



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 143 OF 2018**

JONATHAN W. NTHULI.....1<sup>ST</sup> APPELLANT

MUTUKU DENNIS MULONZI.....2<sup>ND</sup> APPELLANT

**-VERSUS-**

PETER MWANZIA MAKAU.....1<sup>ST</sup> RESPONDENT

PAULINE NDIDA KIOKO(Suing

as the legal representatives of the Estate

of MUTUA MWANZIA MAKAU (Deceased).....2<sup>ND</sup> RESPONDENT

*(Being an appeal arising out of the decree emanating from the judgment and decree of Hon. G. Mmasi which was delivered on 7<sup>th</sup> March, 2018 in Nairobi C.M.C.C. no. 6748 of 2012)*

**JUDGEMENT**

1) Peter Mwanzia Makau and Pauline Ndinda Kioko, the 1<sup>st</sup> and 2<sup>nd</sup> respondents herein and being the legal representatives of the estate of Mutua Mwanzia Makau, deceased, filed a compensatory suit before the Chief Magistrate's Court Milimani, under the Law Reform Act and the Fatal Accidents act against Jonathan W. Nthuli and Mutuku Dennis Mulonzi, the appellants herein following a road traffic accident which occurred on 3<sup>rd</sup> May 2010 along Mombasa-Nairobi road near Bellevue Area.

2) The appellants filed a defence to contest the respondents' suit. Hon. G. M'Masi (Mrs.), learned Senior Principal Magistrate heard the suit and on 7<sup>th</sup> March 2018 delivered a judgment in favour of the respondents in the sum of ksh.2,188,195/= representing both general and special damages.

3) The appellant being dissatisfied preferred this appeal and put forward the following grounds:

***i. THAT the learned trial magistrate erred in law and in holding the appellants 100% to blame for the death of the deceased despite the evidence that placed liability on the deceased.***

***ii. THAT the learned trial magistrate erred in law and in fact by awarding damages under the Law Reform Act and the Fatal Accidents Act that were too excessive and out of line with the facts of the case and the established legal principles in Fatal accidents cases.***

***iii. THAT the learned trial magistrate erred in law and in fact in failing to consider the appellants evidence, submission and the authorities that had been tendered and in so doing she arrived at an erroneous decision in both liability and quantum.***

4) When the appeal came up for hearing, this court with the concurrence of learned counsels directed the appeal to be disposed of by written submissions. I have re-evaluated the case that was before the trial court and also considered the rival submissions plus the authorities cited by the parties.

5) When the suit came up for hearing before the trial court, the respondents summoned the evidence of three (3) witnesses while the appellants presented the evidence of a single witness. It is the evidence of Peter Mwanzia (PW1) that the deceased was knocked down along Mombasa road and died as a result. The evidence of P. C. Mutima (PW3) corroborated the evidence of PW1. He (PW3) stated that motor vehicle reg. KAM 887Q veered off the road and knocked down the deceased who was far of the left side of the road.

- 6) Dennis Mulonza Mutuko (DW1) testified in support of the defence (Appellant's) case. DW1 the driver of motor vehicle reg. no. KAM 887Q stated that the vehicle was damaged on the left side and that he was driving at a speed of 40kph.
- 7) DW1 also stated that the deceased was knocked down when he attempted to cross the road.
- 8) The learned Senior Principal Magistrate weighed the competing evidence and was convinced by the evidence of PW3, a traffic police officer who stated that the vehicle lost control, veered to the left side of the road and hit the deceased. The learned magistrate was convinced that the appellant's driver was wholly to blame for the accident.
- 9) Though the appellants put forward a total of 3 grounds, those grounds revolve the twin issues of liability and quantum. On liability it is the submission of the appellants that the trial magistrate erred in holding them wholly liable for the accident yet they tendered evidence which blamed the deceased for the accident.
- 10) The respondents are of the submission that the trial magistrate's decision on liability cannot be faulted because the evidence she took into account solely blamed the 1<sup>st</sup> appellant for the accident.
- 11) I have carefully re-evaluated the evidence presented on liability. The respondents summoned an eye witness to testify in support of their case. Joel Mwema Makau (PW2) told the trial court that on the fateful day i.e on 3<sup>rd</sup> May 2010 he gave the deceased a lift and on the way he alighted near Bellevue. PW2 said he saw motor vehicle reg. KAM 887Q hit the deceased after losing control and veering off the road towards where the deceased was.
- 12) The respondent's witness (DW1) stated that the motor vehicle he was driving (i.e KAM 887Q) hit the deceased while he was attempting to cross the road.
- 13) A careful analysis of the rival evidence, will show that the deceased was knocked down at the far left side of the road. It is also clear that the motor vehicle lost control before veering off the road.
- 14) It is apparent in my mind that the evidence presented clearly and solely put blame on the driver of motor vehicle reg. No. KAM 887Q. I am satisfied that the learned Chief Magistrate arrived at the correct decision on liability hence her decision cannot be disturbed.
- 15) On quantum, I have already stated that the respondents were awarded a sum of ksh.2,188,195/= representing both general and special damages. It is the submission of the appellants that the award is too excessive and out of line with the facts of the case and the established legal principles.
- 16) The respondents are of the submission the award has been tabulated according to the principles of assessing damages hence the trial magistrate cannot be faulted. It is further argued by the respondents that the award is not excessive.
- 17) After carefully re-evaluating the evidence on quantum, it is apparent that the deceased used to earn ksh.20,000/= per month. At the time of his death the deceased was aged 39 years. The trial magistrate took into account statutory deductions and fixed the deceased monthly pay at kshs.15,000/=. She also applied a multiplier of 16 yeas assuming that the deceased would have worked upto the age of 55 years. A 2/3 dependency ratio was applied to the total earnings.
- 18) In my view, the learned Senior Principal Magistrate applied the correct principles in assessing damages. The amount awarded is neither high nor low but the same is commensurate with the loss suffered.
- 19) In the end, I find no merit in this appeal. The same is dismissed with costs being awarded to the respondents.

**Dated, Signed and Delivered virtually via Microsoft Teams at Nairobi this 3<sup>rd</sup> day of July, 2020.**

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**J. K. SERGON**

**JUDGE**

**In the presence of:**

.....**for the 1<sup>st</sup> and 2<sup>nd</sup> Appellants**

.....**for the Respondent**