



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**CIVIL APPEAL NO. 348 OF 2008**

**MARY NEKESA (Suing as legal representative of the state of**

**MESHACK NDALILA NYONGESA (Deceased).....APPELLANT**

**VERSUS**

**1. GEORGE MUCHICHU MWAURA**

**2. PAUL NG'ANG'A MUTURI.....RESPONDENTS**

***(Being an appeal from the judgment and decree of the Honourable Ms. E. Maina Senior Principal Magistrate in Nairobi CMCC 10035 OF 2006)***

**JUDGMENT**

The appellant herein, had sued the Respondents as the administrator of the estate of Meshack Ndalila Nyongesa (the Deceased), who passed away following injuries sustained in a road traffic accident along the Saba Saba Road in Kayole Nairobi, on the 29<sup>th</sup> October 2004. The 1<sup>st</sup> Respondent's motor vehicle Reg. No. KTH 254 Isuzu lorry driven and/controlled by the 2<sup>nd</sup> Respondent hit and knocked down the deceased who was lawfully and carefully pushing a handcart. The Appellant contended that the said motor vehicle was so carelessly or recklessly driven, managed and/or controlled such that it went out of control, veered off the road and knocked down the deceased thereby occasioning him fatal injuries. He blamed the accident on the negligence of the 2<sup>nd</sup> Respondent and the 1<sup>st</sup> Respondent being vicariously liable.

The Appellant therefore filed suit against the respondents praying for general as well as special damages under the Law Reform Act and the Fatal Accidents Act.

The respondents filed a statement of defence denying the claim and contending that if the accident occurred as alleged, then the same was wholly occasioned and/or substantially contributed to by the negligence of the deceased. They therefore prayed for the dismissal of the suit.

After a full trial, Judgment was entered in the lower court for the Appellant as against the 2<sup>nd</sup> Respondent only. Damages were also awarded accordingly. Aggrieved by the orders made in the said judgment, the appellant lodged this appeal citing the following grounds in the memorandum of appeal filed on 30<sup>th</sup> June 2008 –

- i. That the learned Magistrate erred in law and fact in dismissing the Plaintiff's suit against the 1<sup>st</sup>

- Defendant contrary to the weight of the evidence on record;
- ii. That the learned Magistrate erred in law and fact in awarding damages for pain and suffering, loss of expectation of life, loss of dependency and funeral expenses that were manifestly so low as to be regarded as unfair compensation to the deceased's estate;
  - iii. That the Learned Magistrate erred in law and fact in adopting wrong principles in assessing damages in the lower court leading her to assess manifestly low damages;
  - iv. The Learned Magistrate erred in law and in fact in failing to consider the plaintiff's submissions and authorities on record.

The appeal was heard by way of written submissions. Those on behalf of the Appellants were filed on 7<sup>th</sup> July 2015 while the Respondents' were filed on 21<sup>st</sup> July 2015.

The obligation of this court after having heard the rival arguments is to reconsider the evidence afresh and make its own conclusion taking into account the trial court had the advantage of seeing and hearing the witnesses. The Respondents did not lead any evidence during the trial.

This means that the Respondents, apart from denying liability in their defence, did not attempt to rebut the evidence of the appellant. Further, PW2 an eyewitness to the accident very concisely adduced evidence on how the accident occurred. This was sufficient to point to negligence on the part of the 2<sup>nd</sup> Respondent as motor-vehicles don't ordinarily veer off the road and hit pedestrians or other road users. As earlier stated, the Respondents did not call or lead any evidence to rebut the testimonies of the two witnesses for the Appellant. It was therefore reasonable for the Learned Magistrate to attribute 100% negligence on the 2<sup>nd</sup> Respondent.

