



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO 78 OF 2014

KENYA POWER & LIGHTING COMPANY LIMITED.....1ST APPELLANT

PHILIP MACHANDA ORINA.....2ND APPELLANT

VERSUS

DOROTHY WANJIRU WAINAINA &

JAMES KAHORA GICHUHE.....RESPONDENTS

JUDGMENT

1. The suit in Nakuru CMCC No. 40 of 2009 was initiated by the Respondents (the Plaintiffs). They sought general damages under the Law Reform Act and the Fatal Accidents Act arising out of a motor vehicle accident which occurred on 21/3/2008. The accident involved the 2nd Respondent's vehicle KAQ 424K Isuzu Lorry driven by one Wainaina Gichuhi (now deceased) and motor vehicle KAE 556F Mitsubishi Lorry owned by the 2nd Appellant.

2. It was the Respondent's case that the accident which claimed the life of the deceased was caused by the negligence of the 1st Appellant's driver whom according to the particulars set out in the plaint drove the motor vehicle recklessly, failed to control the motor vehicle and swerved on to the path of the motor vehicle KAQ 424K causing a collision which cost the deceased's life and extensive damage to the motor vehicle KAQ 424K which vehicle became a write off.

3. The trial court found the Appellants 100% liable and awarded damages as follows:-

Pain & suffering	30,000/=
Loss of expectation of life	130,000/=
Funeral expenses	63,785/=
Loss of motor vehicle KAQ 424K	658,700/=
Loss of dependency	<u>1,920,000/=</u>
Total	2,920,000/=
Less damages under Law Reform Act	<u>160,000/=</u>
Net award Kshs.	<u>2,542,485/=</u>

4. The Appellants were aggrieved by both the liability and quantum which they appealed on the following grounds:-

(i) The learned magistrate erred in law and in fact by failing to give a concise statement of the case, the points of determination, the decision thereon and reasons for his judgment pronounced on 28th May, 2014.

(ii) The learned magistrate erred in law and in fact in disregarding that the burden of proof lay on the Respondents/Plaintiffs to prove negligence and particulars of negligence pleaded in the plaint which they failed to do.

(iii) *The learned magistrate erred in law and in fact in failing to hold that the Plaintiff had failed to prove that the 1st Defendant (1st Appellant) was registered owner of motor vehicle registration number KAE 556F Mitsubishi and that the 2nd Defendant (2nd appellant) was the 1st Defendant's (1st appellant's) driver and/or servant and/or agent which facts were denied by the Appellants and ignored that the Plaintiffs had neither pleaded nor proved vicarious liability for judgment to be entered against 1st Defendant (1st Appellant).*

(iv) *The learned magistrate erred in law and in fact in failing to appreciate the evidence before him and entering judgment in favour of the Plaintiffs/Respondents on 100% liability and ignoring the issue of contributory negligence pleaded by the Defendants (Appellants).*

(v) *The damages awarded by the learned magistrate are speculative, excessive, unrealistic and not supported by evidence and in particular:-*

(a) *The learned magistrate erred in law and in fact in finding that the deceased was earning Kshs.15,000.00 monthly in the absence of conclusive evidence and ignoring the muster roll which had been produced in evidence as well as applying gross salary earned instead of net salary earned by the deceased.*

(b) *The multiplier of 16 years adopted by the learned magistrate in calculating dependency is unreasonable excessive and unrealistic.*

(c) *The learned magistrate erred in law and in fact in awarding 658,700.00 for loss of motor vehicle ignoring and rejecting clear evidence that:-*

I. The plaintiff had been compensated by his insurance company,

II. There was no claim on behalf of any insurance company claiming under their subrogation rights; and,

III. The award resulted in the plaintiff getting double benefit.

(vi) *The learned magistrate failed to appreciate the totality of the evidence before him and not considering the written submissions filed on behalf of the Appellants/Defendants.*

5. Parties consented to prosecute the appeal through written submissions which they filed along with authorities and subsequently highlighted. I have carefully considered grounds of appeal, the record and the submissions. There are multiple issues which arise in the appeal but which all revolve around whether the Plaintiffs proved negligence; whether there was contributory negligence on the part of the Plaintiff's driver; ownership of the accident vehicle and vicarious liability thereof; and whether the award was excessive.

