



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 405 of 2003

JOHN MUGO NGUNGA.....APPELLANT

VERSUS

RAHAB MICERE MURAGE.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

SIMON PETER MWANGI.....3RD RESPONDENT

(Appeal from the original judgment of the Senior Principal Magistrate, Hon. Nyakundi in Civil Case No.66 of 2003 at Milimani Commercial Courts dated 9th June, 2003)

J U D G M E N T

1. This is an appeal arising from a suit which was initially filed in the High Court at Nairobi by Rahab Micere Murage (hereinafter referred to as the 1st respondent). The 1st respondent brought the suit in her capacity as the legal representative of Kinyua Ayub Murage (hereinafter referred to as the deceased). The suit was against the Hon. Attorney General, Simon Peter Mwangi and John Mugo Ngunga (hereinafter referred to as the 2nd, 3rd respondents and the appellant respectively).

2. The suit arose from an accident involving motor vehicle registration No.GK M400 belonging to the Ministry of Livestock Development, motor vehicle registration No.KAW 617, belonging to the 3rd respondent and motor vehicle registration No.KUE 189 belonging to the appellant. The deceased was allegedly a passenger in motor vehicle registration No.GK M400 at the time of the accident. He is alleged to have suffered fatal injuries from which he died. The 1st respondent maintained that the accident was caused by the negligence of either the 2nd respondent, 3rd respondent, the appellant or all of them or their drivers or agents. The 1st respondent therefore filed a suit on behalf of the deceased's dependants and deceased's estate for recovery of loss and damage arising under the Fatal Accidents Act, and the Law Reform Act.

3. The 2nd respondent, 3rd respondent and the appellant each filed a defence denying the 1st respondent's claim. In addition, the 3rd respondent blamed the 2nd respondent and the appellant for the accident contending that the accident was caused by their negligence. The 3rd respondent further denied that the deceased was a passenger in motor vehicle registration No.GK M400. The appellant on the other hand, alleged that the accident was caused or substantially contributed to by the negligence of the driver of motor vehicle registration No.GK M400.

4. The suit was subsequently transferred to the lower court where it was heard by a Senior Principal Magistrate. During the hearing, the 1st respondent testified that the deceased was her 3rd born child, and that he died as a

result of road traffic accident. The 1st respondent produced the death certificate and the police abstract report of the accident. The 1st respondent stated that she was not present during the accident, but claimed to have received a report from two ladies who were sent to her. The 1st respondent explained that the deceased used to sell chicken and used to support the 1st respondent who is 60 years old. The 1st respondent explained that as a result of the death of the deceased, she incurred expenses for paying mortuary charges, transport and purchase of coffin. She did not have receipts but claimed the sum of Kshs.10,000/=. Under cross-examination, the 1st respondent explained that the deceased used to give her Kshs.1,500/= per month.

5. The appellant testified that on the material day, he was driving motor vehicle registration No.KUE 189 a Mitsubishi Pickup. He was travelling from Marugo towards KagioTown. On the way, there was a vehicle ahead of him travelling towards the opposite direction. The vehicle was approaching with full lights. The appellant signaled but the other vehicle did not dim its lights. The appellant slowed down and moved to the left and then stopped off the road. He then heard a bang. It was a GK vehicle which hit the appellant's motor vehicle and another vehicle which was following the appellant's vehicle. The police were called and the driver of the GK vehicle was subsequently charged.

6. Neither the 2nd respondent nor the 3rd respondent offered any evidence in support of their defence. The 1st respondent, 2nd respondent and the appellant each filed written submissions urging the trial magistrate to find in their favour. In his judgment, the trial magistrate found that there was ample evidence that there was a collision between motor vehicle KUE 189, KAW 617 which were travelling from Kutus and motor vehicle GK M400 which was travelling from a different direction. He accepted the information contained in the police abstract that the deceased was a passenger in GK M400 and that he suffered fatal injuries. The trial magistrate found that there was no concrete evidence as to who was to blame between the 3 drivers. Relying on *Bakers vs Marker Hurborough Industrial Cooperative Society Ltd [1953] 1472* and *Welch vs Standard Bank Ltd [1920] EA 115*, *Simon vs Carol [1970] EA 285*, the trial magistrate held all the three drivers to blame and apportioned liability at 50% against the 2nd respondent, 25% against the 3rd respondent and 25% against the appellant. The trial magistrate adopted a multiplier of 27 years an income of Kshs.4,000/= and a dependency ration of $\frac{1}{3}$ and awarded general damages for lost years at Kshs.432,000/= and pain and suffering at Kshs.10,000/=.

