



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 445 OF 2011

ACROSS AFRICA SAFARIS.....1ST APPELLANT

DIAMOND TRUST BANK KENYA LIMITED.....2ND APPELLANT

VERSUS

JOHN WANG'OMBE

(Sued as legal representative of the estate of JANE KAMENE-Deceased).....1ST RESPONDENT

ANDREW KAMAU.....2ND RESPONDENT

(Being an appeal from the judgment and decree of Hon. M.R. Gitonga (Mrs.)

(Senior Principal Magistrate) delivered on 16th August, 2011

in THIKA CMCC NO. 496 OF 2002)

JUDGMENT

1. John Wang'ombe, the 1st respondent herein and the legal representative of the estate of Jane Kamene ("the deceased") instituted a suit against the 2nd respondent by way of the plaint dated 23rd May, 2002 and sought for both general damages under the Law Reform Act, Cap. 26 Laws of Kenya and the Fatal Accidents Act, Cap. 32 Laws of Kenya and special damages plus costs of the suit and interest thereon.
2. The 2nd respondent was sued in his capacity as the owner of motor vehicle registration number KAA 310K Lorry ("the first vehicle").
3. The 1st respondent pleaded that sometime on or about the 25th day of May, 1999 while the deceased was travelling as a lawful passenger aboard motor vehicle registration number KAD 202X ("the second vehicle") the 2nd respondent whether by himself or through his servant/agent caused the first vehicle to collide with the second vehicle, causing the deceased to sustain fatal injuries.
4. The 1st respondent attributed the accident to negligence on the part of the 2nd respondent, the particulars of which were set out in the plaint.
5. It was also pleaded in the plaint that at the time of her death the deceased was a young woman aged 25 years who enjoyed robust health and has left behind the following dependants:

(i) MN	Daughter	7 years
(ii) MW	Son	3 years
(iii) Monicah Nyambura Wang'ombe	Mother	50 years
(iv) John Wang'ombe	Father	53 years

6. On being served with summons, the 2nd respondent entered appearance and put in the statement of defence dated 9th August, 2002 to deny the claim.

7. The 2nd respondent subsequently took out third party proceedings against the 1st and 2nd appellants who in turn entered appearance and filed their statement of defence to deny the averments made in both the plaint and the 2nd respondent's defence.

8. At the hearing, the 1st respondent testified and called an additional witness while the 2nd respondent and the appellants did not call any evidence. Thereafter, the 1st respondent and the 1st appellant filed and exchanged written submissions.

9. Finally, the trial court entered judgment on 16th August, 2011 in favour of the 1st respondent and against the 2nd respondent and the appellants in the manner hereunder:

a) Liability 80% against the appellants and 20% against the 2nd respondent

b) General damages

(i) Pain and suffering Kshs. 10,000/

(ii) Loss of expectation of life Kshs. 100,000/

(iii) Lost years Kshs. 1,380,000/

Total Kshs. 1,490,000/

The 1st respondent was also awarded costs of the suit and interest thereon.

10. The abovementioned judgment now forms the subject of the appeal before this court. The appellants have put forward the following grounds of appeal in their memorandum of appeal dated 14th September, 2011:

(i) THAT the learned trial magistrate erred in both fact and law in awarding damages which were manifestly excessive in the circumstances.

(ii) THAT the learned trial magistrate misdirected herself by finding the third party 80% liable for the accident that is the subject matter in the suit.

(iii) THAT the learned trial magistrate erred in both fact and law by disregarding the authorities presented to the court on the issue of assessment of damages under the Fatal Accidents Act.

(iv) THAT the learned trial magistrate erred in fact and in law by failing to weigh the evidence placed before her before delivering the judgment.

(v) THAT the learned trial magistrate erred in fact and in law by relying on insufficient evidence to rule in favour of the 1st respondent.

11. The appeal was dispensed with through written submissions. On its part, the 1st appellant submitted that the evidence tendered by PW1 that the first vehicle was to blame for the accident was not controverted at the trial and that neither the 2nd respondent nor the 1st respondent tendered any evidence to show that the appellants being the third party in the suit were in any way to blame for the material accident.

12. The 1st appellant submitted that from the above, it is clear that the trial court erred by apportioning liability between the 2nd respondent and the appellants.

13. According to the 1st appellant, the burden rested with the 2nd respondent to prove their liability and that he did not discharge this burden. Various authorities were cited by the 1st appellant, including the case of **Stapley v Gypsum Mines Ltd (2) (1953) A.C. 663 at p. 681** where the court held as follows:

“To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it...”

“The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as

having jointly caused the accident. I doubt whether any test can be applied generally.”

