



REPUBLIC OF KENYA



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**Nyaga v Njagi (Suing as the legal representative of the estate of Peter Musembi Njagi (Deceased))
(Civil Appeal E024 of 2021) [2023] KEHC 18666 (KLR) (20 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 18666 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CIVIL APPEAL E024 OF 2021
MS SHARIFF, J
MARCH 20, 2023**

BETWEEN

PAUL MAINA NYAGA APPELLANT

AND

JOSPHAT KYALO NJAGI RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF PETER
MUSEMBI NJAGI (DECEASED)**

*(Being an Appeal from the judgment and decree of the Learned Trial
Magistrate Hon. S. M. Nyaga in Marimanti Chief Magistrate's
Court Civil Case No E014 OF 2020 delivered on 30th September 2021)*

JUDGMENT

a. Case Background

1. Vide a Complaint dated December 5, 2020 the Respondent herein being the legal representative of the estate of Peter Musembi Njagi (deceased) sued the Appellant for tortious negligence following the involvement of the Respondent's Motor Vehicle Registration Number KCD 027V Isuzu lorry and the deceased in a road traffic accident at Karocho on January 12, 2020.
2. The aforesaid suit was duly defended by the Appellant and after the hearing of the case judgement was entered for the Respondent against the Appellant on 100% basis on liability and the award on quantum of damages was as below :-

Item Amount in Kshs

- a. Pain and suffering 50,000
- b. Loss of expectation of life 100,000



- c. Lost years/loss of dependency (global) sum 800,000
- d. Special damages 50,550
- Total 1,000,550

b. Appeal

- 3. The Appellant was aggrieved by the aforesaid judgement on both liability and quantum and filed this appeal wherein he sets forth three grounds of appeal viz:
 - i. That the Learned Trial Magistrate erred in law and fact by finding the Appellant 100% liable for the accident.
 - ii. That the Learned Trial Magistrate's finding on liability is against weight of evidence on record and amounts to a wholly erroneous finding.
 - iii. That the Trial court's award on damages for loss of dependency in the sum of Kshs 800,000 is excessive and an erroneous estimate of damages payable.

c. Submissions

Appellant's submissions

- 4. The Appellant submits that given the finding by the trial court that there was no eye witness to the accident that caused the death of the deceased, the said court had no factual basis to hold the Appellant liable on 100% basis.
- 5. The Appellant maintains that PW 3 evidence only confirmed that indeed the deceased was ran over by the Respondent's lorry but the same has not probative value on who was to blame for the said accident.
- 6. The Appellant maintains that had the deceased been lawfully walking alongside the road he would not have been ran over by the Respondent's lorry's left rear tyre; that the circumstantial evidence leads to the inference that the deceased negligence contributed substantially to his own death.
- 7. It is further submitted that the Respondent's own witness Chief Inspector Robert Musila (PW 1) attributed blame upon the deceased.
- 8. The Appellant thus moves this court to find that the trial magistrate erred and to thus hold the deceased liable on 90% basis.
- 9. The quantum of damages on lost years is also challenged and the Appellant submits that the award of Kshs 800,000 made by trial court was without any basis and was not premised on precedents. The Appellant posits that a sum of Kshs 500,000 would suffice.
- 10. The Appellant further relies on his earlier submissions made before the trial court.

Respondent's submissions

- 11. The Respondent supports the trial court's judgment on both liability and quantum and urges this court to uphold the same.



d. Evidence

Respondent's evidence

12. PW 1 Chief Inspector Robert Musila testified that a report of a road traffic accident involving the deceased and the Appellant's Isuzu lorry Registration No KCD 027V was reported at Marimanti Police station. Consequently, an inquest file was opened and statements were recorded from witnesses; the testaments were conflicting with some saying that the deceased was walking while others said he was hanging precariously behind the lorry when he fell down and was ran over by the lorry's left rear tyre. PW1 maintained that the police investigations had concluded that the deceased was to blame for the said accident that occasioned his death and that had he survived they would have charged him accordingly. This witness produced a police abstract as P.EX 1 which indicated that the deceased was to blame for the accident.
13. PW 3 said that at around 8 p.m. he was walking a head of the lorry that was coming from Karocho where it been loading mangoes. He said that he saw the deceased screaming after he had been ran over by the lorry. On re-examination this witness said that the lorry was overloaded and it lost control and ran over the deceased. In his statement, this witness stated that the deceased was one of the loaders who were loading mangoes onto the said lorry and that when he had finished they started walking towards Rungu market when the accident occurred.
14. PW 4 said that the deceased worked for him on an on and off basis with a two weeks break each month for five years at a salary of Kshs 15,000 per month. There was neither a formal agreement or contract of employment nor records of payment of the said salary.

Appellant's evidence

15. DW 1 George Muriuki Kinyua the Appellant's driver maintained that on the material day he had been hired by the Appellant to collect mangoes from farmers in Rungu in Tharaka Nithi County and deliver the same in Nairobi. He said the deceased was one of the loaders and that after the loading was concluded, he started driving slowly, through a feeder road heading to Mutunguo. It was his testimony that he had passed a group of people walking when he later encountered an obstruction in the rear tyres and he thus stopped to establish the cause of the obstruction only for him to find that the deceased had been ran over by the lorry's left rear tyre. This witness maintained that the deceased was the author of his own misfortune.

e. Analysis and Determination

16. This being a first appellate court I am enjoined to re-evaluate, re-analyze and scrutinize the entire evidence in an exercise akin to a re trial and thus draw my own conclusions while taking into account the fact that I did not have the advantage enjoyed by the trial court of seeing and hearing the witnesses testify and I cannot therefore make any assessment on their demeanor. (See *Abok James Odera T/A A. J. Odera & Associates vs John Patrick Macharia T/A Macharia & Company Advocates* (2013) eKLR.
17. When considering whether to disturb awards of damages this court must be satisfied on 3 principles as laid down in the case of *Kiwifio Africa Ltd T/a Meru Express Services Gathogo Kanini vs A. M. M Lubia & Another* (1982-88) 1 KAR a 730 that is:
 - i. The Trial court took into account an irrelevant factor.
 - ii. The Trial Court left out of account a relevant factor.



- iii. The assessed amount is so inordinately low or inordinately high that it must be a wholly erroneous estimate of the damages. (Also see *Ilango vs Manyoka* (1961) E. A 705 and *Lukenya Ranching & Farmers Co-operatives Society Ltd vs Kavoloto* (1970) E. A 414, 418, 419)

f. (i) Liability

18. I have re-analyzed, re-evaluated and scrutinized the evidence of both sides and I find that there was no evidence laid before the court to establish how the accident occurred. PW 3 only saw the deceased after the accident when he heard him screaming yet he said that they were walking alongside the road towards Rungu market when the lorry that was overloaded lost control and ran over the deceased. PW3 did not say that the lorry overturned, which would have been the obvious outcome had the lorry driver lost control of the lorry due to an overload of mangoes. Had PW3 been walking in the company of the deceased then he could have been certain of what had led to the accident. I note from his statement that he had not mentioned that the lorry was overloaded. It was the evidence of this witness that he had been walking in front of the said lorry. In those circumstances there was no way he could have seen what happened at the rear side of the said lorry. The veracity and credibility of this witness is questionable and his testimony cannot therefore be a sound basis for making a finding on liability.
19. PW 1 the Investigating officer who was called by the Respondent maintained that the investigations conducted by the Traffic Police concluded that the deceased had 'stolen' a ride on the rear side of the lorry when he fell down and was ran over by the left rear tyre. It is also noteworthy that the accident occurred at night and no evidence was led by either side on the visibility at the material time.
20. Given that the lorry driver DW 1 had already driven past a group of people when he encountered an obstruction of the rear tyres, the conclusion cannot be escaped that DW 1 was not negligent in his driving and that deceased must have placed himself in harm's way at the rear side of the lorry hence the accident. DW 1 maintained that his speed was slow as he was driving in a feeder road. This evidence stood uncontroverted.
21. Premised upon the factual analysis of the evidence I find that the deceased was grossly negligence and contributed to the accident that caused to his demise at 60%.

(ii) Quantum

22. The only award that is challenged is the one on loss of dependency; indeed, dependency and the income of the deceased was not proved wherefore the adoption of the lump sum mode of making the award under this head is proper and the trial court did not err in anyway on that account. I do not see any reason as to why I should disturb the awarded global sum of Kshs 800,000.

g. Conclusion

23. I therefore find that this appeal is merited on the issue of liability and I therefore set aside the liability of 100% against the appellant and I apportion the same at 40% against the Appellant and 60% against the Respondent.
24. The award on quantum under the different heads is upheld and the same shall be subject to 60% contributory negligence.
25. Each party to bear its own costs.
It is hereby so ordered.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 20TH DAY OF MARCH 2023



MWANAISHA S. SHARIFF
JUDGE

