



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO.38 OF 2017

PETER GACHERU NJOROGE.....APPELLANT

-VERSUS-

BENARD MWANGI (Legal representative of the estate of the late

JOHN NJENGA KIARIE.....RESPONDENT

(An appeal from the judgments and decree of Hon. B. Mararo, Principal Magistrate in Nakuru CMCC. No.772 of 2015 delivered on 22nd February, 2017)

JUDGMENT

BACKGROUND

1. This appeal arises from a suit filed in the lower court by the respondent seeking general and special damages for the death of **John Njenga Kiarie (deceased)** who was hit by the defendant's/appellants motor vehicle registration number KAU 320N along Nakuru – Nyahururu road. After hearing of the suit, the trial magistrate found the defendant/appellant 100% liable and awarded damages as follows:-

- a. Pain and suffering.....kshs 20,000
- b. Loss of expectation of lifekshs 150,000
- c. Lost years-10,000 x12 x 18 x1/3.....kshs 720,000
- d. Costs and interest at court's rate

2. The appellant being aggrieved by the trial magistrate's determination filed this appeal on the following grounds: -

- i. That the learned trial magistrate erred in law and fact in finding the Appellant 100% liable for the accident.
- ii. That the learned trial magistrate erred in law and fact in finding that the Respondent who was a brother to the deceased, was a dependent under the Fatal Accident Act.
- iii. That the learned trial magistrate erred in law and fact in not considering the pleadings, evidence and submissions filed on behalf of the Appellant and if he did, he made a wrong finding on the law cited.
- iv. That the decision arrived at was against the weight of the evidence.

3. This appeal proceeded by way of written submissions.

APPELLANT'S SUBMISSIONS

4. On finding on liability, the appellant submitted that PW2 and PW3 contradicted each other in their evidence. That PW2 said the motor vehicle veered off the road and knocked the deceased while PW3 who was a police officer testified that, according to the sketch plan, the point of impact was within the road in the middle on the left lane, the appellant's rightful lane. Appellant stated that the provisions of **Section**

107 of the Evidence Act which requires a party to prove existence of facts which he asserts.

5. Appellant submitted that in view of the contradiction, the respondent failed to prove his claim against the appellant. Appellant further submitted that his evidence tallied with evidence of PW3 and stated that the respondent was equally to blame for coming into the road. He proposed that the deceased should have been held 30% liable for the accident.

6. On quantum, the appellant submitted that the trial magistrate erred in finding that the respondent who was a brother to the deceased was dependent on him. He quoted **Section 4(1) of the Fatal Accidents Act** as follows: -

“Every action brought by nature of the provisions of this Act shall be for the benefit of wife, husband, parent and child of the person whose death was so caused and shall, subject to provisions of Section 7 be brought by and in the name of the execution or administration of the deceased...”

7. The appellant cited the case of **Mary Nabwire Omalla Vs David Wachira & 2 Others Nairobi HCCC No.605 of 2009[2011] eKLR** where **Rawal J.** held as follows:-

“I do agree that the dependents /beneficiaries under the Fatal Accidents Act are specified under Section 4 (1) of the said Act. Thus I shall not consider the sisters and brothers of the deceased as dependants of the estate.”

8. Appellant submitted that based on the above, the respondent being a brother to the deceased is not a dependent under **Section 4 of Fatal Accidents Act**; that he failed to state full particulars of the persons on whose behalf he filed suit.

RESPONDENT'S SUBMISSIONS

9. On liability the respondent submitted that evidence led was that the deceased was lawfully walking along Nakuru-Nyahururu road when the appellant's vehicle rammmed and hit the deceased from behind causing injuries which led to his death; that the respondent's evidence is corroborated by PW2 an eye witness and PW3 a police officer.

10. Respondent further submitted that the appellant confirmed that he was driving the vehicle at the material time and stated that the road was clear with no bushes; that the appellant confirmed being able to see the left and right lane. Further the certificate of inspection of the vehicle confirmed that he was speeding as demonstrated by the impact on the deceased and the vehicle.

11. Respondent submitted that in his testimony at page 67, the appellant admitted having stopped at a distance of 100 to 200 meters while at page 26 he says he stopped 30 meters from the scene and it is not in dispute that there are glaring inconsistencies as to the distance the vehicle stopped after the accident. Respondent urged the court to find the appellant 100% liable.

12. On quantum, the respondent submitted that being a brother to the deceased, he is lawfully entitled to claim under **Fatal Accidents Act** and **Law Reform Act**. He stated that **Section 4 (1) of the Fatal Accidents Act** provide as follows: -

“An action under this Act shall be brought for the benefit of any person who is the wife, husband, parent or child of the deceased or who is, or is the issue of, a brother, sister, uncle or aunt of the deceased person.”

13. Respondent submitted that it is not in dispute that he is the brother of the deceased; further that the court was right in admitting multiplicand of kshs.10,000, multiplier of 18 years and dependency ratio of 1/3. Respondent cited several authorities in support of his case.

ANALYSIS AND DETERMINATION

14. This being the first appellate court, I am required to reevaluate evidence adduced before the trial court and arrive at an independent determination. This I do with the knowledge that unlike the trial court, I never had the opportunity of taking evidence first hand and make observation on demeanor of witnesses. For this I will give due allowance.

15. In respect to liability, I note from the record that PW2 testified as an eye witness. He stated that on 6th December 2014, he was riding a bicycle from the market when he saw motor vehicle registration number KAG 382 lose control and hit a pedestrian who was off the road. He said he was hit on the left side of the road. He said the vehicle was speeding and the driver tried to flee but he was forced to take the pedestrian to hospital. He blamed the driver for recklessness. He stated that he sped off. On cross examination, he said the road is tarmac with no potholes.

16. PW3 a traffic police officer confirmed that the accident occurred. He said the complaint by the driver is that the pedestrian was crossing the road. He said after investigations, there was no eye witness on the accident scene. He blamed the driver for the accident.

17. On cross examination PW3 said he was not the investigating officer. He said the accident was on the left side of the road within the road; he stated that the pedestrian was crossing from left to right. On reexamination he said the defendant/appellant was on the left side of the road.

18. In his defence, the appellant confirmed that he was driving the vehicle at the material time. He said the road was clear and he felt he had hit something and stopped at Maili Moja. He stated that on inspection the vehicle was found not to have any pre-accident defects.

19. From the evidence adduced, it is not in dispute that the road was clear; this was confirmed by the appellant. This means the appellant was able to see other road users. The vehicle also had no defect prior to the accident. If the respondent was walking ahead of the vehicle, the appellant should have been able to see him and control the vehicle if he was not driving in excessive speed. Even if the respondent was trying to cross the road as he alleges, the appellant should have hooted, slow down or swerve to avoid the accident. In my view he carries larger percentage of blame for failing to be considerate of the other road users and failing to control or manage the vehicle which was found to be in good condition prior to the accident.

20. On the other hand, PW2 who stated that he was at the scene at the time of the accident never recorded statement with police. He said he sped from the scene leaving no eye witness to assist police with investigations. Even though he says the deceased was walking off the road, PW3 said sketch plan show point of impact as left side of the road and if that be the case, then the deceased was attempting to cross the road and he should carry a small portion of blame for failing to look out for vehicles on the road before making a move to cross. In my view 20% blame would be adequate for the deceased.

21. In respect to quantum, it is not disputed that the respondent is a brother to the deceased. Each party has quoted provisions of **Section 4 (2) of the Fatal Accidents Act** to argue whether a brother should or should not benefit from the deceased's estate.

22. **Section 4 (2) of Fatal Accidents Act** provide as follows: -

“Action to be for benefit of family of deceased (1) Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and shall, subject to the provisions of Section 7, be brought by and in the name of the executor or administrator of the person deceased”

23. From the above it is evident that there is no mention of brother. I do not understand from which statute the respondent quoted **Section 4 (1) of the Fatal Accidents Act**. I have done my best to search for amendments of the section to include brothers and sisters but I have not found. However, in my view if a brother or sister were to prove that he was dependent on the deceased, that I believe would consider him or her as dependent. In the instant case I have perused pleadings before the lower court and evidence adduced and there is no mention of any dependent mentioned by the respondent. There is no mention of wife, children, parent and he has not also adduced evidence to demonstrate that he was depending on the deceased. The respondent who gave his age as 58 years old only said the deceased was scrap metal dealer, that he lived with his(respondent's) family and he used to assist him.

24. In view of the provisions of **Section 4 (1) of Fatal Accidents Act** and evidence adduced, I find that the trial magistrate erred in awarding damages under **Fatal Accidents Act Cap 32**.

25. I have considered submissions and evidence and submissions in respect to the awards in other subheadings and see no reason to interfere. They will remain as awarded by the trial court.

26. FINAL ORDERS

1. Appeal on liability is allowed.

2. Liability is apportioned at 20:80 in favor of respondent/Plaintiff. Respondent/plaintiff to shoulder 20% and appellant/defendant 80%.

3. Award under loss of dependency is set aside.

4. Award under pain and suffering and special damages to be reduced by 20% contribution.

5. Each party to bear own costs of the appeal.

Judgment dated, signed and delivered via zoom at Nakuru This 7th day of May, 2020

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RACHEL NGETICH

JUDGE

In the presence of:

Schola - Court Assistant

Mr. Githui Counsel for Appellants

No appearance for Counsel for Respondent