



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MALINDI

CIVIL APPEAL NO. 37B OF 2009

(Being an appeal from a Judgment of Hon. J. M. Nduna Senior Resident Magistrate

delivered on 19th February 2009 in Kilifi, in Civil Case No. 342 of 2008)

KIKAMBALA FISH

STATIONAPPELLANT

VERSUS

PERISI WANJALA MAGANGA

MWENDWA MUTIA

(suing as Administratrix and Administrator of the Estate of James Mutisya Mutia)RESPONDENT

RULING

This appeal is filed by Kikambala Fish Station (Appellant) against Peris Wanjala Maganga (1st respondent) and Mwendwa Mutua (suing as Administratrix and Administrator of the estate of James Mutisya Mutua (2nd respondent)).

The appeal arises from a decision by the Senior Resident Magistrate (Kilifi) Hon. J. M. Nduna in SRMCC No. 342 of 2008 where the respondent had sued the appellants following a road traffic accident which occurred on 23-12-07 along Mombasa – Malindi road, involving James Mutisya Mutia (deceased) who was walking along the said road, when he was hit by motor vehicle registration No. KAT 595C, a vehicle owned by the appellant and driven by its agent. The appellants were accused of negligence and upon determination of the matter, judgment was entered in favour of the respondents on liability which was apportioned at 80% against appellants and 20% borne by the deceased.

The award was then broken down as follows:

Loss of dependency Kshs. 560,000

Loss of life expectation	kshs.	100,000
Pain and suffering	kshs.	20,000
Specials	kshs.	45,200
Total award	Kshs.	725,200

Less 20% contribution Kshs. 145,040 to give a net sum of Kshs, 580,160/=.

The appellants are dissatisfied with these findings saying that:

- (1) The apportionment of liability was wrong and unreasonable as the evidence pointed to entire or most blame on the deceased.
- (2) The respondents had not proved their case a balance of probabilities and the evidence was contradictory
- (3) The special damages awarded at Kshs, 45,000/- had not been proved by any receipts
- (4) The sum of Kshs. 30,200/- awarded as funeral expenses was neither pleaded nor proved
- (5) There wasn't sufficient evidence on which to base the findings that deceased was earning kshs, 527/- per day and the trial magistrate ought to have taken the minimum wage when computing.
- (6) The submissions by appellant's Counsel were not properly considered so the appeal should be allowed and judgment set aside or suitably varied.

The appeal is opposed on grounds that the award was fair.

At the hearing, Miss Kubai appeared for the appellant whilst Mr. Bosire acted for the respondent.

The evidence presented to the trial court was that on 23-12-08 the deceased and Mwandawiro Mwale (PW2) were together within Majengo area at about 7.00pm, they were standing on the side of the road at a stage when a motor vehicle belonging to the appellant came from Mombasa – Kilifi direction heading towards Mombasa direction. The motor vehicle lost control and went off the road and hit the deceased. PW3 noted the motor vehicle registration number as KAT 595C – it did not stop but sped off. He stated in his evidence in chief as regards deceased:

“He was not attempting to jump off the road”

The offending motor vehicle returned to the scene accompanied by police officers and they took away the deceased to hospital. According to PW3, deceased died in hospital.

On cross-examination he stated that they were at the stage, waiting for vehicles heading to Mombasa and that deceased did not attempt to cross the road. Findings by the police was contained in the evidence of Cpl. Abdi Kadugu who stated that investigations showed that deceased was completing going across the road when he was hit and that he was crossing from the right to the left as one faces Mombasa. He was at the edge of the road when he got hit by the motor vehicle side mirror. Police observed skid marks and concluded that the motor vehicle was moving at a high speed.

On cross-examination the police officer (PW1) stated from the police file;

“The statement of the driver was that the deceased was crossing the road. It is possible that the vehicle was at a reasonable speed....there were skid marks on the road at the edge...this shows that the driver did all that a prudent person could do in the circumstances...”

On re-examination he stated:

“It is not possible to cause skid marks if the vehicle is moving at a slow speed.”

He further stated:

“The pedestrian had crossed the road. The driver did not swerve”

The appellant’s driver Bakari Mwinyi Bakari testified that while driving the said motor vehicle around Majengo area, as he approached a stage, he slowed down, there were other vehicles, when deceased appeared crossing the road at high speed.

