



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL APPEAL NO. 669 OF 2017**

**JANE MUTHONI MUKABI AND CECILIA WANJIRU NJOKI**

**(Suing as the personal Representatives of the Estate of**

**DAVID WAITHAKA MUTHONI – (DECEASED) .....APPELLANTS**

**VERSUS**

**PHILLIP MACHARIA NDIRANGU.....1<sup>ST</sup> RESPONDENT**

**PATRICK MWANIKI .....2<sup>ND</sup> RESPONDENT**

**CHARLES MURIITHI NJERU .....3<sup>RD</sup> RESPONDENT**

**CONSOLIDATED WITH**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL APPEAL NO. 641 OF 2017**

**PHILLIP MACHARIA NDIRANGU.....1<sup>ST</sup> APPELLANT**

**PATRICK MWANIKI.....2<sup>ND</sup> APPELLANT**

**CHARLES MURIITHI NJERU .....3<sup>RD</sup> APPELLANT**

**VERSUS**

**JANE MUTHONI MUKABI**

**CECILIA WANJIRU NJOKI (suing as the personal representative of the estate of**

**DAVID WAITHAKA MUTHONI (DECEASED)..... RESPONDENTS**

**JUDGMENT**

1. David Waithaka Muthoni, deceased, was knocked down by motor vehicle Reg. No. KBA 166C on 4<sup>th</sup> February, 2012 along Nakuru-Nairobi Road at Kinoo area. The deceased was admitted at Kenyatta National Hospital but passed away two days later on 6<sup>th</sup> February, 2012. Jane Muthoni Mukabi and Cecilia Wanjiru Njoki in their capacities as the administratrixes of the estate of David Waithaka Muthoni, deceased filed a compensatory suit before the chief magistrate's court, Nairobi, against Philip Macharia Ndirangu, Patrick Mwaniki and Charles Muriithi Njeru, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants respectively. The Appellants filed a joint statement of defence to deny the Appellant's claim.

2. Hon. L. Kabaria, learned Senior Resident Magistrate heard the suit and eventually entered judgment in favour of the Respondents and against the Appellants as follows:-

*(i) The Respondents and Appellants to shoulder 70% and 30% liability respectively.*

*(ii) General damages – Kshs.5,616,000/=*

*(iii) Special damages – Kshs.136,721*

**Kshs.5,752,725/=**

*Less Contribution of 70%....Kshs.4,026,904/70*

*Net total .....Kshs.1,725,820/30*

The Respondent was also given costs and interest.

3. The appellants were aggrieved by the aforesaid decision and were therefore prompted to file this appeal putting forward the following grounds:-

*(i) That the learned trial magistrate misapprehended the evidence on record and thereby misdirected herself in holding that the deceased was crossing the dual carriage highway through a gap in between the wall while in fact, the deceased jumped over the wall that separates the dual carriage highway.*

*(ii) THAT the Learned Trial Magistrate erred in fact and in law and further misdirected herself in failing to appreciate that the deceased ought to have used the fly-over which was only a few metres ahead and meant for use by pedestrians.*

*(iii) THAT the Learned Trial Magistrate erred in law and in fact and further misdirected herself by holding the Appellants 30% liable for the accident despite making a conclusive finding that the deceased was the author of his own misfortune.*

*(iv) THAT the learned Trial magistrate erred in fact and in law and further misdirected herself in holding that the 1<sup>st</sup> appellant ought to have been careful while approaching the scene of the accident by reason of him being an experienced driver who often plied along that route which finding was not based on any law.*

*(v) THAT the learned trial magistrate erred in law and in fact and further misdirected herself by failing to find and/or appreciate that the deceased's act of crossing the dual carriage highway at an undesignated are constituted an illegality and accordingly ought to have been held 100% culpable for the accident.*

4. The respondents on the other hand were also unhappy with the decision hence they filed Nairobi H.C.C.A No. 669 of 2017 in which they put forward the following grounds of appeal that:

*(i) The learned magistrate erred in over relying on the contradictory and incredible testimony of PC Joel Kasyula.*

*(ii) The learned magistrate erred and misdirected herself when she relied on evidence of PC Joel Kasyula to the effect that the gaps on the wall between the dual carriage were not sanctioned or authorized yet he same PC Joel Kasyula had testified in chief that there were absolutely no gaps on the said wall from Limuru to Uthuru.*

