



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

Civil Appeal 1034 of 2004

**GUADALUPE FATHERS.....1ST
APPELLANT**

**FATHER FRANCISCO ZAPATA.....2ND
APPELLANT**

VERSUS

JOSEPH MUKARE SAKON

(Suing as the Legal Representative of the Estate of

**SAINA SAKON SHIRA.....
.....RESPONDENT**

J U D G M E N T

This appeal originates from Civil Case No.1683 of 2003 which was initiated in the Chief Magistrate's Court at Nairobi by Joseph Mukare Sakon, (hereinafter referred to as the respondent). In that suit the respondent who was suing as the legal representative of the Estate of Saina Sakon Shira sued Guadalupe Fathers and Father Francisco Zapata (hereinafter referred to as the 1st and 2nd appellants respectively). The respondent was seeking damages under the fatal accidents Act Cap 32 and the Law Reform Act Cap 26 arising from the death of Saina Sakon Shira (hereinafter referred to as the deceased). The deceased died as a result of an accident involving a motor vehicle registration No. KAN 839G (hereinafter referred to as the subject vehicle), allegedly owned by the 1st appellant. At the time of the accident the motor vehicle was allegedly being driven by the 2nd appellant, a driver, servant or agent of the 1st appellant. It was contended that the accident was caused by the negligence of the 2nd appellant for whose negligence the 1st appellant is vicariously liable. That negligence was particularized as follows:

- (a) Driving at an excessive speed.
- (b) Losing control of motor vehicle registration number KAM 839G so that it left the road and knocked down the deceased.
- (c) Failing to keep any or any proper look out.
- (d) Failing to brake, stop or swerve or in any other way control the said motor vehicle as to avoid the accident.

- (e) Permitting the said motor vehicle to veer of the road.
- (f) Permitting or causing the said accident to happen.

The appellants filed a joint defence denying the respondent's claim. In particular, it was denied that the 1st appellant was the registered owner of the subject vehicle or that the 2nd appellant was the driver of the subject vehicle. The 2nd appellant also denied all particulars of negligence alleged against him and contended that if the accident occurred then the same was caused by the negligence of the deceased which was particularized as follow: -

- a) Walking on the road without paying any or any sufficient regard to motor vehicles on the said road, particularly the defendant's motor vehicle.
- b) Walking on the road and in the rightful path of the defendants' motor vehicle and thereby leading to the accident.
- c) Failing to walk at the designated pedestrian crossing and therefore leading to the accident.
- d) Walking in the path of the defendant's motor vehicle without paying any or any sufficient regard for his own safety.
- e) Suddenly emerging into the rightful path of the defendants' motor vehicle and therefore leading to the accident.

At the hearing of the suit, the respondent and one John Senet Polong testified in support of the respondent's claim. Their evidence was briefly as follows: The deceased who was a younger brother to the respondent was aged 15 years. On the material day, the deceased was walking on the footpath next to the road when the subject vehicle which was being driven very fast left the road and hit him. John Senet Polong who was walking by the road side witnessed the accident. He assisted the driver of the vehicle and together they took the deceased who was unconscious, to a dispensary. The respondent was informed about the accident and he proceeded to the dispensary where he was advised to take the deceased to Kenyatta National Hospital. On arrival at the hospital, the deceased was declared dead. The accident was reported to the police and a police abstract report was produced in evidence. The deceased was said to be a businessman who was buying and selling animals, making a profit of about Kshs.10,000/= monthly. The respondent having obtained letters of administration appointing him as the administrator of the Estate of the deceased, filed a suit seeking damages, on his own behalf and on behalf of his two sisters claiming to be dependants of the deceased.

Nyamu Kiria Karachu an Inspector with the Ministry of Roads and Public Works was the witness who testified on behalf of the appellants. Briefly he testified that on the material day, he was on his way from Kajiado to Machirui. He was in the company of the 2nd appellant and he was seated on the front passenger seat. Karachu explained that the motor vehicle was involved in an accident. According to the witness, the deceased appeared from the left side of the road and ran across the road to the right side. The driver of the vehicle hooted, braked and swerved but was unable to avoid knocking the boy. The witness maintained that the driver was driving at a speed of about 75 to a 100 Kilometers per hour. According to the witness, the respondent's witness John Senet Polong, was not at the scene.

In his judgment the trial magistrate found that the subject vehicle was being driven at an excessive speed hence the inability of the driver to stop. The trial magistrate accepted the evidence for the respondent that the deceased was walking along the road and rejected the appellants' evidence that the deceased was crossing the road. He therefore concluded that the 2nd appellant was negligent. The trial magistrate apportioned liability as against the 2nd respondent at 80% and held the 1st respondent vicariously liable. The trial magistrate further awarded damages to the respondent subject to 20% contribution as follows: -

Kshs.480,000/= in respect of lost years

Kshs.100,000/= loss of expectation of life

Kshs.10,000/= pain and suffering,

Kshs.10,000/= proven specials.

Being aggrieved by that judgment, the appellant has filed an appeal raising 5 grounds as follows: -

- (1) That the learned magistrate erred in fact and in law in failing to appreciate the evidence presented on the issue of liability and in finding the appellants liable to the extent of 80%.
- (2) That the learned magistrate erred in fact and in law in failing to be guided by the evidence of the defendant witness and police findings to find that the appellants were not to blame for the accident.
- (3) That the learned magistrate erred in fact and in law in awarding the respondent the sum of Kshs.480,000/= as damages for lost years which sum is manifestly excessive as to be an erroneous estimate of the damages that would adequately compensate the respondent.
- (4) That the learned magistrate erred in fact and in law in failing to give due regard to guiding authorities that were cited by the appellants in their submissions and in so doing awarded excessive sum.
- (5) That the learned magistrate erred in fact and in law in applying a multiplier of $\frac{2}{3}$ in assessing the damages for lost years despite evidence having been led that the deceased was a bachelor with no dependants whatsoever.

In support of the appeal, counsel for the appellants pointed out that the evidence of John Sendet Polong which was relied upon by the trial magistrate was inconsistent. He submitted that in the absence of the evidence of the 2nd boy who was said to be with the deceased, the trial magistrate ought to have accepted the evidence of the defence witness, who was a passenger in the subject vehicle that the deceased was running across the road. Relying on the case of *Kemfro African Ltd T/A Meru Express Services (1976) & Another vs Luvia & Another (1987) KLR 30* and the case of *Lang vs London Transport Executive & Another (1959) 3 All ER 609*, Counsel for the appellant submitted that the trial magistrate was wrong in finding the appellant liable as he failed to take into account relevant factors. Counsel further maintained that the trial magistrate was wrong in drawing an adverse inference from the failure of the 2nd appellant to testify.

With regard to the award of damages, counsel for the appellant submitted that the award in respect of loss of dependancy was improper, as the persons listed in the plaint as persons for whose benefit the claim was brought, were not dependants within the meaning of Section 2 of the Fatal Accidents Act. Counsel maintained that Section 4 of the Fatal Accidents Act as read together with Section 2(1) does not include brothers. The court referred to the case of *Gammel vs Wilson (1981) 1 All ER 578*. The court was further referred to *HCCC No.52 of 2004 Johan Distelberger vs Vincent Mwema Mbithi & Another*, regarding the trial magistrate's failure to consider the submissions and the authorities which were availed to him by the counsel.

On his part, counsel for the respondent submitted that there was no contradiction in the evidence of the respondent's witness as there was clear evidence that the deceased and another boy were walking together. Counsel maintained that the trial magistrate arrived at the right conclusion as there was evidence that the deceased was walking on a footpath on the side of the road. The court was further urged to accept the finding of the trial magistrate as he had the benefit of seeing the demeanour of the witnesses.

Relying on the case of *Khambi & Another vs Mahithi & Another (1969) EA 70*, Counsel for the respondent submitted that the appellant has not identified any error of principle or any exceptional circumstances that would justify the interference with the trial magistrate's apportionment of liability. Relying also on the case of *Peters vs Sunday Post Ltd (1958) EA 424*, counsel for the respondent argued

that the appellant had not shown that there was no evidence to support any conclusion made by the trial magistrate nor had the appellant shown that the trial magistrate failed to appreciate the weight or bearing of circumstances proved. Counsel further maintained that there was no evidence to support the defence contention that the deceased was negligent. It was further submitted that the appellants having made part payment to the respondent as per the consent recorded on the 17th December, 2005, there was an admission on liability.

Regarding the award for lost years, it was submitted that this was with regard to the income that the deceased would have earned which was a loss suffered by the Estate. It was submitted that although the trial magistrate purported to award damages for lost years/loss of dependency, the trial magistrate was in actual fact awarding damages for lost years. Referring to the case of *Gammel vs Wilson* (supra), which was cited by the appellants' counsel, it was submitted that lost years were actually awarded to the Estate of the deceased. It was maintained that the multiplier of 20, adopted by the trial magistrate, was not unreasonable. The court was therefore urged to find the award proper.

In a rejoinder to the submissions made by the respondent's counsel, the appellants' counsel sought to distinguish the authorities which were relied upon by the respondent's counsel. He distinguished the *Khambi case* (supra), as relating to an appeal between joint tortfeasor against the apportionment of blame which was not the case herein. Counsel for the appellant maintained that each case must be determined by its own peculiar circumstances and that in this case, there were exceptional circumstances warranting the interference of the trial magistrate's finding on liability. The case of *Peters vs Sunday Post* (supra), was also distinguished as involving a contractual dispute unlike the present case based on tortious liability.

I have carefully reconsidered and evaluated the evidence as I am expected to do in this first appeal. The authority of *Peters vs Sunday Post Ltd* (Supra) which was cited by counsels provides an appropriate guide in undertaking such an exercise. That is, that the court should be cautious in interfering with the conclusions of the trial judge but if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved or has plainly gone wrong, the appellate court should not hesitate to interfere.

In this case, the record shows that there were two varying versions of how the accident occurred: The respondent's version being that the deceased was walking by the roadside when the subject vehicle, which was being driven very fast, left the road and knocked the deceased; the appellant's version being that the deceased appeared from the left side of the road and suddenly ran across the road to the right side, and that the driver of the subject vehicle hooted, applied brakes and swerved, but was unable to avoid hitting the deceased before the vehicle went off the road. It is noteworthy that the boy who was said to have been in the company of the deceased was not called to testify nor was the appellant's driver called to testify. The trial magistrate appeared to have concluded that the appellant's driver failed to testify because his evidence would have been adverse to him. This was a misdirection as under Section 107 of the Evidence Act (Cap 50) the burden of proof remained on the respondent and the trial magistrate could not shift that burden to the appellant. Moreover, in all fairness, the trial magistrate ought to have drawn the same conclusion with regard to the failure by the respondent to call the boy who was with the deceased.

The evidence of the respondent's witness was that he was off the road. Although the trial magistrate stated in his judgment that he believed this witness, "*when he said that he was walking along the same time with the deceased on the left side of the pedestrian path*", this is not borne out by the evidence. In his evidence in chief, the witness was not clear on which side of the road he was, as he talks about "*off the road towards our side*". Under cross-examination, the respondent's witness explained that; "*I was to the right of the road and the motor vehicle was following me*". He insisted that the boys were ahead of him on the same side and that the vehicle left the road and hit the deceased after passing him. That would mean that the deceased was hit off the road on the right side of the road. But then, the same witness stated in his evidence in chief that; "*the motor vehicle left the road and hit the deceased on the left side of the motor vehicle*". I find this witness's evidence inconsistent. For, if the vehicle was being driven on its right side of the road, which is left, it is difficult to understand how it would veer off the road to the right

without any particular reason. Secondly, it is difficult to understand how the vehicle could have hit the deceased by its left side if the deceased was on the right side.

