



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 16 OF 2010

JANE OVUYANZI RAPHAEL (Suing as the Legal Representative

of the Estate of JAPHETH AMAYI.....APPELLANT

VERSUS

SALINA TRANSPORTERS LTD.....RESPONDENT

(An appeal from the original judgment and decree of Hon. Mr. S. Mungai (SPM) delivered on 12th February, 2010 in Machakos Chief Magistrates' Courts CMCC No. 691 of 2009)

JUDGEMENT

1. The appellant sued the respondent in her capacity as the legal representative of the estate of Japheth Amayi (deceased) on her behalf and on behalf of the deceased's other beneficiaries. She sought special damages of KShs. 850/, general damages under the Fatal Accident Act and the Law Reform Act, costs of the suit and interest.
2. It was her case that on or about 22nd December, 2008, the deceased was lawfully riding his bicycle along Mombasa-Nairobi road when the respondent and or his agent servant, driver and or employee negligently drove motor vehicle registration number KRS – ZA 5157 that it lost control, veered off the road and hit the deceased occasioning him fatal injuries and that his estate suffered loss and damage. It was pleaded that the deceased was a strong and healthy man aged 22 years old at the time of his demise. That he had cleared his form four education and was working as a casual in Athi River and earning approximately KShs. 400/ per day. That he lost his expectation of life and his estate suffered loss and damage.
3. The appellant testified that she was on the material day called by her other son Patrick Wanda informing her of the deceased's demise. She produced a burial permit (P. Exhibit 1) and a death certificate (P. Exhibit 2). She testified that the deceased used to give her KShs. 6,000/ per month for her upkeep. She further produced a copy of grant of letters (P. Exhibit 3), copy of records (P. Exhibit 4) and demand notice (P. Exhibit 5). In cross examination, she stated that she gets some small income from farming. That she has three other children but who do not support her. That she essentially relied on the deceased.
4. Haggrey Imbuga Kwendo (PW2) testified that he was on the material day doing his 'boda boda' work and was on his way back to Athi River. He was following a trailer whose registration number he said he could not recall. That before reaching the junction to Athi River and descending, the trailer moved in a zigzag manner and briefly left the road. He stopped and realized that the trailer had knocked down a cyclist beyond recognition. He stated that someone asked him for his phone to call the deceased's brother. On cross examination, he stated that there was no trench on the side of the road and that he was not on the tarmac when he was knocked. He however stated that he did not witness how the accident occurred.
5. Albert Mbook Kisingula (PW3) testified that he was on the material day picking vegetable on a *shamba* next to Athi River K.M.C. factory when he told the deceased to park his bicycle on the side of the road and wait for him. He stated that the point was about 50 meters away from where he was. He then heard people scream and he rushed to check. On checking, he found that the deceased had been run over and crashed by a trailer registration number KRS. He then asked someone to assist him with his mobile phone with which he informed the deceased's brother Patrick of the incident. The police collected the body and took it to Machakos General Hospital. He stated that the pieces of the body were on the left side of the road as one heads to Nairobi. That the trailer stopped ahead of the body parts but there were some stuck on the tyres of the trailer. On cross examination, he stated that the deceased had not commenced work at Athi River.
6. P.C. Hezbon Onsongo Mochama (PW4) who took up the matter from Corporal Nderitu who was transferred to Meru stated that he had the police file. He stated that the scene was visited and that there was a sketch plan for the edge of the road along Mombasa – Nairobi road near Devki Steel Mills. That it is said that KRS 598 Trailer No. ZA 5157 which was coming from Mombasa heading to Nairobi hit a pedal cyclist who crossed the road from the right to the left side of the road. That the cyclist died on the spot with his flesh scattered along the edge of the road. That some were partially off the road. That the vehicle stopped with half of its body on the tarmac and the other half off the tarmac. On cross examination, he stated that the sketch shows that the deceased's body parts were found on the tarmac at the beginning of the bus stop.

That the vehicle stopped partly ahead of the bus stop. On re-examination, PW4 stated that he got the information on the crossing of the road from the driver of the vehicle.

7. The respondent filed a statement of defence in which it denied the allegations. It alleged that if at all the accident occurred the same was caused solely or substantially contributed to by the deceased's negligence.

