



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 454 OF 2008

FRIDA AGWANDA. 1ST APPELLANT

EZEKIEL ONDURU OKECH. 2ND APPELLANT

VERSUS

TITUS KAGICHU MBUGUA. RESPONDENT

(From the judgment and decree of Kiarie W. Kiarie, SPM, in Milimani Commercial Courts Civil Case No. 12852 of 2004)

J U D G M E N T

The facts in the Plaintiff in this case show that the claim arose from a motor accident injuries, which were sustained on or about 20th November, 2001 at Upper Hill in Nairobi.

The facts as far as this court can gather, were that the Appellants Frida Agwanda and Ezekiel Onduru Okech, were relatives of the deceased, Samuel Agwanda Onduru. They filed this claim in the lower court as Administrators of the Estate of the deceased, under both the Law Reform Act, Cap 26 and the Fatal Accidents Act. The trial magistrate rightly ruled that the claim, although poorly drafted in the Plaintiff, was proper and lawful and was sustainable subject only upon the evidence by the parties.

The Plaintiffs had called three witnesses, Dr. Moses Kinuthia, PW 1, Fridah Auma Agwanda, PW 2 and Gladys Iminza, PW 3. The Defendant had testified alone and called no witness.

PW 2, Frida Auma Agwanda testified that she was a business woman and that the deceased Samuel Agwanda Onduru was her brother. On 20th November, 2001 the deceased was involved in a non-fatal motor accident in which he sustained non-fatal injuries. He died on 30th July, 2002 from other causes. She produced the Letter of Administration, a P3 and, medical treatment documents. She also produced demand letters written to the Defendant and his insurance company in relation to the motor vehicle insurance cover. A letter from the insurance company in response to the demand letter was also produced, all as exhibits. The witness finally also produced receipts given for medical treatment and prayed for special and general damages.

Dr. Moses Kinuthia had examined the deceased on 10th June, 2002 and confirmed that the deceased had in the motor accident sustained

- a. Facial injuries with a cut wound on the lower lip.
- b. Had lost a set of upper teeth.

- c. Had body soft injuries on the left-hip-joint.
- d. Had injury which left a rugged scar on the inner and outside lower lip.

- e. That the injuries were moderate soft tissue injuries.

The Doctor also testified that the wounds had healed with ugly scars. The teeth would require replacement at estimated costs then of Kshs.600,000/- to Kshs.800,000/-. He also produced the payment receipt he had received for his evidence and medical report. He said he had also noted that the patient had received medical treatment at Kenyatta National Hospital. He concluded that the patient's injuries were not fatal at the time but were soft tissue injuries.

P W 3, Gladys Iminza testified that she was a trader in groceries and knew Samuel Agwanda Onduru well. Samuel was a business neighbour at upper Hill where he ran a hotel. That on 20th November, 2011 a power transformer about 3 metres nearby, blew up with big banging noise. The customers who were at the time in Samuel's Hotel were shocked and panicked due to the great noise. They began running from the hotel to all directions. At the relevant moment a motor car was being driven from the City Bank Group towards Bunyala Road. The driver of the said motor vehicle lost control and hit Samuel who had come out and stood outside his café, about 3 metres from the road. According to this witness, the driver was relatively in high speed and had hit the deceased outside of the road on which he was driving. The witness also testified that the driver himself took the deceased Samuel to hospital. That before he lost control and drove outside the road, he had overrun bumps which had been fixed on the road to reduce motor vehicles speeds.

The witness was categorical that the deceased Samuel had not left the Cafe to run to the road in panick as did his customers.

The Defendant/Respondent had also testified in his defence. He said that on the material morning he was indeed driving along Upper Hill Road at 8.15 a.m. going to his office. He then suddenly saw people running in a rush from the left side of the road as he drove to Bunyala Road. He quickly made the impression that they were running way in panick from something. That he then saw the deceased run to the road in his front and applied brakes but was unable to stop the car, although he was driving slowly at about 30KPH. That it was the deceased who hit his vehicle on the left front side wing. That the deceased was indeed injured as he also fell on the edge of the road. That he took the injured person to hospital in company of a police officer who came to the scene, before reporting the incident at Kilimani Police Station. He concluded his evidence that he did not go off the road when he hit the pedestrian.

The Defendant also stated that he did not have opportunity to stop, swerve the car before the accident, to avoid it. He said that he did not panick. He recorded his statement at the police station.

