



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO.11 OF 2016

MUTAH KIRANGA ALIAS GEORGE MUTAH KIRANGA.....APPELLANT

VERSUS

MARGARET WANGARI WAWERU.....1ST RESPONDENT

EPHANTUS MUGI WANYAGA.....2ND RESPONDENT

(suing as the administrator of the estate of WILLIE WANYAGA MUUGI)

J U D G M E N T

By a plaint dated 1st June 2016 the plaintiffs' respondents Margaret Wangari Waweru and Ephantus Mugi Wanyaga (suing as the administrator of the Estate of Willie Wanyaga Muugi) sued the defendant/appellant Mutahi Kiranga alias George Mutahi in CMCC 228 of 2013.

They sought judgment against the defendant for:-

- i. General damages under the Law Reform Act and the Fatal Accident Act.
- ii. Special damages of Kshs.63,195/-.
- iii. Costs of the suit.
- iv. Interest on (i) (ii) and (iii) at court rates
- v. Any further/better relied that the court may deem fit.

After hearing the case, the learned magistrate Wilbroda A. Juma CM found for the plaintiffs by finding the defendant 100% liable for the traffic accident that happened on 22nd July 2012 along the Nyeri-Karatina Road. It was the plaintiffs' case that on that day the defendant was the driver of motor vehicle Registration No.KAW 158H, which he drove negligently at excessive speed and without due care to other road users, such that he failed to keep a proper control of the motor vehicle and hit Willie Wanyaga Mugi, causing him fatal injuries.

He was survived by his widow and 5 children one of whom was 14 years old hence a minor.

The learned magistrate went on to make the following award:

Pain & Suffering - Ksh. 25,000.00

Loss of Expectation of life - Ksh. 100,000.00

Loss of Dependency 15000 X 10 X 12 X 2/3 =

Ksh. 1,200,000.00

Special Damages - Ksh. 63,195.00

The defendant was aggrieved by the above judgment and decree of the court and filed this appeal. He listed 8 grounds of appeal. That the learned magistrate erred in law and fact:-

- i. By finding the appellant 100% liable in negligence regardless of the evidence tendered against such a finding whilst Kenyan Law has not reached the stage of liability without fault.
- ii. By disregarding the evidence of the appellant herein who was the only credible witness in this matter.
- iii. By failing to appreciate that no negligence was established against the appellant and as such no liability could arise
- iv. By misdirecting herself by fully relying on the evidence of a discredited eye witness and thus arriving at an erroneous decision
- v. By failing to discount the award of loss of expectation of life from the final award thus making a double award to the plaintiff.
- vi. By relying on a letter of Employment as proof of earnings which letter was not definitive on the issue and thus arriving at an erroneous award on loss of dependency.
- vii. In failing to consider or even adequately adopt and appreciate the written submissions of the appellant on record.
- viii. Misdirecting herself by failing to be bound by the decision of the apex court when failed with similar facts.

Parties agreed to dispose of the appeal by way of written submissions which I have read.

The role of the 1st appellate court is to review and re-access the evidence in the subordinate court and draw its own conclusions always alive to the fact that it did not see/hear the witnesses.

From the statement of defence dated 11th May 2014 the defendant denied all the allegations and claims and laid blame on the deceased accusing him of negligence in the following terms: -

Jaywalking carelessly in the path of motor vehicle Reg.No.KAW 158H, wanton recklessness running on a busy highway toward KAW 158H, staggering and running carelessly while intoxicated on a busy highway, failing to take care of his own safety, failing to run, evade, in any way avoid running towards motor vehicle KAW 158H, being absent minded while driving on the road, ignoring and failing to heed the road traffic rules.

The defendant also contented that he would rely on the principles of res ipsa loquitur and volenti non fit injuria.

He put the plaintiffs to still proof of all the claims.

The plaintiffs joined issued with the defendant.

Margaret Wangari Waweru testified that the deceased was her husband. On 22nd July 2012 he left home about 6.00pm to Marua shopping Centre. At 7.30pm she was called that he had been hit by a motor vehicle in a hit and run accident.

