



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL APPEAL NO. 46 OF 2012

JGW

EWV..... APPELLANTS

Versus

JAMES MURIITHI MURUGARESPONDENT

(Appeal arising from the Judgment of J.M. Omido Senior Resident Magistrate Karatina in Civil Case No. 90 of 2007)

JUDGMENT

1. By a plaint dated 4th September 2007 the appellants sued the respondent in respect of a traffic accident on 20th March 2005 involving the respondents motor vehicle registration No. KAS 182M and the deceased one BKG along Karatina Kerugoya road. The appellants blamed the respondent for the said accident and subsequent fatal injuries to the deceased and in paragraph 4 thereof pleaded particulars of negligence.
2. On 23rd April 2008 the respondent through the law firm of P.M. Kahiga & co. Advocates filed a defence wherein they denied the accident and the particulars of negligence attributed to themselves and in the alternative and without prejudice pleaded that the accident was wholly caused by the deceased.
3. Based upon these pleadings the matter proceeded for hearing before Hon. Omido J.M. Then Senior Resident Magistrate who dismissed the suit with cost to the 1st respondent and proceeded to assess general damages at 169,635/-.
4. Being aggrieved by the said decision the appellant filed this appeal and raised the following grounds on the memo of appeal.
 1. ***The learned trial magistrate erred in law in his misapprehension of true import of the theory of liability in a civil case.***
 - 2.
 1. ***The learned trial magistrate further erred in law and in fact in his assertion that the registered owner of a motor vehicle must be a party in a suit for liability to attach to a beneficial owner.***
 - 2.
 3. ***The learned trial magistrate erred in law and in fact in ignoring the pleadings, the evidence and the statements of the defence witnesses thereby reaching a wrong conclusion on the issue of liability.***

1. ***The learned trial magistrate erred in law and in fact in his failure to appreciate that at the age of 15 years, the deceased helped the appellants and that therefore damages for loss of dependency ought to have been awarded***
- 2.
1. ***The learned trial magistrate erred in law and in fact in awarding an incredibly low award under the head of loss of expectation of life, while evidence on record clearly indicated that the deceased was robust and aged 15 years***
- 2.
1. ***The learned trial magistrate erred in law and in fact in rendering a judgment that is not supported by the evidence on record.***
- 2.
1. The appellant therefore prayed that the appeal be allowed and the respondent held 100% liable, the court award damages for loss of dependency and the award for expectation of life be enhanced.
2. Directions were given that this appeal be heard by way of written submissions which have now been filed. On behalf of the appellant it was submitted that the trial court misconstrued the legal principal of liability when he stated that the plaintiff opted to withdraw the suit against the second defendant and in his view the beneficial ownership of the first defendant could not be established without the actual owner. It was submitted that the respondent had admitted in evidence that he was the owner of the motor vehicle at the time of the accident.
3. It was further submitted that the trial magistrate failed to award damages for loss of dependency and gave no reason for not doing so despite case law in support thereof. It was therefore submitted that the following award should be made.
4. a. Loss of expectation of life - 150,000
5. b. Loss of dependency - 300,000
6. c. Pain and suffering - 50,000
7. d. Special damages - 39,635
1. Total - **539,635**
8. On behalf of the respondent it was submitted that at the time of the accident the respondent (who was the 1st defendant) was neither the registered owner of the motor vehicle registration No. KAS 182M nor its driver and therefore the trial court was right in dismissing the suit. It was further submitted that the appellants did not prove any negligence where there was no fault on the part of the respondent.
9. This being a first appeal the court is under duty to reassess the evidence tendered before the trial court and to come to its own conclusion. On behalf of the appellant P.W. 1 JOSEPH GATHUKI KANGARA testified that the respondent was the driver of the motor vehicle registration No. KAS 182M while Khadija Abdula Yahya was the owner. He stated that on 20th March 2005 he was informed by Mutugi who witnessed the accident wherein the deceased died. It was his evidence that the deceased died at the age of 15 years was in class 7 and wanted to be an Engineer. He produced documents in support of the claim.
10. P.W.2 JOSEPHAT MUTUGI MURIUKI stated that the deceased was riding a bicycle and it was drizzling and misty towards Karatina from Kerugoya when the motor vehicle while speeding swerved to avoid a pot hole and collided with the bicycle on its lane. Under cross examination he confirmed that he saw the accident and blamed the driver of the motor vehicle for the accident.
11. P.W.3 Sgt GABRIEL MWAMBA produced the police abstract wherein it is stated that the respondent was the owner of the motor vehicle. On behalf of the respondent D.W.1 TONY GITARI testified that he was the driver of motor vehicle registration KAS 182M from Karatina to Kerugoya when two boys emerged with bicycles one of them left his lane and collided with the motor vehicle. It was his evidence that motor vehicle was owned by James Murithi Murage. Under cross examination he confirmed that he was employed by the respondent and stated that the deceased came to his lane.