The trial magistrate considered the above evidence from both sides. He accepted the medical evidence establishing the soft tissue injuries sustained by Samuel Angwena Onduru. He was however, of the view that the Defendant was not in high speed, taking account of the circumstances of the case and was persuaded that by the time the accident actually occurred and the collision occurred, the Defendant's car had successfully been brought to a halt.

The Learned trial magistrate believed that the deceased was himself running away when he was hit and this is because the customers in the deceased's cafe were all running in panick and that is common sense.

On the above basis, the trial court found that the Defendant/Respondent was not to blame and was not liable. The blame lay in the people running in a stampede as the Defendant acted in a manner any prudent driver would act. He dismissed the claim which led to this appeal.

I have perused the record of evidence and the manner the same was handled by the lower court. I am also conscious of the fact that my duty is to fully re-evaluate the evidence and independently come to a reasonable conclusion as properly supported by the evidence. I am also aware that I did not have opportunity to hear the witnesses at close range and did not observe their demeanour, as did the trial

magistrate. I am therefore to approach the issues with sufficient reasonable caution. I might, therefore, find that the conclusions I might reach on matters of fact might be different from that reached by the trial magistrate. However, only if the conclusions reached by the trial court are odd or do not add up, or are unreasonable in the circumstances, should I then find reason to interfere with the trial court's conclusions.

I find that the evidence of PW 3 Gladys Iminza was clear and straight forward. Customers who heard the big transformer explosion run in panick indeed. The deceased was the owner of the cafe. He was not likely to run away and leave his hotel empty and unattended. There is evidence that he got curious and came out of the cafe and stood there as people ran, probably having not paid him for the food they had been eating. There is no evidence that the explosions continued even after he came out. The most logical and common sense conclusion which also would be supported by the clear evidence of PW 3 Gladys Iminza, is that the deceased stood outside the cafe to see what had caused the explosion, before he was suddenly hit by the Defendant's run-away motor car.

The Defendant testified that he had applied brakes but his car did not stop. That clearly suggests that the car was immediately before the application of brakes, on high speed, otherwise it would have stopped immediately on the first application of brakes.

Secondly, if the motor car had stopped before the collision took place, as the trial court concluded, where would the impact to bring the deceased to the ground and/or cause the serious soft body injuries, result from? Clearly, the impact had strong force between the deceased and the Defendant/Respondents car and the trial magistrate's conclusions on that fact, was erroneous and unsustainable.

Thirdly, the Defendant in his evidence admitted that he formed the impression that the people he saw running at the material time, were panicky and were running from something capable of causing the panick. He thus admitted that he might himself have panicked. That ties well with the evidence of Gladys Iminza that he had run over bumps and had driven out of the road to where the deceased stood outside his café.

Finally, the Defendant could have produced the Police Abstract Report to show what he had reported or whether the Police recorded the incident, especially after being helped by a police officer to take the injured person to hospital, but he chose not to. He also did not call his wife who as well, witnessed the accident. The omission can only be read and understood in favour of the deceased. That is to say, had the evidence been brought on record, it would support the Plaintiff's case.

I come to the conclusion that the Plaintiffs/Appellants; had proved their case on the balance of probabilities as a required by law. They should have been given a favourable judgment in assessed damages both special and general. Indeed even when the learned trial magistrate dismissed the claim, in such a case, he should have assessed damages, notwithstanding the dismissal. That now will be done by this court, for convenience, instead for returning the file to the lower court for assessment.

The Plaintiffs had sought Ksh.300,000/- for general damages and Ksh.2,500/- for special damages. The deceased Samuel Agwenda Onduru suffered soft-tissue injuries which the Plaintiff assessed at Kshs.300,000/-. This figure was not opposed or disputed by the Defendant. The court notes also that the deceased's set of teeth which might cost about Ksh.60,000/- to Ksh.80,000/- was lost but he did not however, live longer to need it. The court will accordingly not award that aspect of the claim.

Doing the best I can, I award.

- 1. Special damages of Ksh.2,500/-.**
- 2. General Damages of Ksh.300,000/- enhanced to Kshs.400,000/- to take account of devaluation of the Kenya Shilling.**

I allow this appeal and order that judgment in favour of the Plaintiff/Appellants be entered as stated above with costs. Interest on special damages shall apply as of the date of filing the suit while general damages

will attract court interest from the date of judgment of the lower court. Orders are made accordingly.

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D A ONYANCHA

JUDGE

Dated and delivered at Nairobi this 18th day of November, 2015.

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D A ONYANCHA

JUDGE