to avoid hitting the deceased.

It is not in dispute that the alleged accident occurred at the alleged time and place and that the deceased died as a result. The accident involved motor vehicle registration number KAX 475 K and the deceased who was a pedestrian. There was no evidence from the police on the outcome of the investigations. The police abstract produced by the appellant indicated that the case was still pending under investigation. In view of the evidence on record it cannot therefore be said that the deceased was without blame.

The trial magistrate observed the following:-

> "*Based on the content of the police abstract, it cannot be said that the defendant and or the driver of the motor vehicle was fully to blame for the accident. My opinion is that the deceased must have contributed to the accident. From the circumstances of this case, I am of the finding that the deceased contributed to the accident to the extent of 30%. As such I do apportion liability at the ratio of 30:70 percent against the deceased and the defendant respectively."*

The observation of the magistrate which contributed to his finding on liability was based on the evidence on record. It is not a requirement that the defendant adduces evidence for the plaintiff to be found to have contributed to the accident. The court may apportion liability between the parties solely based on the evidence of the plaintiff.

It is my considered opinion that the magistrate was properly guided by the evidence and reached the correct finding that the deceased contributed to the accident. The apportionment of liability at the ratio of 70:30 percent was supported by the evidence on record. This court upholds the finding of the trial magistrate on liability.

Regarding the multiplier of 15 years, the appellant relied on the following decisions:-

(a) ***FREDRICK MBUTHIA & ANOTHER [2006] eKLR*** where it was held that there was no justification whatsoever for the court to adopt a multiplier of 15 years for a person who died at the age of 33 years.

(b) ***FRANCIS MUTUA SUNGI VS IPA HCC NO. 52 OF 1999*** where the court adopted a multiplier of 14 years where the deceased died at the age of 45 years.

(c) ***LUCY M. NJERU VS FREDRICK MBUTHIA & ANOTHER [2006] eKLR*** the court adopted a multiplier of 20 years where the deceased was 29 years.

The second and the third case relied on by the appellant are not comparable since the deceased in this case died at the age of 33 years. The deceased in the second case died at the age of 45 years while in the third case the deceased was aged 29 years.

In the independent authority of ***BOARD OF GOVERNERS OF KANGUBIRI GIRLS HIGH SCHOOL & ANOTHER VS JANE WANJIKU MURIITHI & ANOTHER [2014] eKLR*** the court held that the choice of multiplier is a matter of the courts discretion which must be exercised judiciously. In determining the multiplier to be adopted, the court may consider the nature of employment of the deceased and the fixed retirement age. In this case the court adopted a multiplier of 24 years where the deceased died at the age of 31 years.

That the court in the ***BOARD OF GOVERNORS KANGUBIRI GIRLS SCHOOL (SUPRA)*** cited the following authorities:-

(a) *High Civil Suit No. 340 of 1993 where the court adopted a multiplier of 22 years where the deceased was aged 33.*

(b) *High Court Civil suit No.482 of 1994 where a multiplier of 23 years was adopted in a case where the deceased was aged 32 years.*

In the case of ***PATRICK MURERWA MBUI VS ATTORNEY GENERAL [2006] eKLR*** the court adopted a multiplier of 22 years where the deceased was aged 33 years.

From the foregoing authorities it is evident that the trial magistrate adopted a multiplier which was on the lower side considering that the deceased was aged 33 years. At that age, the deceased would have worked for more than 20 years. It is my considered opinion that a multiplier of 22 years is appropriate in the circumstances.

I hereby adopt the multiplier of 22 years and substitute it with the one of 15 years adopted by the trial magistrate.

Regarding the dependency ratio, the appellant in his submissions before the trial court had proposed the ratio of 1/3. This is the same ratio that the magistrate adopted and it cannot therefore be an issue for appeal.

The damages for loss of dependency will be calculated as follows:-

7682 x 22 x 12 x 1/3 = 676,016

The court enters judgment in favour of the appellant against the respondent in the following terms:-

(a) Special damages KShs. 10,250/=

(b) Pain and suffering KShs. 10,000/=

(c) Loss of expectation of life KShs.100,000/=

(d) Loss of dependency KShs.676,016/=

Total KShs.796,266/=

Less 30% KShs.238,879/=

Net Total **KShs.557,386/=**

The net damages payable to the appellant to the respondent is KShs.557,386/=.

The appellant will be paid half costs of this appeal since the appeal is only partly successful.

It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 17TH DAY OF JUNE, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

Mr. Mwaniki for Mugambi Njeru for appellant

Ms. Kiragu for Mugambi Mungania for Respondent