



REPUBLIC OF KENYA

COURT OF APPEAL OF KENYA AT NAIROBI (MILIMANI LAW COURTS)

CIVIL CASE 739 OF 2003

CAROLINE ANNE NJOKI MWANGIPLAINTIFF

VERSUS

PAUL NDUNGU MUROKIDEFENDANT

JUDGMENT

The most contentious issues in this running down cause concerns liability. Who is to blame for a motor accident collision between two vehicles? Caroline Anne Njoki Mwangi:-

(The plaint heading should have read:-

Caroline Anne Njoki Mwangi (suing on behalf of the

estate of Anthony Mwangi Murandi (deceased)) sued Paul Ndungu Mwoki for the wrongful death of her late husband due to a tragic road traffic accident.

Paul Ndungu Mwoki (herein referred to as the defendant) is a lecturer at the Kenya College of Communications and Technology. On the 8th of December 2002, he was in the company of his wife (not called as a witness) and was driving home to Wangige. He was travelling along the lower Kabete road at night. The weather was fair at the time with no rain. The vehicle he drove was a Nissan omnibus (matatu as commonly known in Kenya). As he was driving along that road an oncoming vehicle driven by the deceased approached him. The headlights was on giving him full lights. The defendant flashed his lights to indicate to the deceased that he should dim his lights. In the process of doing so a collision occurred. The defendants vehicle stopped stood on its lane of the part of the road as one heads to Wangige. The deceased vehicle due to the impact was off the main road and on the verge of the road as one heads to Nairobi. (See the sketch plan drawn in court by the defendant marked A).

The defendants and his wife were trapped in the said vehicle. The doors were jammed. The defendant leg was stuck. The deceased was leaning half way outside his vehicle from the waist down.

This was confirmed by DW2, the defendant witness who arrived on the scene soon after the accident. The defendant had flagged him down. As a good Samaritan, he then stopped went to assist the defendants but on finding the doors jammed and that the two were talking, he rushed to the deceased vehicle where he found the deceased tosoo out of the vehicle. He went back to his vehicle, which had by now faced the scene of the accidents giving its full light and hooted his vehicle horn. The watchman from nearby flats came to assists. He also rang the police who indeed came. I note that there was no police officers called to give evidence in this case. The plaintiff dispensed with their evidence.

What I am required to decide as to who is to be blamed on liability in this case? A) LIABILITY

The defendant ask I dismiss this suit and blame the deceased at 100%. In the alternative to make the deceased liable at 50%. He relied on the case law of:- i) Lakhamshi v Attorney General (1971) EA 118

Where a motor vehicle collision occurred between two vehicles on the 2.2.68 at 5.30 p.m. along the Eldoret/Nakuru road . Both vehicles had failed to take avoiding actions of the accident by driving to the near side. Both vehicles had the road impaired by smoke and when driving into this smoke a collision occurred. The trial judge (Simpson, J) dismissed the suit and held that proof of negligence on the part of the defendant had not been proved.

On appeal (In Spry, Lutta Mustafa JJA) held that as there was no means of distinguishing between the two drivers as to who should be blamed, the blame to be apportioned equally. The case of:

Baker v Market Harborough Co-operative Society Ltd. (1953) IWL 1472 was followed. The court should find both parties to blame when the evidence is insufficient to establish negligence on the part of anyone. The plaintiff relied on the case of:-

Ephantus Mwangi & Another v Duncan Mwangi Wambugu (1982-1988) IKAR 278 (Potter,Kneller,Hancox) An appeal from the decision of the High Court on a case between collision of two vehicles. The judge (Chesoni,J) found the plaintiff's vehicle was not to blame whilst the defendants vehicle was to blame. The Court of appeal (with one deserting found the plaintiff matatu wholly to blame and reversed the decision of the High Court). In this case I would indeed find that the two vehicles were travelling at night in the opposite directions. The effect of flashing his lights effected the deceased. The vehicles collided. The impact was at the right side on the other sides of the vehicle. These was greater impact on the deceased vehicle, it being a smaller vehicle, that was pushed off the road.

I would in the absence of an official police sketcher/map and on knowing who exactly is to blame on this matter and on a balance of probability hold that the parties are indeed equally to blame at the ratio of 50% each. I now look at the issue of quantum:-

II: QUANTUM

A: Law Reform Act

For a claim under the Law Reform Act, the claimant must hold letters of grant of administration to bring suit before this court (See the case of Touristic Union International & Another v Jane Mbeyu CA 145/90) In this case the plaintiff claims she holds the letters but has in fact filed suit on her own. This is contrary to section 58 of the Law of Succession Act whereby there must be two administrators to file suit due to the resulting trust. First the advocate tried to impress it upon the court that only section 80 of the Law of Succession act would apply. Where there are minor children, it is imperative that two administrators or more file suit.

I would make no award under this head.

I am required by law to state that if the plaintiff had been successful what would my possible award be.

a) Pain and suffering

No evidence was led to show at exactly what time the deceased died. PW2 stated he heard the deceased make snoring sound but did not state whether he died soon after or was alive. The date of death reflects 8.12.02 being the same day the accident occurred. I hereby make no award under this head.

a) Loss of expectation of life A conventional figure of Ksh.70,000/- would have been awarded. I now turn to the B) Fatal Accidents Act a) Loss of dependency The deceased employer appeared to court and confirmed that the deceased was then employed who worked as an accountant in the Travelers Forex

Bureau situated in Westlands. The Gross salary paid to the deceased was Ksh.88,000/-. It was also established that the deceased was 34 years old. In relying on the award to be given the advocate for the plaintiff stated that the multiple of 18 years should be given. He relied on the decision of:-

Susan Mumbi Waitutu V Kefala Grebedhin Hccc321/93, JumaJ.

A motor vehicle collision between two vehicles occurred near small world. (A vehicle/lorry collision). The deceased was aged 34 years old a multiple of 18 years was given.

The defence on the other hand relied on the case of:- Jane Wanja Munene V Dr. Christopher Maina Njuguna, Hccc No. 1836/97, Ang'awa,J.

Where a possible award of a multiplier of 10 years was given for a 35-year old pedestrian (now deceased). I find in this case that the deceased had a bright future ahead of him that has been drastically cut short as a result of this accident. Being in the private sector he may have worked for a much longer period than the statutory 55 years in the public sector. I would award 20 years as a multiplier. As to the multiplicand, I would find the net salary after deductions of the statutory taxes at Ksh.67,008/- as reasonable which I round off to Ksh.60,000/-. Thus loss of dependency be and is hereby computed as: $Ksh.60,000/- \times 20 \times 12 \times 2/3 = Ksh.9.600.000/-$.

This sum is subjected to 50% contributory negligence being Ksh.4.800.000/-. I am required by law to discount the said sum to provide for early remarriage and lump sum payment which I accordingly do at Ksh.100,000/-. This gives the total of Ksh.4.700.000/-. The law further required that I apportion this sum amongst the dependents (agreed to by parties on the 16.11.04) as follows:- i) Caroline Anne Njoki Mwangi widow aged Ksh. 700,000/- ii) Tracy Nyambura Mwangi Daughter born 1993 Ksh.2.000,000/-

ii) Wilma Njeri Mwangi Daughter born 1995 Ksh.2.000,000/- Ksh.4.700,000/-

That the sum apportioned to the minors be invested in an interest earning account in the name of the Registrar of the High Court of Kenya, the plaintiff Caroline Anne Njoki Mwangi and a second administrator in a financial institution as the East African Building Society. Parties are at liberty to apply. Special Damages