The Respondents claim that the Appellant did not establish ownership of motor-vehicle KTH 254 because the only documents produced to prove ownership were the police abstract and an extract from the Occurrence Book (OB). A perusal of the defence shows that the Respondents apart from casually denying ownership of the motor-vehicle, did not challenge the claim in evidence as they did not lead any. In **Wellington Nganga Muthiora vs Akamba Public Road Services Limited & Another Court of Appeal No. 260 of 2004 [2010]eKLR** it was held –

***“Where police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even cross-examination challenged it, the police abstract being a prima facie evidence not rebutted could be relied on as proof of ownership in the absence of anything else as proof in civil cases was within the standards of probability and not beyond reasonable doubt as is in criminal cases...”***

The trial Magistrate was therefore wrong in her finding that the Appellant had not proved that the 1<sup>st</sup> Respondent was the owner of motor vehicle KTH 254. There having been no evidence offered to contradict this fact, the Appellant established on a balance of probabilities that the said motor-vehicle was owned by the 1<sup>st</sup> Respondent. In view of the foregoing, the 1<sup>st</sup> respondent was therefore vicariously liable for the acts of the 2<sup>nd</sup> Respondent who was his agent. On ground one therefore, the appeal succeeds.

On ground two of the appeal, Damages under the Fatal Accidents Act must be for the benefit only of the wife, husband and child of the deceased person. See section 4(1) of the Act. The deceased was survived by his mother the Appellant herein as there is no evidence that he was married or had any children. The claim made by his siblings cannot stand. The lower court awarded the mother to the deceased a global sum of Kshs. 200,000/= for loss of dependency. However, in order to assess damages under the Fatal Accidents Act, the Deceased's income, the extent of his dependants' dependency and the multiplier to be used must be determined.

The deceased was aged 31 years and of good health when he died. It is reasonable to expect that he would have worked possibly even past the retirement age. As there is no retirement age when one is doing business, there is no higher age limit. Everything being equal he would have worked for another thirty or forty years. Taking into consideration the uncertainties of life it would be proper to apply a multiplier of 25 years.

As for the multiplicand, the evidence on record is that the deceased was a vegetable vendor. The Appellant testified in the lower court that he sent her 10,000/= for her upkeep and that of his other siblings every month. Without any evidence to support these assertions, it is only reasonable to use the minimum wage then as the multiplicand considering vegetable vending would generally give a profit of Kshs. 5,000/- per month on a rough estimate. He probably expended two-thirds of his monthly income on his family considering their circumstances.

Damages would then work out as follows –

**Kshs. 5,000/- X 12 X 2 X 25 = Kshs. 1,005,000/-**

**3**

The award of Kshs. 200,000/- under the Fatal Accidents Act is thus substituted with Kshs. 1,005,000/-.

Under the Law Reform Act, the damages to be awarded are for pain and suffering and loss of expectation of life. Damages under pain and suffering usually depend on how soon after the injuries death occurred and whether the deceased's suffering was prolonged. In this case, the deceased died instantly which in essence means he did not endure considerable pain. The award of Kshs. 10,000/- was reasonable and I see no reason to upset the award. As for loss of expectation of life though the deceased was young and healthy at the time of death, Kshs. 70,000/- awarded by the trial court was sufficient. The Appellant's Counsel in their submissions have quoted **Benedeta Wanjiku Kimani vs Changwon Cheboi & Another [2013]eKLR** where the Plaintiff was awarded Kshs. 100,000/- under this head. It is not sufficient that this Court would have probably awarded a slightly higher amount.

On whether the funeral expenses should be enhanced, these are expenses that ought ideally to be a claim under the Law Reform Act without the necessity of strict proof. Every funeral must involve some expense to the estate of the deceased. Given the status of the deceased and considering he died in the year 2004, Kshs. 15,000/- is reasonable sum for the appellant to spend on her son's funeral. This court finds no reason to disturb that award.

In the end this appeal succeeds save for ground 2 specifically relating to the damages under the Law Reform Act (pain and suffering, loss of expectation of life and funeral expenses).

The Appellant shall have the costs of the appeal.

Orders accordingly.

**Dated and delivered at Nairobi this 21<sup>st</sup> Day of October, 2015.**

**A.MBOGHOLI MSAGHA**

**JUDGE**