- 12.D.W.2 GEOFFREY KINYUA MACHARIA stated that he was a passenger in motor vehicle registration No. KAS 182M when the deceased who was cycling down hill rammed onto the motor vehicle and that the accident was caused because the deceased was on the wrong lane. He stated that the motor vehicle had just dropped passengers and was not speeding.
- 13.The respondent confirmed that the motor vehicle registration KAS 182M was his and had been sold to him by an agent whereas KHADIJA Abdulla Yahya was the registered owner. He confirmed that he was the owner of the motor vehicle while TONY GITARI was his driver at the material time.
- 14.From the pleadings proceedings and submissions herein I have identified the following issues for determination.

a. whether the trial court was right in dismissing the appellants case on liability.

b. Whether the court erred in not awarding loss of dependency.

- i. **What order should this court make.**
- ii.

1. LIABILITY

2. In dismissing the appellants case on liability the trial court had this to say:
3. ***“A copy of records was produced to show that the registered owner of the vehicle was Khadija Abdul Yahya. The plaintiff however opted to withdraw the suit against him and in my view beneficial ownership as against the first defendant cannot be established without first enjoining the actual owner of the motor vehicle as a defendant in a suit as it is necessary to establish the annexus between a benefice owner and the actual owner for liability to attract.”***
- 4.
5. With due respect to the trial magistrate in this finding the same fell under error as it was against the evidence tendered before the court. The respondent in his evidence in chief had this to say:
6. ***“My driver phoned me on 20th March 2005 and told me that my matatu KAS 182M had been involved in an accident with a cyclist. My driver was Tony Gitari.... Khadija Abdulla Yahya was the registered owner but is not the one who sold it to me. It was sold to me by an agent.”***
- 7.
8. under cross examination by Miss Mwai the respondent had this to say.
9. ***“I was the owner of the vehicle”*** this evidence supported that of P.W.3 as per the police abstract.
- 10.The respondent having admitted being the owner of the motor vehicle as at the time of the accident the issue of the nexus between the beneficial owner and the “actual owner” whatever the court meant by that had been established and therefore the trial court was wrong in dismissing the claim against the appellant. I would therefore allow this ground of appeal and set aside the order dismissing the suit with cost.
- 11.Having set aside the said order I therefore proceed to make a determination on the issue of liability herein. It is not disputed that the deceased was involved in an accident with the respondents motor vehicle. What is in dispute is how the accident occurred as there are two conflicting views on the same. It was P.W.2's evidence that the respondents driver swerved to avoid hitting pot holes and went into the opposite lane and knocked down the deceased whereas D.W.1 and D.W. 2 both stated that the deceased left his lane and knocked the motor vehicle.
- 12.This dispute would have been resolved had P.W.3 Sergeant Gabriel Mwambo produced the police file with the sketch plan. There being no other independent evidence on how the accident occurred I would apportion liability between the respondent and the plaintiff at 50%: 50%.
- 13.On the issue of loss of dependency the appellant had submitted the case of JACKSON MAGATA KURITU v CHARLES CHERUIYOT KETER NAKURU HIGH COURT CIVIL CASE NO. 437 OF 1995 where justice S.C. Ondeyo as she then was awarded Ksh. 160,000/- in respect of loss of dependency for a seventeen year old. In this case P.W.1 testified that the deceased was aged 15 years in Std 7 a bright student who wanted to be an Engineer and also helped with domestic chores.
- 14.In the case of STANLEY MAINA v NAIROBI DELUXE SERVICES LTD NAIROBI HCCC NO. 54 OF 1992 justice Mbogoli Msagha had this to say:
- 15.***“It has not always been easy to assess damages for lost years or loss of dependency where the***

deceased is of school going age..... it is recognized however that while the children grow up they assist in many respects their parents and the same parents while contributing to the education of their children expect something in return in their adult hood”

16.

17. In the case of ELIUD MWALE LEWA & ANOTHER v PAKA TOWERS LTD & ANOTHER MOMBASA HIGH COURT CIVIL APPEAL NO. 89 OF 2009 Justice M. Odero had this to say:

18. ***“When a child dies the parents do suffer a quantifiable loss. It is established custom in both African and Asian communities that children are educated and raised in the expectation that they will in turn provide for their parents in their old age. There are several instances where court have indeed proceeded to make award for lost year under the fatal accidents Cap 32 Laws of Kenya...”***

19.

20. I would therefore adopt the approach by justice Ondeyo and assess general damages under this head at Ksh. 160,000/-.

21. On the issue of loss of expectation of life I note that the trial court awarded the conventional sum of Ksh. 100,000/- and would therefore not interfere with his award herein. On the issue of pain and suffering it is clear that the deceased died several hours after the accident and therefore a conventional sum of Ksh. 20,000/- would be an appropriate award herein.

22. In the end I allow the appeal herein set aside the judgment of the trial court dismissing the suit and substitute the same with judgment as follows:

23.a. Liability 50%:50%

24.b. Loss of expectation of life - Ksh. 100,000

25.c. Loss of dependency - Ksh. 160,000

26.d. Pain and suffering - Ksh. 20,000

27.e. Special damages - Ksh. 39,635

Total Ksh. **319,635**

1. Less 50%

2. The appellant also be entitled to cost.

Dated, signed and delivered at Nyeri this 11th day of July 2014

J. WAKIAGA

JUDGE

Court: Judgment read in open court in the presence of Mr. Warutere for the respondent.

J. WAKIAGA

JUDGE

11/7/2014

1.