14. It was the argument of the 1st appellant that the trial court apportioned liability on the appellants without substantiating the manner in which they were to blame for the accident, while the 1st appellant is of the view that the 1st respondent proved his case as against the 2nd respondent.

15. The 1st appellant submitted that concerning ownership of the second vehicle, while it is not disputed that it purchased the same and that it is the 2nd appellant who financed the purchase, it is also true from the record that the second vehicle was involved in an accident and was written off, resulting in the termination of the hire purchase agreement between the appellants and the sale of the second vehicle as a salvage to a third person named Nelson Njenga Njoroge.

16. According to the 1st appellant, the 1st respondent only produced a police abstract to show the ownership of the second vehicle but did not produce any documentation linking the appellants to the second vehicle and yet the trial court apportioned liability to them.

17. On quantum, the 1st appellant argued that it is only disputing the award of damages under the head of loss of dependency. The 1st appellant is of the view that a multiplier of 18 years would suffice, a multiplicand of Kshs. 6,900 and a dependency ratio of 2/3 to be tabulated as follows:

$$6,900 \times 18 \times 12 \times 2/3 = \text{Kshs. } 993,600/$$

18. The 2nd appellant who filed its separate submissions on 19th February, 2020 argued that pursuant to leave of the court granted on 16th June, 2015 it introduced new evidence in the appeal to show that the second vehicle was involved in an accident way back in 1997 and was written off by its insurers, who thereafter sold the said vehicle to one Nelson Njenga Njoroge, the result of which the 2nd appellant's interest in the second vehicle ceased as at 28th July, 1997 and it should not have been held liable.

19. The 2nd appellant further argued that it is a separate entity from Across Africa Safaris and Diamond of Kenya who were sued as the third party in the suit and hence if the judgment is upheld, then it is against Diamond of Kenya and not the 2nd appellant.

20. It was the submission of the 2nd appellant that the 1st respondent had no locus standi to institute the suit since his name does not appear in the grant of letters of administration *ad colligenda* issued in the succession case and hence the suit should be declared a nullity ab initio.

21. The 2nd appellant went on to submit that pursuant to the provisions of Sections 107 and 108 of the Evidence Act, the 2nd respondent was responsible for bringing evidence to support his averment of liability against the appellants but he did not. According to the 2nd appellant, this meant that his statement of defence constituted mere denials and hence he ought to have been held solely liable by the trial court.

22. More specifically, the 2nd appellant argued that the 2nd respondent did not adduce any documentary evidence to show that the second vehicle was at the time of the accident under the ownership of the appellants pursuant to the provisions of Section 8 of the Traffic Act which provides that the person whose name is registered shall be deemed to be the owner of the motor vehicle in question unless contrary evidence is adduced.

23. It was the submission of the 2nd appellant that it had brought sufficient evidence to show that both its interest and that of the 1st appellant in respect to the second vehicle had been extinguished long before the accident took place. The 2nd appellant cited the case of **Securicor Kenya Ltd v Kyumba Holdings Ltd [2005] eKLR** in which the Court of Appeal determined that:

“We think that the appellant had, by the evidence it led, proved on a balance of probability, that it was not the owner of KWJ 816 at the time the accident occurred since it had sold it. Our holding finds support in the decision in OSAPIL VS. KADDY [2000] 1 EALA 187 in which it was held by the Court of Appeal of Uganda that a registration card or logbook was only prima facie evidence of title to a motor vehicle and the person whose name the vehicle was registered was presumed to be the owner thereof unless proved otherwise. The appellant had, indeed, proved otherwise.”

24. It was further the submission of the 2nd appellant that in any case, its position in the proceedings as the financier of the 1st appellant in respect to the second vehicle excludes it from liability since its sole duty was to finance the 1st appellant in purchasing the second vehicle at the time and that its name was registered alongside that of the 1st appellant for that sole purpose. To support its argument, the 2nd appellant cited *inter alia*, the case of **Beatrice Adhiambo Ngiela & another v Mehul Kishorchand Shah & another [2012] eKLR** where the court rendered itself thus:

It is clear from annexure ‘HMI’ that the 2nd Defendant was a mere financier of the 1st Defendant for purposes of acquisition of the suit motor vehicle by the 1st Defendant, and the 2nd Defendant’s interest in the said motor vehicle was merely recorded in the registration book or in the records held by the Registrar of Motor Vehicles for the purpose of securing its interest under the hire-purchase agreement. That interest is the balance of the loan or advances to the 1st Defendant. At the time of the accident the 1st Defendant was in possession of the said vehicle operating it for his own benefit, not the 2nd Defendant’s benefit.

Indeed, the available evidence shows on balance that the 1st Defendant was the actual, beneficial, or possessory owner of the motor vehicle in question. Therefore, there is no legal basis for extending ownership to the 2nd Defendant.

