



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Civil Appeal 27 of 2008

JOHN MATHENGE WAMBARIA.....1ST APPELLANT
BENSON RUKWARO MATHENGE.....2ND APPELLANT
VERSUS

PATRICK WACHIRA MUCHEMI
(Suing as personal representative of the estate of
LUKA NJOGU MUCHEMI (Deceased).....RESPONDENT

*(Being appeal from the judgment of J. K. Ng'eno, Ag. Senior Principal Magistrate
in Nyeri CMCC NO. 774 of 2006 delivered on 13th May 2008)*

JUDGMENT

This appeal is against the decision of Hon. J. K. Ng'eno, the then Ag. Senior Principal Magistrate, delivered on 13th May 2008 vide Nyeri C. M. C.C.C. 774 of 2006. PATRICK WACHIRA MUCHEMI, the Respondent herein, in his capacity as the legal representative of the Estate of Luka Njogu Muchemi, deceased, had filed a compensatory suit against JOHN MATHENGE WAMBARIA and BENSON RUKWARO MATHENGE, the 1st and 2nd appellants herein, in respect of the fatal injuries suffered by the deceased as a result of a road traffic accident which occurred on 10th October 2003 involving motor vehicle registration No. KAR 102D allegedly owned by the 1st Appellant and driven by the 2nd Appellant. The aforesaid motor vehicle is said to have been driven in a negligent manner making the same to crash thus fatally injuring the deceased who was a fare paying passenger. The Appellants filed a joint statement of defence denying the respondent's claim. The suit was heard and in the end the Respondent was awarded Kshs.300,000/= and Kshs.16,100 Representing general and special damages respectively. The Appellants are aggrieved hence this appeal.

On appeal, the Appellants put forward the following grounds in the Memorandum of Appeal:

1. *The learned trial Magistrate erred in law and in fact in finding that the plaintiff was the proper person to be issued with grant of letters of administration.*
2. *The Learned trial magistrate erred in finding the defendants liable when there was no evidence to support ownership of motor vehicle or liability in negligence.*
3. *The learned trial Magistrate erred in awarding damages under the Fatal Accidents Act which award was contrary to the express provision of section 4 Fatal Accidents Act.*
4. *The learned trial Magistrate erred in fact and in law in awarding Kshs.316,100/= which award was inordinately high as to represent a reasonable award.*

This being the first appellate court, the Appellants are entitled to a re-evaluation of the evidence which were presented before the trial court. The Respondent's (Plaintiff's) case was supported by the evidence of two witnesses. PATRICK WACHIRA MUCHAI (P. W. 1) told

the trial court that the deceased died as a result of the road traffic accident on 10th October 2003 at the age of 16 years. He was a form II student at Kagumo High School. P. W. 1 averred that the deceased was his brother and that both their parents are deceased. P. W. 1 produced documents showing that the 2nd Appellant, the driver of motor vehicle registration No. KAR 102D was tried, convicted and fined Kshs.10,000/= for causing death by dangerous driving. P. W. 1 further claimed that he incurred a sum of Kshs.35,000/= on the funeral expenses of the deceased though he had kept no documents. He also produced a receipt for Kshs.16,000/= which sum he incurred in obtaining limited letters of administration. P. W. 1 averred that the deceased aspired to be an aeronautical engineer but his life was cut short. JOHN MUCHEMI (P. W. 2) produced records relating to Nyeri C.M.C. Traffic case No. 5 of 2003 R =vs= BENSON MATHENGE which indicates that the 2nd Appellant was convicted and fined on 26th January 2005.

The Appellants tendered the evidence of Benson Rukwaro Mathenge (D. W. 1) in their defence. D. W. 1 conceded that he was the driver of motor vehicle registration No. KAR 102 D when it was involved in a road traffic accident on 10th October 2003. He claimed that the motor vehicle had a front tyre burst when he approached a sharp corner hence he was not to blame. He also said that it was raining and the road was under construction. He said he drove the vehicle at a speed between 40 and 50 Km per hour. In the end the learned Senior Principal Magistrate found him solely liable for the accident. He awarded damages as earlier stated in this judgement.

On appeal, it is the submission of the Appellants that the trial court erred when it found that the 2nd Appellant was the owner of the motor vehicle. I do not think this is a serious issue which will go to the root of the case. The most important issue is that the 2nd Appellant admitted having been the driver of the aforesaid motor vehicle where the deceased was a fare paying passenger. The law presumes that unless the contrary is stated, the driver of the offending motor vehicle must have had authority to drive from the owner. The second issue argued on appeal is the fact that the trial magistrate gave an award based on loss of dependency under the Fatal Accidents Act yet the Respondent was not a dependant. I agree with the submissions of the Appellant that *Section 4* of the Fatal Accidents Act recognizes the dependants of a deceased person as either a wife, husband, parent and or a child. The Respondent herein was a brother of the deceased hence he cannot be regarded as a dependant. On this head the trial court calculated the award at Kshs.300,000/= representing loss of dependency calculated as follows: $25 \times 12 \times 2000 \times \frac{1}{2} = 300,000/=$. It would appear the trial Senior Principal Magistrate did not pronounce the award. He instead made an award of Kshs.300,000/= representing loss of life expectancy. It is therefore not true that an award on this head was made. The record shows that the Plaintiff (Respondent) has asked to be given Kshs.200,000/= for loss of life expectancy, Kshs.30,000/= for pain and suffering and Kshs.2,400,000/= for loss of dependency. I have reconsidered the awards sought and given and I find no reason to interfere with award made. The Respondent raised one preliminary issue against the appeal. It is said that the record of appeal did not have the decree appealed from hence the appeal is fatally defective. The Respondent cited the provisions of *Order XLI rule 8B (4)* of the Civil Procedure Rules. The Respondent relied on three authorities from the Court of Appeal.

I have considered the aforesaid objection and I find no merit in it. So long as the judgment is embodied in the record of appeal, it is not fatal if the decree is not extracted and made as part of the record of appeal. The authorities relied upon are inapplicable because they are in respect of appeals preferred in the Court of Appeal under the provisions of the Court of appeal Rules which makes it mandatory to include the decree in the Record of Appeal. Those Rules do not apply to the High Court.

In the end I see no merit in this appeal. It is dismissed with costs to the Respondent.

Dated and delivered at Nyeri this 7th day of May 2010.

J. K. SERGON

JUDGE

In open court in the presence of Mr. Kingori holding brief Nderi for Appellant and Mr. Kamau holding brief G. Mwangi for Respondent.