



REPUBLIC OF KENYA

HIGH COURT AT NYERI

CIVIL APPEAL 34 OF 2005

NYERI MUNICIPAL COUNCIL)

RICHARD NDEGWA KARUGU).....APPELLANTS

JOHNSON GITAH WAITHAKA)

Versus

CHARLES KINYUA MWORIARESPONDENT

(Appeal from the original Judgment and Decree of the Chief Magistrate's Court at Nyeri in

CMCC. No.662 of 2002 dated 29th June 2005 by R. NYAKUNDI – CM)

J U D G M E N T

This is an appeal from the judgment and decree dated 29th June, 2005 passed by **Rueben Nyakundi Esq.**, the Chief Magistrate in Nyeri Chief Magistrate's court, Civil case number 662 of 2002. By that judgment and decree the learned magistrate ordered Nyeri Municipal Council, **Richard Ndegwa Karugu** and **Johnson Gitahi Waithka** hereinafter referred to as "*the appellants*" to pay **Charles Kinya Mworia**, hereinafter referred to as "*the respondent*" a sum of Kshs.10,000/= being general damages for pain and suffering, Kshs.100,000/= for loss of expectation of life, Kshs.400,000/= for lost years and Kshs.11,700/= special damages. The appellants too were ordered to pay costs to the respondent.

The judgment and decree aforesaid arose out of a suit filed by the respondent against the appellants, **Charles Magathe** and **Wilson Kibiru Gichubi** seeking Kshs.19,850/= as special damages, general damages under the Fatal Accidents Act and the Law Reform Act, and costs of the suit. The respondent's claim was based on a road traffic accident which occurred on 5th April, 1995 involving motor vehicle registration numbers KQN 246 and KPW 401. KQN 246 was at the time registered in the name of the 1st appellant and was at the material time under the control and direction of either the 2nd or 3rd appellants. KPW 401 on the other hand was owned by **Charles Magathe** but under the control and direction of the **Wilson Kibira Gichubi**.

On the material date, one **Benson Alam Mworia**, hereinafter referred to as "*the deceased*" was lawfully standing by the road side along King'ong'o – Nyeri road when **Wilson Kibiru Gichubi** negligently drove, managed, controlled and or handled motor vehicle registration number KPW 401 that he caused the same to collide into motor vehicle registration number KQN 246 that had been negligently parked on the road. As a result of the collision motor vehicle registration number KPW 401 lost control and crashed into the deceased and his friend who were standing off the road, occasioning them severe injuries from which they both died. The respondent was the administrator of the estate of the deceased

and accordingly mounted the suit on his own behalf and for the benefit of the dependents of the deceased under the Fatal Accidents Act and the Law Reform Act.

Particulars of negligence attributed to **Wilson Kibiru Gichubi** by the respondent were that he drove the motor vehicle at a speed that was excessive in the circumstances, drove without due care and attention, failed to see motor vehicle KQN 246 in sufficient time to avoid the collision, had no regard for the safety of other road users and colliding into the deceased. For the 2nd and 3rd appellants, it was alleged that they left their motor vehicle KQN 246 stationary and unattended on the said road, had no regard for the safety of other road users, failed to remove the said motor vehicle from the road and causing obstruction to other road users.

It was pleaded that the deceased was aged about 16 years at the time of his death. He was a pupil in class seven and enjoyed a happy and normal life. He was a good and industrious boy, looking after his mentally retarded mother and young brother. His expectation of a normal and happy life had been cut short and his dependants and estate had thereby suffered loss and damage.

When the appellants and co-dependants aforesaid were served with the suit papers, the appellants reacted by filing a memorandum of appearance and subsequently a joint statement of defence through **Messrs H.P.G. Waweru & Co. Advocates**. The appellants' co-defendants, **Charles Magathe** and **Wilson Kibiru Gichubi** however failed to enter appearance. Accordingly on 8th March, 2007 and on the application of the respondent's counsel interlocutory judgment was entered against them.

The appellants denied that the respondent was the legal administrator of the estate of the deceased. They also denied that they were negligent in any manner as claimed by the respondent. They went on to aver that after their motor vehicle KQN 246 broke down whilst on its correct side of the road, they took all appropriate steps to warn other road users of the danger and further undertook measures to have the said vehicle towed away from the scene as soon as it was practicable. As far as they were concerned the accident occurred due to the sole negligence of the 5th co-defendant, **Wilson Kibiru Gichubi**. The 2nd appellant further averred that he was absolved from any blame for the accident vide Nyeri SPM CD No.4 of 1995. The appellants further denied that the deceased was aged 16 years nor industrious. Indeed he had no dependants.

The suit had initially been filed in the Nairobi Chief Magistrate's court. However on the application of the respondents counsel, the suit was on 31st July, 2002 ordered transferred to the Chief Magistrate's Court, Nyeri by **Justice Githinji**.

The hearing of the case then commenced before **Kaburu Bauni**, Chief Magistrate as he then was. The plaintiff testified that the deceased was his son. On 5th April, 1995 he was at home in Nyeri town when someone came and informed him that a vehicle was lying on his son near Chania Bridge. He went to the scene and found that two vehicles had been involved in the accident and one was lying on top of his son. That was a Toyota matatu registration number KPW 401. The vehicle was lifted but his son was already dead. In the middle of the road facing Nyeri town there was a lorry KQN 246. He thereafter organized for the deceased to be taken to Nyeri PGH. He also obtained police abstract. Before instituting this suit he obtained a grant of letters of administration of the deceased's estate. He incurred burial expenses in the total sum of Ksh.19,850/= as pleaded in the plaint. Some documents in support of those claims were tendered in evidence. The respondent concluded his testimony by stating that the deceased was a student at D.E.B. Primary School and tendered in evidence a letter from the said school. The deceased used to assist him.

Cross-examined by **Mr. Wahome**, learned counsel for the appellant, he replied that he did not witness the accident. He was aware that the driver of the lorry was charged but he did not testify in the case. He did not know the outcome of the case though.

The 2nd witness called by the respondent was his sister, **Jane Waithira Mworira**. Her testimony was that on 5th April, 1995 whilst in the shamba he saw a lorry which collects garbage belonging to the 1st

appellant on the road. It had stopped. Two boys passed by and greeted her. She then entered her house. Shortly thereafter she heard a loud bang followed by a lot of noise and screams. She rushed to the scene and found a vehicle had overturned and was lying on the two boys. She had not seen the vehicle lying on the boys earlier. The lorry was in the middle of the road.

Cross-examined by **Mr. Wahome**, she similarly conceded that she had not witnessed the accident. She also conceded that she had never recorded a statement over the incident with the police nor did she testify in the traffic case. With that the respondent closed his case.

When the case next came up for hearing on 11th may, 2005, it was before **R.N. Nyakundi**, Chief Magistrate. The record is not clear as to the circumstances under which the case found itself before **Nyakundi C.M.** It may be perhaps, that **Kaburu Bauni** had ceased to have jurisdiction over the case on account of either transfer or promotion to the High court. The record is however not clear. Be that as it may, it appears that respective counsel agreed to proceed with the case from where **Kaburu Bauni** had left.

For the defence, the 3rd appellant testified first. He stated that on 5th April, 1995 he was from King'ong'o driving the lorry KQN 246 which lorry was owned by the 1st appellant. Having crossed Chania River Bridge, the lorry stalled as it was going up the hill. He sought assistance from town. In the meantime there came another motor vehicle KPW 401 at a high speed and collided with the lorry. It overturned and hit two boys off the road. The appellant had placed tree branches on the road to warn the other vehicle traffic on the road of the stalled lorry. The tree branches were placed 70 metres down hill and up hill. The vehicle hit the lorry as it drove up the hill. That the court had visited the scene and saw the tree branches. He denied causing obstruction as other vehicles had used the same road at the material time. He was later charged with the traffic offence of causing death by dangerous driving. He was however found guilty of driving a defective motor vehicle. As far as he was concerned the person who was at fault was the 5th co-defendant as he hit his vehicle from the rear. The 3rd appellant was in the company of the 2nd appellant at the time. He was a mechanic. The vehicle was on road with the 2nd appellant checking the mechanical problem.

Cross-examined by **Mrs Ameka**, learned counsel for the respondent, he stated that he had been a driver since 1992. The vehicle had a problem as the compressor used to lock after a few minutes. Prior to the accident he had heard a vehicle coming at a high speed.

The other witness was **Richard Ndegwa Karanja**. He was a mechanic working with the 1st appellant. On 5th April, 1995 he received information that their vehicle KQN 246 had a mechanical problem at Chania Bridge. He proceeded there. Suddenly a vehicle emerged and hit that vehicle. The same vehicle lost control, veered off the road and knocked some two children. The turn boy had placed branches on the road as a warning sign. He denied that they had obstructed the road. Indeed the road from Nyeri was clear. Other vehicles used the same spot. He blamed the driver of the KPW 401 for the accident.

Cross-examined by **Mrs. Ameka**, he stated that their vehicle was slightly off the road. It had stalled on the road. When he came to the scene he found branches placed on the road from Nyeri about 70 metres. He was preparing the metal bar for toying. The vehicle KPW 401 first hit the children and later collided with the lorry. With that the appellants closed their case.

The learned magistrate having evaluated the evidence by the respondent and appellants held that both the appellants and co-defendants were equally to blame for the accident. He thereafter proceeded to make an award of Kshs.521,700/= inclusive of General and special damages plus costs and interest. He then ordered the said amounts be borne equally by the appellants and co-defendants.

The appellants were aggrieved by the judgment and decree aforesaid and hence they preferred this appeal through **Messrs Wahome Gikonyo & Co. Advocates**. They advanced 6 grounds of appeal in their memorandum of appeal.

These are:-

1. **The learned chief Magistrate erred in law and fact in apportioning fifty percent (50%) liability on the part of the appellants when they were not negligent at all. A miscarriage of justice was thereby occasioned.**
2. **The learned Chief Magistrate erred in law and fact in finding the appellants negligent when they had taken all reasonable measures to indicate their presence on the road and when they were themselves victims of a reckless driver. A miscarriage of justice was there by occasioned.**
3. **In so far as the third appellant was absolved from any blame for the accident vide NYERI SPM TRAFFIC CASE NO.4 OF 1996 (C.D.) the learned Chief Magistrate then erred in law and fact in finding the appellants blameworthy and a miscarriage of justice was thereby occasioned.**
4. **In so far as there was an interlocutory judgment against the 4th and 5th defendants, and they never contested the appellants' evidence against them, the learned Chief Magistrate erred in finding the appellants liable in any way. A miscarriage of justice was thereby occasioned.**
5. **The learned Chief Magistrate erred in law and fact in making an extremely high award for pain and suffering, under the Law Reform Act and for lost years. A miscarriage of justice was thereby occasioned.**
6. **The learned Chief Magistrate's findings against the appellants were not supported by the evidence on record. A miscarriage of justice was thereby occasioned.**

When the appeal came up for hearing the court directed that the same be heard by way of written submissions. On 29th May, 2009, the appellants filed their submissions. The respondents had not done so by then. The appeal was put off to 12th June, 2009 to enable the respondent file his written submissions. Come that day and the respondent had again not filed his submissions. At the request of **Mr. Wagiita**, learned counsel then holding brief for **Mrs Ameka** for the respondent, the matter was again put off to 3rd July, 2009. On that occasion neither the respondent nor his counsel appeared. Nor had they filed written submissions. As no explanation was forthcoming for their failure to attend court and or file their written submissions, I decided to act on the written submissions of the appellants on record.

This being a first appeal it is in the nature of a re-hearing. It is my duty to re-evaluate the evidence, analyse it and came to my own conclusions but in doing so I must give allowance to the fact that I have neither seen nor heard the witnesses – See Peters V Sunday Post Ltd (1958) E.A.424, Selle & Another V Associated Motor Boat Co. Ltd & others (1968) E.A. 123, Williams Diamonds ltd V Brown (1970) EA.1 and Kogo V Nyamogo & Nyamogo Advocates (2004) 1 KLR 367.

In arriving at the decision sought to be impugned, the learned magistrate stated:

“.....The vehicle KPW 401 first collided with motor vehicle KQN 246 before loosing control and hitting the deceased who was off the road. The plaintiff witnesses did not see how the accident occurred. The defendant's witnesses stated that they had put branches on the road as a warning. It is not clear from the evidence whether the branches placed were at a position to warn somebody that there is a pending danger ahead. From the evidence I am entitled under section 119 of the Kenya Insurance Act (sic) to presume as absolutely (sic) fact that when two vehicles collide on the highway they do so in consequence of either one or both of the drivers (sic) thereof. I make the assumption here. The defendant's testimony does not rebut that presumption. The reason for that finding is that it is on record that the vehicle stalled in the middle of the road. We are not told why the same was not pushed off the road. There is no evidence that besides that alleged branches, the defendants took any precautionary step for the safety of the motorists on the road.....”

That may well be correct. However I do not think that there was any basis for the learned Magistrate

to invoke the presumption aforesaid. The evidence of the appellants as to how their vehicle stalled, the action they took immediately the motor vehicle stalled to warn the other vehicle traffic on the road as to the danger posed by the stalled motor vehicle and how the other motor vehicle crushed into the stalled motor vehicle was all unchallenged. The respondent did not at all poke holes in the appellant's defence aforesaid. The appellants' motor vehicle stalled as it was going uphill from a bridge. Soon thereafter the appellants put tree branches on both directions of the road warning the oncoming traffic that a motor vehicle had stalled. It is not uncommon in this country for tree branches to be put on the road as a warning sign as opposed to the normal triangle signs. There is evidence uncontroverted that these tree branches were put 70 metres away from the stalled motor vehicle on either side of the road. To my mind these were sufficient warning and had the driver of KPW 401 been observant and drove with due care attention, he would have seen those tree branches and driven carefully as to avoid the accident. The learned magistrate also talked of the efforts put in place by the appellant to push the lorry off the road. The learned magistrate is here being presumptuous that the lorry was capable of being pushed. It may well have been that due to the mechanical problem that caused it to stall, it was incapable of being moved manually.

The lorry stalled as it went up the hill. However KPW 401 crushed into its rear. That means that KPW 401 was coming from behind. If that be the case, the driver of KPW 401 was in position to see the lorry from a distance to be able to avoid crushing into it if he kept a proper look out as the stalled lorry was up the hill and he was coming from down hill. I have no doubt in mind as well that the said motor vehicle KPW 401 was being driven at an excessive speed in the circumstances. This finding is informed by the fact that having crushed into the rear of the lorry the vehicle, left the road, hit the deceased and his companion off the road and rested on them. It is also not lost on me that the same motor vehicle had just come downhill before crashing as aforesaid. There is also the unchallenged evidence of the appellants that just before the accident they saw the said vehicle being driven very fast. To say the least, I think that the driver of KPW 401 was completely reckless.

There is also evidence that the 3rd appellant was subsequently charged with the offence of causing death by obstruction vide Nyeri CM C.D number 4 of 1995 but he was acquitted under section 215 of the Criminal procedure Code. This as correctly submitted by **Mr. Wahome**, was enough evidence that the 3rd appellant was not guilty of having been negligent. It is noteworthy that the respondent and his only witness admitted that they never witnessed nor observed the accident. However the 3rd appellant and his witnesses observed the accident. The evidence of the respondent and his witness as to how the accident happened would appear to be hearsay and inadmissible. We cannot say the same of the appellants. They were eye witnesses to the accident. Their evidence is therefore credible. Of course one may argue that their evidence was self-serving as they were parties to the suit. However they were not the only defendants. There were other co-defendants as well. There were other co-defendants against whom default judgment had been entered and who called no evidence at all to discount what the appellants testified to. Therefore the learned magistrate was thus in error in apportioning liability between the appellant and the co-defendants at 50% when the co-defendants had called no evidence at all and when in fact there was already interlocutory judgment against them. In my view they are the ones who are wholly to blame for the accident.

In the event then I have said enough to show that this appeal is merited. Accordingly it is allowed with costs. The judgment and decree in Nyeri chief Magistrate's Court Civil Case number 1456 of 1998 is hereby set aside. In substitution I make the order dismissing the suit against the appellants. However judgment and decree as against the appellants co-defendants aforesaid stands to the extent of liability. However I would interfere with the damages awarded to a limited extent.

As already stated the respondent was awarded Ksh.10,000/= for pain & suffering, 100,000/= for loss of expectation of life, 400,000/= for lost years and Ksh.11,700/= for special damages. I have no quarrel with the awards aforesaid. However the learned magistrate should have observed the principle of taking into account the award under the Law Reform Act when assessing damages under the Fatal Accidents Act. In other words because the same claimant is benefiting both under the law Reform Act and Fatal Accidents Act, the award under the former ought to be put in regard when the award under the latter is being considered. (**See Kemp & Kemp: On quantum of damages and McGregor on damages**). With that principle in mind I will knock off the sum of Ksh.10,000/= for the pain and suffering and ksh.100,000/=

for loss of expectation of life. Accordingly, the damages now due to the respondent should be Ksh.411,700/= plus costs and interest. Interest on the special damages shall run from the date of filing of the suit whereas that on General damages from the date of the judgment of the subordinate court. The appellants though shall have the costs of the suit in the subordinate court as well as this appeal.

Dated and delivered at Nyeri this 17th day of September, 2009.

M.S.A. MAKHANDIA

JUDGE