8. William Matheka Mulolo (DW1) testified that he was on the material day driving motor vehicle registration number KRS 598 – za 5157 to Nairobi from Mombasa and heading to Sudan. On reaching Athi River near K.M.C., he saw a pedal cyclist on his lane. The cyclist then crossed the road when he was about five meters from him. He applied brakes but it was too late. He denied having knocked the cyclist at the stage. That the cyclist was surprised to see two lorries on the opposite side which hooted at him and he hit the suit lorry on the right side. That in the confusion, the cyclist was run over by the suit lorry as he wrestled it to stop. He blamed the cyclist for suddenly crossing the road at a point where there was no zebra crossing.

9. The trial court then dismissed the claim on the basis that the appellant had failed to establish liability against the respondent who was under no obligation to shoulder the burden of proof. Dissatisfied by the finding, the appellant has filed this appeal on the following grounds:

a) That the learned magistrate erred in law and fact by finding that the appellant had not proved the case against the respondent on a balance of probability when the evidence on record clearly shows that the respondent was liable.

b) That the learned magistrate misdirected himself in law and fact by dismissing the appellant's claim in total disregard of the evidence tendered.

c) That the learned magistrate erred in law and fact by ignoring to consider the appellant's counsel's submissions on issues of law and evidence and thereby arrived at an erroneous decision on liability.

d) That the learned magistrate erred in law and fact by ignoring to consider the Appellant's counsel's submissions on issued of law and evidence and thereby arrived at an erroneous finding on quantum of damages that would be payable to the appellant.

e) That the learned magistrate misapprehended the evidence on record thus arriving at a wholly erroneous decision.

10. It is the appellant's submission that the trial court ignored the fact that the respondent was indeed the owner of the vehicle that caused the death of the deceased: that it was PW2's evidence that the lorry was driven in a zigzag manner and left the road and hit the cyclist. It was submitted that the manner in which the body was torn is an indication that the vehicle was driven at a high speed. It was contended that PW4 stated that he relied on DW1's statement which was clearly biased and that the court should bear in mind the fact that the deceased could not give his side of the story having immediately died. In support thereof the appellant cited **Francis Wainaina Kirungu (suving as the personal representative of the estate of John Karanja Wainaina) Deceased v. Eijah Oketch Adallah (2015) eKLR.**

11. On damages it was submitted under the head of pain and suffering that the deceased was crushed and body parts spread on the edge of the road along the stage. That the deceased was subjected to a lot of pain in the manner in which he met his demise and that a sum of KShs. 200,000.00 would suffice for pain and suffering. The case of **Benedita Wanjiku Kimani (suving as the administrator of the Estate of Samwel Njenga Ngunjiri (deceased) v. Changwon Cheboi and another Nakuru HCC No. 373 of 2008** was cited in support thereof. On loss of expectation of life, it was stated that the deceased was aged 21 years, completed school and was on the material day going to start work at Athi River Mining Company Ltd and that KShs. 300,000.00 would be sufficient compensation for loss of expectation of life. The case of **Johnesh Eshapanya Oumasayi & another v. Minial HLL Koyedia & another HCC No. 1368 of 2006** was cited in support. On loss of dependency, it was submitted that the deceased's mother depended on him as he used to give her KShs. 6,000.00 per month from his carpentry work. That he had relocated to Athi River for a better job at Athi River Mining Company Ltd and had high expectation of life and was at the prime of his life at age 21. That he had no pre-existing medical conditions and was fit and would have lived up to 60 years of age. The appellant suggested that the dependency be worked as hereunder:

6,000 × 2/3 × 12 × 39 = 1,872,000.

12. The respondent submitted that PW2 was not an eyewitness and was unable to narrate how the accident occurred while DW1's evidence that the deceased crossed the road was corroborated by PW4's evidence. That from the point of impact, an inference can be made that DW1 was on the correct lane on the road. That the circumstances of the accident in the case of Francis Wainaina (supra) are different from those of the case at hand and misdirected since the defendant therein swerved off the road and hit the cyclist. That the deceased was the author of his misfortune since he ought to have been careful while crossing the road and that the said mistake should not be visited on the respondent.

