



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CIVIL APPEAL NO. 92 OF 2002

WAMBUA NZOKA..... APPELLANT

VERSUS

STEPHEN WAMBUA SYENGO..... RESPONDENT

J U D G E M E N T

The appeal is brought by Wambua Nzoka suing on behalf of the Estate of John Safari Wambua who died as a result of a Road Traffic accident that involved the Respondents motor vehicle at a place called Miwani. The court dismissed the appellants claim for damages suffered by the deceased's estate after the deceased's death. The appellant being dissatisfied with the decision of the magistrate filed the present appeal. His petition of appeal contained 16 grounds which at the hearing of the appeal were narrowed down and argued as one.

The issues that arise are; who was to blame for the accident that led to the deceased's death? Did the deceased cause the accident or contribute to its occurrence and lastly whether the appellant had the capacity to bring the suit.

Paragraph 4 of the plaint dated 8.2.2001 set out the particulars of negligence attributed to the Respondent and in response the Respondent filed a defence denying the occurrence of the accident but pleaded in the alternative at paragraph 6 of defence dated 21.2.01 that the deceased was wholly to blame for the accident or contributed to it substantially. The said paragraph set out the particulars of negligence attributed to the deceased..

In the lower court 4 witnesses testified for the plaintiff while the respondent called one other witness. Briefly the facts of the case are that the respondent D.W.2 Nzioka and the deceased left Mutomo aboard the Respondent's motor vehicle KAL 846 Z. It was driven by respondent. They stopped at Muwani shopping centre and went to take tea and mandazi at a hotel. According to P.W.1 (respondent) and D.W.2 after having the tea they left the deceased behind as he normally used to alight there. However, when they drove off they were stopped and informed that they had ran over the deceased who was picked up and taken to hospital. P.W.4 a lady who sells some wares outside the tea kiosk said that after D.W.1, 2 and deceased took tea they agreed to proceed to Kitui along with the deceased. She saw them leave the hotel for the vehicle. She however did not see what happened to deceased but when the vehicle moved off she heard shouts by the deceased and she stopped the driver D.W.1.

The magistrate in his judgement found that the grant of letters of Administration was issued on 14.2.2001 whereas this case was filed in court on 13.2.2001 and that the proceedings filed in court showing that the court had made the order for limited grant on 22.1.2001 was concocted for purposes of this case. I have seen a copy of the said order which was produced in court. It clearly shows that the court

had made an order of limited grant on 22.1.2001 but the actual order was issued on 14.2.2001. The order that was produced in court is a certified copy. I have no reason to doubt that it is authentic and that by the time the suit was filed the court had made an order for limited grant of letters of administration and the appellant had the capacity to bring this suit under the Law Reform Act.

It seems that it is only P.W.4 who came close to witnessing the accident. P.W.4 testified twice. The first time she testified that though she had seen the defendant and the deceased at Muwani market at a kiosk, she did not see how the deceased came to be injured. She only heard him shout that he had been hit. However, when recalled to give evidence later, P.W.4 claimed to have seen the deceased and D.W.1 leave the kiosk after taking tea and that D.W.1 asked the deceased to accompany him to town and deceased agreed. She claims that the two passed by her as they went towards the vehicle. It is after the vehicle was started that she heard the deceased shout that he had been hit and that she then beckoned the driver (D.W.1) to stop the vehicle. It therefore seems that P.W.4 did not see what actually happened so that the deceased came to be run over by the vehicle. If indeed D.W.1 knew that they were going away with the deceased, then it was incumbent upon the driver D.W.1 to ensure that the passengers had entered the vehicle and were safely inside before moving the vehicle.

D.W.2 who was in company of D.W.1 denied knowing how the accident occurred. He denied seeing the deceased run after the vehicle and that they had left the deceased behind. The defendant D.W.1 also denied knowing how the accident occurred. I do agree with counsel for appellant that this denial by D.W.1 is contrary to his pleadings in the defence. In his defence at paragraph 6, several particulars of negligence had been attributed to the deceased, which were attempting to board a moving vehicle;

jumping onto a moving vehicle and allowing himself to fall and sustain fatal injuries. D.W.1 is bound by his pleadings and it was upon D.W.1 to adduce evidence in support thereof. It is not in dispute that the deceased met his death after being crushed by the vehicle driven by the respondent. The driver had a duty of care to both his passengers and those around his vehicle as he drove off. If the deceased attempted to board the vehicle when in motion, the driver should have used his driving mirrors to ensure all was fine before driving off. D.W.1 cannot come to court and tell the court he does not know what happened when he had specifically pleaded as to what happened. P.W.1 abandoned his pleadings meaning that he concedes to the pleadings by the plaintiff that it was D.W.1 to blame for the accident.

The deceased too owed himself a duty of care to ensure the vehicle was stationary before he could get onto it or to notify the driver of his intention to do so. In the circumstances, since it is not disputed that the accident was between D.W.1's motor vehicle and the deceased and having considered the pleadings of D.W.1 and the fact that nobody seems to have seen exactly what happened the court can safely infer that both or one of the parties was negligent and the court should have apportioned liability at 50%. This court does apportion liability at 50% against the deceased and D.W.1.

The appellant urged the court to go ahead and assess the appropriate general damages as claimed in the lower court.

Under the Law Reform Act the counsel submitted an award of Ksh. 15,000/- in respect of pain and suffering as the deceased was alive for some time from 8.00 p.m. till 3.00 a.m. and that an award of Ksh. 100,000/- be made in respect of loss of expectation to life. The magistrate correctly considered what he could have awarded under this head and allowed Ksh. 15000/- for pain and suffering and 100,000/- as loss of expectation to life. I would find no reason to differ with that finding. Under Fatal Accidents Act, it was claimed by the witnesses that he earned 2000/- per month. There was evidence for both plaintiff and defence that the deceased was a hawker of some wares, the counsel had suggested 1,500/- as his earnings per month which the magistrate found to be acceptable. The deceased died at the age of 28 years. A multiplier of 18 years was suggested and a multiplicand of 2/3. The counsel had relied on the case of **MUISYO MAILU V. MAVEKE H.C. 1781/98**. The magistrate agreed to the said figures being fair and the claim worked out as follows:- $1,500 \times \frac{2}{3} \times 18 \times 12 = 216,000/-$.

As regard the special damages, though mentioned in the plaint, they are not specifically pleaded nor were they proved at the hearing. That whole claim must fail.

The law is that Damages under Law Reform have to be subtracted from those under the Fatal Accidents Act to avoid the plaintiff being compensated twice. See Kemp and Kemp on the Quantum of Damages VI 22-006. The figures would be worked out as follows:-

Fatal Accident Act	216,000/-
Law Reform Act	<u>115,000/-</u>
	101,000/-
Less 50% contribution	50,500/-

The plaintiff will accordingly have judgement against the defendant for Ksh. 50,500/- in general damages plus costs and interest. Costs be taxed if not agreed and interest to be calculated from date of judgement.

Dated, read and delivered at Machakos this 12th day of October 2004.

Read and delivered in the

Presence of

R. V. WENDOH

JUDGE