



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO.87 OF 2011

JAMES NGETHEAPPELLANT

VERSUS

TOM MULONGO SAKWARESPONDENT

**(Being an appeal from the judgment of Hon. Reuben Nyakundi, CM delivered in Kakamega
CMCC No.421 of 2005 on 09/06/2011)**

J U D G M E N T

Introduction

1. The appellant herein was the defendant in Kakamega CMCC No.421 of 2005. In that suit, the respondent herein sued the appellant claiming the following reliefs:-

- a. Special damages (in the sum of kshs.135700/=).
- b. General damages
- c. Costs of this suit
- d. Interest on (a) (b) and (c) above at Court rates

2. The respondent's claim was anchored in paragraph 4 of the plaint dated 26/07/2005 in which the respondent averred thus:-

“4. THAT on or about the 1st day of December 2003, the Deceased was travelling as a fare paying passenger in the Defendant's motor vehicle registration number KAN 956L Toyota Hiace Matatu along Kakamega – Mumias road, the Defendants driver agent and/or servant drove, managed and/or controlled the aforesaid motor vehicle so negligently and/or recklessly that he permitted the same to violently collide with another motor vehicle registration number KTH 330 Isuzu Lorry thereby occasioning fatal injuries to the deceased and the estate of the deceased has suffered loss and damages.”

3. The respondent held the appellant responsible for the accident in which the deceased died. Particulars of negligence were set out in paragraph 4 of the Plaint. The appellant entered appearance and also filed defence dated 22/01/2006. He denied being the registered owner of the subject motor vehicle and also denied that any accident occurred as alleged or at all. In the alternative the appellant alleged that if any accident occurred, then the same and the deceased's alleged fatal injuries were caused by the negligence of the owner or driver of motor vehicle registration number KTH 330 or the deceased's own negligence as more particularly set out at paragraph 5 of the defence. The appellant also set out particulars of negligence on the part of the owner or driver of motor vehicle Registration number KTH 330. The appellant also averred that “at an opportune time” he would “seek to enjoin the owner or driver of motor

vehicle registration number KTH 330 as a 3rd party to the present suit.” The appellant prayed that the respondents suit be dismissed with costs. The respondent filed a reply to the defence, reiterating his averments in the Plaintiff.

The Evidence and Judgment of Trial Court

4. During the hearing of the case, the Respondent testified as PW1 and also called 2 witnesses namely No.45571 P.C. Asim Owino of Kakamega Police Station and Joseph Tatuli as PW3. The appellant testified as DW1 and denied being the owner of the subject motor vehicle. He also told the Court that he was not aware of the alleged accident. He also denied any knowledge of one Jackson Muchiri and also denied that he ever took out any policy with Blue Shield Insurance Company Ltd.

5. After hearing all the parties, and after a careful analysis of the evidence that was placed before him together with all the submissions that were made before him, the learned trial Magistrate entered judgment for the respondent as follows:-

- a. Liability – 100%
- b. Loss of expectancy of life kshs.100,000/=
- c. Pain and suffering kshs.15000/=
- d. Specials ksh.17500/=
- e. Fees for Grant of Letters kshs.15000/=
- f. Loss of dependency kshs.640,000/=

The Appeal

6. After discounting the claim under the Law Reform Act) the learned trial Magistrate arrived at kshs.525000/= as general damages plus specials of kshs.325000/=. The learned trial Magistrate also awarded costs and interest at Court rates till payment in full. The appellant was aggrieved by the judgment and filed this appeal on the following 5 grounds:

1. That the learned magistrate erred both in law and fact in holding that the Respondent had proved his case on a balance of probability.
2. That the learned magistrate erred both in law and fact by rejecting the defence offered by the Appellant.
3. That the learned magistrate erred both in law and fact in analyzing the evidence before himself and hence arriving at a wrong finding.
4. The learned magistrate erred both in law and fact by awarding excessive general damages to the respondent
5. The learned magistrate erred in law and fact by refusing to consider the submissions of the counsel for the Appellant in arriving at his findings.

7. The appellant prays that the appeal be allowed and the judgment of the lower Court be quashed with costs to himself. This is a first appeal, and as such this Court is under a duty to reconsider and evaluate the evidence afresh with a view to reaching its own conclusions in the matter only remembering that this Court does not have the opportunity the trial Court had of seeing and hearing the witnesses. In the case of **Peters –vs- Sunday Post Limited [1958] EA 424** the Court of Appeal for Eastern Africa expressed itself thus on the duty of the first appellate Court.

(i) whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly

gone wrong, the appellate court will not hesitate so to decide. *Watt v. Thomas*, [1947] All E.R 582; [1947] A.C.484, applied.

(ii) as there was documentary and other evidence which either tended strongly to confirm the appellant's evidence or, alternatively, to show that the respondent's principal witness was unworthy of credit, the full significance of which the trial judge had apparently not appreciated, this was a case where the appellate court ought not to allow the conclusion reached by the trial judge to stand."

8. What the above holding means is that it is only in plain cases that an appellate Court would interfere with the findings of a trial Court such as where there is no evidence to support the findings of the trial Court or where it is clear to the appellate Court that the trial Court acted on wrong principles.

9. In the instant case, I have carefully reconsidered the evidence and evaluated it afresh. I have also carefully considered the judgment of the learned trial Court and from all the above, the issues that arise for determination are the following:-

1. Whether the evidence on record supports the findings and conclusions of the learned trial Court;
2. Whether the learned trial Court rejected the appellant's defence.
3. Whether the damages awarded by the learned trial Court were excessive in the circumstances and whether this Court should alter the same.
4. Whether the learned trial Magistrate refused to consider the submissions made to him by appellant's Counsel.

