REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Appeal 120 of 2003

[Being an appeal from the Judgment of Honourable N.O. Ateya – S.P.M in Chief Magistrate's Court, Nakuru, CMCC No.737 of 2001 dated 4th July 2005]

KAMAU MWANGI

NYORO CONSTRUCTION COMPANY LTD …….……. APPELLANT

- VERSUS -

GRACE WANGUI MACHARIA (*Suing as the Legal Representative*

***of the Estate of* GERALD MUCHAI KARANJA – DECEASED ..... RESPONDENT**

JUDGMENT

Kamau Mwangi and Nyoro Construction Company Ltd, the appellants in this appeal were the defendants in a suit that was instituted by the respondent in the lower court.

In the judgment of the lower court, the subject of this appeal, the trial Magistrate found that the appellants were 100% liable to blame for the accident. On quantum the following sums were awarded to the respondent.

*(a) Special damages - Kshs. **1,095/-***

*(b) Reasonable funeral expenses - Kshs. **10,000/-***

*(c) Pain and suffering - Kshs. **20,000/-***

*(d) Loss of expectation of life - Kshs.**120,000/-***

*(e) Loss of dependency 3000 x ½ x 12 x 30= Kshs.**540,000**/-*

TOTAL Kshs.691,095/-

Judgment was entered for the respondent in the sum of Kshs.691,095/- with costs and interest at court rate.

The appellants being dissatisfied with the above judgment they have appealed and raised eleven (11) grounds of appeal against the above judgment.

Mr. Thuo who appeared for the appellants submitted that the trial magistrate erred in admitting the evidence of ownership of the motor vehicle by way of an abstract form, the respondent thus did not discharge the burden of prove for failure to produce a certificate of official search from the Registrar of Motor Vehicle. In the absence of prove of ownership no liability could have attached to the appellant.

On the issue of the causation of the accident, no eye witness was called to give evidence on how the accident occurred. The four witnesses or any of them who gave evidence on the part of the plaintiff did not witness the accident.

Counsel went on to submit that the trial court erred by relying on evidence of conviction of the 1st Appellant in a traffic case based on a plea of guilty.

In this regard he put forward the decision in the case of Philip Keipto Chemwolo and Mumias Sugar Co. Ltd -Vs- Augustice Kubende 1982 – 1988 IKAR to buttress the argument that the conviction by a traffic court cannot be taken as conclusive evidence that there cannot be contributory negligence which might affect the overall position of liability and quantum on damages. The evidence in the police file clearly indicates that the cyclist must have been speeding.

On the issue of pleadings, Counsel for the appellants submitted that the same were null and void as the verifying affidavit by the respondent is not accompanied by a certificate of thump printing.

Lastly on the issue of quantum, the award of Kshs.20,000/- for pain and suffering was said to have no basis as all comparable authorities of decided cases in the High Court award Kshs.10,000/-. The award of Kshs.120,000/- was also challenged as being on the higher side due to the fact that the deceased was only aged 20 years as at the time of the accident. Similarly, the award of kshs.540,000/- for loss of dependency was not born out of the evidence. The respondent gave evidence that the deceased used to give her Kshs.1,000/-, thus the trial court was in error by awarding the respondent Kshs.1,500/- per month and for using the multiplier of 30 years.

On the part of the respondent, Mr Mutonyi Counsel representing the respondent defended the judgment. According to the respondent, they discharged the burden of prove by establishing the 1st appellant was the driver of the motor vehicle that caused the death of the deceased and they produced a police abstract form through the investigating officer to prove that the subject motor vehicle was owned by the 2nd appellant. If the appellant alleges that he was not the owner of the motor vehicle, he had the obligation to rebut the evidence produced by way of an abstract and show lack of ownership as mere denial that was not supported by evidence was not enough. The police officer who produced the abstract form was the investigating officer who visited the scene of the accident. It is clearly indicated the name and address of owner of the vehicle registration number KAB 200L is Nyoro Construction Company.

The first appellant was charged with the offence of causing death by dangerous driving in SRMCC at Molo Traffic case number 2305 of 2000 and was convicted on his own plea of guilty and sentenced to pay a fine of Kshs.20,000/- or one (1) year's imprisonment and further disqualified from holding a driving licence for three (3) years. Since the appellant did not call any evidence for the defence, they cannot fault the trial court for finding the appellants 100% liable for the accident.

In this regard, Mr Mutonyi made reference to a leading text by Halsbury's Laws of England 4th Edition para 69, the passage on contributory negligence where the learned authors have written;

" In order to establish contributory negligence the defendant has to prove that the plaintiffs negligence was a cause of the harm which he has suffered inconsequence."

As regards the issue of ownership of the motor vehicle, Counsel for the respondent submitted that was not a ground for appeal. On the issue of quantum, counsel for the respondent submitted that the same cannot be faulted as the trial magistrate properly evaluated the evidence and took into consideration all the submissions by the parties and there is no basis for interfering with the learned magistrates exercise of his discretion.

Having carefully considered the rival submissions and the record of the lower court, what comes across in this appeal is whether the respondent proved negligence against the appellants and if so proved, whether the same should have been apportioned, whether the pleadings were null and void and whether the assessment of damages was inordinately high.

On the issue of the ownership of the motor vehicle, I agree with Mr. Mutonyi that aspect is not a ground of appeal. According to the provisions of Order 41 rule 2 of the Civil Procedure Rules;

"The memorandum of appeal shall set forth concisely and under distinct heads the ground of objection to the decree or order appealed against without any argument or narrative, and such grounds shall be numbered consecutively."

Failure by the appellant to include this as a ground of appeal is tantamount to taking the respondent by surprise and thus this ground is hereby rejected.

On the issue of prove of negligence and/or contributory negligence, the records of the trial court show that P.C David Rotich gave evidence and produced the police file that contained the investigations which he undertook regarding the accident involving lorry registration number KAB 200L which belonged to Nyoro Construction. The proceedings in SRMCC at Molo in Traffic Case number 2305 of 2000 were also produced. The 1st appellant was convicted on his own plea of guilty and the proceedings especially the facts of the case were stated as follows: -

"On 27th September 2000 at about 2.00 p.m, the accused person was driving a motor vehicle registration number KAB 200L along Molo – Elburgon road and he came across a tractor whose registration number is unknown near Timsales Factory heading to the same direction. He overtook it without checking ahead and in the process hit a pedal cyclist coming from the opposite direction. The pedestrian was taken to Molo district Hospital and he died on arrival. Matter was reported to Molo Traffic Base who visited the scene, the motor vehicle was towed to traffic yard for inspection and on 29th September 2000, it was inspected. The motor vehicle had no pre-accident defects capable of causing the accident. The accused was charged after investigations."

The reason why it is important to restate the above facts is to establish whether the findings on negligence on the part of the appellants by the trial court are erroneous. The appellants did not call evidence but filed written submissions in which the court was urged to dismiss the respondent's case.

The lower court held that the appellants were 100% liable for the accident. I am satisfied that the trial court was not in error because as far as liability was concerned, the defendant never offered any evidence to controvert what was stated by the plaintiff's witness namely; P.C David Rotich.

The case of Philip Keipto Chemwolo (*suppra*) is distinguishable from the present case. It involved the setting aside of an exparte judgement and that is when the Court of Appeal held that

conviction in a traffic case is not conclusive evidence that the defence would not raise triable issues for contributory negligence in a civil case.

The appellants had an opportunity to adduce evidence on contributory negligence but they failed to do so and thus I am satisfied the decision of the trial court cannot be interfered with.

On the issue of quantum, several authorities were presented before the trial court by the defendant on the awards for the loss of expectation of life and the amounts awarded in similar cases are between Kshs.60,000/- to Kshs.80,000/-. Considering the age of the deceased and that death was instantaneous, an assessment of Kshs.20,000/- for pain and suffering and kshs.120,000/- for the loss of the expectation of life are on the higher side.

Similarly, the multiplier of one half in the assessment of the loss of dependency is not borne out from the plaintiff's evidence who said that she used to get Kshs.1,000/- from the deceased.

The principles governing the circumstances under which the appellate court can interfere with the award of damages of the trial court were settled in the case of Butt –Vs- Khan [1982 – 1988] Vol.1 KARL

"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on the wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which is inordinately high or low."

In this case taking all the evidence into account and the authorities submitted by the appellants' Counsel the assessment of damages was inordinately high and in particular the assessment of loss of dependency was based on a wrong consideration. It is for this reason, I set aside the award and substitute it with the following awards;

(a) Special damages - Kshs. 1,095/-

(b) Reasonable funeral expenses - Kshs. 10,000/-

(c) Pain and suffering - Kshs. 10,000/-

(d) Loss of expectation of life - Kshs.70,000/-

(e) Loss of dependency 3000 x 1/3 x 12 x 30 = Kshs.360,000/-

TOTAL Kshs.451,095/-

I will therefore set aside the award of kshs.691,095/- for damages and substitute it with the award of Kshs.451,095/-.

The appellant shall have one half of the cost of the appeal but the respondent shall have the costs of the suit in the lower court with interest from the date of judgment.

Dated at Nakuru this 28th day of July 2006.

MARTHA KOOME

JUDGE