IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: OMOLO, SHAH & PALL, JJ.A.)
CIVIL APPEAL NO. 292 OF 1997
BETWEEN

SAMUEL NGURE

GATHII......................................APPELLANT

AND

JOSEPHINE WANJIRU MBUGUA................................RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Nairobi (Hon. Mr. Justice J.v. Juma) dated the 27th day of June, 1996)

in

Civil Suit No.4173 of 1989)

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JUDGMENT OF THE COURT

This is an appeal by Samuel Ngure Gathii from a judgment and decree of the superior Court (Mr. Justice Juma) in Nairobi on 27th June, 1996 by which the respondent was awarded damages under the Fatal Accidents Act and the Law Reform Act arising out of the death of her husband in a road traffic accident which occurred on 22nd November, 1987 along Maragua/Muranga Road near Maragua Railway Station in Muranga District.

The respondent's claim in the superior court was based on claims under both the above-mentioned Acts. She had pleaded her case on the alleged negligent driving of the appellant's vehicle registration number KYN 992, a Toyota "matatu". The particulars of negligence as pleaded are:

(a)Driving at an excessive speed in the circumstances.

(b)Failing to keep any or any proper look out.

(c)Driving the said motor vehicle without due regard and attention to the other road users who might be expected reasonably to be on the said road.

(d)Failing to apply brakes in good and sufficient time so as to avert the said accident.

(e)Failing to stop, to slow down or in any other way manage and/or control the said motor vehicle so as to avoid the said accident.

(f)Causing the said accident to occur.

In addition the respondent had pleaded that the appellant was convicted by a court of competent jurisdiction of the offence of causing death by dangerous driving contrary to section 46 of the Traffic Act Cap 403, Laws of Kenya. The respondent was clearly relying on the fact of such conviction, which was in relation to the manner of driving of the appellant's vehicle, to show negligence on the part of the appelAlta ntt.h e trial in the superior court the respondent called no evidence as regards the actual manner of driving of the appellant's vehicle but relied on the fact of the said conviction as proof of negligence. The learned judge had this to say on this issue:

> ***"In the instant case the defendant did not give evidence and I therefore hold that he was fully liable for the death of the plaintiff's husband".***

Miss Janmohammed for the appellant, arguing the first ground of appeal, urged that the learned judge erred in law and in fact in finding that the appellant was 100% liable when there was no evidence to support the same. She relied on the case of Queen's Dry Cleaners & Dyers Ltd v. East African Community & Others (1972) E.A. 229 to say that the fact of such conviction does not mean the convicted driver is 100% negligent. That far we would agree with her. But what would be the position when in the face of such a conviction, the driveSre cdtoieosn n4o7tA goifv et heev iEdveindceen?c e Act reads:

> ***"47A. A final judgment of a competent Court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, to be taken as conclusive evidence that the person so convicted was guilty of that offence as charged".***

Where, as in the instant case, the issue of contributory negligence by the deceased has been raised, the court has to investigate that issue on evidence to be called by the defendant who alleges contributory negligence. If the defendant calls no evidence then he has not discharged the onus on him of proving the contributory negligence pleaded by him. In the absence of such evidence the court cannot decide relative blameworthiness. In these circumstances we cannot say that the learned judge erred. He had before him evidence to show that the appellant was guilty of the offence of causing death by dangerous driving. That is, he had evidence before him of dangerous driving on the part of the appellant.In the absence of any evidence by the appellant as to how the deceased contributed to the accident the learned judge correctly concluded that the appellant was 100% to blame. The first ground of appeal therefore fails.

The second ground of appeal complains about the learned judge awarding a sum of shs.80,000/= under the Law Reform Act when the respondent had not taken out letters of administration for the estate of her deceased husband at the time she instituted the proceedings in the superior court.

The learned judge whilst awarding damages under this head said that the decision in the case of Hintz vs. Mwakima [1982-88] 1 KAR 482 was the applicable law at the time the suit was filed and that therefore the ratio decidendi of the decision in the case of Troustik Union International & Another vs. Mbeya and Another Civil Appeal No. 145 of 1990, (unreported) did not apply to the case before him. With respect the learned judge erred in so saying. The Troustik case simply decided that the majority judgment in the Hintz case was wrong. The Truistik case did not alter the law. It put it right. The learned judge erred in saying that "the decision in Troustik case did not apply retrospectively".

The letters of administration were taken out after the institution of the proceedings. Such letters do not validate a claim filed earlier. The doctrine of relation back, as applies in the case of a will, does not apply to intestacy.

In the Troustik case, this court reaffirmed what it stated in the case of Otieno vs. Ougo (1982-88) 1 KAR 1049.

The court observed:

> ***"The administrator is not entitled to bring an action as an administrator before he has taken letters of administration. If he does the action is incompetent at the date of its inception".***

Therefore the claim under the Law Reform Act was incompetent and the learned judge erred in awarding the said sum of shs.80,000/=. That award is set aside in its entirety.

The third ground of appeal relates to the multiplier and multiplicand adopted by the learned judge. The deceased was 43 years of age at the time of his death. He had no history of bad health, that is to say, he was a healthy individual.He would have retired, in the ordinary course of events, at the age of 55 from his job as a teacher in the employ of Teachers Service Commission. Miss Janmohammed argued that whilst arriving at a multiplier of 12 years the learned judge did not take into account imponderables. The deceased was a teacher. Upon reaching the retirement age set by the Teachers Service Commission he might have taken up a teaching job at a private school. There was no evidence that he would not have worked after the age of 55. In the circumstances, we think a multiplier of 12 years, is not so high as to merit an interference.

As to the multiplicand of shs.3,000/= per month applied by the learned judge, Miss Janmohammed conceded in the end it was reasonable in the circumstances of the deceased, and there is no occasion for us to interfere.

The upshot of all this is that this appeal is allowed only to the extent that the award of shs.80,000/= made under the Law Reform Act is set aside and there will be judgment for the respondent against the appellant in the sum of shs.460,500/= as follows:

General Damages - shs.432,000/=

Special Damages - Shs. 28,500/=

Total Shs.460,500/=

The sum of shs.28,500/= will carry interest at 12% per annum from 15th September, 1989 until the date of payment and the sum of shs.432,000/= will carry interest at the rate of 12% per annum from 27th day of June, 1996 until the date of payment.

The appellant has had some measure of success in this appeal. The appellant will have of 1/5th the costs of this appeal.

Dated and delivered at Nairobi this 7th day of April, 1998.

R.S.C. OMOLO

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

G. S. PALL

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR