



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS

Civil Appeal 652 of 2009

WANJIKU & LUCY WANGUI KIHARA.

REGINA

(Suing as the Administrator of the Estate of AARON MUMO MATHEKA.....**APPELLANTS**

VERSUS

TRADING LTD

KANJU

SIMON NZYOKI

KINYATI.RESPONDENTS

(From the Judgment and Decree of W Mokaya, Principal Magistrate in Milimani CMCC NO. 433 of 2008)

J U D G M E N T

The Appellants were the Plaintiffs in the lower court. In a plaint dated 15th January, 2008, they, as Administrators of the Estate of Aaron Mumo Matheka, deceased, sued the Respondents who were the Defendants. They sought general and special damages under the Law Reform and Fatal Accidents, Acts, arising from a motor vehicle accident which occurred on 25th July, 2007 along Nairobi-Mombasa Highway. The accident involved motor vehicle No. KAU 320W – 2C337 which overturned while allegedly being driven by the 2nd Respondent. The Plaintiffs had alleged negligence on the part of the 2nd Defendant who was the driver of the vehicle and also alleged vicarious liability on the part of the 1st Defendant in whose employment and duty the 2nd Defendant was alleged to have been working at the material time.

The Defendants/Respondents had filed a defence not only denying all the contents of the Plaintiff/Appellant's pleadings, but also that the accident had occurred at all. In the alternative the Respondents had denied, by themselves or by their agents or servants, conducting themselves in any negligent manner so as to cause the alleged accident. Furthermore and in the alternative, they had alleged

that it was the deceased a turnboy in the motor vehicle, whose negligence caused the accident.

During the hearing of the case the Appellants called two witnesses who testified for them. PW I was Stephen Musyoki. He was driving along Nairobi-Mombasa road on the material date and time when he saw a truck following him at a high speed. He, out of caution, gave it way to pass, which it did. Just ahead of the witness, the truck which was pulling a trailer overturned due to being driven at high speed. The witness stopped his car and went to the accident scene where he noticed that two people, a man and woman had been killed. A person accompanying him went to call the police who arrived while he was still at the scene of accident. Later the same day he got information that one of the deceased was his relative. He accordingly went to Changamwe Police Station the next day and there confirmed that the motor vehicle that caused the deaths of two people was the one he had witnessed the day before. He also confirmed that the dead and was Aaron Mumo Matheka who was his relative and whom he knew before. He thereafter went to Coast General Hospital where he identified the body before returning to the Police Station where he met the driver of the accident motor vehicle. The witness was there, introduced to the owner of the motor vehicle whose name was Benson Karanja who also was at the Police Station at the time. He did not record his statement with the police as the police showed no interest at the time.

The second witness who testified for the Plaintiff was the 1st Appellant, Regina Wanjiku. She also was the deceased's wife. She testified that she knew that her husband was working as a turn boy of motor vehicle registration KAU 320W, having been so employed by the 1st Defendant a year and half before the accident. Regina also testified that her husband was first employed at Ksh.6000/- which was later increased to Ksh.8000/-.

Regina further testified that when the accident occurred, it was one Susan, the owner the Defendant's Company, who called her and informed her of her husband's death. Susan asked her to go to Changamwe Police Station to get her husband's personal effects. Regina had then immediately gone to Mombasa and went to Changamwe Police Station where she reported and obtained a Police Abstract Report showing Simon Nzioka Kingati as the driver of the accident truck. The abstract also confirmed the owner of the motor vehicle KAU 320W as Kanju Trading Co. Ltd, the employer of her husband's, facts she had known from the time when her husband was employed there.

It was Regina's further evidence that she then visited the premises of her husband's employer as she prepared to transport her husband's body upcountry. That she met the said Susan who was the owner of the company and sought for her deceased husband's last salary. There she was paid Ksh.8000/- being July salary. That she signed a salary payment voucher prepared by the deceased employer dated 20th August, 2007 – **Exhibit 7**.

Regina did not produce any documentary evidence of her husband's employment by the 1st Defendant. She neither produced any documentary evidence of the ownership of the 1st Defendant of the motor vehicle KAU 320W. She however produced a Grant of Letters of Administration of her husband's estate, a marriage certificate with her husband, Death Certificate of her husband, birth certificates of her two children, the Police Abstract Report, and expenses receipts related to the burial of her husband as well as the salary payment voucher given to her by her husband's employer.