7. Being aggrieved by that Judgment, the appellant has lodged this appeal raising 8 grounds as follows:

- (i) The learned magistrate erred in finding that the appellant was negligent to the tune of 25% yet the first respondent in her evidence did not adduce any evidence in respect of the issue of liability. Further the learned magistrate failed to consider that neither the second respondent nor the third one adduced any evidence to counter the first respondent's allegations of negligence against them. Neither did the aforesaid second and third respondents adduce any evidence to counter the evidence adduced by the appellant to the effect that the said accident was solely caused by the negligence of the second respondent.
- (ii) The learned magistrate erred in failing to consider and or attach any value to the evidence adduced by the appellant that he had made deliberate and significant effort to move to the extreme left side of the road to avoid the second respondent's vehicle which he noted from a far was being driven in a very hazardous manner and that the latter hit the appellant's vehicle when the latter was virtually at a standstill; before proceeding to hit the third respondent's vehicle.
- (iii) The learned magistrate erred in admitting hearsay evidence from the first respondent as she was not at the scene of the accident when the same occurred. She only heard about the accident and found her son's body in the mortuary. Furthermore, she clearly stated that she could not prove who was negligent and or to what extent.
- (iv) The learned magistrate erred in finding that the respondent's son was a lawful passenger or at all in the second respondent's vehicle registration number G.K. M400. The first respondent in her evidence was unable to prove that her son was a passenger at all on the said second

respondent's vehicle as she was not at the scene of the accident at the time when the same occurred. Moreover, the first respondent clearly stated that her son was not a government employee at the time of the accident and so the legality of his alleged passengerhood in the said vehicle is highly questionable.

- (v) The learned magistrate erred in finding that the first respondent was a dependant of the deceased. Considerable attention ought to have been given to the first respondent's evidence that she used to house and feed the deceased. No evidence was adduced to prove that the deceased engaged himself in any income generating activity. It was a mistake for the learned magistrate to assume that simply because the deceased was a fourth form school leaver, he must have been making at least 4000/= per month.
- (vi) It was an error on the part of the presiding magistrate to find that the deceased was entitled to compensation for pain and suffering and awarding Kshs.10,000/= by way of compensation yet no evidence was adduced to the effect that the deceased did not die on the alleged spot of the accident.
- (vii) The learned magistrate erred in awarding Kshs.432,000/= by way of loss of dependency and lost years as the same is extremely on the higher side and should be revised downwards or better still set aside completely for reasons aforesaid.
- (viii) The appellant reserves the right to amend this memorandum of appeal after receipt of the proceedings and judgment from the lower court as the judgment was only part read by the learned magistrate.

8. It was agreed between the parties, that written submissions be duly exchanged and filed. Written submissions were filed by the appellant, the 1st respondent and the 3rd respondent. No submissions were filed by the 2nd respondent despite a reminder being sent to the Attorney General.

9. For the appellant, it was submitted that the 1st respondent in his plaint, had alleged negligence against the 2nd respondent particulars of which were inter alia as follows:

- (i) Driving on the wrong side of the road and having done so, failing to return to his correct side of the road in time or at all.
- (ii) Failing to notice in sufficient time the presence of the vehicle KAW 617 and KUE 189.
- (iii) Failing to give the 3rd respondent and the appellant any or any sufficient warning of his approach.