10. Regarding the first issue I am satisfied that the evidence on record fully supports the findings of the learned trial Magistrate. The deceased was a fare paying passenger in the motor vehicle registration number KAN 956L. The evidence is clear that the driver and/or agent of the said motor vehicle which belonged to the appellant so carelessly and dangerously drove the said motor vehicle that he caused it to veer off the road and it overturned, thereby causing fatal injuries to the deceased. As a passenger, the deceased had no part to play at all in causing the accident that killed him. He was not the driver of the motor vehicle. There was no evidence adduced by the appellant to show that the deceased either jumped or attempted to jump out of the said motor vehicle so as to be held accountable for his own death.

11. Further, there was evidence showing that the motor vehicle in which the deceased was travelling on the fateful day belonged to the appellant. PW2 testified and produced the police abstract which showed that the insured of that vehicle was the appellant. The appellant's dry denial that the vehicle did not belong to him was not sufficient to rebut or discredit the evidence adduced by the respondent as to the ownership of the motor vehicle. The authority relied on by the appellant as to ownership of the motor vehicle was the case of **Samwel Mukunya Kamunge –vs- John Mwangi Kamuru – Nyeri HCCA No.34 of 2002.**

12. In the case, Okwengu J (as she then was) held and I wholly agree with her ladyship that: **"I find that the trial Magistrate went wrong in holding that only a certificate of official search from the Registrar of motor vehicles could prove ownership of the motor vehicle. I find that a Police abstract report having been produced showing the Respondent as the owner of the motor vehicle KAH 264 A, 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."**

13. The scenario in the Samwel Mukunya Kamunge case (above) is on all fours similar to what obtains in the instant case. In any event, the appellant who had alleged in his pleadings that the accident which gave rise to the death of the deceased was caused by the negligence of a third party failed to prove those allegations against the third party. In the circumstances, I am satisfied that the respondent proved his case against the appellant on a balance of probability and that the learned trial magistrate's findings and

conclusions were well anchored on the law and evidence.

14. The appellant's second complaint is that the learned trial Magistrate rejected the appellant's defence. After carefully considering the judgment of the learned trial Magistrate, I find that this complaint has no basis. This is what the learned trial Magistrate said about the appellants defence. **“Despite the defendant taking out third party notice no evidence was adduced linking the owner or driver of KTH 330 on causation based on negligence. The burden to adduce evidence of causation against the third party was on the defendant. He however elected to abandon that route of demonstrating contributory negligence against third party when he found (?) on the proceedings. I had the advantage of looking at the demeanor of the defendant. My judgment and observation was that he did not tell the Court the truth about this matter. He appeared evasive and uneconomical with the truth while being cross-examined by plaintiff counsel and later by third party counsel.”**

15. From the above, even if the learned trial Magistrate had rejected the appellant's defence, it was for a good reason. The appellant was found to be untruthful and evasive in the manner he gave his evidence. Since I did not see the appellant testify, I would have no reason to change the trial Court's view of the kind of witness the appellant was. Accordingly, I dismiss the appellants second ground of appeal.

16. The appellant also complained that the learned Trial magistrate refused to consider the submissions made to him by the appellant's Counsel. I do not find any merit in this complaint for the reason that at page 21 of the Record of Appeal, which is part of the judgment of the learned trial Magistrate, he stated the following: “I have considered the Plaintiff's evidence and submissions by each Counsel to this matter” and then proceeded to make his findings. Again at page 22 of the Record of Appeal, which is also part of the judgment of the learned trial Court, the learned Magistrate stated the following: “I have read written submissions by each Counsel to this case and in my judgment”. it is therefore clear that the learned trial Magistrate neither refused nor failed to consider the submissions made to him by appellant's defence. How a Court considers the material before it is a matter of style. It does not mean a detailed synopsis of each and every sentence written down or made to the Court. A sentence showing that the Court has considered the submissions is in my considered view, sufficient to show that the Court has considered the matters in hand.

17. The final issue for determination is whether the damages awarded by the learned trial Magistrate were excessive in the circumstances and whether this Court, in its appellate jurisdiction should alter the same. The principle underlying the award of damages is that such damages should not exceed the damage suffered. As stated by R. Kuloba in his book MEASURE OF DAMAGES FOR BODILY INJURIES, 2006 at page 5, **“the object of an award damages is to give the Plaintiff atonement of damage, loss or injury which he has suffered”** and the assessment thereof is within the discretion of the trial Magistrate or judge. The injunction against the trial Judge/Magistrate being that the award should be fair. If an award is challenged on appeal, the appellate Court can only interfere with the same if it is clear that the trial Magistrate acted on a wrong principle in making the award or if it is evident that the amount awarded is either inordinately high or low.

18. I have read the judgment of the learned trial Magistrate and seen the reasoning behind the award made. In my considered view, it cannot be said that the learned trial Magistrate proceeded on wrong principles of law or that the award was too high in the circumstances. The deceased died at the age of 35 years; he was married and had a family which depended on him though the birth dates for his children were not proved. Prior to his death, the deceased was gainfully employed at a monthly salary of kshs.16,000/=. The trial Court found that dependency on the deceased by the respondent would have continued for another 10 years.

19. The above being my considered view, I dismiss ground 4 of the appellants appeal.

Conclusion

20. In conclusion, I find and hold that the appellant's appeal on all the 5 grounds lacks merit and is hereby dismissed with costs to the respondent.

21. Orders accordingly

Judgment delivered, dated and signed in open Court at Kakamega this 5TH day of NOVEMBER 2015.

RUTH N. SITATI

J U D G E

In the presence of:

Mr. Momanyi (not in Court) for Appellant

Mr. Elungata h/b for Rauto (present) for Respondent

Mr. Lagat - Court Assistance