



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

CIVIL APPEAL NO 597 OF 2003

JOHN NJUGUNA CHEGE APPELLANT

VERSUS

ESTHER WAMBUI KARIUKI (Suing as the administrator

**of the estate of JOHN GITHENJI KARIUKI, deceased)
RESPONDENT**

**(An Appeal from the Judgment of Hon. H. N. Ndungu, SRM
in Kajiado Civil Suit No. 16 of 2003 delivered on 14th August, 2003).**

JUDGMENT

On the 17th July, 2001 the deceased John Githenji Kariuki was walking along Kiserian – Magadi road when he was knocked down by a motor vehicle owned and driven by the Appellant. He subsequently died from the injuries sustained from the accident.

The Appellant's case is that he was driving on the aforesaid road at about 6 pm on the material day when the deceased suddenly emerged onto the road, in an attempt to cross the road. He tried to swerve but it was too late and the deceased was hit by the right side of the motor vehicle and later died. An inquest regarding the accident was conducted and the Appellant was exonerated, and found not to blame for any criminal wrong doing.

The matter was heard and determined by the lower court and in a judgment delivered on 14th August, 2003 the Appellant was found 75% liable for the accident. Aggrieved by that decision, the Appellant has appealed to this court based on the following grounds:

- 1. That the learned trial magistrate erred in law in not pronouncing judgment in open court at all and in not signing and dating the judgment in open court.***
- 2. That the learned trial magistrate erred in law and in fact in entering judgment for the Respondent against the weight of the evidence before her.***
- 3. That the learned trial magistrate erred in law and in fact in failing to consider fully, adequately or at all the evidence placed before her and the law.***
- 4. That the learned trial magistrate erred in law and in fact in failing to find and conclude that no negligence and that none of the particulars of negligence alleged against the Appellant was proved by the Plaintiff to the required standard of proof or***

at all.

5. That the learned trial magistrate erred in law and in fact in attributing to the Appellant any lack of care or lack of care to the extent she did and in apportioning contributory negligence as she did without having due regard to the whole of the evidence, the total circumstances and the law in that respect.

6. That the learned trial magistrate erred in law and in fact in considering and relying upon the Respondent's evidence that was materially at variance with her, the Respondent's pleadings and basing the award thereupon.

7. That the learned trial magistrate erred in law and in fact in making assumptions and conclusions as to the deceased's earnings and support to Plaintiff without any or any good basis, reason or sufficient evidence or cause and basing her award thereupon.

8. That the learned trial magistrate erred in fact and in law in placing undue reliance and credence on the Plaintiff's evidence and submissions without any good basis or sufficient cause for her to do so and further in heavily relying upon assertions in the written submissions for the Defendant which assertions had not foundation on the evidence before the court and which the Appellant had no opportunity to challenge.

9. That the learned trial magistrate erred in law and in fact in failing to consider sufficiently or at all the Appellant's evidence and submissions as to facts and the law placed before her.

10. That the learned trial magistrate erred in law and in fact in placing an inordinately high duty of care on the Appellant and a disproportionate duty of care on the deceased in the circumstances of the case.

11. That the learned trial magistrate erred in law and in fact in awarding the Plaintiff damages in any sum at all or in awarding a sum that was manifestly excessive in the circumstances.

12. The learned trial magistrate erred in law and in fact in awarding a sum of Kshs.60,000/= for loss of expectation of life without any or any proper evidence or criterion to base the same upon.

13. That the learned trial magistrate erred in law and in fact in awarding funeral expenses to the Respondent to the extent of Kshs.14,320/= or any sum at all without proof of her having incurred the same or any sum in that regard at all and in the fact of and notwithstanding evidence on record that other named persons, who are not dependants, provided the funds thereof.

Despite these needlessly long and wordy 13 grounds of appeal, the essential issues before the court are liability and quantum.

Mr Githuka, Counsel for the Appellant, argued that the Magistrate having clearly noted that the Appellant was exonerated from liability in the inquest, she had no basis in finding the Appellant liable in negligence.

Mr Kamau, Counsel for the Respondent, argued that the Appellant was driving at 60 kph at the material time and knocked down the Deceased, a pedestrian. That, he argued, was an act of negligence, making him liable for at least 75% as the lower court held. www.kenyalawreports.or.ke John Njuguna Chege v Esther Wambui Kariuki [[222000000555]] e eeKKLLRR 4 According to the evidence on record, PW 2

Joseph Macharia who witnessed the accident and who was about 30 – 40 metres away, saw the motor vehicle belonging to the Appellant hit the deceased. In his own evidence, the Appellant admitted that he was driving at 60 kph, that there was a vehicle ahead of him, that he tried to swerve, but it was too late, and he hit the deceased. What all this means is that he was not keeping a proper look-out, that he probably was speeding, and that he failed to stop in time. This is a reasonable conclusion to draw, and after hearing all the witnesses, and testing their demeanour, the Magistrate was satisfied that, on a balance of probability, the Appellant was 75% to blame for the accident. I would agree with that finding.

As the first Appellate court, I am duty bound to, and I have indeed carefully reviewed and re-evaluated the evidence adduced in the lower court to ensure that the findings of facts by the trial court were based properly on the evidence before it and that the court did not act on wrong principles in reaching the conclusion. (**See Makube vs Nyamuro (1983) KLR 403**).

Having reviewed the evidence before the lower court, I have no reason to interfere with the findings of fact made by the trial court. The Appellant was in control of his motor vehicle, and had a greater duty than the Respondent to keep a look-out. This he did not, and I am satisfied that he was 75% liable for the accident. I agree with Counsel for the Respondent that just because the Appellant had been exonerated at a criminal inquest, that in itself did not absolve him from liability in a civil trial. The burden of proof in a criminal inquest is not the same as in a civil trial where negligence is determined on a balance of probability.

On the issue of quantum, Counsel for the Appellant argued that the award was excessive and the specials were not proved.

It is now trite law that special damages must first be pleaded and then strictly proved. See: **Coast Bus Service Ltd vs Sisco E. Murunga Ndanyi and Others C A No 192 of 1992 also Eldama Ravine Distributors Ltd and Another vs Samson Kipruto Chebon C A 22 of 1991**.

The funeral expenses and other special damages were not pleaded in the plaint and cannot be awarded.

With regard to general damages, the Court of Appeal in the case of **Butler vs Butler C A No 49 of 1983** laid down the following principles that an appellate court should consider in reversing an award of damages by the lower court.

“(a) That the court acted on wrong principles;

(b) That the court has awarded so excessive or so little damages that no reasonable court would;

(c) That the court has taken into consideration matters he ought not to have considered, or not taken into consideration matters he ought to have considered, and in the result, arrived at a wrong decision.”

Taking those principles into account, and the evidence in the lower court, I am not persuaded that the award for general damages is excessive or unfair. In any event, Counsel for the Appellant did not refer to a single authority, and did not guide this Court, or make submissions on why he believed the award was excessive.

Accordingly, I will not interfere with the Judgment both on liability and quantum, except that I will disallow the claim of Kshs.14,320/= for special damages. I have noticed that there is an arithmetical error in the calculation of the final award. The correct total (excluding the claims for special damages) is Kshs.430,000/=. The net award after deducting the 25% contribution is Kshs.322,500/= which is the final amount awarded, together with costs and interest. The Appellant shall also have the costs of this appeal.

Dated and delivered at Nairobi this 28th day of April, 2005.

ALNASHIR VISRAM

JUDGE