*(iii) The learned Magistrate erred in fact in making a finding that there was a pedestrian bridge ( fly over) a few metres from the scene of the subject accident which the Deceased could have use d.*

*(iv) The learned Magistrate erred in law and fact in making a finding that the existing spaces on the wall of the dual carriage are illegal or unauthorized.*

*(v) The learned magistrate erred in fact and in law in finding that the deceased was contributory negligent for crossing the subject road through the existing spaces on the wall.*

*(vi) The learned magistrate erred in fact and in law by finding the deceased 70% liable for the subject accident.*

*(vii) The learned Magistrate erred in law and in fact when she exonerated the driver from liability by 70% yet the driver should have been careful in the circumstances considering that the surrounding area was heavily inhabited, it was at night, it was raining and his visibility was impaired.*

*(viii) The learned magistrate erred in fact and in law in finding that the 2/3 dependency ration was high in the circumstances and using a low ratio instead.*

*(xi) The learned magistrate erred in fact and in law in failing to properly consider the appellant's evidence and submissions on quantum and liability.*

*(x) The learned magistrate erred in entering a judgment largely favouring the defendants.*

5. The two appeals were ordered consolidated on 26<sup>th</sup> April, 2019 when the appeal came up for hearing, learned counsels recorded a consent order to have the same disposed of by written submissions.

6. I have re-evaluated the case that was before the trial court and also considered the rival submissions plus the authorities cited. Though the parties put forward numerous grounds of appeal in their respective appeals, those grounds revolve around the twin issues touching on liability and quantum.

7. When it comes to liability both parties are unhappy about the decision by the trial court to apportion liability. I have already stated that the learned Senior Resident Magistrate apportioned liability in the ratio of 70%:30% as against the Respondents.

8. It is the submission of the appellants that the Learned Senior Resident Magistrate fell into error when she held that the driver of motor vehicle Registration No. KBA 166C is 30% liable yet there was overwhelming evidence that the deceased crossed the highway at an illegal unauthorized and or undesignated location.

9. It was further argued that it was wrong for the trial magistrate to place an obligation upon the 1<sup>st</sup> Appellant to have been on the look-out in case anyone was crossing the highway at that area merely because he was used to driving along that route.

10. The appellants also argued that the 1<sup>st</sup> Appellant was not obligated in law to look out for pedestrians who were crossing the highway using the illegal gaps in an area where pedestrians had been provided with a footbridge to use.

11. The Appellants further pointed out that going by the evidence of “PW1” and “DW2” the court ought to have found that the deceased was solely to blame as the author of his own misfortune that befell him for negligently crossing a busy highway at night and at an undesignated area while there was a flyover less than 20 metres away meant for use by pedestrians.

12. The Respondents on the other hand are of the submission that the learned trial magistrate erred by apportioning 70% liability on the deceased.

13. It was pointed out that there was credible evidence that the deceased crossed the road in a zebra crossing place. It was also stated that the motor vehicle which knocked the deceased was moving at a high speed of 70km/h at night in a populated area while it was raining.

14. The recorded proceedings show that the trial magistrate took into account the evidence of P.C Ondieki (PW1), P.C Kasyula (DW1) and Phillip Macharia (DW2) and came to the conclusion that the gap between a wall where the deceased passed were not sanctioned for pedestrian crossing since there was a flyover intended for the use by pedestrians crossing the highway.

15. She further stated that by crossing the road at an unauthorized place on a highway at night, the deceased exposed himself to obvious danger hence the deceased authored his own misfortune.

16. She also found that the 1<sup>st</sup> appellant at fault. She stated that the 1<sup>st</sup> appellant was a regular driver on the road and that he was aware of the existence of gaps in that wall and should have been cautious. The learned magistrate proceeded apportion 30% liability on the part of the deceased.

17. Having re-evaluated the evidence which were presented before the trial court, the only eye witness who testified was Phillip Macharia (DW2) who said that the deceased was crossing the road from the right to the left side. DW2 said that he did not see the deceased crossing the road at all.

