



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

(CORAM: R. MWONGO, J.)

CIVIL APPEAL NO. 63 OF 2016

FREDRICK NJOROGE.....1ST APPELLANT

GATERI JAMES.....2ND APPELLANT

VERSUS

SAMUEL MARIGAH THAIRU & ESTHER WAMBUI NDUATI

(Suing as the administrators of the estate of

PETER KARANJA MARIGAH (Deceased).....RESPONDENTS

(Being an Appeal from the Judgment of Hon P. Gesora, CM

delivered on 14th March, 2016 in Naivasha CMCC No 492 of 2014)

JUDGMENT

1. This appeal is filed by the Appellants against the judgment of Hon. P. Gesora, Chief Magistrate dated 30th September, 2016 in which he awarded the Plaintiffs damages as follows:

a) Pain and Suffering	Shs. 10,000.00
b) Loss of Expectation of life	Shs. 120,000.00
c) Loss of Dependency	Shs. 3,115,864.00
d) Special Damages	Shs. <u>15,000.00</u>

Total **Shs. 3,260,864.00**

2. The grounds of appeal are as follows:-

“1. That the Learned Trial Magistrate erred in law and in fact in failing to make a concise statement of law issues.

2. That the Learned Trial Magistrate erred in law and in fact in finding the Appellant 100% liable and failed to find that the motor vehicle in question was not supposed to be on the road pursuant to the Section 9 (1) of the Traffic Act.

3. That the Learned Trial Magistrate erred in law and in fact in failing to find that the Respondent was 100% liable for the occurrence of the accident.

4. That the Learned Trial Magistrate erred in law and if fact in making a finding and arriving at an award of damages which is inordinately high as to represent an erroneous estimates of damages payable.

5. *That the Learned Trial Magistrate erred in law and in fact in applying a wrong multiplier and multiplicand and arrived at an award of Kshs 3,114,864/= for loss of dependency.*

6. *That the Learned Trial Magistrate erred in law and in fact in failing to discount the loss of expectation of life and pain and suffering from the loss of dependency.*

7. *The Learned Trial Magistrate erred in law and in fact in failing to consider the Appellants' submissions and hence arrived at a wrongful award in as far as awarding of damages is concerned.*

8. *That the Learned Trial Magistrate erred in law and in fact in applying wrong principles of failing to take into account relevant facts in arriving at an erroneous award."*

Brief Facts

3. The suit in the lower court emanated from an accident which occurred on or about 12th December 2014, along Gilgil-Nakuru Highway when the deceased was driving Motor Vehicle Registration number KAY 881T Toyota Matatu. The vehicle was allegedly driven carefully and lawfully. According to the plaint in the lower court, it collided with vehicle Registration Number KBP 180B Mitsubishi Canter, lawfully but carelessly and recklessly driven by the Defendants/Appellants or their agents or employees.

4. As a result of the accident the deceased who was aged 31 years and was a matatu driver, died. He claimed general damages under the Law Reform Act and the Fatal Accidents Act, damages for loss of consortium and servitium. He also claimed special damages of Kshs 154,750/=. The defendants in the lower court denied liability.

5. At the hearing, PW1 PC Fredrick Gitari of Gilgil Police Station produced the Police Abstracts in respect of Peter Marige (P. Exhibit 1) and the accident vehicle KAY 881T (P. Exhibit 2). He stated that the driver of the canter was to blame. He also admitted that he was not the investigating officer and did not visit the scene, but asserted that the Canter moved to the lane being used by the matatu and hit it.

6. PW2 Esther Wangui Njoroge testified that she was the deceased's wife. She produced deceased's death certificate and birth certificates for their children Virginia and Samuel, together with a bundle of receipts for Shs 84,750. She admitted she did not have the deceased's payslip.

