



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 112 OF 2007

ISAAC MATHENGE.....APPELLANT

-VERSUS-

**JOHN MUNYAO (Suing as the administrator ad litem of the estate of
RUTH NTHAMBA MBONDO-Deceased).....RESPONDENT**

(An appeal from the judgment delivered by Honourable T.W.C. Wamae (Mrs.) (acting Principal Magistrate) on 8th February, 2007 in Civil Case No. 10251 of 2004)

JUDGMENT

1. The appellant was the defendant in CMCC NO. 10251 OF 2004. The respondent, being the plaintiff therein, filed a plaint on 16th September, 2004 seeking both general damages under the Fatal Accidents Act and the Law Reform Act together with special damages on behalf of the estate of Ruth Nthamba Mbondo, in addition to costs of the suit together with interest. The appellant filed his defence on 27th October, 2004, following which the parties proceeded for hearing.
2. At the hearing, the plaintiff and defendant called two (2) witnesses each and at the close of their respective cases, the parties filed written submissions. Finally, the trial court delivered its judgment on 8th February, 2007 in favour of the respondent.
3. The appeal before this court is against the abovementioned judgment. The memorandum of appeal is dated 26th February, 2007 and is premised on four (4) grounds.
4. The appellant in his submissions argued that no clear evidence was adduced to show that the driver who allegedly caused the accident acted negligently and was to blame for the accident; that it was ascertained that the appellant was not the owner of the subject motor vehicle and it matters not that he faced criminal charges to which he pleaded guilty since the charges did not relate to any negligence or cause of death.
5. The appellant went ahead to argue that the learned trial magistrate erred in awarding the sum of Kshs.300,000/= to the respondent for loss of dependency.
6. In response thereto, the respondent submitted that he had proved on a balance of probability that the appellant's driver drove the subject motor vehicle negligently and that the driver and his conductor did not give evidence to explain the manner in which the accident occurred.
7. The respondent also submitted that the special damages awarded amounted to Kshs.100/= and not

Kshs.80,000/= as purported by the appellant. The respondent largely supported the award made by the learned trial magistrate.

8. I have taken into consideration the submissions by the respective parties.

9. On the question of negligence, it is evident that the driver who allegedly caused the accident on the material day was not made a party to the suit. Be that as it may, I have perused the copy of motor vehicle records and observed that the registered owner as at 15th April 2002 was not the appellant which verifies the appellant's account. Nonetheless, the court record reveals that the appellant was charged in Traffic Case No. 1448 of 2002 as the owner of the motor vehicle and in relation to the accident, to which he confirmed the facts as being true and pleaded guilty. Thereafter, he was convicted. It is therefore not true that the charges were read and conviction made in the absence of the appellant. In any event, if at all the appellant took the view that he was not the owner of the motor vehicle at the material time, it would have been prudent for him to seek to enjoin both the actual owner and driver but he did not.

10. The respondent in his oral evidence indicated that he came to be aware that the appellant was the owner of the subject motor vehicle by virtue of the police abstract that was issued to him. The respondent further stated that he applied for a motor vehicle search but did not receive an answer. However, he was made aware that the appellant had been charged with a traffic offence as the owner of the said motor vehicle to which he pleaded guilty to the relevant offence and was convicted.

11. I am able to confirm from the police abstract report that the appellant was indicated as being the owner of the motor vehicle as at the time. Not only so, but the traffic court record spells out that the appellant confirmed the facts surrounding the accident and his ownership of the said motor vehicle as being true.

12. The courts have in the past reasoned that the motor vehicle records held with the relevant registrar are not conclusive evidence of actual ownership and especially in instances where a contrary position is proved as is the case here. In fact, it has been argued that where a police abstract shows that a particular party is the owner of a particular motor vehicle and such abstract is in no way challenged, the person named therein is deemed to be the owner.

13. Take for instance the case of *Samuel Mukunya Kamunge v John Mwangi Kamuru [2005] eKLR* where the court reasoned as follows:

“It is true that a certificate of search from the Registrar of motor-vehicle would have shown who was the registered owner of the motor-vehicle according to the records held by the Registrar of motor vehicle. That however is not conclusive proof of actual ownership of the motor vehicle as section 8 of the Traffic Act provides that the contrary can be proved. This is in recognition of the fact that oftentimes vehicles change hands but the records are not amended...I find a police abstract report having been produced showing the Respondent as the owner of motor vehicle KAH 264A, and evidence having been adduced that letters of demand sent to the Respondent elicited no response from him denying ownership of the motor vehicle, and the Respondent having offered no evidence to contradict the information on the police abstract report, the appellant had established on a balance of probability that motor vehicle KAH 264A was owned by the Respondent.”

