



H Young & Co (EA) Ltd v Ngongo & another (Suing as the legal representatives of the Estate of Lucas Masgija (Deceased) & another (Civil Appeal E005 of 2021) [2024] KEHC 9352 (KLR) (24 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9352 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CIVIL APPEAL E005 OF 2021
SM GITHINJI, J
JULY 24, 2024**

BETWEEN

H YOUNG & CO (EA) LTD APPELLANT

AND

PENINAH WANJALA NGONGO AND HEZRON MASGIJA (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF LUCAS MASGIJA (DECEASED) 1ST RESPONDENT

FATUMA ABDI MOHAMED 2ND RESPONDENT

(Being an Appeal from the Judgment and/or Decree of the Senior Resident Magistrate delivered on 10th June, 2021 in Garsen PMCC NO.76 of 2019)

JUDGMENT

1. By this Appeal, the appellant herein challenges the whole judgment and decree of Honourable E.M Kadima delivered at Garsen on 10th June 2021 in Garsen PMCC No. 76 of 2019 wherein judgment was entered in the following terms;
 1. Pain and suffering Kshs. 20,000
 2. Loss of expectation of life Kshs. 100,000
 3. Loss of life Kshs. 1,200,000
 4. Special damages Kshs. 36,000
 5. Liability 80% against the defendant and 20% against the 3rd party
 6. Costs and interest.



2. Aggrieved by the judgment, the appellant lodged this appeal on the following grounds;
 1. That the learned trial magistrate erred in law and in fact and misdirected himself in finding the appellant 20% liable notwithstanding the evidence on record to the contrary.
 2. That the learned trial magistrate erred in law and in fact in failing to properly analyse the evidence before him which clearly established that the driver of motor vehicle registration number KBY 921U was wholly to blame for the subject accident by ramming onto the Appellant's motor vehicle registration number KAV 398K which was stationary thereby causing the subject accident.
 3. That the learned trial magistrate erred in law in failing to appreciate and apply the principles applicable in assessing liability in a claim for negligence.
 4. That the learned trial magistrate erred in law by shifting the burden of proof to the Appellant.
 5. That the learned trial magistrate erred in law and fact in finding the appellant liable for the accident.

Evidence at Trial

3. Pw1 No.62078 PC Willis Mugendi testified that there was an accident on 10/5/2019 at around 7.30pm at Tarasaa along Garsen-Malindi road involving Matatu registration no. KBY 912U and motor vehicle registration no. KAV 398K Mercedes Benz truck. He told the court that the truck was stationary as it had broken down and the matatu rammed at the back. Further that the truck driver had placed life savers. He blamed the driver of the matatu for the accident.
4. PW2 Hadhia Shakila Shee Hola told the court that on 10/5/2019 an accident occurred at Tarasaa along Malindi-Garsen road and that she was a passenger in the matatu seated behind the driver. She stated that there was vegetation on the road to indicate a stalled vehicle. She blamed the driver of the matatu for the accident.
5. Pw3 Hezron Mwangangi told the court that the deceased was his nephew. That he died as a result of the accident at age 20 years and was a student at Marifano Secondary School. He produced as PEX documents as per the list of documents.

Analysis and Determination

6. The appeal was canvassed by way of written submissions. I have taken into account the submissions by the parties as well as the authorities relied upon. Though the appellant raises five grounds in the Memorandum of Appeal, they all narrow down to one issue whether the trial court erred in finding the Appellant 20% liable for the accident.
7. It is trite this is a first appeal and as provided in the well settled principles, I am entitled to re-evaluate the trial record, but must remember that the Learned trial magistrate had the advantage of hearing and seeing witnesses testify before him, an advantage that is not availed to this Court (See Peters Vs Sunday Post Limited [1958] EA 424).
8. Whereas there is no contest that the said accident occurred, what is contested is the Appellant's contribution. From the impugned judgment, the trial court had to determine on a balance of probabilities who between the Appellant and the 2nd Respondent was to blame for the accident.
9. In the trial court, the entire claim was pegged on the tort of negligence and liability as defined by Clerk & Lindsell on Torts 18th Edition in the following passage; -



There are four requirements for the tort of negligence namely; -

- i. the existence of law of a duty of care situation i.e., one in which the law attaches liability to carelessness. There has to be recognition by law that the careless infliction of the kind of damage in suit on the class of person to which the claimant belongs by the class of person to which the defendant belongs is actionable.
- ii. breach of the duty of care by the defendant, i.e. that it failed to measure up to the standard set by law;
- iii. a causal connection between the defendant's careless conduct and the damage;
- iv. that the particular kind of damage to the particular claimant is not so unforeseeable as to be too remote. When these four requirements are satisfied the defendant is liable in negligence.

“A defendant will be regarded as in breach of a duty of care if his conduct fails below the standard required by law. The standard normally set is that of a reasonable and prudent man. In the oft cited words of Baron Alderson; “Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do; or doing something which a prudent and reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would not do; or doing something which a prudent and reasonable man would not do”. The key notion of “reasonableness” provides the law with a flexible test, capable of being adapted to the circumstances of each case.”

10. In determining the appellant's liability, the beginning point would be for me to make a finding whether there existed sufficient cause of connection between the Appellant and the 1st Respondent breach of duty of care so as to activate the element of contributory negligence. A case involving contributory negligence calls upon the trial court to question of what the other party ought or ought not to have done under the circumstances in that particular accident to apportion negligence. Two things must concur to support a finding on contributory negligence, an obstruction on the road being used by the parties and the default of each of the drivers, and their want of ordinary care to avoid it.
11. From the evidence of Pw2 who was an eye witness as corroborated by pw1, it is clear that the Appellant's motor vehicle had stalled on the road. It was stated by pw2 that there were leaves on the road that the Appellant's driver had put. In finding the Appellant liable, the trial magistrate considered that there was no documentary evidence in support of the assertion that the defendant was to solely blame. Having reviewed the trial record, I do concur with the trial magistrate that indeed there was no evidence to show that the defendant was to solely blame for the accident. In the circumstance that the lorry had stalled on the road, there ought to have been reflective live savers on the road placed within a reasonable distance from the stalled lorry as leaves alone would not suffice, more so at night when visibility is not clear. It is also arguable that had the lorry not stalled on the road the matatu would not have rammed into it and therefore it follows that the driver of the matatu should not shoulder the entire blame. As such, I do not find any reason as to why I should interfere with the findings of the trial court. The upshot is that the appeal lacks merit and the same is hereby dismissed with costs to the Respondents.

JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 24TH DAY OF JULY, 2024.

.....



S.M. GITHINJI

JUDGE

In the Presence of; -

Mr Mbithi for the Appellant

Wambua Kilonzo is for the Respondent (absent) – Miss Nyambuto present for the Respondent

Mr Mbithi; -We pray for 30 days stay.

Court; - 30 days' stay is granted.

