REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 383 OF 1999

WILSON KIBET SOGOMO ……..APPELLANT

VERSUS

TOROKASI MINIKHA MWASHI)

ERNEST KIVULI MWASHI)…….....……RESPONDENT

JUDGMENT

This appeal is against the judgment of the Principal Magistrate (Kanyangi) as he was then, in the Resident Magistrates Court Civil Case Number 5704 of 1995 at Milimani Commercial Court's Nairobi.

In that case, one Wilson Mwashi Alusiola was, on the evening of 3rd June 1993, walking on the pedestrian kerb along Ring Road/Ngong Road Nairobi when motor vehicle Registration Number KPV 312 owned and driven by the defendant and/or his agents and/or servants knocked him and inflicted severe injuries upon him for which he later died at Kenyatta National Hospital on 4th July 1995.

His widow and son, after obtaining letters of administration to his estate, filed a suit in the above court on 7th June 1995 to claim from the appellant both special and general damages under the Fatal Accidents' and Law Reform Acts plus costs of the suit and interest.

The plaint blamed the appellant for negligence in the manner he drove the motor vehicle on the material day. Particulars of this negligence were specified in paragraph 4 of the plaint.

In a defence filed herein on 7th February, 1998 all the particulars of negligence were denied by the appellant.

The case was placed before and heard by the learned Senior Principal Magistrate on 5th August, 1999. There were 2 witnesses for the plaintiff's side who testified. They included the traffic police officer, one Inspector David Muthura (PW1) and the deceased widow Dorcas Mwashi.

The police officer simply came to produce the entry in the Police Occurrence Book of the accident report.

Dorcas testified about how the deceased died through a motor accident in Nairobi on 3.6.93; how she was issued with letters of administration and that the deceased was buried in his farm at Kitale.

She testified that the deceased died at the age of 58 years and how she spent Kshs.20,000/= on funeral expenses.

That he had retired as a cook at the time of his death and had gone to live on his 2½ acre plot in Kitale where he planted maize and got 100 bags for every season.

In cross examination she said she was in Kitale when the deceased died and that she was only told that the accident occurred along Ngong Road.

The defence tendered no evidence and closed the defence case.

Counsel for the parties then filed written submissions and the learned Senior Principal Magistrate wrote his judgement on 18th September, 1999 and awarded the plaintiffs the following damages:-

(a) Funeral expenses - Kshs. 15,000/=

(b) Damages for loss of expectation of life - Kshs. 80,000/=

(c) Damages for pain and Suffering - Kshs. 60,000/=

(d) Loss of dependancy Kshs.3000 x 12 x 10 x ¼ - Kshs. 90,000/=

(given that the deceased had retired)

TOTAL - Kshs.245,000/=

The plaintiff were also granted costs of the suit and interest on the amount at courts rate from the date of judgement until payment thereof in full. This is why this appeal was filed.

The memorandum of appeal had 6 grounds of appeal which questioned whether the respondents had established liability for negligence against the appellant and/or whether she proved special damages or her entire case against the appellant on a balance of probabilities.

Counsel for the parties appeared before this court on 10th June, 2002 to either urge or oppose this appeal with counsel for the appellant repeating that the respondent did not adduce evidence to prove liability against the appellant as she was not at the scene of the accident.

That no evidence was adduced to back awards for lost years or for pain and suffering. There was no death certificate produced and it was not easy to certify the date of death of the deceased or that he died at Kenyatta National Hospital.

That there was no evidence of the deceased earnings per month and so forth.

Counsel for the respondent referred to the O.B extract to show how the accident occurred and that since the defence filed had admitted the occurrence of the accident, it was on the appellant to appear in court to confirm this or otherwise.

According to counsel liability here was proved on a balance of probabilities though in case of apportionment it should have been at a lower level since there was an admission of a collision.

That since there was a plea in the defence for contribution evidence should have been adduced in defence to shade light on this apportionment.

As regards awards made by the lower court counsel for the respondent said they should not be disturbed as the amounts were proper.

And as to proof of death of the deceased, counsel stated that issue of letters of administration to his estate to the respondents was sufficient proof.