14. A similar position was taken in *Hellen Gathoni Mbutia & another v Nelson Wachira Murage [2016] eKLR* by the Honourable Justice John Mativo who in truth made reference to the above-cited case hand-in-hand with that of *Wellington Nganga Muthiora v Akamba Public Road Services Ltd & Another CA NO. 260 OF 2004(Kisumu) (2010) eKLR* where the Court of Appeal held that:

“Where police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even cross-examination challenged it, the police abstract being a prima facie evidence not rebutted could be relied on as proof of ownership in the absence of anything else as proof in civil cases was within the standards of probability and not beyond reasonable doubt as is in

criminal cases. However, where it was challenged by evidence or in cross-examination, the plaintiff would need to produce certificate from the Registrar or any other proof such as an agreement for sale of the motor vehicle which would only be conclusive evidence in the absence of proof to the contrary.

15. Justice Mativo went ahead to find that no cross-examination was done on the police abstract, neither was there an objection to its production or a prayer to call its maker to give evidence.

16. I am in full support with the respective courts' decisions as articulated above. The appellant at no point challenged the production of the police abstract or cross-examined the respondent witnesses on the same. Equally, no request was made to have the maker of the document called. In the premises, I am persuaded that the details provided in the police abstract coupled with the plea of guilty by the appellant on the same facts point towards a prima facie evidence of ownership by the appellant.

17. In advancing my arguments hereinabove, I am also convinced that the witness' accounts and in particular, that of PW 2 point towards negligence. The mere fact that the subject motor vehicle was said to be in motion at the time the deceased is alleged to have alighted goes to show that the driver was negligent. The driver of the subject motor vehicle was not called as a witness to explain his version on how the accident occurred. The court therefore believes the account as given by the PW2.

18. As concerns the limb on special damages, I have perused the judgment delivered by the trial magistrate and established that the amount of Kshs.100/= was awarded on the same. The trial magistrate explained that the funeral expenses incurred had not been proved. I therefore agree with the respondent's argument that the sum of Kshs.80,000/= was not granted under special damages. Ground 2) of the appeal fails.

19. The appellant also brought forth the argument that loss of dependency was not proved and yet an award was made. Upon perusal of the proceedings, I noted that the respondent gave evidence to the effect that the deceased supported him as a single mother. It is well noted that the respondent did not adduce evidence confirming the deceased's earnings though he testified that she was a general worker. He added that she catered for his education fees. Given the circumstances, the learned trial magistrate relied on a global sum in awarding Kshs.300,000/= as damages for loss of dependency.

20. The appellant took the stand-point that the abovementioned award was made in the absence of proof. My view on this is that whereas the respondent did not avail a copy of his birth certificate, he swore an affidavit on 2nd April, 2004 before the Family (Succession and Probate) Division indicating that the deceased was his mother. Further to this, he took out a limited grant of letters of administration ad litem.

21. In support of my arguments above, I choose to draw reference from the *Section 4(1)* of the Fatal Accidents Act which states that:

“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...”

22. The respondent also indicated that the deceased maintained him. I would presume that such maintenance was not limited to the financial aspect and given the age of the respondent, it is likely that he would have continued to rely on the deceased's support. That said, I am convinced that the respondent has proved dependency on a balance of probabilities.

23. That said, the learned trial magistrate noted in her judgment that there was nothing to show the nature of the deceased's work but appreciated that the deceased had to have been working to afford to take the respondent through school. In making her award, the trial magistrate considered the authorities cited by the respondent since the appellant did not make reference to any judicial precedents. In view of the above backed by the case of *Comply Industries Limited & another v Martha Ngima Muthini (Suing As The*

Legal Representative Of The Estate Of The Late Stephen Mirau Muthini [2014] eKLR where the court awarded the sum of Kshs.319,920/= as damages for loss of dependency, I find the award of Kshs.300,000/= made by the trial magistrate to be reasonable.

24. Lastly, I wish to address the award on quantum of the general damages as a whole. The renowned case of *Kemfro Africa Ltd t/a Meru Express Services 1976 & Another [1976] v Lubia & Another (No. 2) [1985]* eKLR addresses the subject as follows:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

25. The learned trial magistrate, in awarding general damages for loss of expectation of life and pain and suffering, once again took into account the authorities relied upon by the respondent and. The appellant on his part did not cite authorities. Further to the above, the respondent cited comparable awards made in various authorities, all of which fall within a reasonable range in comparison to the awards made by the trial magistrate. Consequently, I find no reason to interfere with the award given on the remaining general damages. Grounds 3) and 4) are untenable.

26. In the end, the appeal is lacking in merit and the same is dismissed with costs to the respondent.

Dated, signed and delivered at **NAIROBI** this 7th day of March, 2019.

L. NJUGUNA

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent