



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
CIVIL APPEAL NO. 26 OF 2013

DR APOLLO MAINA T/A

FUGALIMA CENTRE.....APPELLANT

VERSUS

GRACE NJAMBI IRUNGU

(Suing as the administratrix of the estate

of

Lucy Njeri Njambi (Deceased)).....RESPONDENT

(Being an appeal against the judgment and decree issued in Kigumo Resident Magistrate's Court Civil Case No. 132 of 2008 (Hon. M. W. Mutuku)

JUDGMENT

Background

This appeal arises out of a judgment in a case in which the appellant was held to have been solely responsible, albeit vicariously, for a road traffic accident that resulted in the death of the respondent's daughter Lucy Njeri Njambi (the deceased) on 6th February, 2007.

The occurrence of the accident was not disputed; from the evidence on record, it is apparent that both parties were in agreement that a road traffic accident involving the appellant's motor vehicle registration number **KAT 633 S** and the deceased occurred either along or off Maragwa range road near Mugetho trading centre on 6th February, 2007. They were also agreed that the deceased died as a result of this accident.

The only points of divergence between the parties in this appeal as they were in the subordinate court are first, the liability attributed to the appellant's driver who was driving the ill-fated vehicle at the material time and second, the quantum of damages payable to the deceased's estate under the **Law Reform Act (Cap. 26)** and under the **Fatal Accidents Act (Cap. 32)**.

The parties' cases

The plaintiff's case was that the appellant was solely responsible for the accident; in support of her case, the plaintiff called an eye-witness who was with the deceased when the accident occurred. This witness, Mercy Njoki (PW1) was aged eleven at the time she testified implying that she was approximately eight

years old when the accident occurred three years before.

According to Mercy Njoki's testimony, the deceased, herself and one Joyce Wairimu were coming from school on the material day. The deceased was walking alone while she walked with Joyce Wairimu on the opposite side of the road; apparently, their respective schools were on the opposite side of the road. She then saw an on-coming motor vehicle which swerved and hit the deceased. The vehicle stopped and its occupants including the driver came out, looked at the deceased, who apparently had fallen down and was lying near the vehicle bleeding. The driver of the vehicle and his passengers removed the deceased from where she was and placed her somewhere around the road; they left abandoning her there. Mercy Njoki and Joyce Wairimu ran home to tell their mother about the accident.

The deceased's mother, the respondent herein, told the court that she was a single mother and the deceased was one of her only two children; she told the court that the deceased was aged five at the time of the accident. When she went to the scene, she found her daughter lying off the road, still bleeding with her face on the ground. The police arrived at scene after the deceased had apparently died. She came to learn later that the accident vehicle was the appellant's and it was his driver who had reported the accident when she got the police abstract from Maragua police station.

The driver of the accident vehicle Joseph Kiiri (DW1) testified on behalf of the appellant; the following is an excerpt of his statement to the court:-

“It was about 3p.m. A few metres from the shop, we saw three children on the left side of the road. They were in uniform. As I approached, one child ran across the road. I swerved to the right to avoid the child. She was hit by the right side of the motor vehicle; part of my motor vehicle was in the bush. When I noted I had hit the child, I pulled off the road. The right side mirror got broken by bushes as I avoided the accident. I got out and saw the child bleeding. I noticed the child had died. I called my boss Dr Apollo Maina. He told me to report. I went to Maragua police station. We went back to the scene and saw the child had been taken to the mortuary. It was raining during the day. The accident took place on a rough road and the road is narrow and bushes on the side. I was driving at about 50 Km/hr. I saw the child earlier but she jumped on the road. I swerved on the opposite side to avoid the other two. The child was on the side of the road of the motor vehicle, the others remained on the opposite side of the road. I have driven for 10 years.”

Grace Wambui Wainaina (DW2) who was a passenger in the appellant's vehicle at the material time witnessed how the accident happened; she said that they saw children on the side of the road; she could not remember how many children they were but that in order to avoid them, the driver decided to drive to the right. Somehow, the vehicle was driven to the bush and apparently it hit the deceased when she attempted to cross the road. According to this witness the vehicle was being driven at 20km/hr.; she was, however, clear that the road was straight and they could see the children ahead of them before the accident happened. On cross-examination she said:-

“The children were standing beside the road, on the left side of the road. She jumped to the left side. I do not know why the driver did not stop.”

Basically, this is the evidence that was led at the hearing of the suit against the appellant. As noted there are only two issues in dispute; whether the appellant was wholly responsible for the accident and whether the award made by the learned magistrate was excessive in the circumstances. The analysis of the evidence presented in the subordinate should dispose of these questions.

Liability

The evidence of the two appellant's witnesses left no doubt that what the plaintiff told the court was the more likely explanation of how the accident; this is because their version of evidence is not only contradictory and inconsistent but is also illogical.

The driver testified that he saw three children who were all on the left side of the road. It is when one of them, apparently the deceased, attempted to run across the road that she was hit by the right side of the vehicle.