18. He further said that he only stopped when he heard some noise of something he hit.

19. DW2 claimed there was a fly over which was 20 metres away from the scene of the accident. It is the evidence of P.C Ondieki (PW1) that the wall separating the dual carriage road had places for pedestrian crossing.

20. PW1 said that there are gaps in the wall where pedestrians can cross. PW1 also said that at area 87 there is a zebra crossing. PW1 said that the foot bridge is about 10 kms from Kabete police station.

21. P.C Joel Kasyula(DW1) said that at 87 area there is a fly over which is supposed to be used by pedestrians to cross from one side to another. DW1 said there are sections which were demolished for pedestrians to cross. P.W 1 also stated that he was not the investigating officer in the traffic case. He said that the investigating officer was one Cpl. Kisoi.

22. D.W.1 admitted that there may be spaces in between the wall separating the dual carriage road but those gaps are illegal. D.W.1 further admitted that he did not know whether the deceased used those spaces.

23. Phillip Macharia (D.W.2) claimed that there was a flyover about 20 metres away from the accident scene and that there was no gaps. He said the speed of 70km/h was okay because the road was clear.

24. DW2 had written in a statement he recorded with Direct Line Insurance, that the deceased had jumped over the wall. He however denied that when he testified before the trial court and claimed the deceased was crossing the road.

25. DW2 said that the deceased emerged suddenly hence he could not avoid the accident even if he had driven at a speed of 50km/h. DW2 appears to have contradicted himself because he initially said he did not see the deceased but only stopped when he hit something.

26. Having carefully re-evaluated the evidence tendered before the trial court, it is clear in my mind that the evidence tendered by DW1 could not be heavily relied upon. The same were contradictory as earlier pointed out. The investigating officer was not summoned to testify to shed light on how the accident occurred. Had the investigating officer been called to testify he would have corroborated the contradictory evidence of D.W.1.

27. The evidence tendered seem to lay blame on the deceased and the 1<sup>st</sup> Appellant in equal measure. The evidence suggest that the deceased crossed the road without a proper look out in a place not designated for pedestrian crossing in a highway.

28. On the other hand, the evidence seems to suggest that Phillip Macharia (D.W.2) drove at a high speed in a place next to a shopping centre. It appears also that he did not undertake a proper look out for pedestrians crossing. It was also raining and slippery hence the driver should have been more careful.

29. In circumstances of this case, I think the deceased and the 1<sup>st</sup> Appellant should be held equally liable consequently the order apportioning liability in the ratio of 70:30 is set aside and is substituted with an order apportioning liability in the ratio of 50:50.

30. The other ground touches on the applicable dependency ratio. The Respondents have urged this court to find that the dependency ratio of 1/2 is low and should therefore be set aside and substituted with the ratio of 2/3. The appellants appear not to have addressed this court over the issue. In her judgment, the learned Senior Resident Magistrate stated that in the absence of evidence of the extent of dependency, a dependency ratio of 2/3 is high.

31. It is not in dispute that the Respondents did not present any evidence to show how much of his income the deceased spent on his family. It is trite law that there is no hard and fast rule that the dependency ratio of 2/3 should be applied to deceased persons who were married with dependents. With respect, I find no fault in the dependency ratio the trial magistrate applied. I find no merit in the appeal as against quantum.

32. In the end, the appeal partially succeeds as against the order on apportionment but fails as against the order on dependency ratio. Consequently the order apportioning liability in the ratio of 70:30 is set aside and is substituted with an order apportioning liability in the ratio of 50:50.

The award on appeal is set out as follows:-

*Gross award .....Kshs.5,752,721/=*

*Less 50% contribution .....Kshs.2,876,360/50*

*Net total .....Kshs.2,876,360/50*

33. The aforesaid amount to attract interest as ordered by the trial court. In the circumstances of this appeal, each party should meet their own costs of the appeal. However the Respondents should have costs of the suit.

**Dated, Signed and Delivered at Nairobi this 21<sup>st</sup> day of January, 2020.**

.....

**J.K. SERGON**

**JUDGE**

In the presence of:

..... for the Applicant

..... for the 1<sup>st</sup> Respondent

..... for the 2<sup>nd</sup> Respondent

..... for the 3<sup>rd</sup> Respondent



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