I find the evidence of the defence witness that the deceased appeared from the left side of the road and was hit whilst running across the road to the right, the more likely version. Indeed, this is consistent with the trial magistrate's own finding that the impact was on the extreme right corner of the road. The trial magistrate therefore ought to have rejected the defence version that the deceased was hit whilst off the road on the pedestrian path. I find that although the 2nd appellant swerved to the right in a bid to avoid the accident he was traveling at a very excessive speed, hence his inability to stop or avoid the collision.

In my considered view, both the deceased and the 2nd appellant were negligent and the apportionment of liability by the trial magistrate was not supported by the evidence. It is apparent that the deceased has to shoulder a substantial part of the blame for running suddenly across the road without ensuring that it was safe to do so. Nevertheless, the major part of the blame must remain upon the 2nd appellant who was obviously driving at a speed which was excessive, given the fact that he was driving near a market place, where there were bound to be many people crossing the road. In the circumstances, I would set aside the trial magistrate's apportionment of liability of 80%:20% as against the appellants.

With regard to the assessment of damages, the case of *Kemfro African Ltd T/A Meru Express Services Ltd (1976) & Another* (supra), sets out the principle to be observed by the appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge. i.e. the appellate court must be satisfied that the judge in assessing the damages, took into account an irrelevant factor or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. The deceased was awarded Kshs.100,000/= for loss of expectation of life, Kshs.10,000/= for pain and suffering and Kshs.10,000/= for proven specials. No reason has been given to this court as to why this court should disturb those awards. The bone of contention appears to be in respect of the award of Kshs.480,000/= in respect of lost years/loss of dependency.

It is now generally accepted that under the Law Reform Act, damages for lost years are recoverable for the Estate of the deceased where the deceased dies as a result of an accident before he can institute an action. The case of *Hassan vs Nathan Mwangi Kamau Transporters & 5 others [1986] KLR 457* refers. Under Section 2 of the Law Reform Act Cap 26, such damages are recoverable for the benefit of the Estate of the deceased and are in addition to any rights conferred on the dependants of the deceased by the Fatal Accidents Act Cap 32. Therefore, the term loss of dependency which was used by the trial magistrate was in actual fact a misnomer as in this case it was not a question of loss of dependency but loss of income to the Estate of the deceased.

Although the suit was filed by a brother of the deceased, who would not qualify to be a dependant under the Fatal Accidents Act, the damages in respect of lost years is nonetheless recoverable for the benefit of the Estate of the deceased under the Law Reform Act. According to the respondent's evidence, the income of the deceased was said to be on average Kshs.10,000 per month. There was however, no evidence in support of that contention. Indeed, the trial magistrate rejected that figure and adopted a figure of Kshs.3,000/=. Although he did not give any reasons for adopting that figure, the figure was not unreasonable given the fact that the deceased had no known skills. The trial magistrate further assessed the deceased's reasonable living expenses at about $\frac{1}{3}$ of his income and adopted a multiplier of 20. In view of the deceased's age of 15 years, the multiplier of 20 was reasonable. In the circumstances, I find that there is no just cause to interfere with the award of damages for lost years which was made by the trial magistrate as the trial magistrate took into account relevant factors and the amount is not unreasonably high or low.

The upshot of the above is that I allow this appeal to the extent of setting aside the trial magistrate's apportionment of liability and substituting thereof an apportionment of liability against the appellant at 60% only. The general damages awarded in favour of the respondents shall therefore be subject to 40% contribution. The appellant shall further be entitled to have half the costs of this appeal. To this extent only does the appeal succeed.

Those shall be the orders of this court.

Dated and delivered this 23rd day of October, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Masinde for the appellants

Advocate for the respondent absent