



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 165 OF 2011

JAMAL MOHAMMED SUNKAR APPELLANT

VERSUS

- 1. ANGELINA MASAA MUTEMI**
- 2. DAUDI MUTUA MUTEMI RESPONDENTS**

(Being an appeal from the Judgment and Decree of the Senior Resident Magistrate's Court at Mwingi of Hon H.M. Nyaberi (S.R.M) Civil Case No. 53of 2008 dated 19th October 2011)

(Before B. Thurairaja J)

J U D G M E N T

1. The Respondents, **Angelina Masaa Mutemi** and **Daudi Mutua Mutemi** were the Plaintiffs in the lower court. They had sued the Appellant, **Jamal Mohammed Sunkar** as the 3rd Defendant and the equitable and/or beneficial owner of motor vehicle reg. No. **KAE 063Z** lorry registered in the name of the 2nd Defendant **China Jiangsu International Economic Technical Co-operation**. The 1st Defendant was **Daniel Chiira Mwangi** who was sued as the registered owner of motor vehicle Reg. No. **KAQ 877V** (matatu).
2. The Respondents were the legal representatives of the late **Mutemi Mutua** (deceased) who was involved in a fatal road accident on 18/5/2005. The Respondents blamed the accident on the alleged negligence in the manner in which the two motor vehicles were being driven at the material time. The Appellant denied any negligence and blamed the accident on motor vehicle **KAQ 877V**.
3. The 1st and 2nd Defendant did not enter appearance or file any statement of defence and interlocutory judgment was entered on 23/3/2009. The case was subsequently fixed for hearing. Judgment was finally entered for the Respondents on 100% liability against the Appellant for Kshs.800,000/= plus costs and interests.
4. The Appellant was aggrieved by the said judgment and appealed to this court on grounds that can be summarized as follows:-
 - **The judgment was against the weight of the evidence.**
 - **The trial magistrate erred in failing to apportion liability.**
 - **The Appellant was not given the opportunity to call a crucial witness.**
 - **The award of General Damages was excessive.**

5. Directions were given that the appeal be canvassed by way of written submissions. The Respondents filed their submissions but the Appellant did not file any.
6. This being a first appeal, the court is duty bound to re-evaluate the evidence on record and come to its own findings – See **Selle –vs- Associated Boat Co. Ltd (1968) EA 123**.
7. During the trial before the lower court, the Respondents called three witnesses. PW1 **Angelina Masaa Mutemi** is the widow of the deceased who is also one of the administrators of the estate of the deceased. PW2, **Francis Malili Mathenge** was the eye witness. According to PW2, he was at **Mwingi-Garissa road** waiting for a motor vehicle to go to **Nairobi** when the matatu registration No. **KAQ 877 V** (matatu) came from **Mwingi direction**. That the matatu stopped with one side on the tarmac and the other side off the tarmac. A bus that also came from **Mwingi direction** stopped behind the matatu. Before PW2 could enter the matatu he heard people shouting and upon checking saw motor vehicle **KAE 052 Isuzu lorry** (lorry) coming from **Mwingi direction** and it avoided hitting the matatu and veered off the road and stopped about 10 metres away from the matatu. PW2 later saw the deceased who was injured and unconscious lying next to the matatu.
8. PW3 **C.I.P. Ndiema Cyrus** from **Mwingi Traffic Base** testified using the records of the accident. He blamed the accident on the matatu which he stated had stopped suddenly at the middle of the road. His evidence was that the deceased was a pedestrian. The driver of the matatu was charged with the offence of careless driving according to PW2 and the police abstract produced. The court proceedings in the traffic case were not produced as exhibits.
9. The Appellant is the only witness who testified on the Defendant's side. The Appellant (DW1) testified that he was the owner of the lorry and that he was informed by his driver about the accident. The Appellant was however not at the scene of the accident. DW1's driver did not testify. Whatever the Appellant was told by his driver remains mere hearsay.
10. From the evidence of PW2 and that of the investigations carried out as per the evidence of PW3, my view of the accident is that none of the two drivers can escape liability. The uncontroverted evidence of PW1 and PW2 establishes that the matatu stopped partly on the road. On the other hand, there is no evidence to show why the lorry driver was not able to stop or to overtake the matatu. The Appellant closed his case after giving his evidence. There was no attempt made to apply for adjournment to call any other witnesses. The Appellant cannot therefore be heard to complain that he was not given the opportunity to call a crucial witness. The copies of records from **Kenya Revenue Authority** confirmed that the matatu was owned by the 1st Defendant. The 1st Defendant however is not a party in this appeal. Although the two copies of records produced dated 5/11/2007 reflect both the 2nd Defendant and the Appellant who was sued as the beneficial owner of the lorry, the Appellant in his evidence admitted the ownership of the lorry. I would apportion liability between the matatu and the lorry on 50:50 basis.
11. The evidence of PW1 (the widow) shows that the deceased was married and had four children and an elderly mother who were dependent on him. The widow claimed Special Damages totaling Kshs.60,980/= and produced the receipts in support thereof. However the receipts bear no revenue stamps except one for Kshs.8,400/=. It is not clear from the evidence or the judgment of the lower court how the trial magistrate arrived at the award of Kshs.16,795/= as Special Damages.
12. On the issue of General Damages, the widow produced the Death Certificate which reflects the age of the deceased as 47 years. The payslip produced reflects a net pay of Kshs.21,621/=. The deceased was married and had a family which he provided for. The trial magistrate was right in adopting a multiplier of 10 years; a multiplicand of Kshs. 21,621/= and a dependency ratio of 2/3 and arrived at a total of Kshs.1,729,680/=. I would assess pain and suffering for the two days at Kshs.50,000/= and loss of life at Kshs.100,000/=. The total award comes to Kshs. 1,879,680/=. The trial magistrate however gave a total award of Kshs.800,000/= plus costs and interests based on his pecuniary jurisdiction. The total award of Kshs.800,000/= is less than half of what the Respondents would have been entitled to if the suit had been filed in a court with a higher pecuniary jurisdiction. The issue raised by the Appellant that the award of damages was excessive therefore has no merits.
13. With the foregoing, I enter judgment on liability against the 3rd Defendant/Appellant at 50% and

uphold the total award of General Damages at Kshs.800,000/= plus costs and interest. The appeal having been partly successful, each party to meet own costs of the appeal.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 30th day of September 2014.

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B. THURANIRA JADEN

JUDGE