10. It was noted that the 2nd respondent only made a general denial of the allegations of negligence, but did not specifically deny that the 2nd respondent's vehicle was travelling on the wrong side of the road and never returned to its correct side of the road. It was submitted on behalf of the appellant that the 1st respondent did not witness the accident and therefore her evidence in this regard was hearsay and inadmissible. It was noted that the only evidence on record regarding how the accident occurred was that of the appellant who explained that he swerved off the road to the extreme left. It was therefore submitted that the GK vehicle was travelling on the wrong side of the road when it collided with the appellant's vehicle which was on the extreme left. It was submitted that the trial magistrate ought to have found the driver of the GK Vehicle 100% to blame for the accident.

11. It was argued that the authority relied upon by the trial magistrate were only applicable where there was no evidence to show whom to blame. It was maintained that in the present case, there was clear evidence showing that the appellant was on the extreme left and that he did all he could to avoid the accident. The trial magistrate therefore erred in apportioning liability on the appellant. It was further submitted that there was no evidence to prove that the deceased was a lawful passenger in the GK vehicle at the time of the accident. It was argued that the evidence relating to the deceased's income was not adequate, nor was it established that the 1st respondent was a dependant of the deceased. It was contended that the award of Kshs.10,000/= for pain and suffering was unjustified as the pleading

showed that the deceased died instantly. Regarding the multiplier adopted, it was submitted that the deceased had only one dependant who was 60 years of age, and it was unreasonable to speculate that she would be a dependant for another 27 years. Relying on ***Simon and another vs Carol and others [1970] EA 284***, it was submitted that a multiplier of 10 would have been more appropriate.

12. For the 1st respondent it was submitted that there was no dispute before the trial magistrate that the deceased was a passenger in motor vehicle registration No.GK M400, and that the deceased died as a result of the collision involving the 3 vehicles. It was submitted that the trial magistrate had the discretion to assess the evidence of the appellant and make any findings on the veracity of such evidence. It was submitted that an appellate court ought not to interfere with the findings of fact of a trial court or the exercise of discretion by the trial court, simply because it could have arrived at a different decision. In that regard the following cases were relied upon:

- (i) ***Civil Appeal No.181 of 1994 Njagi Kanyunguti alias Karingi Kanyunguti & 4 others vs David Njeru Njogu.***
- (ii) ***Civil Appeal No.46 of 1996 Haji Ahmed Sheikh vs Highway Carriers.***
- (iii) ***Mariga vs Musila [1984] KLR 251.***

13. On the issue of quantum it was submitted that the evidence of the 1st respondent on the support she was receiving from the deceased was not challenged. It was submitted that assessment of damages is an exercise of discretion which cannot just be reversed. Regarding the multiplicand of 27 years, it was noted that although the accident happened on 1st June, 1990, the 1st respondent who was the dependant is still alive 19 years later. It was further maintained that a multiplicand is based on the age of the deceased. The court was therefore urged to dismiss the appeal.

14. In his submissions, the 3rd respondent concurred with the appellant that the trial magistrate's finding on liability should be overturned and urged the court that no liability should have touched on the 3rd respondent as the blame for the accident was squarely on the 2nd respondent. It was submitted that the 1st respondent did not establish any of the particulars of negligence alleged against any of the defendants. It was submitted that a plaintiff succeeds on the strength of his case but not on the weakness of the defence. Relying on ***Section 107 of the Evidence Act***, it was submitted that the burden was upon the 1st respondent to prove her case. It was maintained that she failed to discharge this burden and therefore her suit ought to have been dismissed.

15. On the issue of quantum, it was submitted that the deceased was the one depending upon the 1st respondent and the claim for dependency ought to have failed. The court was urged that the 1st respondent's claim for loss of expectation of life could not succeed as the suit was filed prior to obtaining letters of administration. It was maintained that there was no basis for the multiplicand adopted or for the average income. It was submitted that general damages if any could only be for loss of dependency which ought not to have been more than Kshs.80,000/=.

16. I have carefully reconsidered and evaluated all the evidence which was adduced before the trial magistrate. I have also considered all the submissions filed before the trial magistrate and before this court. I find that in the pleadings, the 1st respondent alleged that at the time of the accident, the deceased was lawfully riding in Motor vehicle registration No.GK M400, and that the deceased died as a result of injuries suffered in the accident. This fact was controverted by each of the defendants in their defence. Therefore, the 1st respondent was under a responsibility to prove what she alleged.

17. In her evidence, the 1st respondent conceded that she was not present at the time of the alleged accident, and that she only received information about the accident. Therefore, the evidence relating to the deceased's involvement in the accident was hearsay evidence. The trial magistrate relied on the police abstract report produced by the 1st respondent. The police abstract report indicated the name of the deceased as one of the passengers who died in the

accident. However, no police officer was called to produce the police abstract report or testify as to the origin of the information contained in the abstract report. Thus, the abstract report was insufficient to establish that the deceased was a lawful passenger in motor vehicle GK M400 or that he died as a result of the accident.

18. As regards the issue of negligence, the 1st respondent in his plaint, alleged particulars of negligence against the defendants. Again it was upon the 1st respondent to adduce evidence to establish the particulars of the negligence alleged. The 1st respondent did not adduce any such evidence. That notwithstanding, the appellant whose evidence was the only evidence on record regarding how the accident occurred, gave clear and concise evidence. The evidence of the appellant was consistent with the particulars of negligence alleged by the appellant against the 2nd respondent and the particulars of negligence alleged by the 1st respondent against the 2nd respondent.

19. In regard to the evidence of the appellant, the trial magistrate stated as follows:

“There is evidence that the 3rd defendant though he had seen the vehicle GK 400M advance did all it takes to control, manage the said vehicle to avoid the occurrence of the accident. I would conclude that each driver owed a duty of care to other road users. There is no concrete evidence that as the vehicle approached each other, from opposite direction each gave way for the other to pass. In absence of this, the 3rd defendant’s testimony does not pass the test of exonerating himself from liability.”

20. The above extract, shows that the trial magistrate having rightly found that the appellant did all that was necessary to control or manage his vehicle to avoid the occurrence of an accident, it was a contradiction for the trial magistrate to hold that there was no concrete evidence that the appellant did not give way. Secondly, the trial magistrate appears to have wrongly shifted the burden on to the appellant to exonerate himself from liability.

21. The burden remained on the 1st respondent, or the 2nd respondent, who were alleging negligence against the appellant to establish the same. Further, the trial magistrate wrongly directed himself that there was no concrete evidence as to who was to blame for the accident. There was clear uncontroverted evidence adduced before the trial magistrate by the appellant, which showed that the driver of GK M400 was to blame for the accident. The authorities cited by the trial magistrate were therefore distinguishable.

22. On the issue of quantum, it is trite law that an appellate court can only interfere with the assessment of quantum by the trial court where the assessment is based on wrong principles of law, or misapprehension of facts, or is either too low or high as to be a wholly erroneous estimate. (*Mariga vs Musila [1984] KLR 251*). In this case, the appellant contended that the 1st respondent had not shown that she was a dependant. However, the 1st respondent testified that the deceased used to support her by giving her a sum of Kshs.1,500/= monthly on average. This evidence was not controverted.

23. As regards the multiplier of 27 years adopted, the deceased was a young man of 21 years old, the multiplier was therefore appropriate. The income of Kshs.4,000/= adopted by the trial magistrate was also fair. I therefore find no substance on the grounds of appeal relating to quantum except for the award in respect of pain and suffering, which was not justified, the 1st respondent having pleaded that the deceased died instantly. The upshot of the above is that the appellant having succeeded in his appeal with regard to liability, and the 2nd respondent not having appealed, I allow this appeal to the extent of setting aside the apportionment and judgment of the lower court on liability, and substituting thereof a judgment in favour of the 1st respondent against the 2nd respondent on full liability. I uphold the award of damages made by the trial magistrate in respect of loss of dependency. The 2nd respondent shall pay the appellant costs of this appeal and costs in the lower court. Those shall be the orders of this court.

Dated and delivered this 30th day of April, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Parekh for the appellant

Nyaitho for Namada for the 1st respondent

Ms Karanja for the 3rd Respondent

Eric - Court clerk