



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**

**Civil Appeal 120 of 2003**

**GEORGE NDERITU NDUMIA**

**NG'ANG'A KAMITHI.....**  
**.....APPELLANTS**

**VERSUS**

**NYAMBURA GITONGA .....**  
**.....RESPONDENT**

***(Appeal from the judgment and Orders of the Resident Magistrate J.B.A. Olukoye (Mrs.) dated 2<sup>nd</sup> September 2003 in the Chief Magistrate's Civil Case Number 222 of 2002)***

**J U D G M E N T**

This appeal originated from a suit filed in the Resident Magistrate's Court at Nyeri where Joram Gitonga Ndegwa filed the suit as the legal representative to the estate of Jeremiah Muchiri Ndegwa claiming under the Law Reform Act and the Fatal Accidents Act for special and general damages arising from a road traffic accident in which the vehicle of Nganga Kamithi, the 2<sup>nd</sup> Appellant which was being driven by George Nderitu Ndumia the 1<sup>st</sup> Appellant knocked the deceased Jeremiah Muchiri Ndegwa causing him fatal injuries. Joram Gitonga Ndegwa the original Plaintiff died before the hearing of the suit and was substituted by his wife Nyambura Gitonga (*Respondent herein*).

The Respondent's evidence was that on the 26<sup>th</sup> June 1999, the deceased and Aloysious Ndonga (P.W.2) were walking together along Ihithe – Nyeri Road. The deceased was carrying 1 ½ debe of potatoes on his back. A Vehicle then came from behind them driven on the right side instead of the left side. The vehicle which was speeding hooted and P.W.2 managed to jump off the road, the deceased however was hit by the vehicle and died instantly.

The Respondent claimed that the deceased was a farmer who used to make about Kshs.3,000/- per day and that He used to assist his brothers who included the original Plaintiff and 3 others. They therefore claimed loss of dependency. They also claimed Kshs.19,150/= as special damages incurred during the funeral and also in obtaining Letters of Administration.

The Appellants denied that the accident was caused by their negligence. They claimed that the accident was caused by the negligence of the deceased in suddenly jumping onto the road and crossing the road when it was not safe for him to do so.

In his evidence the 1<sup>st</sup> Appellant who was the only defence witness testified that He was driving along

the Ithite – Nyeri Road when the deceased suddenly jumped onto the road and hit his vehicle on the left mudguard and frame of the windscreen. He tried to avoid hitting the deceased by applying brakes and swerving to the right but it was too late. The 1<sup>st</sup> Appellant maintained that He was driving on his right lane on the right whilst facing Nyeri town. He explained that the deceased was known to him as someone who was insane as He used to roam the roads and jump onto the way of oncoming vehicles quite often.

The trial magistrate was not impressed by the 1<sup>st</sup> Appellant’s version of the events. She found the 1<sup>st</sup> Appellant solely liable for the accident and the 2<sup>nd</sup> Appellant vicariously liable for the 1<sup>st</sup> Appellant’s negligence she accepted that the deceased was a farmer with an income which assisted his brothers. Adopting a multiplicand of 15, she assessed general damages for loss of dependency at Kshs.180,000/= loss of life expectancy at Kshs.60,000/= and pain and suffering at Kshs.5,000/=. She also awarded Kshs.19,150/= as special damages. The trial magistrate therefore gave judgment for the Respondent as against the Appellants jointly and severally for Kshs.264,150/= together with costs and interest.

The Appellants have lodged several grounds of appeal against this judgment. The Appellant’s counsel submitted that the Respondent did not prove the particulars of negligence set out in their paragraph 4 of the plaint. He relied on the case of *Jane Mwikali v/s Akamba Public Road Services HCCC (Machakos) Civil Case Number 79 of 1991, (unreported)* in which Mwera J. dismissed a suit in which particulars of negligence were not proved. He also relied on the case of *Jane Muli v/s Julius Muoki Muli & Another HCCC (Machakos) Number 359 of 1995 (unreported) in which Mwera J.* held that high speed alone is not evidence of negligence. Counsel urged the court to reconsider and evaluate the evidence as the evaluation by the trial magistrate was wrong the trial magistrate having shifted the burden of proof from the Plaintiff to the Defendant and having also failed to take into account Section 68(3) of the Traffic Act which places a duty on the pedestrian to observe the High Way Code.

On the issue of quantum it was submitted that there was no evidence adduced in support of the deceased’s earnings and that in any case the claim for loss of earning which is a special damage was not specifically pleaded. Further He submitted that there was no proof of dependency as none of the alleged dependants testified. Finally it was submitted that the special damages were not proved.

For the Respondent it was submitted that there was sufficient evidence adduced by the Respondent’s witness which established the negligence of the 1<sup>st</sup> Appellant. It was also submitted that the dependency was demonstrated in the evidence and that the trial magistrate was guided by the authorities which were cited to her and which are part of the record of appeal.

The case of *Mwasokoni v Kenya Bus Services Limited [1985] KLR 931* sets out the circumstances in which an appeal court may interfere with findings of a lower court on fact as follows: -

***“The court of appeal will interfere with a finding of fact by the High Court where the finding is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles in reaching the finding. The appellant court also has the power to examine and re-evaluate the evidence on a first appeal where that becomes necessary.”***

A similar holding was arrived at in the majority decision in the case of *Kiruga v Kiruga & Another [1988] KLR 348* where it was held inter alia.