7. PW3 Stephen Warui John, the owner of Matatu Registration KAY 881T produced the matatu logbook. He testified that the matatu was headed for Nakuru from Gilgil when the lorry suddenly moved onto the lane in which the matatu was driving. He stated that he earned Kshs 3,500/= daily but had no records to prove it. He said he paid Kshs 1,080/= in taxes per year. He admitted that the vehicle logbook was still in the name of Mary Njoki Kamotho from whom he purchased the vehicle. He said he had taken out third party insurance.

8. The sole defence witness was James Kinyua Kariuki. He said he was in the Canter KBP 180D as a turn boy when it was involved in the accident at about 7.00pm. He stated that they were in the climbing lane when the matatu was overtaking and hit their vehicle. He admitted that the lorry driver was charged in court.

Liability

9. Grounds 1 to 3 of the appeal concern liability. The Appellants fault the trial court for: failing to make a concise statement of law and not framing issues; finding the appellants 100% liable; and for failing to find that the Matatu Registration Number KAY 881T was not supposed to be on the road in light of **Section 9** of the **Traffic Act**.

10. Whilst it is true that the trial magistrate did not specifically frame issues and set out concise statements of law in his judgment, it is clear that he did deal with the kernal issues in dispute, namely, liability and quantum of damages on each head in the plaint. He also analysed the evidence adduced by the parties and made conclusions thereon. I therefore see no basis to interfere on these points.

11. The Learned Magistrate found the defence witness' evidence "*not convincing*" and found the 1st and 3rd defendants in the lower court jointly and severally liable.

12. With regard to the complaint on **Section 9** of the **Traffic Act**, the section provides:

"No motor vehicle or trailer the ownership of which has been transferred by the registered owner shall be used on a road for more than fourteen days of the date of transfer unless the new owner is registered as the owner thereof."

13. The penalties for breach of the provisions under Part I of the **Traffic Act** are in **Section 14**. That section provides that a person who contravenes or fails to comply with the provisions under Part I shall be guilty of an offence and liable on first conviction to a fine not exceeding one thousand shillings or imprisonment for a term not exceeding three months.

14. I have considered the issue raised by the appellant impugning the trial court's finding of 100% liability against the defendants and not taking into account **Section 9 (1)** of the **Traffic Act**. On perusal of the pleadings, no issue concerning **Section 9 (i)** of the **Traffic Act** was pleaded; nor was it raised in the issues for determination or issues argued in court. Thus, that issue cannot be raised on appeal.

15. From the proceedings, the parties consented on 3rd March, 2016 to file submissions on 4th April, 2016. At the mention on 4th April, 2016 for confirming the filing of submissions the Plaintiff's counsel appeared with submissions filed but there was no appearance for the

defendant. The court gave a date of 9th May, 2016 for judgment. The defendant's submissions were filed thereafter, giving the plaintiff no opportunity to deal with the ambush contained in his submissions regarding **Section 9** of the **Traffic Act**.

16. In my view, that issue did not form any part of the lower court's proceedings and could therefore not and was not, pronounced upon. It is not an issue that can be raised on appeal, and I hereby disregard it.

17. It is true that PW3 testified that the matatu was his; that he produced a log book (showing the previous owner's name) and agreements showing he had purchased the vehicle. The Learned Magistrate's decision cannot be impugned for not delving into areas and issues which were not in issue before him. Indeed, the issues for determination were framed by the plaintiff and the defendant's did not participate. I think the issue on **Section 9 (1)** of the **Traffic Act** discloses an offence for which there are prescribed penalties and cannot be a subject of this appeal.

18. With regard to the cause of the accident my view is as follows. The evidence of PW1 is useful on this point to the extent that he produced P. Exhibit 1 (Abstract for Peter Marige), P. Exhibit 2 (Abstract for KAY 881T) and P. Exhibit 3 (Certificate of examination of KAY 881T).