Grace Wambui Wainaina, the driver's passenger confirmed that they saw the children ahead of them, on the side of the road; however, she added that in order to avoid them, the driver moved to the right but still hit the deceased by the right side of the vehicle when she attempted to cross the road.

If it is true the deceased was on the left side of the road it is difficult to make out how she could have been hit by the right side of the vehicle when she allegedly attempted to cross the road as these two witnesses claimed.

If the deceased was on the left side of the road, which is the same side that the vehicle was being driven, she could only have been trying to cross from the left to the right and therefore the most probable point of impact would have been the left or front side of the vehicle but not its right side.

These witnesses' testimony that the deceased was on the left side of the road but was hit by the vehicle's right side when she allegedly attempted to cross the road is illogical and is simply misleading.

It is also noted that in cross-examination, the driver's passenger, Grace Wambui Wainaina said that the deceased jumped on the left side of the road contradicting her evidence in chief and that of the driver that the deceased was initially on the left side of the road and was crossing to the opposite side when she was hit.

The first respondent's witness testimony is more plausible; she said she was on one side of the road together with her friend Joyce Wairimu while the deceased was on the opposite side of the road; the vehicle swerved and hit the deceased who was on the right side of the road. This testimony is more credible and the learned magistrate cannot be faulted for accepting it as the truth for several reasons; first, the driver himself testified that he swerved to the right side of the road and the reason he gave for swerving in this direction was to avoid hitting the deceased.

Looking at the entire evidence, it is true that the driver swerved to the right; however, the evidence on record does not support his contention that he swerved to the right to avoid hitting the deceased. His own passenger contradicted him in this respect; she told the court that the driver swerved to the right to avoid hitting the other two girls who were on the opposite side, the left side of the road. Irrespective of the reason as to why the driver swerved to the right, he ended up hitting the deceased who was on that side of the road. This explains why the point of impact was on the right hand side of the vehicle.

Is it an accident that the driver could have avoided? In my humble view, the accident could and should have been avoided were it not for the negligence of the appellant's driver in driving, managing or controlling the accident vehicle. I am of this view because, in his own words, the driver said that he saw the children ahead of him in advance; he also described the road on which he was driving as rough and narrow; finally, he said that the road was bushy on its either sides. Any reasonable man driving under these conditions would be expected to be vigilant and exercise the necessary care to avoid any tortious acts that may be attributed to all or any of these conditions, whether directly or indirectly. The appellant's driver does not appeal to me to have exercised this care; instead he appears to have likely breached the duty of care he owed to other road users such as the deceased. My assessment of the evidence on record is that he was solely responsible for the accident.

In his submissions, counsel for the appellant urged this court to find that the deceased, though a child at the material time, contributed to the accident. In view of my assessment of the evidence on record, no case for contributory negligence was made out, regardless of the age of the victim; however, even if this argument for contributory negligence was viable, I doubt I would hold a five year old child to have contributed to the accident. I am not satisfied and no material was presented in court to persuade me that a child of five years and in particular the deceased had the requisite road sense to avoid the accident.

In the case of **Rahima Tayab & Another versus Anna Mary Kinaru (1982-88) 1KLR 90**, a decision which was cited by the appellant's counsel, the Court of Appeal considered the question of age of a child as a factor whenever questions of contributory negligence arise. The court cited its predecessor's decision in **Attorney General versus Vinod (1971) EA 147** which found that a boy aged eight and a half years who ran out from a line of parked cars into the path of an oncoming car, was contributorily negligent to the extent of 10%. The court quoted Mustafa J.A. who said:-

“In dealing with contributory negligence on the part of a young boy the age of this boy and his ability to understand and appreciate the dangers involved have to be taken into consideration.”

More pertinent to this appeal, is the passage from the judgment of Lord Denning in **Gough versus Thorne (1966) WLR 1387** which Mustafa J.A. quoted in his decision. In that case Lord Denning was of the view that:-

“A very young child cannot be guilty of contributory negligence. An older child may be. But it depends on the circumstances. A judge should only find a child guilty of contributory negligence if he or she is of such an age as to be expected to take precautions for his or her own safety; and then he or she is only to be found guilty if blame is attached to him or her. A child has not the road sense of his or her elders. He or she is not to be found guilty unless he or she is blameworthy.”

I would suppose that a child of five years such as the deceased is in the category of “a very young child” in circumstances that Lord Denning had in mind; she could not be held to be blameworthy because she was unlikely to have the requisite road sense and apprehension of the potential danger.

As noted, however, I was not going to impute any responsibility on the deceased even if she was of age because the evidence on record strongly suggests that she was innocent. My brief remarks on the question of contributory negligence vis-à-vis the age of the victim are out of deference to the learned counsel for the respective parties who made substantial submissions on this point.

Quantum

The appellant has urged this court to review downwards the amount of damages awarded to the respondent because in his view, the learned magistrate's award was manifestly excessive; in this regard the learned counsel for the appellant cited the decision in **Bashir Ahmed Butt versus Uwais Ahmed Khan (1982-88) 1KLR 349 (at page 356)** where it was held that an appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate; it must however be shown that the judge proceeded on the wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was inordinately high or low.

The learned magistrate made an award of Kshs. 577, 667/= broken down as follows:-

Pain & Suffering	Kshs	10,000.00
Loss of expectation of life	Kshs	140,000.00
Lost years	Kshs	400,000.00
Special damages	Kshs	27,000.00

These awards were way above what the learned counsel for the appellant thought was a fair compensation due to the respondent under the **Fatal Accidents Act** and the **Law Reform Act**. In his view, the award should have been as follows:-

General damages

under the Law Reform Act	Kshs	80,000.00
General damages		
for pain and suffering	Kshs	10,000.00
General damages under the		
Fatal Accidents Act	Kshs	200,000.00
Special damages	Kshs	21,000.00

The appellant's counsel's proposal was based on the decision of Visram J (as he then was) in **Muchoki versus Attorney General (2004) KLR 518**, a case that was decided ten years ago. Except for the special damages, the proposed awards under separate heads are similar to the awards made in that case.

Counsel also cited the case of **Rahim Tayab and Another versus Mary Kinanu (1982-1988) 1KAR 90** where the Court of Appeal reduced the general damages awarded by the High Court to a minor who had been injured in a road traffic accident from Kshs 750,000/= to Kshs 300,000/=. In that case Hancox J.A. dissented and proposed a figure of Kshs. 400,000/=. The decision was made in 1983 which is more than thirty years ago.

The respondent's counsel on the other hand had proposed Kshs. 20,000/= for pain and suffering, Kshs. 200,000/= for loss of expectation of life, Kshs. 800,000/= for lost years and Kshs. 27,665 as special damages. Though he cited several decisions in support of his proposal he only submitted to court the decision in **Nairobi High Court Civil Case No. 2409 of 1998, David Ngunje Mwangi versus The Board of Governors, Njiri High school. In that case** Ang'awa, J. awarded the sum of Kshs.10, 000/= for pain and suffering; Kshs. 60,000/= for loss of expectation of life and Kshs.1, 680,000/= for lost years in respect of a seventeen year old boy who died in a road traffic accident. The decision was made in 2001.

Looking at the two decisions cited by counsel in support of the respective positions they have adopted, I am not persuaded that the awards made by the learned magistrate under heads of the Law Reform Act and the Fatal Accidents Act were far off the mark; there is nothing to suggest that the awards were inordinately high or the learned magistrate proceeded on the wrong principles or that she misapprehended the evidence in some material respect in arriving at the awards she made. The only variation I would make is in respect of special damages; the record shows that the special damages that were pleaded and proved amounted to Kshs. 19,365/= the sum of Kshs 27,000/= which the learned magistrate awarded under this head was not supported by evidence.

I respectfully agree with the awards made in **Muchoki versus Attorney General (supra)**; however, it is noted that the learned judge adopted the reasoning of Musinga J (as he then was) in **Patrick Nthenge versus Tawfiq Bus Services Ltd, Nakuru HCCC No. 178 of 1997** in which he distinguished the Court of Appeal decision in **Sheikh Mushtaq Hassan versus Nathan Mwangi Kamau Transporters and Five Others (1982-1988) 1KLR 946** that while parents in Kenya are entitled to rely on their children for support in old age, the situation is different in a case of a three year old whose future in this regard is unknown. In that case the learned judge held that it would be speculative to hold that such child would go through life relatively successfully and earn a living out of which he will support his parents. He therefore awarded conventional damages under the Fatal Accidents Act for loss of dependency.

The deceased in this case was aged five, she was already enrolled in school and therefore while I agree with the decisions of my learned senior brothers in **Muchoki versus Attorney General (supra)** and **Patrick Nthenge versus Tawfiq Bus Services Ltd**, I have to bear in mind the deceased's future was not as uncertain as a three year old who had not joined school.

Again the deceased was the only other child that the plaintiff had; she testified that she is a single mother and the deceased's premature death left her with only one child she can look upon for support in future.

Looked at from the foregoing perspective, I would be hesitant to disturb the awards made by the learned magistrate. In conclusion I find the words of Lord Morris said in **West (H) & Son Ltd versus Shepherd (1964) AC 326** quite apt when it comes to interfering with the awards made at a lower court level; at page 353 of his decision the learned judge said that:-

“The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion of judgment and of experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award by himself would have made. Having done so, and remembering that in his sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment.”

If I pose as suggested by the learned judge, I would not have made an award that would be significantly different from that that the learned magistrate made except, of course, the award in respect of the special damages which is not supported by the pleadings and the evidence. I have no reason to dismiss the learned magistrate’s figure under the under heads dishonest as the wrong figure; in my view her assessment was a fair and reasonable award taking all the necessary factors into consideration. I would uphold her awards except for the award for special damages which is varied to read Kshs 19,365/= instead of Kshs. 27,000/=; save for this one variation, the appellant’s appeal is dismissed with costs.

Dated, signed and delivered in open court this 24th day of October, 2014.

Ngaah Jairus

JUDGE