13. On loss of dependency, the respondent relied on an excerpt from **Aurthur Nyamwate Omutondi & others v. United Millers Limited & 2 others (2009) eKLR** thus:

“...Proof of income is basic to a claim of loss of dependency under the Fatal Accidents Act because one can only be supported financially by what was earned in hard pounds and cents. If income is not proved then no award of dependency can issue...”

It was further argued that it was PW1's testimony that the deceased had been called to do a casual job and was therefore not in any gainful employment and hence not entitled to loss of dependency. It was submitted that the trial court did not err in its finding on loss of expectation of life of KShs. 100,000.00 but that this court should lower the same to KShs. 70,000.00. The sum of KShs. 10,000.00 was suggested for pain and suffering.

14. This being a first appeal, this court is under an obligation to re-evaluate the facts afresh and come to its own independent findings and

conclusions as was observed in Selle v. Associated Motor Boat Company & Others (1968) E.A. 123.

15. From an analysis of the evidence, it is in my view unclear whether or not the deceased was crossing the road at the time he was run over. This is in view of PW4's evidence that he got the information from DW1. I further note that none of the appellant's witnesses saw the accident occur. However, PW2 stated that the deceased had parked by the road side. The evidence on record therefore is PW2's word against DW1's. DW1 stated that he saw the deceased five meters away and that he wrestled to control the vehicle but it was too late and he could not manage to stop and that is when the deceased was run over. An inference is made therefrom that he was driving at a speed that made it difficult to control the vehicle to come to a halt while the deceased failed to be on the lookout. There is no doubt that the Highway Code of Traffic demand that road users must use the road in due care and be mindful of other road users. Both the deceased and DW1 owed each other duty of care but both did not exercise due care. DW1 being a driver of a lorry was handling a lethal machine and should have been cautious. See, Isabella Wanjiru Karanja v. Washington Malele., Nairobi Civil Appeal No. 50 of 1981 (1982-1988) 1KAR 186 where it was held:

“What I find makes the distinction in their blameworthiness is the fact that Isabella had under her control a lethal machine when Washington had none and all things being equal she was under an obligation to keep a greater lookout for other road users.”

In the circumstances of this case, the safe apportionment of liability should be 50% on each party herein.

16. On quantum see Loice Wanjiku Kagunda v. Julius Gachau Mwangi C A No. 142 of 2003 (UR) where the Court held:-

“We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence, an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those or other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (See Mariga –vs- Musila (1984) KLR 257.)

17. Applying the test, I am in agreement with the trial court's finding on the issue of pain and suffering, loss of expectation and special damages. However, under the head of loss of dependency, it was the trial court's finding that the deceased was not working since PW2 stated that he had not commenced working. It is my considered view that each life is important and there is no doubt that the deceased's life was cut short. PW1 was clear that he used to be a carpenter from whose proceeds he supported her and had travelled to Athi River to get a better employment which in fact PW2 confirmed that he was to commence. The aspect of his life having been cut off prematurely has to be thus considered. The appellant had stated that the deceased used to support her with Kshs 6000/ per month. I find the said sum to be reasonable in the circumstances. I find a multiplier of 30 years would be reasonable as deceased was aged 21 years at the time of death and would have retired at the age of about 51 years excepting vagaries of life in the process. The loss of dependency therefore works out as:

$$6,000 \times \frac{2}{3} \times 12 \times 30 = 1,344,000.$$

18. The Appellant's award in total is made up as hereunder:

Pain and suffering	KShs. 20,000/=
Loss of expectation of life	KShs. 100,000/=
Loss of dependency	KShs. 1,344,000/=
Sub-total	KShs. 1,464,000/=
Less	KShs. 100,000/=
<u>Total award</u>	<u>KShs. 1,364,000/=</u>
Less 50%	<u>KShs. 682,000/=</u>

Plus costs and interest at court rates.

19. In the result it is my finding that the appellant's appeal has merit. The same is allowed to the extent that the trial court's judgement is hereby set aside and substituted with judgement being entered in favour of the appellant against the respondent at 50% liability with net General damages of Kshs 682,000/-. The appellant is awarded the costs of this appeal.

It is so ordered.

Dated and delivered at Machakos this 18th day of September, 2019.

D.K KEMEI

JUDGE