



**1. REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 86 OF 2006**

**GLADYS WANJIRU NJARAMBA**

*Suing as personal representatives of the Estate of*

**ERNEST WAWERU NJARAMBA, GEORGE MAINA NJARAMBA.....APPELLANT**

**Versus**

**GLOBE**

**PHARMACY**

**THOMAS OKOTH ONDONGO.....RESPONDENTS**

*(Appeal arising from the judgment of Hon. R.N Nyakundi*

*Chief Magistrate in Nyeri Civil Case No. 245 of 2003)*

**JUDGMENT**

1. By a plaint dated 4th April 2003 the Appellant sued the respondents in respect of a road traffic accident on 14th June 2002 involving GEORGE MAINA NJARAMBA and motor vehicle Registration No. KAP 494L and claimed for general damages under Law Reform Act Cap 26 and the Fatal Accidents Act Cap 32 and special damages of Ksh. 35,250 having all attributed the said accident and subsequent death of the deceased to the negligence of he 2nd Respondent.
2. The Respondents filed a statement of defence dated 22nd May 2003 in which they denied ownership of the said motor vehicle and attributed the occurrence of the accident therein to the deceased particulars whereof were pleaded on paragraph 6 of the defence.
3. The matter proceeded for hearing and Nyakundi R.N. Dismissed the appellant's claim on the basis that she had failed to establish negligence on the part of the 2nd Respondent on a balance of probability.
4. Being aggrieved by the said decision the appellant filed this appeal and raised the following grounds of appeal.
  1. ***The learned trial magistrate erred in fact and in law in finding that the appellants had not on balance of probabilities, established that the 1s respondent was the owner of motor vehicle registration No. KAP 494 L.***
  - 2.
  1. ***The learned trial magistrate erred in fact and in law in failing to assess damages he would otherwise have awarded to the appellants.***
  - 2.
  1. ***The learned trial magistrate erred in fact and in law in failing to take into account the appellants' evidence and submissions.***

2.

1. ***The learned trial magistrate erred in fact and in law in failing to consider the appellant had joined issues in the reply to defence.***

1. ***The learned trial magistrate erred in fact and in law in stating the whole of the plaintiffs' claim failed without addressing all the evidence adduced.***

2.

***6. The learned trial magistrate erred in fact and in law in failing to consider all the evidence, pleadings, fact and law before him and in failing to make a finding on each and every issue raised by parties.***

1.

2. **SUBMISSIONS**

3. Directions were given that this appeal be heard by way of written submissions which have now been filed.

4. **APPELLANT**

5. On behalf of appellant it was submitted that since the respondent had in its defence admitted the ownership of motor vehicle Registration No. KAP 494L by virtue of the provisions of section 60 of the Evidence Act there was no need to prove this fact. It was further submitted that the appellant had clearly stated that the owner of motor vehicle was Globe Pharmacy a fact which was confirmed by the police file and the police abstract. In support thereof the case of PHILIP TOROITICH ANOTHER V ALIAS TOROITICH CHERUBO ELDORET HIGH COURT CIVIL CASE NO. 152 OF 2007 was submitted.

6. It was further submitted that the trial court failed to assess damage he would have awarded to the appellant who had submitted Ksh. 3,235,150 in support thereof the following cases were submitted.

7. a. MORDEKAI MWANGI NANDWA v BHOGALS GARAGE LTD CA NO. 124 OF 1993

8. b. JACKLINE MUENI NZIOKA V JETHA RAMJI KERAI NRB CA NO. 154 and 155 of 1996 among others.

9. It was submitted that the trial court failed to take into account the appellant's evidence and submissions and in particular the evidence of the investigating officer who explained that pedal cyclist was hit from behind from the extreme left side of the road and he preferred a charge of causing death by dangerous driving and the sketch plan on where the accident occurred produced in evidence.

10. It was further submitted that the trial court did not consider all the evidence, pleadings, facts and law before it and failed to make finding on each and every issue raised by the parties. The trial court it was submitted did not consider whether the plaintiff had proved her claim for special damages of Ksh. 35,000/-.