19. In both P. Exhibit 1 and P. Exhibit 2 there was an indication that it was intended to charge Fredrick Njoroge with causing death by dangerous driving. P. Exhibit 3 is a certificate of examination of vehicle KAY 881T which concludes with the remarks **"No pre-accident defects mechanical."**

20. The evidence of PW3 who was a passenger in KAY 881T was that the defendant's lorry was on the overtaking lane. That the said vehicle suddenly moved onto the lane on which the deceased was driving and collided with the matatu despite the deceased serving to the edge. In cross-examination he confirmed that the *"accident occurred on the left side of the road when facing Nakuru"*.

21. DW1 was the other eyewitness. He said he was the turnboy in the lorry. He stated that their lorry was on a climbing lane, and that the matatu was overtaking and came onto their lane and hit the lorry. In cross-examination he said that:

"The accident was head-on. Both vehicles rested on the left side while facing Nakuru." (Underlining added)

He also said he saw the matatu at a distance of 70 metres and admitted that the defendant's driver was charged with the offence.

22. The Learned Magistrate found that the testimony of DW1 was not convincing. He held that the driver of the Canter/lorry moved out to the lane the deceased was driving on and the collision occurred. The trial magistrate was however wrong to conclude that DW1 did not state in what capacity he was in the vehicle, since DW1 had clearly stated he was a turnboy.

23. I otherwise agree with the trial magistrate's conclusion on liability. The evidence of both PW3 and DW1 is that the canter was on the climbing lane. Thus it was driving uphill. Both witnesses are clear that after the accident, both of the vehicles rested on the left side of the road, and both were facing Nakuru. The reasonable likelihood is therefore that the accident occurred on the left side of the road facing Nakuru. This gives credence to the plaintiff's assertion that the Canter is the one that moved to the left lane used by the vehicles headed to Nakuru.

24. On the above basis I find no reason to interfere with the trial court's finding on liability.

Quantum (Grounds of Appeal 4 to 8)

25. The first principle the court must keep in mind, as correctly stated by the appellants, is that held in **Butt v. Khan KAR [1982-88] page 1**, namely, that an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. Thus, it must be shown that the trial court proceeded on wrong principles, or that it misapprehended the evidence in some material respect, and so arrived at a figure which was inordinately high or low.

26. The appellant impugned, in particular, the trial court's award on loss of dependency. None of the other heads: Pain and Suffering, Loss of Expectancy and Special Damages were appealed upon, and I need not address them. I will therefore deal with loss of dependency.

Loss of Dependency

27. On this head the appellant faults the trial magistrate's decision for: using a 2/3 dependency ratio; upholding the deceased's employment to PW3 without production of concrete proof; and for using a sum of Kshs 19,474.15 as the deceased's monthly income which sum applies to drivers of heavy commercial vehicles. For these reasons, the appellant argues, the trial court's award of Kshs 3,115,864 was inordinately high.

28. *Dependency ratio*: It is not disputed that the deceased was married and was survived by his wife and two children. The extent of their dependency is a question of fact to be determined in each case. See, Ringera J in **Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Anor Nairobi HCCC No. 1638 of 1988** (unreported) cited in **Leonard O. Ekisa & Anor v. Major K. Birgen [2005] eKLR Page 4**.

29. The evidence of PW2, was that she was the deceased's wife and that they were blessed with two children. According to their birth certificates Virginia was born on 23rd October, 2007 and Samuel was born on 1st June, 2011. Thus they were aged seven and three, respectively, at the time of the deceased's death. PW2 added simply that the:

“deceased’s death has adversely affected us and he used to be our bread winner.” (Underlining added)

30. This supports the assertion in the Complaint under the head “Nature of claim” which describes the role of the deceased in his family:

“The deceased was the main support of his family. By his death, his estate and dependents have lost the said means of support and more so that at their tender years when they needed it most.”

PW2 also availed the deceased’s death certificate which showed that the deceased was aged 31 years and was a matatu driver at the time of his death.

