



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL 44 OF 2006**

**ANWARALI & BROTHERS LIMITED.....APPELLANT**

**VERSUS**

**MICHAEL MBURU GITAU .....  
RESPONDENT**

\*\*\*\*\*

**JUDGEMENT**

This present appeal has been filed by Anwarali & Brothers Limited (hereinafter referred to as the Appellant) against one Michael Mburu Gitau (hereinafter referred to as the Respondent) suing on his own behalf and on behalf of the estate of the late Peter Njenga Mburu (hereinafter referred to as the deceased). The deceased was the son of the Respondent. The appeal arises from the judgement of Mombasa Principal Magistrate Hannah Ndungu delivered on 16<sup>th</sup> February 2006. In that judgement the learned magistrate found in favour of the Respondent against the Appellant and Seahorse Limited who were the 2<sup>nd</sup> Defendants (but who have not filed any appeal) jointly and severally in the sum of Kshs.636,000/-. The Appellants were dissatisfied with that decision and filed this present appeal vide a Memorandum of Appeal dated 6<sup>th</sup> March 2006 which lists five grounds of appeal.

The basic and undisputed facts of the case before the subordinate court were as follows. The deceased used to work for the Appellant company as a turn-boy on their vehicles plying the Mombasa-Kampala route. The deceased who met his unfortunate death on 12<sup>th</sup> September 2001 was 23 years old and unmarried. On that material date the deceased was lawfully engaged in his duties as a turn boy on one of the Appellants vehicles a trailer Registration No. KAK 199S-2B8196 being driven towards Mombasa from Nairobi direction. Near a place called Kenani the said vehicle developed some fault and got stuck on the road. A second vehicle also a trailer belonging coincidentally to the same Appellants Registration No. KAK 702L/ZB 8213 was being driven in the opposite direction. The driver of this second vehicle stopped and positioned his vehicle facing Mombasa intending to tow or pull the first vehicle out of the sand where it was stuck. The deceased was instructed to tie a rope between the two vehicles in order to facilitate this towing. A reflective triangle was placed about 20 metres ahead of the first vehicle to warn oncoming vehicles of its presence on the road. Despite this a 3<sup>rd</sup> vehicle Registration No. 700UBM Mercedes Benz belonging to Sea Horse Freighters Limited came and rammed into the rear side of the 1<sup>st</sup> vehicle and then proceeded to hit the deceased where he was engaged in tying the ropes. The deceased was rushed to hospital but died on the way. The accident was duly reported Voi Police

Station. Police did issue an abstract **Pexb7**. Police after completing their investigations blamed the driver of the 3<sup>rd</sup> vehicle who was charged with Causing Death by Dangerous Driving before Voi Law Courts. Mr. Abubakar appeared at the appeal hearing for the Appellant whilst Ms. Abuodha appeared for the Respondent. Mr. Abubakar in his oral submissions before court argued that the learned trial magistrate erred both in fact and in law in finding the Appellants liable to any degree for the accident. He argues that the investigating officer placed the blame on the driver of the 3<sup>rd</sup> vehicle for failing to be “**observant**”. I do not agree with this submission. The findings of a police investigator cannot influence or bind a civil court as the standard of proof required in criminal is very different to that required in civil cases. Liability in a civil suit cannot be pegged on criminal culpability. It is quite feasible and does often happen that one may be held liable in a civil suit but absolved from any criminal responsibility for the same act.

Mr. Abubakar further submits that PW2 Inspector Gabriel Okoth who testified on behalf of the Respondent was not an eye-witness to the accident nor was he the investigating officer. His evidence was therefore merely opinion evidence and ought not to have been relied on by the trial magistrate in concluding that the 1<sup>st</sup> vehicle was partly on the road and partly off the road. I do concede that **PW2** was not the investigating officer. Indeed **PW2** told the court that the investigating officer one Corp Alfred had been transferred from Voi Police Station. However **PW2** did avail the police file as an exhibit before the lower court **Pexh7**. The trial magistrate was able to peruse this file which contained a sketch plan of the scene. That sketch plan marked as “**B3**” clearly shows that the 2<sup>nd</sup> vehicle was partly on the road. It was the presence of part of this vehicle on the road which the trial magistrate found to have caused an obstruction to on-coming vehicles. Furthermore I have carefully read the judgement of the learned trial magistrate and I find no evidence that she relied on the evidence of **PW2** in coming to her decision. At page 2 line 26 the learned trial magistrate observed –

***“The 2<sup>nd</sup> motor vehicle which was intended to tow the 1<sup>st</sup> one was not a towing motor vehicle. Normal distance for putting triangles should be 50M from stalled motor-vehicles on both sides”.***

It is clear that in the opinion of the learned trial magistrate the failure to call a proper towing vehicle and the decision to use instead the 2<sup>nd</sup> vehicle as a tow truck was negligent. The learned magistrate also took issue with the Appellants placement of the triangle at 20 metres away which in her view was too close to the vehicle to provide any meaningful warning of its presence of the road. She observed that the normal distance to provide adequate warning would be 50 metres away. I am therefore satisfied that that learned trial magistrate formed her own independent opinions based on the evidence on record as well as what she was able to glean from the police file. The contention that she relied largely on the evidence of **PW2** is not in my view supported by her judgement.

Mr. Abubakar for the Appellant also argued that the trial magistrate ought to have apportioned liability between the two Defendants in the case rather than finding them jointly and severally liable. I will again refer to the judgement itself at page 6 line 3 the learned trial magistrate observes that:-

***“It would appear he [referring to the driver of the 3<sup>rd</sup> vehicle] must have been negligent to have failed to see at least the vehicle with its tail on the road, but that cannot excuse the 1<sup>st</sup> defendants driver of their negligence also in having had a part of their vehicle on the road and having the Plaintiff [the deceased] tying towing ropes in the dark. I hold that both the 1<sup>st</sup> and 2<sup>nd</sup> defendants are equally both to blame for the accident”.***

The magistrate has given clear reasons as to why she found the two defendants in her case equally to blame for the accident. She went on to quote the case of **Baker –vs- Market Herborsha Co-operative Society Ltd [1953] 1 WLR 1472** where the court held that:-

***“Once both are to blame, and there are no means of distinguishing between them, then the blame should be cost equally on each”.***

I am satisfied that the learned trial magistrate has given valid and indeed convincing reasons backed by

authorities as to why she found as she did. There is no legal requirement that liability must be apportioned between the two Defendants. Therefore I do dismiss the above grounds of this appeal.

Finally Mr. Abubakar for the Appellant appeals against the damages awarded which he cites as excessive. Ms. Abuodha for the Respondent however submits that the damages awarded were just and equitable and urges this court not to interfere with them. The learned trial magistrate awarded damages as follows:-

- (i) **Pain & Suffering** - **Kshs.100,000/-**
- (ii) **Loss of life Expectation** - **Kshs. 70,000/-**
- (iii) **Loss of Dependency** - **Kshs.456,000/-**
- (iv) **Special damages** - **Kshs.100,000/-**

The bone of contention in this appeal was the award made for loss of dependency. In my view the awards made under (i) (ii) & (iv) cannot be said to be excessive. As such I do uphold and confirm those awards. For loss of dependency the learned trial magistrate took the deceased salary at Kshs.4,750/- per month. This was not disputed by the Appellants. She used a multiplier of 12. This again was not disputed by the Appellants and in my view was quite reasonable. The deceased died at the age of 23 years. The normal retirement age at that time was 55 years. All things being equal he had about 32 years of active working life left. As the trial magistrate pointed out a multiplier of 12 was on the lower side but I am not inclined to review or interfere with that decision. The learned trial magistrate opined that the deceased would spend ? of his salary on himself and  $\frac{2}{3}$  on assisting his family. Mr. Abubakar for the Appellants submitted that ? was a more appropriate figure for dependency ratio and not the  $\frac{2}{3}$  used by the trial court. At page 30 line 19 of her judgement the trial magistrate stated as follows –

***“This will assume ? of his salary to support his father, mother and siblings which is common in African families”.***

I do agree with that observation. The deceased was a single man. He had no wife or children to support. It is common in African families that a single son who is working will spend the bulk of his earnings in supporting his parents and siblings. In my view a dependency ratio of ? is reasonable in the circumstances. As such I find the award of Kshs.456,000/- for dependency was not at all excessive and I do hereby confirm the same. Based therefore on the foregoing I find that the total award of Kshs.636,000/- was quite equitable and just given the circumstances and I am not inclined to interfere with this award.

In totality therefore and in conclusion I find no merit in this appeal. I hereby confirm the findings and award given by the learned Principal Magistrate. This appeal is dismissed in its entirety. Costs to be met by the Appellant.

**Dated and delivered at Mombasa this 27<sup>th</sup> day of July 2009.**

**M. ODERO**

**JUDGE**

Read in open court in the presence of:

Mr. Abubakar for Appellant

Mr. Amollo holding brief for Ms. Abuodha for Respondent

**M. ODERO**

**JUDGE**

**27/7/2009**