11. **RESPONDENT**

12. On behalf of the Respondent it was submitted that the appellant did not call an eye witness in the case with the only evidence tendered being that of the police officer which was hearsay. In support thereof the case of ROBERT GITAU KANYIRI v CHARLES R. KAHIGA 2 OTHERS [2010] 2KLR was submitted.

13. It was further submitted that the appellant court can not substitute the chief magistrates judgment on liability since it was a decision made having regard to the evidence presented by the parties in support thereof the case of KARANJA v MELELE (1983) klr 142 at Page 152 where the court had this to say:

14. ***"I agree with what Law JA said in Malde v Angira civil appeal No. 12 of 1982(unreported) that apportionment of blame represents an exercise of discretion with which this court will interfere only when it is clearly wrong or based on no evidence or on the application of a wrong principle."***

15.

16. It was further submitted that the chief magistrate was right in dismissing the appellant's suit on the basis that the burden of proof on the plaintiff was not discharged. It was submitted that the fact that the chief magistrate did not assess what sort of general damages that would have been

awarded is not a ground to allow the appeal

#### 17. **EVIDENCE**

18. This being a first appeal, the court is expected to reevaluate the evidence tendered before the trial court and to come to its own conclusion though taking into account the fact that it did not have the advantage of seeing and hearing witnesses as per the decision of JABANE v OLENJA 1986 KLR 664, JACKSON AMWOKA V ABDULHALIM SALYANI CIVIL APPEAL NO. 288 OF 1998.
19. It was the evidence of P.W.1 PC FRANCIS MURIU that the deceased a pedal cyclist was hit by motor vehicle from behind on the extreme left side of the road as one faces Karatina by the second defendant known as OKOTH ODONGO who was later charged with causing death by dangerous driving. He further confirmed that the owner of the motor vehicle was the 1st defendant (respondent) Global Pharmacy and produced police abstract. Under examination the witness stated that he is not the one who visited the scene of the accident.
20. P.W.2 GLADYS WANJIRU stated that the deceased was 25 years old and used to sell shoes and was giving her Kshs. 5000/- per month. She produced the receipt in respect of the police abstract, licence of motor vehicle at Ksh. 15,000/= purchase of coffin at Ksh. 3500/- and Ksh. 15,000/- for filing of letters of administration.
21. The respondent witness THOMAS OKOTH ODONGO in his evidence stated that he worked with Global Pharmacy Ltd as a sales supervisor and on the material day was driving motor vehicle registration KAP 494L at a speed of 90 KPH when the deceased made a U-turn from the right and entered the road to the left in front of him. He tried to avoid hitting him but ended up hitting him on the rear.
22. Based upon this evidence R.N. Nyakundi C.M. identified two issues for determination being liability and quantum and on liability held that the appellant failed to prove that the second defendant was in any manner liable for the death of the deceased and that the police file recommendation are of little benefit. On damages the court found that the appellant was not entitled to any compensation and dismissed the case with cost.

#### 23. **ISSUES**

24. From the pleadings proceedings and submission herein I have identified the following issues for determination.

1. ***Was the trial magistrate in error in failing to assess general damages payable to the appellant having dismissed this suit.***
- 2.
3. ***Did the appellant prove her case on a balance of probability or did the same fail to prove her case.***
- 4.
5. ***What order should the court grant.***
- 6.

1. It is trite law that the trial court was under duty to assess the general damages payable to the plaintiff even after dismissing the suit. This position is confirmed by the court of appeal in the case of MORDEKAI MWANGI NANDWA v BHOGALS GARAGE LTD CA NO. 124 OF 1993 reported in [1993] KLR 4448 where the court held that the practice that damages be assessed even if the case is dismissed does not imply writing an alternative judgment” and in the case of MATIYA BYABALOMA & OTHERS v UGANDA TRANSPORT CO. LTD UGANDA SUPREME COURT CIVIL APPEAL No. 10 OF 1993 IV KALR 138 where the court held that the judge erred in not assessing the damage he would have awarded had the appellant been successful in her claim”.
2. From the above authorities it is clear that the trial court fell into error by not assessing the award of general damages he would have awarded to the appellant had she been successful in proving her case.
3. On the issue of liability the evidence on record is very clear that the deceased was knocked down by the 2nd Respondent from behind. The police abstract and police file were all produced in evidence and there are in my considered opinion documentary evidence which established the negligence on the part of the 2nd respondent. There is evidence on record that the 2nd respondent was charged with the offence of causing death by dangerous driving.
4. I therefore find that the trial court fell into error by holding that the plaintiff/appellant did not