6. In considering these issues, I am conscious of my duty as a first appellate court that I must subject the evidence to a fresh review and arrive at my own conclusions. As stated by the Court of Appeal in **Selle & another V associated Motor Boat Company Ltd. & Others** [1968 EA:-

“Being a first appeal the principles, upon which this court acts are well settled in that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

Whether the Respondent/Plaintiff proved negligence

7. The standard of proof in civil cases is one on a balance of probability. The onus is on the Plaintiff to prove their case. See **Kiema Mutuku Vs. Kenya Cargo Handling Services Ltd.** [1991] KAR 464. Further, the onus can shift to the person who would lose if no evidence was presented by either side. Where the court is faced with two equal probabilities the court must go with what is more probable than not. In **Palace Investments Ltd. Vs Geoffrey Kariuki Mwenda & Anor.** [2007] eKLR, the Court of appeal cited **Miller V Minister of Pension** [1947] 2 ALL ER 372 and stated in respect to the burden of proof in civil cases thus:-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘we think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not.”

8. The Appellants argue that the Respondent/Plaintiff failed to prove negligence on the part of the Appellant's driver and that the trial court failed to consider the Appellant evidence which showed the respondent to be at fault. The Respondent on the other hand submits that the trial court correctly found that it was 2nd Defendant “who authored the accident” due to the negligent manner in which he was navigating the 1st Defendant's vehicle.

9. I have looked at the evidence presented to the trial court. The only eye witness to the accident was the Respondent's turn boy who was seated in the front cabin with the driver (now deceased). He testified that they were travelling between Molo and Njoro when they got

involved in an accident between Elburgon and Tori. He said that their motor vehicle was going uphill while the Appellant's vehicle KAE 556F was going downhill. That he saw the appellant's motor vehicle about 80-100 metres away moving in a zigzag manner from left to right then back; that the driver of motor vehicle KAQ 424K moved off the road to avoid the collision and the KPLC motor vehicle angle line hit the cabin of the Respondent's motor vehicle. PW4 was categorical even in cross-examination that it was the KPLC motor vehicle that left its side of the road.

10. The 2nd Appellant Philip John Machanda Orina testified for the defence as DW1. He told the court that he was employed by KPLC (1st Appellant) and was the driver of the company motor vehicle registration No. KAE 556 F Fuso lorry. That on 21/3/2008 he was driving from Elburgon to Molo descending to Molo when he saw an oncoming lorry driving at high speed and overtaking a cyclist. That the lorry veered off to his lane and hit bus lorry on the rear side even after he had swerved. DW1 further stated that the other lorry was thrown and rolled after the impact and his own lorry did not overturn even after it was hit though it was empty. DW1 further stated that he was driving at a speed of 50 – 60km per hour. He blamed the driver of the other lorry KAE 556F for the accident.

11. It is clear from the testimony of the two witnesses above that the court was faced with two conflicting probabilities. Needless to restate, the burden of proof in civil cases lies with the Plaintiff. If the Defendant however wished the court to believe him he ought to have brought evidence to counter the Plaintiff's case.

12. I have looked at the evidence of both PW1 and DW1 restated above. Both witnesses testified to the occurrence of the accident, so I find the occurrence of the accident proved as a fact. The scene of the accident is not also disputed. It occurred on Molo-Elburgon Road between Elburgon and Tori. The point of divergence is which driver or lorry was to blame. It is accepted by both witnesses that the motor vehicle registration KAE 556F Mitsubishi lorry was travelling downhill while motor vehicle KAQ 424 Isuzu lorry was travelling uphill. Both lorries were empty according to the testimony of the two witnesses. There is therefore a possibility that they would have been moving fast. The Appellant's driver insisted that he is the one who was driving downhill, it is therefore more probable than not that the lorry he was driving was moving fast downhill.