The plaintiff claimed the following Burial and funeral expenses. i) Obituaries and funeral announcements Ksh.47,000/- These expenses required to be particularized and not lumped to together. Kemp & Kemp a text book on the subject clearly states a claim for clothes cannot be made under Special damages. I see only two receipts for announcements of:- Ksh.4850/- Ksh.3750` Ksh.8,600/- As the sum have not been specifically pleaded I make no award. There is I presume, under this heading nation newspapers which shows bill of Ksh.12,000/-, Ksh.12,000/- and Ksh.10,000/- = Total Ksh.34,000/-. As the same was not specifically pleaded it is hereby dismissed. ii) Mortuary fees Ksh.11,900/- This was supported with no documents nor substantiated I hereby reject and dismiss this claim. www.kenyalawreports.or.ke Caroline Anne Njoki Mwangi v Paul Ndungu Muroki [[222000000444]] e eKKLLRR 9 iii) Hire of venue and money accommodation Ksh.25,700/- There was no documents substantiated. There was also no explanation why this head of special damages was being claimed. The same is dismissed iv) Lease of house Kh.40,700/-

No evidence was supplied by this. The same is dismissed. v) Coffin purchase Ksh.40,000/- No evidence was supplied by this. The same is dismissed. vi) Invoice excess Payment Ksh.35,000/-

It is unclear why and which insurance is being claimed. The same is dismissed. The plaintiff produced insurance document for a motor vehicle of deceased to prove that she was paid ksh.550,000/- for the vehicle. There was no claim by way of subrogation claim on material loss of a motor vehicle nor was it pleaded in evidence. I hereby make no award for material loss as it was never pleaded. No award would have been given as the Insurance company failed to attend court to give the required evidence. iv) Police abstract fee

The receipt by the government of Kenya for 100/- is illegible and does not reflect to be a receipt for the police abstract. It is dated the 23.12.02 whilst the police abstract was issued on 8.1.03. I reject this claim as not proved. I would accordingly enter judgment for the plaintiffs on the proved claim.

In Summary www.kenyalawreports.or.ke Caroline Anne Njoki Mwangi v Paul Ndungu Muroki [[222000000444]] e eeKKLLRR 10 1) Motor vehicle collision between two vehicles 2) Driver aged 34 years 3) Injuries: Fatal 4) Quantum: a) Law Reform Act i) Pain and suffering Nil ii) Loss of expectation of life Nil No locus by plaintiff b) Fatal Accidents Act i) Loss of dependency Ksh.6,000/- x 12 x 20 x 20 x 23/3rds Ksh.9.600,000/- Less 50% contributory Ksh.4,800,000/- Less discounted Ksh.100,000/- Total Ksh.4,700,000/- This sum accordingly be subject to apportionment I award interest on general damages to the plaintiff. I award costs of this suit to the plaintiff.

Dated this 30th day of November 2004 at Nairobi.

M.A. ANG'AWA

JUDGE

E.M. Wachira & Co. Advocates for the plaintiff S.M. Chege & Co. Advocates for the defendant

1) Motor vehicle collision between two vehicles

2) Driver aged 34 years old in 2002

3) Injuries: Fatal

4) Liability

5) Quantum

1) Law Reform Act Pain and suffering

Loss of expectation of life Lost years

II) Fatal Accidents Act

Loss of dependency III) Special Damages

6) Case Law a) Jane Wanja Munene v Dr. Christopher Maina Njuguna Ha 1836/97, Ang'awa,J

b) Lakhamshi v Attorney General 1971 EA 118 (Spry,Lutta;Wambugu JJA)

c) Ephantus Mwangi & Another v Duncan Mwangi Wambugu 1982-1988 IKAR 278, Potter,Kneller,Hancox. d) Susan Mumbi Waitutu v Kefafa Grebedhin Hccc321/93, Juma,J.

e) Barker v Market Harborough Industrial Cooperative Society (1953) IWLRL 1472

e) Touristic Union International & Another v Jane Mbeyu CA 145/90 Apaloo,Kwach,Cockar,Tunoi JA 7) Advocates:

P.M. Wachira advocate for the plaintiff

S.M. Chege advocates for defendant