- discharge the burden of proof and would therefore allow the appeal herein and set aside the trial courts judgment in dismissing the appellants case.
5. Section 78(2) of Civil Procedure Act give this court the same powers of the trial court and therefore on the issue of liability upon evaluation of the evidence tendered before the trial court and taking into account the fact that the 2nd respondent knocked the deceased from behind and was subsequently charged with the offence of causing death by dangerous driving I hold that the 2nd respondent was liable for the accident herein at 90% against the deceased 10%.
  6. On quantum the appellant had proposed damages under Law Reform Act at a sum of Ksh. 150,000/- in respect of the deceased herein and used the cases of (1) JACKSON MAGATA KARITU v CHARLES CHERUIYOT KETER NAKURU HC. NO. 437 1996 where a 16 year old was awarded Ksh. 120,000/- (2) ALICE MBOGO V SAMUEL KIBURI NJOROGE NK HCC NO. 357 OF 1999 – Ksh . 150,000/-. I am of the considered view that a conventional figure of Ksh. 100,000/- would be adequate and I find support thereof in the case of NJUGUNA v AG CA NO. 55 OF 1997.
  7. On pain and suffering from the death certificate and the police abstract it is clear that the deceased died on the same day. The appellant proposed 50,000/- but without indicating justification for the same having submitted two authorities where a sum of Ksh. 25,000/- was awarded. I am therefore of considered opinion that an award of Kshs. 25,000/- would be very adequate.
  8. In assessing an award for lost years the task of the court is to find the age, wages and consider the expectant of the deceased and the proportions of the net income the deceased would have made available for his dependant as per the decision of Ang'awa J in DAVID NGUNJE MWANGI V THE CHAIRMAN OF THE BOARD OF GOVERNOR OF NJIRI HIGH SCHOOL MILIMANI CIVIL CASE NO. 2409 OF 1990 reported in (2001) 2 KLR.
  9. The deceased herein was 25 years old. According to the appellant he used to give her Ksh. 5000/- per month but she provided no evidence for the said support neither did she give any documentary evidence in support of the deceased earnings which was put to Kshs. 15000/-. In the absence of any evidence I would adopt multiplicand of Ksh. 5000/- and since the deceased was not married and the appellant being his mother who had other children who could have supported her I would adopt a 1/3 as being available to support his mother with a multiplier of 25 years.
  10. From the aforesaid lost years would therefore work as follows:
  11.  $1/3 \times 12 \times 25 \times 5000 = 500,000/-$
  12. I would therefore allow the appeal herein and substitute the trial courts judgment dismissing suit with judgment as follows:
  - 13.a. Liability 90%:10% against the respondent.
  - 14.b. Pain and suffering Kshs. 25,000/-
  - 15.c. Law Reform Ksh. 100,000/-
  - 16.d. Lost years  $1/3 \times 5000 \times 12 \times 25$  Ksh. 500,000/-
    1. Total Ksh. 625,000/-
    2. Less 10% Kshs. 62,500/-Ksh.562,500
  17. The appellant is entitled to cost of the lower court suit and cost of the appeal.
  18. dated, signed and delivered at Nyeri this 4th day of April 2014.
  - 19.

J. WAKIAGA

JUDGE

Mr. Muhoho for Gathiga Mwangi for appellant.

Mr. A. Kariuki for Mr. Masika for Respondent.

Court: Judgment read in open court in the presence of the above named.

J. WAKIAGA

JUDGE

1.