The Defendants did not adduce any evidence to support their pleadings or controvert the plaintiffs' evidence. They, however, through their counsel had opportunity to cross-examine the Plaintiffs.

In the process of evaluating the plaintiff's evidence the honourable trial magistrate observed that the Plaintiff did not produce documentary evidence of employment of the deceased by the 1st Defendant and that the salary voucher produced by PW 2 did not bear the name or identity of the 1st Defendant. She also thought that the showing of the deceased's profession on the death certificate as a salesman contradicted his employment as a turn boy. On that basis the honourable trial magistrate concluded that there was no evidence linking the deceased and the 1st Defendant and therefore the Plaintiffs had failed to prove the claim on the balance of probability. She went ahead to dismiss the Plaintiffs claim and suit. That is what aggrieved the Appellant who then appealed to this court.

The summary of the grounds of appeal is as follows: -

- 1. That the trial court applied a higher standard of proof than the balance of probabilities.**
- 2. That the trial magistrate erred in law and fact in failing to note that the Defendants failed to controvert plaintiffs' adequate evidence for proof of the claim on the balance of probabilities.**
- 3. That the trial magistrate erred in law and fact in acting against the evidence on record.**
- 4. That the trial court erred in law in failing to assess damages notwithstanding the fact that she dismissed the claim.**

I have carefully perused the appeal record which includes pleadings, the Appellants evidence before the lower court, the submissions of both sides before the lower court, the Judgment of the lower court and the written submissions before this court. The main issue is whether or not the plaintiff's evidence as it stood, proved their case on the balance of probabilities. Other issues depend on the answer.

I have re-evaluated the evidence on record as is the duty of this court acting on appeal. Plaintiff's witness Stephen Musyoki, PWI's evidence as to how the accident occurred, stands unchallenged. He clearly supported the plaintiff's pleadings that the driver of motor vehicle registration No. KAU 320W, was driving in high uncontrollable speed before he failed to control or manage it. That the result was that it overturned before his own eyes after he gave away for the said truck to pass. Immediately, thereafter he witnessed the death of a man and woman who were passengers on the said motor vehicle. The next day, after being informed that one of the two people killed in the accident was his relative, he went to Changamwe Police station where he confirmed the identity of the vehicle as the one he saw overturning the day before.

In my view, PW I's evidence sufficiently proved that motor vehicle KAU 320W overturned due to the negligence or recklessness of its driver. The evidence also sufficiently proved that the deceased who was the plaintiff's husband, died in the said accident.

Thereafter the evidence of the 1st plaintiff, Regina Wanjiku, established several issues. First she testified that her deceased husband had been employed by the 1st Plaintiff, Kanju Trading Co. Ltd as a turnboy over a year and half before his salary was increased from Ksh.6000/- to Ksh.8000/- and that she knew all those facts before the accident occurred. She said it was the company servants who informed her of her husband's death and who asked her to report at Changamwe Police Station to collect his personal effects, which she did. She also said she saw one Susan of the said company whom she dealt with and who directed her to get her husband's July, 2007 salary from the offices of the company, which again, she did. Furthermore, she said she was made to sign a salary payment voucher whose original copy she produced in evidence. She also produced the Police Abstract Report to confirm her evidence that she had already known that the vehicle KAU 320W belonged to the 1st Defendant who also was her husband's employer.

All the above crucial evidence was unchallenged, notwithstanding the defence pleadings which denied everything pleaded by the Plaintiff. It is, in addition, trite law, that mere pleadings in the plaint or defence, not supported by evidence, unless admitted, or conceded, amount to no evidence and has little evidentiary value. In the circumstances, and in the face of the plaintiff's uncontroverted evidence, her case clearly stands proven on the balance of probabilities. In the finding of this court, the plaintiff's evidence carried no substantive contradictions which the trial magistrate could have relied on to reject the same.

The information contained in the death certificate, for example was that the deceased's profession was salesmanship, Regina, explained that she was not the one who gave such kind of information to those who prepared the Certificate of Death. In my view, that explanation was satisfactory in the circumstances, coming from her as the deceased's wife who knew his profession better. In any case, a person who took salesmanship as a course, might, in hard or unfavourable circumstances, engage himself as a turnboy to make a living for himself and his family. There is no contradiction in such a situation.