13. The police did not produce the sketch map of the scene. Such a sketch would have assisted the court to see the point of collision on the road. PW5 No. 78971 P.C Dennis Mwororo told the court that the sketch had been produced in the court in the criminal case in which the driver of KAE 556F was charged with causing death by dangerous driving. Even without the sketch map, I am persuaded by the respondent's evidence that the motor vehicle KAE 556F moved to the lane of motor vehicle KAQ 424. I say because the point of impact on KAQ 424 was only the driver's side of the cabin. Had the motor vehicle KAQ 424 been on the wrong lane, then there would have been a head on collision. Conversely I am not persuaded by DW1's testimony that the great impact on the KAQ 424 shows that it is the one that hit the other motor vehicle KAE 556F that was heading down hill and therefore carried greater force.

14. DW1 introduced the presence of a motor cyclist at the scene. He said that the driver of motor vehicle KAQ 424 was overtaking a cyclist when the accident occurred. It is curious that no other witness including the police who went to the scene talked about the presence of a motor cyclist. If it is believed that the accident motor vehicle KAAQ 424 was overtaking, then there would have been a head on collision with motor vehicle KAE 556F which was not the case.

15. From the analysis above, I am of the firm persuasion that there was sufficient evidence for the trial court to find that the 2nd Appellant negligently drove motor vehicle KAE 556F occasioning a collision with motor vehicle KAQ 424 Isuzu lorry.

16. The Appellants argued that the 2nd Appellant had been charged, tried and acquitted of the offence of causing death by dangerous driving. I would agree with the trial court that such a contention was not material to the suit. This is because the reasons for acquittal were not canvassed and further it is well known that the standard of proof in criminal case is one beyond reasonable doubt. In the civil case giving rise to this appeal, the Respondents were only required to prove their case on a balance of probability.

17. The Appellants also urge on ground (iv) that there was contributory negligence on the part of the 2nd Respondent. I would readily agree with them. This is because the evidence shows that motor vehicle KAQ 424 was going uphill and that its driver saw that the other lorry was moving in a zig zag manner. He ought therefore to have slowed down to mitigate the negligent driving of the other driver. I would attribute 10% negligence.

Ownership of accident motor vehicle KAE 556F

18. The Appellant submitted that there was no proof that the 1st Appellant owned motor vehicle KAE 556F and that there was no evidence that the 2nd Appellant was the driver or agent of the 1st Appellant. They relied on **Thuranira Karauri vs Agners Ncheche Meru CA civil Appeal No 92 of 2006** and **Charles Nageo & others Vs. Joshua Mwangi Mgonda Nakuru HCCA No 188 of 2002**.

19. The Respondents on the other hand submitted that the trial court was right in accepting the police abstract (exhibit 7) as proof of the ownership of the motor vehicle. They cited **Nancy Ayemba Ngaira Vs. Abdi Ali High Court Mombasa Civil Appeal No. 107 of 2008** (Ojwang J) and **Samuel Mukunya Kamunge Vs. John Mwangi Kamuru High Court Civil Appeal No. 34 of 2004** (Okwengu J) to support the proposition that in the absence of evidence to the contrary a police abstract is acceptable as proof of ownership.

20. It is true that the Respondents' did not produce a certificate of search to prove ownership of the accident motor vehicle registration KAE 556F. As readily conceded by the Appellant's counsel however, courts have time and again in the absence of any evidence to the contrary, accepted other forms of documentation including a police abstract as proof of ownership. In the present case, it would be a mockery of justice for the court to hold that the Plaintiff did not prove ownership when a police abstract is on record and when the Appellants' own witness being the 2nd Appellant testified on oath that he was driving motor vehicle registration No. KAE 556F owned by the KPLC who is the 1st Respondent.

21. On the same breath failure of the Respondents to plead vicarious liability was not fatal to the Plaintiffs' case in the absence of any serious contest on the employer/employee relationship between the owner of the vehicle and the authorized driver. I would hold without hesitation that the 1st Appellant is vicariously liable for the negligence of the 2nd Appellant.