25. For all the foregoing reasons, the 2nd appellant urged this court to allow the appeal.
26. In response, the 1st respondent through his brief submissions dated 13th March, 2020 supported the finding of the trial court and urged this court to reconsider that from the evidence, what emanated is that the second vehicle was substantially to blame for the accident.
27. The 1st respondent further submitted that the argument by the 1st appellant that it was the duty of the 2nd respondent to tender evidence against the appellants does not hold water.
28. It was also the contention of the 1st respondent that going by the evidence, it is clear that the 1st appellant was the registered owner of the second vehicle at all material times and it rested with the 1st appellant to tender evidence to the contrary at the trial but it did not.
29. On quantum, the 1st respondent urged this court to uphold the award of the trial court.
30. On his part, the 2nd respondent did not participate in the appeal.
31. I have cautiously considered the rival submissions on appeal coupled with the various authorities cited therein. As rightly put by the parties, this being a first appeal I am enjoined by law to re-evaluate the evidence tendered before the trial court and having done so, to arrive at my own findings.
32. It is noted that the appeal lies against both the findings on liability and quantum, specifically the award of damages for loss of dependency. Consequently, I will address the grounds of appeal under the two limbs.
33. On liability, PC Felix Rugut who was PW1 stated that he was at all material times stationed at Kabati Police Station. He stated that the material accident involved two (2) vehicles: the first vehicle and the second vehicle.
34. According to the witness, the second vehicle was headed to Nairobi from Othaya while the first vehicle which was ahead lost control and started moving in a zigzag manner, causing the second vehicle to hit it from behind before rolling several times. The witness produced the Occurrence Book (OB) Report and police abstract as P. Exh 1 and 2 respectively.
35. In cross-examination, PW1 stated that the matter was still pending under investigation at the time of giving his testimony.
36. The 1st respondent who was PW2 stated that he is the father to the deceased and that he received a report of her death and that he travelled to Nairobi on the date following the accident to identify her body.
37. In cross-examination, the 1st respondent stated *inter alia*, that he does not know the appellants.
38. In her judgment, the learned trial magistrate found that the 2nd respondent did not adduce any evidence to rebut the testimony of PW1 regarding the occurrence of the accident. Consequently, the learned trial magistrate apportioned blame between the 2nd respondent and the appellants.
39. From the record, the finding of liability against the 2nd respondent has not been challenged. The issue lies with the apportionment of liability to the appellants.
40. From my re-examination of the evidence on record, it is not in dispute that the material accident occurred, involving the first and second vehicles, and that the deceased lost her life as a result.
41. I note that neither the 2nd respondent nor the appellants adduced any evidence at the trial. Suffice it to say that it is not in dispute that it is the 2nd respondent and not the 1st respondent who took out third party proceedings against the appellants. It therefore rested with the 2nd respondent to prove that the appellants ought to be held partially or substantially liable.
42. On the subject of ownership, the 2nd respondent did not adduce any documentation such as the copy of records to establish ownership of the second vehicle, pursuant to the provisions of **Section 8 of the Traffic Act, Cap. 403 Laws of Kenya**.
43. The only evidence that was tendered before the learned trial magistrate to give an indication of ownership of the second vehicle was the police abstract dated 25th May, 1999. From my study of its contents, I established that the owner of the second vehicle was indicated as being Geoffrey Karanja, who is not a party to the suit or the instant appeal.
44. In the instant appeal, the appellants admitted that at some point, the 1st appellant was registered as the owner of the second vehicle before the same was involved in an accident sometime in 1997 and was later sold to a third person named Mr. Nelson Njoroge Njenga. The 2nd appellant further admitted to being the financier of the 1st appellant vide the hire purchase agreement annexed to its affidavit in support of the appeal.
45. The 2nd appellant also annexed the letter dated 4th March, 2002 from Kenindia Assurance Company Limited (“the insurer”) the contents of which are that the insurer sold the second vehicle to the third person on 8th August, 1997 and that the log book was released to him for purposes of effecting a transfer. It remains unclear whether such transfer was ever done. However, the above letter appears to support the

avermment of the 2nd appellant regarding the sale of the second motor vehicle.

46. Be that as it may, I will reiterate that in the absence of any evidence to prove ownership of the second vehicle by the appellants at the time of the accident, the 2nd respondent's pleadings constituted mere denials. It is apparent from her finding that the learned trial magistrate did not take this into consideration.

47. Even if ownership of the second vehicle had been proved, it is not controverted that the 2nd appellant was merely a financier of the 1st appellant and would therefore be excluded from liability even though its name appeared on the registration documents pertaining to the second vehicle. In so finding, I borrow from the case of **Beatrice Adhiambo Ngiela & another v Mehul Kishorchand Shah & another [2012] eKLR** cited in the 2nd appellant's submissions and which holding I have already stated hereinabove.

48. On negligence, it is not in dispute that both the first and second vehicles were involved in the accident. In fact, PW1 in his evidence stated that the first vehicle belonging to the 2nd respondent lost control and caused the second vehicle in which the deceased was travelling to knock it from behind and roll over.

49. Once again, the 1st respondent having proved negligence on the part of the 2nd respondent, it was the duty of the 2nd respondent to prove that the appellants contributed to the accident but he did not.

50. For all the foregoing reasons, I am convinced that the 2nd respondent did not call any evidence to link the appellants to the second vehicle at the time of the accident or to show the need for apportionment of liability against them. I therefore arrive at the conclusion that the learned trial magistrate had no basis for apportioning liability as she did and in any event, I note that she did not give any explanation for such apportionment.

51. In my view, the apportionment of liability ought to be disturbed and substituted with a finding of 100% liability against the 2nd respondent.

52. In respect to the second limb on quantum, the 1st appellant challenged the award made on loss of dependency. In his pleadings and evidence, the 1st respondent indicated that the deceased was aged 25 years at the time of her death. This was confirmed by the death certificate tendered as evidence at the trial. The 1st respondent also tendered the birth certificates for the two (2) children of the deceased who were minors at the time.

53. On his part, the 1st respondent proposed a multiplier of 25 years, a multiplicand of Kshs. 10,000/ and a dependency ratio of 2/3 to be tabulated as follows:

$$10,000 \times 25 \times 12 \times 2/3 = \text{Kshs. } 2,000,000/$$

54. The appellants on their part proposed a multiplier of 24 years, a multiplicand of Kshs. 5,000/ and a dependency ratio of 2/3 to be tabulated as hereunder:

$$5,000 \times 24 \times 12 \times 2/3 = \text{Kshs. } 960,000/$$

55. The learned trial magistrate on her part applied a multiplier of 25 years, together with a multiplicand of Kshs. 6,900/ and a dependency ratio of 2/3 thereby arriving at the following award:

$$6,900 \times 25 \times 12 \times 2/3 = \text{Kshs. } 1,380,000/$$

56. From my re-examination of the evidence adduced at the trial, I observed that while the 1st respondent pleaded that the deceased worked as a waiter, he did not adduce any evidence to that effect. Further to this, there was no proof of earnings for the deceased, which begs the question: how did the learned trial magistrate arrive at the multiplicand of Kshs. 6,900?

57. To my mind, in the absence of proof of earnings as well as proof of profession, I find that a global award would better suit the present circumstances. I therefore considered global awards made to the beneficiaries of deceased persons whose ages were in close proximity to that of the deceased herein.

58. In the case of **Gerishon Mwangi Muthemba (Suing as one of the administrators of the estate of Ibinson Maina Mwangi-Deceased) v Crystal Industries Limited & another [2020] eKLR** the court awarded a global sum of Kshs. 1,200,000/ to the estate of a deceased who died aged 25 years. A similar award was made in the instance of a deceased person of similar age in the case of **Geoffrey Obiero & another v Kenya Power & Lighting Corporation Limited & another [2019] eKLR**.

59. I will therefore make a global award of Kshs. 1,200,000/ under this head.

60. Consequently, the appeal succeeds on both liability and the award of damages for loss of dependency. The finding of liability against the appellants in the ratio of 80% is hereby set aside and is substituted with a finding of 100% liability against the 2nd respondent. Likewise, the award of Kshs. 1,380,000/ on damages for loss of dependency is hereby set aside and is substituted with a global award of Kshs. 1,200,000/.

61. For the avoidance of doubt, the judgment on appeal is as follows:

a) Liability **100% against the 2nd respondent**

b) General damages

(i) Pain and suffering **Kshs. 10,000/**

(ii) Loss of expectation of life **Kshs. 100,000/**

(iii) Loss of dependency **Kshs. 1,200,000/**

Total **Kshs. 1,310,000/**

Costs of the suit are awarded to the 1st respondent plus interest on general damages at court rates from the date of judgment until payment in full. The suit against the appellants is dismissed with costs to be borne by the 2nd respondent.

In the circumstances of this appeal, a fair order on costs is to order that each party meets its own costs of the appeal.

Dated, signed and delivered at NAIROBI this 15th day of October, 2020.

.....

L. NJUGUNA

JUDGE

In the presence of:

..... for the 1st Appellant

..... for the 2nd Appellant

..... for the 1st Respondent

..... for the 2nd Respondent