Bakari applied emergency brakes but deceased got hit by the motor vehicle side mirror which broke and scattered. The accident occurred at 7.30pm. There was a hostile crowd so Bakari drove off to the police and that is why he returned to the scene accompanied by police officers. He denied going out of the road, saying he hit the deceased, while he was on the tarmac, he blamed deceased for the accident.

The trial magistrate in his judgment found that the deceased was neither at the edge of the road nor in the middle of the road. He was certain that the driver had seen the deceased and that is why he braked and stated as follows:

“I am convinced by the evidence of PW1 and PW3 that the deceased had almost competed crossing the road when he was hit. That is why he was not hit by the front of the vehicle but by the side mirror”

On this account then the trial magistrate held that the appellant’s driver was more to blame and apportioned liability at 80%.

The trial magistrate acknowledged that deceased had a duty to ensure that the road was safe to cross and on that account apportioned on him 20% blame

The trial magistrate noted that according to a letter dated 28-2-08 produced as exhibit 7, the deceased was working with Halai Brothers at a salary of Kshs. 527/= per day and used this figure to make a finding that it would mean deceased was earning Kshs, 13,702/- per month which figure he toned down to Kshs. 10,000/- per month observing that there would be days when deceased would not be working. He held that specials consisting of kshs. 15000/- paid to obtain Letters of Administration, and Kshs, 200/- paid for the police abstract were well deserved.

However for some unexplained reason, although this was not a prayer in the pleadings the trial magistrate decided to award kshs. 30,000/= for funeral expenses – this despite acknowledging that Defence had proposed kshs, 5000/=.

Miss Kubai submitted that the trial magistrate ought to have found that the driver in fact made effort to avoid hitting the deceased by braking and that deceased had not yet finished crossing the road.

She urged this court to be guided by the decision in **Ance Jacob v AG.**

Mr. Bosire for the respondents on this point urged the court not to interfere with the apportionment

pointing out that the trial court in fact took into consideration all the relevant factors. He pointed out that PW1 was not the investigating officer (yet wasn't he the respondent's witness) and that he only brought a report to confirm occurrence of the accident and that this court should uphold the finding that it is the motor vehicle which lost control and hit the deceased who was standing on the road side, borne by the fact that the driver confirmed swerving. From the judgment and from the trial magistrate observation the deceased had almost completed crossing the road – which would explain why he got hit by the side mirror and not the front part of the motor vehicle.

Did the trial magistrate take into account all the factors? What about the fact that it was about 7.30pm (meaning darkness had fallen and this then required the deceased to be very careful before crossing the road, because at night, it becomes difficult to have an accurate visual estimation of a motor vehicle's distance due to the lights. Could it be that deceased underestimated the distance of the appellant's motor vehicle and realized too late – which would explain why DW1 just saw someone hurriedly crossing the road – which in turn would explain why he got caught by the side mirror. Would that still make the liability stand at 80%?

I have considered the decision cited by the appellant's Counsel in **Ance Jacob v AG HCCC (Msa) No. 57 of 1980.**

From what the trial magistrate observed in his judgment and from what the police noted in their investigations as per the file produced by PW1, the deceased had not completely finished crossing the road. It is pretentious for Mr. Bosire to now poke holes as to the suitability of PW1 as a witness yet it was the respondents who had sought to rely on his evidence.

Upon realising that someone was crossing the road, the driver took steps to try and avoid hitting him, by braking. However just like in the **Alice** (supra) case cited, the appellant's driver was approaching a stage and ought to have slowed down – from the evidence of pW1 and the findings on investigation, the motor vehicle was moving at a fast speed, that is why the skid marks took the form they did – if the motor vehicle had been moving slowly, the skid marks would not have measured so extensively. Indeed borrowing from the text quoted in that case from the text book **Charlesworth on Negligence 6th Ed. Paragraph 678 (page 526)**

“Look Out: It is the duty of the driver or rider of a vehicle to keep a good lookout. He must look out for other traffic which is or may be expected on the road, whether in front of him, especially at cross-roads, junctions and bends... when there is a pedestrian about, the driver or rider must be ready in case they step from a street refuge or footpath, or from behind a vehicle or other obstruction and also be prepared for children, knowing that they may be expected to run onto the road. When passing... care should be taken and a good look out kept”