Quantum

22. Several issues were raised by the Appellants with respect to quantum. They submitted that the damages awarded were speculative, excessive unrealistic and not supported by evidence. That there was no evidence that the deceased earned Kshs. 15,000/= per month and that the multiplicand was wrong and that the plaintiff benefited twice having been compensated by the insurance.

23. I am bound by the clear principle that an assessment of damages is an exercise of discretion by the trial court and that an appellate court should be slow to reverse the finding of a trial judge unless it is shown that the court acted on wrong principles or awarded inordinately high or low damages or took into consideration matters which he ought not to have considered and thereby arriving at a wrong decision. See **Butler Vs. Butler, 1984 KLR.**

Salary

24. The Appellants submitted that there was no evidence that the deceased earned a salary of Kshs. 15,000/= per month and that even if 15,000/= was proved statutory deductions were not taken into account. The Respondents on the other hand submitted that the Respondent's wife testified that he earned 15,000/=. I have looked at the oral testimony of PW1 and the Muster Roll produced by the PW2. The Muster Roll indeed does not indicate the salary and the uniform entry pointed out by the Appellants is indeed suspect. However, it is my considered view that sometimes it is possible for one to hold a paid job without documentation particularly in informal employment. PW2 testified that the deceased was his younger brother which to my mind raises the possibility that he may not have had a formal letter of employment.

25. In **Jacob Ayiga Maruya & Another V. Simeon Obaya [2005] eKLR** the Court of Appeal faced with lack of documentary evidence on the earning of the deceased, rejected the notion thus:-

“We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things. In this case, the evidence of the Respondent and the widow coupled with the production of school reports was sufficient material to amount to strict proof for the damages claimed. Ground one of the grounds of appeal must accordingly fail.”

26. Similarly I would accept that evidence of PW1 and PW2 with respect to the employment and earnings of the deceased Kenya shillings fifteen thousand shillings (Kshs. 15,000/=) was reasonable pay for a driver. As to the question as whether the same was gross or net of tax, it would be speculative of the court to decide whether the same was gross or net of statutory deductions in the absence of evidence from a comprehensive pay slip.

Multiplier and dependency ratio

27. The Appellants were dissatisfied with the multiplier and dependency ratio applied by the trial court. I have considered the opposing submissions in this respect. The Appellants argue that the multiplicand of 16 year was excessive. I find no merit in the argument since it was shown that the deceased was 39 years at the time of his demise while the retirement age was 55 years. I have also not found any material to suggest that the deceased was not applying two-thirds of his earnings towards his nascent family.

Special damage claim

28. The Respondent claims that his motor vehicle was written off. As a consequence thereof, he sustained a loss of Kshs.658,700/=. He however admitted in his evidence that he was paid Kshs.410,000/= by the insurer. I would therefore readily agree with the Appellants that to award the full claim would lead to double benefit. I will therefore deduct Kshs.410,000/= from the claim leaving a balance of Kshs.248,700/=.

29. In the end the appeal partially succeeds. The award is revised as follows:-

Pain & suffering	30,000/=
Loss of expectation of life	130,000/=
Funeral expenses	63,785/=
Loss of dependency	1,920,000/=
Loss of motor vehicle KAQ 424K	<u>248,700/=</u>
Total	2,392,485/=
Less damages under Law Reform Act	<u>160,000/=</u>

2,232,485.00/=

Less 10% contribution 223,248.50/=

Net award Kshs. 2,009,236.50/=

The Respondents shall also have costs in the lower court and interest from date of judgement in the lower court. Each party shall bear their costs in this appeal.

Orders accordingly.

Judgement signed

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R.LAGAT KORIR

JUDGE

Judgment delivered, dated and signed at Nakuru This 3rd day of April, 2019

.....

JANET MULWA

JUDGE

In the presence of:

.....**Court Assistant**

.....**For the 1st Appellant**

.....**For the 2nd Appellant**

.....**For the Respondents**