He was rushed to Consolata Mission Hospital Mathari and taken to ICU where he died after 30 minutes. The matter was reported to Nyeri police station where she was issued with a Police Abstract, through the account of an eye witness one Mercy Njoki Kanyangi. The motor vehicle involved was KAW 158H Toyota DX Station Wagon. An official search was conducted to establish its ownership at Ksh 500. Postmortem was conducted at Kshs.6150/-. The hospital bill was Kshs.5545/-. Death was found to be as a result of head injury caused by blunt trauma in a Road Traffic Accident. A death certificate was issued. The burial expenses coffin and hearse were Kshs. 21,000/-.

Later she obtained letters of administration to enable her file this case spending Kshs. 30,000/- on legal fees.

She produced documentary evidence to show that the children were hers and the deceased. She said her husband was aged 59 years old and worked at Dikwarmar Commercial Agencies as a Sales Representative earning Kshs. 18,000/- per month. He spent all his money on the family –paying fees. By then the last born child was in form 2.

The defendant was charged with a traffic case No.8 of 2012 at CM'S Court Nyeri for causing death by dangerous driving and failing to report an accident.

On cross examination she told the court she did not have his pay slip and did not know whether the Kshs. 18,000/- was gross or net salary.

She said the scene of the Road Traffic Accident was flat and the deceased was walking on a foot path.

PW2 was PC Joseph Ngera No.53765 who told the court that the accident was a hit and run but a person who witnessed it reported it at the Nyeri police station. The motor vehicle was found in a garage in Nyeri town being repainted. The officer noted that it had a dent on the left

side, and blood stains, and the windscreen was smashed.

The driver told him he ran away from the scene because he feared being lynched by the mob.

PW3 Mercy Njoki Kimani testified she was walking down hill at Nyeri/Karatina road at Marua. A motor vehicle coming from the opposite direction hit a person who was walking towards the same direction from behind. He was thrown into a culvert. The motor vehicle stopped about 5m away. She crossed the road and saw the motor vehicle to be KAW 158H. She approached the scene. The motor vehicle took off. She read the number at the back.

On cross examination she said on crossing the road she went to the motor vehicle to see whether the driver would come out and assist the victim- that is when she recorded the registration number. She said she did not record her statement because she was not there when people were recording statements.

The defendant John Mutahi Kiranga confirmed that indeed there was a Road Traffic Accident on the material date involving his motor vehicle Reg. No. KAW 158H and a pedestrian. He reported to the police the following day.

His side of the story was that the pedestrian had hid in the bush and suddenly jumped into the road as if he had wanted to commit suicide. He braked, swerved but still hit him. He stopped but did not go to the victim because he feared mob justice because "*Marua is known for beating up people*".

He was later charged with causing death by dangerous driving.

He did not call any witness.

I have perused the rival submissions filed by counsel from each party.

The only issues for determination are:-

- i. Whether the plaintiffs proved their case to the required standard.
- ii. Whether the defendant was liable for the accident.
- iii. Whether the deceased contributed to the accident.
- iv. Whether the learned magistrate applied the correct principles in arriving at the award of damages.

It is the appellant's position that the respondent's main witness was a sham and she never witnessed the accident.

According to her testimony the Road Traffic Accident happened about 20 m away from her on the opposite side of the road. The motor vehicle hit the deceased from behind. She did not know who had been hit. She crossed the road heading towards the motor vehicle. Since there was no one else on the road she expected that she and the driver of the accident motor vehicle would assist the victim. However the motor vehicle drove off but she managed to get the registration number.

It appears to me that the defendant's explanation is that he drove away after hitting a person whom he believed was "committing suicide". He thought no one had witnessed the accident. When he saw the PW3 crossing the road he did not imagine she would be able to see the registration of his motor vehicle. So, who is the credible witness here?

Even if the defendant was afraid that he would be lynched by a mob what stopped him from reporting to the police that night? The evidence that he went to repair his motor vehicle the following day was not in any way challenged by the defendant and that is why he was charged with failing to report an accident. So when it comes to credibility, the conduct of the defendant does not make him a credible witness.

Coming back to the testimony of the PW3, she saw the motor vehicle and her perception that the motor vehicle was being driven at a speed. It is correct she was not a driver and could not establish the exact speed of the motor vehicle but in her view the motor vehicle was at a speed that was high in the circumstances because of the manner in which the Road Traffic Accident happened, that the motor vehicle hit the deceased from behind.

The motor vehicle bore dents on the left side, it had blood stains and the windscreen was smashed. It would appear that the grill was also dented. These damages on the motor vehicle are consistent with what the PW3 said she saw and conceded by the defendant in his testimony.