I acknowledge that the driver took reasonable steps to avoid the road traffic accident, but he was approaching a stage at night and it was reasonable that he takes precautionary steps and be on the lookout because of the likelihood of an incalculating pedestrian suddenly coming onto the road. At the speed he was moving, then despite the attempt to avoid hitting deceased by braking, the accident was inevitable yet the deceased is also not without blame – crossing the road at night – he ought to have taken reasonable steps to ensure that the road was clear – I would apportion blame at a higher percentage because in my view the trial magistrate did not take into account the extent of the duty of care on the deceased's part, he seemed to tilt it more on the driver, however by apportioning liability the trial magistrate in fact resolved the contradiction in appellant's favour. To that extent, I am inclined to interfere with the finding and apportion liability at 60% against the appellant and 40% against the deceased.

This then rationally impacts on what was awarded finally.

The other issue raised is that specials were not pleaded or proved yet the trial court awarded the same with no basis.

Miss Kubai cited the decision in **Mriam M. Ali versus Jackson M. Nyambu t/a Sisera Store C.A. No. 5 of 1990** where the Court of Appeal judges referred to the statement by Lord Goddard C.J. in **Deham**

Carter v Hyde Park Hotel Ltd (1948) T.L.R. 177 that:

“Plaintiffs must understand that if they bring action for damage it is for them to prove, it is not enough to write down particulars, and so to speak, throw them at the head of the court, saying this is what I have lost. I ask you to give me these damages. They have to prove it”

It is on the strength of this that Mrs. Kubai submits that there was nothing to prove the funeral expenses and that the only special damages proved was the Kshs. 15,200/-.

Mr. Bosire’s argument is that the court appreciated that the body had to be given a decent burial. The curious fact is that PW2 (the deceased’s wife Peris Wanjala) never made reference to any burial, - where was the body buried for instance – was it buried at a cemetery, was it transported to the deceased’s rural home, where was the rural home – was he buried in a coffin, or were his remains cremated or did he remain at the hospital mortuary and his body given a mass burial by the public health department? What formed this kshs. 30,000/=, did it include hiring of vehicles buying new clothes, for the body, a wreath, mourners expenses? Really there was no basis at all for awarding that sum – not so much because no receipt was referred to but because there was never even a word on any expenses incurred for the funeral – who knows may be the deceased’s employer shouldered all the funeral expenses. I concur with Miss Kubai to that extent that this award on specials was not part of what was pleaded and proved and the court interferes with that sum to reduce it to Kshs. 15,200/- (for the letters of administration and the police abstract).

Miss Kubai also took issue with the multiplier and multiple used in loss of dependency saying there was no proof of the deceased’s earnings and the court ought to have been guided by the minimum wage. This was opposed by Mr. Bosire who pointed out that the court was guided by the letter from the deceased’s employer which indicated the deceased’s earnings per day, and the trial magistrate assessed and calculated the monthly income of the deceased, taking into account that deceased would not be working everyday of the month and toned this to Kshs. 10,000/-

Indeed the trial magistrate’s approach on this head was well reasoned and properly analysed with regard to the multiple and the multiplier of 7 years was used after considering the age of the deceased and the fact that he had a family guided the trial magistrate into applying the 2/3 ratio.

I find no reason to interfere with the trial magistrate’s findings under this head.

Those were the only issues raised in the memorandum of appeal and Mrs. Kubai could not then suddenly introduce issues regarding paternity of the dependants, ownership of the motor vehicle, which did not form part of the grounds of appeal.

The upshot is that the appeal awarded to this extent.

- (a) Liability is apportioned at 60% against the appellant 40% against the respondent
- (b) Specials pleaded and proved Kshs, 15,200/- (fifteen thousand, five two hundred)
- (c) The total sum award would then be 725,200

Less 30,000

695,200/=

Less contribution at 40% gives a net figure of: 695,200

Less 40% 278,080

416,120 i.e four hundred and sixteen thousand, one

hundred and twenty shillings only.

Plaintiff is awarded the costs of the suit plus interest thereon from date of judgment.

Delivered and dated his **21st** day of **February 2011** at Malindi.

H. A. Omondi
JUDGE

Mr. Wambua Kilonzo holding brief Bosire for Respondent

Mr. Angima holding for Swaleh for appellant