As to ownership of a motor vehicle, its proof cannot be limited only to registration. Quite often, those who own and manage motor vehicles, especially business motor vehicles, do own and use them without changing registration. What matters is the evidence of use, management and control of the motor vehicle. In this case the first Defendant called no evidence to controvert the Plaintiff's evidence through the first plaintiff, that she knew long before the accident, that the motor vehicle KAU 320W belonged to the first Defendant. She also knew and that her husband was employed by the first Defendant to serve as its turn boy, which position he had served for 18 months before he met his death while working on the same vehicle. The 1st Defendant even, did not deny the fact that the deceased died while serving the turnboy on the relevant vehicle.

Furthermore, there was no contravention of the evidence that Regina received the deceased's last salary on a salary voucher prepared by the 1st Defendant. The fact that the voucher bore no identity of the first Defendant was neither here nor there. It was not difficult for the 1st Defendant to call one of its employees to deny such evidence or any other evidence recorded by the plaintiff's witnesses. It deliberately chose not to do so to its detriment.

I am aware that the honourable trial magistrate had discretion to come to the conclusions she did and that such discretion should not easily be reversed unless relevant principles have been breached. In this case however, the honourable trial magistrate applied a higher standard of proof than the lawful one on the balance of probabilities applicable in civil cases. She noted and magnified contradictions which did not exist. She took into account irrelevant issues of fact which made her make wrong and misleading conclusions, as earlier demonstrated in this judgment. She failed to consider the fact that the evidence produced by the plaintiffs remained uncontroverted and was good enough to prove the claim on the balance of probability.

In these circumstances, this court finds that the trial court erred in concluding the way it did and must and hereby reverse the lower court's findings of the law and fact. The court finds that the plaintiffs proved their case on liability, on the balance of probabilities. It hereby in that respect enters judgment for the plaintiffs.

It is trite law and practice that even where, in its wisdom the trial court dismisses a suit seeking general damages, it must nevertheless properly assess such damages in case the trial court's findings are later reversed. In this case the trial magistrate erred in not assessing the damages, which duty this court has now got to carry out, basing the exercise upon the evidence on the record.

The deceased, Aaron Mumo Matheka, lost his life in the accident when his salary was Ksh.8000/- per month. He was 33 years old. This gave him 22 years of active service before he could reach the retiring age of 55. A multiplier of 22 would be proper. The deceased was married with two school going children for whom he paid school fees as well as maintained in addition to their mother, his wife. The deceased paid Ksh.4,500/- towards monthly rent of the house they occupied. In these circumstances, a dependency ratio of 2/3 would be proper. The computation of loss of Dependency would accordingly be:

$8000 \times 22 \times 12 \times 2/3 = \text{Ksh.1,408,000/-}$

The deceased died instantly thus having his pain and suffering reduced or eliminated. An award of Ksh.20,000/- would be suitable. That would be all under the Fatal Accident Act.

Under the Law Reform Act there is the loss of expectation of life. The practice is to award Ksh.100,000/-. However, due to inflation as at the year of death, Ksh.120,000/- would be suitable for pain and suffering.

The plaintiffs had also sought special damages which were in this court's view, proven as follows: -

1. Mortuary charges Ksh.11,200.00
2. Air fare for body from Mombasa to Nairobi Ksh.12,235.00

3. Air fare for PW I to accompany body	Ksh. 6,400.00
4. Death Certificate	Ksh. 50.00
5. Court fee for grant of letters of Admn.	<u>Ksh. 1,150.00</u>
T O T A L	<u>Ksh.61,300.00</u> =====

The summary of awards is as follows: -

a) Loss of dependency	Ksh.1,408,000.00
b) Loss of expectation of life	Ksh. 120,000.00
c) Special damages	Ksh. 61,300.00
d) Pain and suffering	<u>Ksh. 20,000.00</u>

T O T A L A W A R D **Ksh.1,609,300.00**
=====

This court accordingly awards total damages of Ksh.1,609,300/- with interest at court rates from the date of filing in respect of special damages and the date of judgment of the lower court in respect of general damages. This appeal is accordingly allowed with costs. Orders accordingly.

Dated and delivered at Nairobi this 17th day of September, 2012.

.....

D A O N Y A N C H A

J U D G E