The doctrine of *res ipsa loquitur* though relied on by the appellant, appears, to me, to support the case for the respondent.

It is true that the police investigation file was not produced, neither was any sketch plan of the scene of the accident. The defendant moved the car from the scene. The defendant did not report the case to the police. The scene had not been preserved and hence by the time the police got there it was already interfered with. Nevertheless, PW2 the police officer did not say he made any sketch plan. Neither was he at the scene when the Road Traffic Accident happened hence he would only testify on what he had and what he saw himself.

This case is distinguishable from Nzule Kimatu Vs Mitau Kyendwa & Another (2001) eKLR where the traffic case against the defendant was completed and the lower court proceedings in the traffic case were available by the time of the hearing of the civil suit. There the police visited the scene and were able to make out a sketch of the scene.

In this case it was evident that at the time of this hearing the traffic case had not been finalized. At the same time there was no evidence that in the traffic case a sketch plan of the scene had been made. This is evidence that was available in the Nzule Kimatu case but was not said to be available in this case.

There is no evidence that the deceased was drunk as alleged by the defence, or that he was jaywalking or that he was driving anything, or that he jumped into the path of the motor vehicle in the act of committing suicide. This idea of suicide was obviously an afterthought on the part of the defendant and the same is not believable. Had he rushed to the police station that night and made that report, it could have been believable. His conduct after the accident compounds his guilt. As the driver he must have known he had done something wrong. Hence I find no evidence that the deceased contributed in any way to the accident.

I find no reason to interfere with the finding on liability.

With regard to the damages: - the plaintiff produced a letter dated 23rd March 2012 from Dikwamar Commercial Agencies headed “*Letter of appointment*” It indicated that the deceased had been offered employment with effect from 1st April 2012 at the rate of Kshs. 18,000/- per month. It is the appellant’s position that the letter of appointment should not have been treated as proof of the deceased’s income. The letter states that “*other specific terms and conditions of service will be spelt out once you report*”.

There is no evidence that the deceased ever worked at the said firm. There was no pay slip or proof that he had even worked there at all. Without such proof the learned magistrate misdirected herself in accepting the same as proof of earnings.

The defendant proposed a rate of Ksh.6200 at one time, and Kshs.7000/- at another. The wife of the deceased stated that they were farmers. They had raised their children and the last one was in high school. Without other evidence of income, I would allow an income of Kshs. 10,000/- per month.

The deceased died while undergoing treatment hence the award of Kshs. 25,000/- for pain and suffering remains.

All the other children of the deceased were adults except. The deceased had a 14-year-old child who depended on him. The issue of dependency cannot be disputed while clearly there was a minor.

In their proposals in the lower court defendant offered a multiplier of 7 years. The plaintiff asked for 16 years. The magistrate gave 10 years.

I find no reason to disturb that.

Kshs. 10,000/- X 10 X 12 X 2/3 = Kshs. 800,000/-

The award of Ksh 100,000 for loss of expectation of life remains

Under the Fatal Accidents Act, the claim is for the benefit of the dependants, and under the Law Reform Act – it is for the benefit of the Estate of the deceased. It was argued that where the administrators are the beneficiaries and the award made under loss of expectation of life ought to be discounted from the final award to avoid duplicity of awards.

In this case the administrators are the wife and an adult son of the deceased. There was a minor in the case who was a dependant of the deceased and hence the trial magistrate declined to discount this as the minor was not one of the administrators of the estate.

Total award

Pain & Suffering - Ksh. 25,000.00

Loss of Expectation of life- Ksh. 100,000.00

Loss of Dependency 10000 X 10 X 12 X 2/3 = 800,000

Special Damages - Ksh. 63,195.00

Ksh 988, 195

The appeal is allowed in part. I substitute the award of the learned magistrate with the award of Ksh 988, 195 plus costs and interest to the plaintiff respondent from the date of judgment in the subordinate court.

Dated, delivered and signed at Nyeri this 28th Day of September 2018

Mumbua T Matheka

Judge:

In the presence of:

Court Assistant Albert

Ms Mwangi HB for Lucy Mwai for respondent

Ms Nyakio for Mr. Ngige for appellant

Ms. Nyakio: Mr. Ngige prays for 30 days stay of execution

Ms. Mwangi: No objection

Court: Appellant has 30 days stay of execution from the date hereof.