



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYAMIRA
HIGH COURT CIVIL APPEAL NO. 62 OF 2015

1. PETER MATARA
2. MANYARA TIMOTHY
3. CO-OP BANK OF KENYA.....APPELLANT

-VERSUS-

ALLOY KENYATTA KEVONGO.....RESPONDENT

[From the Principal Magistrate's Court at Keroka original Civil Suit No.42 of 2013]

J U D G M E N T

1. This is a High Court civil appeal from the judgment of the Resident Magistrate at Keroka [Hon. N. Kahara] dated 27th October 2014.
2. The plaintiff, Alloys Kenyatta Kerongo in a **civil suit No.42 of 2013** filed his case in Keroka Principal Magistrate's Court against three Defendants jointly and severally for:
 - (a) **General Damages under the fatal accident Act and Law Reform Act.**
 - (b) **Special damages Kshs.53,150/=**
 - (c) **Interests and costs**
 - (d) **Any other relief this court would deem fit to grant**

3. The Defendants filed their defence in which they denied the contents of the plaint but averred alternatively that if the said accident did occur which they demand, it was wholly occasioned and/or substantially contributed by the negligence on the part of the plaintiff-deceased.

The defence then set out the particulars of negligence of the deceased –plaintiff in their defence. As a result thereof the defendant prayed for the dismissal of the plaintiff's suit with costs.

4. The plaintiff filed his reply to the defence dated 4th June 2013 but filed on 10th June 2013.

5. The plaintiff presented four witnesses to prove his case.

The Defendants, in their turn, presented the driver of motor vehicle KBN 812F, Mitsubishi lorry, as their

defence witness.

6. In her judgment, the learned magistrate entered judgment in favour of the plaintiff on 100% liability.

She proceeded to award damages as follows:

1. Pain and suffering	-	Kshs.100,000
2. Loss of expectation of life	-	Kshs.100,000
3. Loss of dependency under Fatal accident/lost years	-	Kshs.680, 000
4. Special damages	-	<u>Kshs. 52,000</u>
Total		<u>Kshs.842, 000</u>

7. The plaintiff prayed for Kshs.2,773,150 itemized as here below:

(a) General Damages

(i) Fatal accidents Act (lost years) $9,000 \times 12 \times 35 \times 2$

= **Kshs.2, 520,000**

(b) Law Reform Act

(i) Pain and suffering - Kshs. 80,000

(ii) Loss of expectancy of life - Kshs.120,000

(iii) Special damages - Kshs. 53,150

Total - Kshs.2, 773,150

8. The appellants being aggrieved and dissatisfied have appealed against the judgement/decision of the resident magistrate.

They set out five (5) grounds of appeal:

1. **THAT** the learned Trial Magistrate erred in law and in fact in finding the Appellant/Defendant 100% liable when the Plaintiff failed to prove any iota of negligence on the Appellant/Defendants' part during trial.

2. **THAT** the learned Trial magistrate erred in law and in fact by relying on extraneous evidence in her testimony on liability.

3. **THAT** the learned Trial Magistrate erred in law and in fact in not fully comprehending and recording the testimony of the Defence, DW1.

4. **THAT** the learned Trial Magistrate erred in law and infact in not taking into account the entire testimony of the police officer PW4.

5. **THAT** the learned Trial magistrate erred in law and in fact in not taking into account entirely the submissions of the Appellants on liability.

9. Issue for determination, did the court's finding on 100% liability against the defendants/Appellants misplaced in the light of the evidence as testified?

10. The duty of the appellate court is to read the record of the proceedings and arrive at an independent conclusion as inferred from the court record, taking into account that they did not have the advantages to hear the evidence himself, *see Selle –v- Associated Motor Boat Co. [1968] E.A 123.*

Upon reading the testimonies of PW3, PW4 and DW1, it is difficult to discern with certainty who was to blame for the road accident of 20th November 2013. DW1 did not know he knocked any one. It is the public who alerted him that he had caused an accident by pelting him with stones and shouting. He was consequently afraid for his life. He drove directly to the police station at Manga to report. However, he also stated that he was driving at a slow pace because it was steepy and uphill on a murram road.

PW4, was not the investigating officer. That from the investigation, the deceased was to blame for the accident. The body was on the extreme right side of the road as you face Mecheo direction, contradicting materially PW1 and PW3 respectively.

From the testimonies above stated nothing is helpful on the issue of negligence. I have read the authorities cited by the appellants and I agree with their submission that since there is no clear direction as who was to blame for this accident, it is therefore instructive that both parties shoulder the blame equally.

The authorities are:

1. *Multiple Hauliers [E.A] Ltd –vs- DMK* [Minor suing through his next friend and father DKM [2015] ECLR where the court of Appeal allowed the appeal restating the dictum in the case of *Haji –vs- Marair freight Agencies Ltd 1984 KLR 139* that:-

“Where it is proved by evidence that both parties are to blame and there are no means of making distribution between them, the blame can be distributed equally on each”.

2. *NDERITU –vs- RUPKOI & ANOTHER 2004 e KLR*. The court of Appeal held that:

“Where two motorists failed to exercise the degree of skill and care required on the road, they are to be held equally liable for the accident”

3. *POSTAL CORPORATION OF KENYA & ANOTHER –vs- DICKENS MUNAYI 2014*

Lady justice G. Ngenya noted as follows:

“As I have already noted the evidence of the plaintiff and defence case was contradicted by PW4, there was also very scanty evidence given by PW4 as to how the accident occurred. The trial court failed to give regard to these issues and instead found the appellants to be liable at 100%. This was a misdirection on her part. It is my view that both parties should share the blame equally”.

(a) Accordingly, the appeal dated 24th November 2016 be and is hereby allowed.

(b) The judgment on liability of the Resident Magistrate dated 27th October 2014 be and is hereby varied as against the appellants as follows:

(i) Liability be and is hereby apportioned equally, that is, 50% for the Appellants and 50% for the Respondent –Defendant

(ii) On quantum, the Respondent – Defendant to be awarded Kshs.421,000.

(iii) Plus costs and interest subject to 50% contribution

Orders accordingly.

Dated and delivered at Nyamira this 20th day of January 2016.

C. B. NAGILLAH

JUDGE

In the presence of:-

N/A for the Appellant

Ondari for the Respondent

Migiro Court Clerk