31. In **Board of Governors of Kangubiri Girls High School & Anor. v. Jane Wanjiku Muriithi & Anor. [2014] eKLR** the court made the following apt statement:-

*“We have examined case law where the deceased is 31 years of age. In *Rachel Ivasha Igunza v. Nyenjeri Kamau HCCC No. 34 of 1993* the deceased was 33 years and a multiplier of 22 was used. In *Mary Awino Adunga v. John K. Wambua & Anor. HCCC No. 482 of 1994* the deceased was 32 years and multiplier of 23 was adopted. In *Cornelia Eleana Wamba v. Shreeji Enterprises Ltd. & Others (supra)* the deceased was 31 years of age at the time of his death, a multiplier of 25 years is not only appropriate but also fair to both sides.” (Underlining added)*

32. From the foregoing evidence and authorities, the deceased was the family’s bread winner and died aged 31 years. A multiplier of 24 years would take his retirement age to about 55 years which is not unreasonable given that government employees were required to retire at about that age at the time. I would adopt a multiplier of 24 years.

33. As for the multiplicand, the trial court adopted Shs 19,474.15 as the minimum wage for a heavy commercial driver of classes A,B,C and E as proposed by the plaintiffs. On their part, the defendants proposed a multiplier of 11 years and a dependency ratio of ½.

34. As for dependency ratio, there are numerous authorities in which a dependency ratio of ½ has been applied to a person without a family; whilst 2/3 has been applied in cases where the deceased has a family depending on him. I would not interfere with the trial court’s decision on this point, as he made a finding of fact on the dependency arising on account of the deceased having a very young heavily dependent family.

35. Finally, on the multiplicand, the appellants urged a figure of Kshs 9,000/= as salary in the lower court. Upon appeal, they rely on the **Regulation of Wages (General) Amendment Order 2013, LN No. 197 of 2013**. The salary for a driver of a medium sized vehicle is shown as Shs 13,606.35. The appellant however quibbled that there was no proof that the deceased was employed at all by PW3.

36. The deceased’s wife testified that the deceased’s employer was one John Warui. PW3 Stephen Warui John testified that he was the owner of the matatu and produced agreements to prove that fact despite not having transferred the matatu into his name. He stated that the deceased was his driver. The deceased’s driving license and license to drive a public service vehicle were availed. On cross-examination no question was raised to challenge or contradict the fact of the deceased’s employment.

37. The record shows that the deceased was employed by PW3. I accept the evidence of that fact on balance of probabilities, taking into account that the courts do not subscribe to the view that the only way to prove a person’s profession is by documentary evidence. This is particularly relevant taking into account the dynamic, fluid and ever-changing nature of informal sector employment.

38. The evidence of PW2 was that the deceased earned Shs 25,000/= per month, but the Complaint states that he earned “about” Kshs 25,000/= per month. PW3, his employer, did not indicate the deceased’s monthly salary. I am therefore inclined to view PW2’s evidence as exaggerated, given that the Complaint indicated only an estimate.

39. To that extent, I agree with the Appellants and will adopt the **2013 Regulation of Wages 2013** minimum wage. However, as the evidence shows that the deceased was a driver between Gilgil and Nakuru. I will apply the rate of “Municipalities” which is KShs 15,259.95. Accordingly, the dependency calculation will be as follows

15,259.95 x 24 x 12 x 2/3 = 2,929,910.40

40. Ultimately the award shall be as follows:

e) Pain and Suffering	Shs.	10,000.00
f) Loss of Expectation of life	Shs.	120,000.00
g) Loss of Dependency	Shs.	2,929,910.40
h) Special Damages	<u>Shs.</u>	<u>15,000.00</u>
Total	<u>Shs.</u>	<u>3,074,910.40</u>

41. The appeal succeeds to the extent shown above, and judgment is entered for the Plaintiff/Respondent in the sum of Kshs. 3,074,910.40.

42. In the circumstances each party will bear their own costs of the appeal.

43. Orders accordingly.

Dated and Delivered at Naivasha this 9th Day of October, 2019.

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Ombui for the Appellants
2. Mburu holding brief for J. Ndungu Njuguna for the Respondents
3. Court Clerk – Quinter Ogutu