These are the submissions I have heard and recorded for consideration and decision.

Counsel for the appellant questions whether liability was proved in the case subject to this appeal on a balance of probabilities.

On this, I wish to refer to paragraph 3 of the defence which admits the occurrence of the accident and pleads for contribution on the part of the deceased.

I also refer to the occurrence book extract No.3/4/6/93 involving a statement made to Kilimani police station by the appellant on 4.6.93 giving the manner in which the accident occurred; that as the appellant drove his motor vehicle KPV 312 Datsun 160B, on passing the junction of ring road Kilimani, a pedestrian emerged from the left at short distance to cross to the right. He hit the pedestrian and then took him to the hospital.

In these circumstances, there would be no need for there to be an eye witness to say how the accident occurred since the appellants' own statement to the police told it all.

Unfortunately he did not come to the court to testify and explain what a statement like "at short distance" was meant to imply.

Otherwise the impression the statement gave to the lower court was that there was a collision between the pedestrian and the appellants motor vehicle and that the Magistrates view must have been that the appellant was not on the look out to see the deceased in time or at all so as to avoid hitting him. This is why the Magistrate placed blame against the appellant at 100%.

As to lack of a death certificate to enable court ascertain the cause of the deceased death, there was no explanation from the plaintiff's side and particularly from her lawyer why this had not been produced.

The first thing counsel should think of before filing a fatal running down case in court is to obtain the deceased death certificate but that this was not done herein is abit of a surprise to me.

However, since letters of administration in respect to the deceased estate were issued to the plaintiff-respondents, I am satisfied, as I feel the lower court was, that this suffices for this kind of case to proceed.

The possibility is this certificate was produced in the Succession Case where letters of administration were issued to the respondents.

I do not feel this is a serious matter in the circumstances and the magistrate was considerate in ignoring it.

As regards 100% blame worthiness placed upon the appellant, I would only wish to state that much as there was a collision between the appellant's motor vehicle and the deceased, the former driver would be expected to be more on the look out than the pedestrian on the side walk so as to be able to see the deceased in time to apply whatever means including emergency brakes to avoid hitting him.

And because the deceased would have emerged from a foot path unsuspectingly onto the main road, it would only be fair that some contributory negligence be attributed to him for this accident and in my own estimation 25% would be a good percentage.

As to damages, though the respondents claimed Kshs.20,000/= for funeral expenses, the learned magistrate awarded them Kshs.15,000/=. No receipts were produced. Moreover, in the plaint Kshs.13,000/= was claimed. This shows a conflict which I do not know how the learned magistrate resolved. But this was a special damage to be specifically pleaded and strictly proved.

This was not done and in particular in view of the conflict in the figure pleaded in the plaint, that claim in the evidence and that amount the Magistrate eventually awarded, I am inclined to disallow and

set aside the same.

The amount of Kshs.80,000/= awarded for loss of expectation of life is a conventional figure and in the circumstances of this case, the amount was not unreasonable. I uphold it.

As regards the sum of Kshs.60,000/= for pain and suffering the accident occurred on 3.6.93 and the deceased died on 4.7.93. These dates were not contested, which means for a whole month the deceased was undergoing a period of pain and suffering before he rested.

These pains must have been severe and in awarding the respondents the amounts above the learned magistrate must have taken all this into account. The figure was not excessive and I do not intend to disturb it.

As regards loss of dependency, a wife and children usually depend on the man of the home for support. Here, the deceased died at 58 years of age and the court gave him another 10 years of active life.

The first respondent was left with about 7 children to look after.

The magistrate gave the respondents Kshs.90,000/= on this head of damages, which in my view was also not excessive.

The grant total herein is **Kshs.230,000/=** out of which 25% should be deducted leaving a sum of **Kshs. 230,000/= - 59,750/=** = **Kshs.170,250**/= to be paid to the respondents with interest from the date of filing suit.

To this extend only the appeal is allowed with no order for

costs.

Delivered this 4th day of July, 2002.

D.K.S. AGANYANYA

JUDGE