



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NO. 518 OF 1999**

ROBERT BONYO MBUGUA

AND ANOTHER .....APPELLANT

VERSUS

HANNAH NYAKARURA GICHUHI .....RESPONDENT

**J U D G M E N T**

The deceased Peter Gichuhi Ibutu died on 26th September, 1994 as a result of a road traffic accident along Ronald Ngala/Mfangano Street in Nairobi.

The allegation in the plaint is that on the date in question, he was walking along the said road when the second (2nd) appellants bus registration number KWA 575 driven by the first (1st) appellant knocked him down. He died instantly.

His widow Hannah Nyakarura Gichuhi, after obtaining letters of administration limited for the purpose of filing suit, filed the suit in the court of the Principal Magistrate at Kiambu on 27th July 1998 to claim from the appellants both jointly and severally both special and general damages under both the Law Reform and the Fatal Accidents Acts blaming the accident on the negligence of the 1st appellant.

The particulars of negligence and special damages were set out in paragraph 5 of the plaint.

A defence filed to this claim on 15th September, 1998 denied the respondent's claim and instead blamed the respondent wholly in negligence as per the particulars set out in paragraph 7 of the defence, and in particular by:-

- (a) crossing the road without due care and attention,
- (b) failing to pay attention to the driver's hooting alerting him to clear the way,
- (c) walking into the path of the motor vehicle thereby causing the collision, and
- (d) causing the accident.

The case was heard on 2nd June 1999 by the Resident Magistrate, (P.N. Morigori) when the plaintiff and his witness testified. The defence did not adduce any evidence and judgment was delivered on 1st November, 1999 in which the learned Magistrate's awarded the respondent Kshs.156,000/= for loss of dependency and Kshs.40,000/= for loss of expectation of life plus costs of the suit assessed at Kshs.30,000/=.

The appellants were not amused by this decision and so lodged an appeal to this court on 26th November, 1999 in a memorandum of appeal which listed 8 grounds of appeal.

The 1st and 2nd grounds of appeal dealt with the limitation of time while the 3rd and 4th grounds dealt with the issue of liability.

The 5th and 6th grounds dealt with the quantum of damages while the 7th ground dealt with the issue of costs.

Dealing with the 7th issue first the issue of costs is either upon agreed by the parties or that costs are taxed; otherwise the court has no power or discretion to work out costs on its own.

In the case subject to this appeal I do not know where the learned magistrate found the figures out of which he worked out costs of Kshs.30,000/= and I agree with counsel for the appellant that these costs had no basis.

On the first and 2nd grounds of appeal once the lower court has decided on the issue of limitation, there is no provision for the appellate court to interfere.

In the case subject to this appeal, there is no evidence that counsel for the appellants raised the issue of limitation before the respondent started testifying on 2nd June 1999. The first time he raised it was during the submissions.

And in his judgment the learned magistrate covered the issue sufficiently when he said:-

***“The fault of not filing the suit within time was caused by previous counsels who had been instructed by the plaintiff. The plaintiff is extremely illiterate as is shown in evidence in her sworn affidavit filed in court on 28.4.98 in which she has thumb printed her signature on the affidavit. She was therefore not aware of the issue of limitation period. It was on that consideration that the plaintiff was granted leave to file the suit out of time.”***

Every case must be considered on its own merit and in the particular case subject to this appeal, the reason given by the learned magistrate why the appellant was granted leave to file this appeal out of time was valid and I cannot fault it.

Grounds 3 and 4 dealt with the question of liability. There are tricky.

The respondent and her witness did not witness the accident.

And though the police officer (PW3) who visited the scene alleged he took measurements thereof and drew sketch plans, he did not produce to the court such measurements or plans to show the place of impact.

Of course the learned magistrate acknowledged that:-

***“No evidence was adduced as to who was to blame for the accident.”***

But misdirected himself in saying:-

***“and I need not pursue the matter”***

because he was bound to pursue it to convince the parties that he had formed the basis for awarding the respondent the damages he awarded to her. He did not do so.

But in this particular case where the respondent blamed the appellant for the accident as per the particulars set out in paragraph 5 of the plaint and where the appellant in turn blamed the deceased for the

same accident as per the particulars of the defence which I have quoted and where the same appellants offered no defence to show how the deceased should be wholly to blame their liability is and should be apportioned at 50-50; see **Barkley – Steward Ltd. and D. Cottle and S. Cottle Vs Lewis Kimani Waiyaki [1982 -8B] 1 KAR 1118.**

The deceased died at 47 years old. He was earning Kshs.3,660/= per the evidence of Augustino Njomo Nganga (PW2) which was not challenged.

The learned magistrate thought, as a driver, the deceased would have worked up to the age of 60 years. He was right as the deceased worked for a private company.

And his consideration of the respondent's dependency at Kshs.1,000/= per month was not unreasonable.

Given the circumstances, I am satisfied the learned magistrate was justified in awarding the respondent a sum of Kshs.156,000/= as damages under the Fatal Accidents Act and Kshs.40,000/= under the Law Reform Act except that out of those sums 50% should have been knocked off leaving the respondent with Kshs.78,000/= and Kshs.20,000/= respectively for which Judgment should have been entered for the respondent with ½ costs.

In the ultimate result I allow the appeal and set aside the lower court award and enter judgment for the respondent for Kshs.120,000/= plus interest from the date of filing suit and ½ costs hereof.

Delivered this 4th day of December, 2002.

**D.K.S. AGANYANYA**

**JUDGE**