- ***“An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong.***
- ***An appellant court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.***
- ***Where it happens that a decision may seem equally open either way, the appellate approach is that the decision of the trial judge who has enjoyed the advantage not available to the appellate court***

***becomes of paramount importance and ought not to be disturbed.***”

It is therefore open to this court to review and evaluate the evidence which was adduced before the trial magistrate with a view to establishing whether the conclusions reached by the magistrate should stand. However, this court can only depart from the findings of the trial magistrate if it is satisfied that the finding is not supported by any evidence or based on a misapprehension of the evidence or wrong principles.

On the issue of liability, there was no dispute that the deceased died as a result of an accident involving the 2<sup>nd</sup> Appellant’s motor-vehicle. The issue was who was to blame for the accident.

The trial magistrate was faced with two versions as to how the accident occurred. That of the Respondent which alleged that the 1<sup>st</sup> Appellant was driving very fast and appeared suddenly from a corner, approaching the deceased persons from behind and that it was being driven on the wrong side and knocked the deceased who was not able to jump off the road as fast as his colleague P.W.2, whilst the version of the Appellant alleged that the deceased who was insane jumped onto the road from the left suddenly, and that the 1<sup>st</sup> Appellant who had not seen him before due to the hedge and trees on the side of the road, tried to avoid hitting him by applying brakes and swerving to the right, but it was too late as the deceased hit the vehicle on its left mudguard and frame of windscreen.

The trial magistrate did not go into an in-depth analysis of the evidence but preferred the Respondent’s version of the events. Her reason seems to be in her finding as follows: -

***“The court finds that the 1<sup>st</sup> Defendant should have gone further to prove the deceased’s insanity for instance by calling as witnesses other people who knew him to be insane and those who were aware of his behaviour of jumping into the way of moving vehicles on the road, but that he did not do, a clear indication that whatever he said was a figment of his imagination. In fact had the deceased been of that state of mind and in the habit of jumping into the way of moving vehicles he would not have lived for the 45 years he was at the time of his death and to that extent I dismiss that evidence as an afterthought.”***

The reasoning of the trial magistrate as to why she did not accept the defence version of how the accident occurred was sound, however she ought to have first considered the Respondent’s case and made a specific finding as to whether the Respondent had established the alleged negligence against the Appellant. That notwithstanding, the record shows that the Respondent’s eye-witnesses (P.W.2) testified that the Appellants’ vehicle came “speeding”. This coupled with the 1<sup>st</sup> Appellants own evidence that He was driving at a speed of 60 to 70 kilometers per hour and the fact that 1<sup>st</sup> Appellant was unable to stop or in any way avoid the collision confirms that 1<sup>st</sup> Appellant was driving at a speed which was in the circumstances unreasonably high.

The Respondent’s witness also maintained that the Appellant’s vehicle was being driven on the right side of the road contrary to the traffic rules which requires all vehicles to keep to the left side of the road. In his defence the 1<sup>st</sup> Appellant maintained that He was on his right lane on the right while facing Nyeri. This implies that He was actually driving on the right side of the road which was wrong.

I am satisfied and I do find that the evidence adduced was sufficient to establish the negligence of the 1<sup>st</sup> Appellant. With regard to the apportionment of liability. It is obvious that that was a matter of discretion exercised by the trial court in the light of the circumstances before her. In the case of ***Karanja v Malele [1983] KLR 142 Chesoni Ag. J. A.*** (as He then was) stated as follows: -

***“I agree with what Law J. A. said in Malde v Angira Civil Appeal Number 12 of 1982 (unreported) that apportionment of blame represents an exercise of a discretion with which this court will interfere only when it is clearly wrong, or on no evidence or on the application of a wrong principle.”***

The trial magistrate may have had an unusual approach in her consideration of the evidence, it cannot

be said however that she was clearly wrong in her apportionment or that she applied wrong principles.

As concerns the evidence regarding quantum, it is evident that there was no tangible evidence produced regarding the deceased's income or evidence of his alleged farming. There was need for more evidence to support the allegations particularly since the death certificate indicated He had no occupation. There was even no basis for the figure of 3,000/- which was given either as a daily income or a monthly income. Moreover no evidence was adduced regarding the assistance that the deceased used to give the alleged dependants.

P.W.1 's evidence that her husband used to get 200/= per month was not support by anything. Three of three of the deceased's brothers said to be his dependants were all much older then him having their families. Why would they depend on the deceased a young unmarried man who did not appear to have any income.

No evidence was adduced with regard to what the younger brother Nderitu Ndegwa was doing and what kind of support that He received from the deceased. I find that the trial magistrate did not exercise her discretion properly in awarding damages for loss of dependency when there was clearly no evidence before her to justify such a claim. I would accordingly set aside the award.

With regard to damages for loss of life expectancy and pain and suffering the trial magistrate properly exercised her discretion based on the authorities cited to her. I have no reason to interfere with her assessment. The special damages were not only specifically pleaded but also supported by receipt which were produced in evidence.

The upshot of the above is that I allow the appeal to the extent of setting aside the award of Kshs.180,000/- in respect of loss of dependency. I confirm the judgment in favour of the Respondent as against the Appellants jointly and severally in the sum of Kshs.79,150/= being general damages in respect of loss of life expectancy and special damages. Each party shall bear his own costs in respect of this appeal.

Those shall be the orders of this court.

*Dated, signed and delivered this 22<sup>nd</sup> day of May 2006.*

**H. M. OKWENGU**

**JUDGE**