



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

Civil Case 435 of 1992

ELIZABETH MARY ADEMBESA PLAINTIFF

-VERSUS

SHADRACK MWOKI HARUA NIXON OYWA DEFENDANTS

J U D G M E N T

On 7th December, 1991 at about 4.30 p.m. a collision involving two motor vehicles took place along Mombasa/Lung a lunga road at a place called Denyenye . The vehicles involved were reg. No. KWK 089 make Subaru Station Wagon owned and driven by the late Nathan Munyori Adembesa hereinafter called the deceased and Reg . No. KNP 369 make Isuzu tipper lorry owned the second defendant and driven by the first defendantherein.

Motor vehicle Reg .No KWK 089 was being driven from Mombasa towards Diani direction while KNP 369 was being driven from Diani towards MOMBASA direction. As a result of t he saidcollision the deceased received very serious injuries which claimed his life three days thereafter, that is, on 10th. December 1991.

Elizabeth Mary Adembesa the plaintiff herein, is the widow of the deceased who brought this action for damages onher own behalf and that of the other dependants of the deceasedboth under the Fatal Accidents Act and the Law Reform Act. Asrequired of her under the Law Reform Act, the plaintiff appliedfor and obtained from the court a grant of letters of administration in respect of her late husband's estate. She produced exhibit No.4 being the certificate of confirmation of the said grant.

In her pleadings, the plaintiff attributed the accident to the first defendant's negligence in his driving of motor vehicle Reg. No. KNP 369. This has been denied in the statement of defence which blames the deceased for the accident. I shall first address the issue of liability.

The deceased was an advocate of the High Court of Kenya with an established private practice in Mombasa.. There is also evidence that he had also set up a branch office at Eldoret On the fateful day the deceased was driving his said carto the South Coast. He had three passengers, one of them being James Mouko (PW.I) also an advocate of the High Court of Kenya based in Mombasa.' The other two passengers were foreigners from the United States on a visit to Kenya.

Mr. Mouko was seated at the front passenger seat next to the deceased while the other two passengers were seated at the back. It is essential, in my judgment, to set out herein below Mr. Mouko's evidence in regard to the occurrence. He stated as follows:

"Along Lunga Lunga road at a place called i Denyenye our motor vehicle was going at a fairly slow speed as we were showing visitors the scene/place and explaining to them. I was sitting at the front passenger seat .

At Denyenye there were two vehicles coming from opposite side. A small motor vehicle and behind it a tipper lorry. The tipper lorry was close behind. It was Reg. No. KNP No. 369 Both motor Vehicles from the opposite direction were moving very fast. Our motor vehicle was on the left lane. When our motor vehicle was going to meet with the tipper lorry, the lorry swerved from its side of the road to our side of the road and rammed into our car - driver's side. At the point of impact there was a loud noise like that of a tyre burst. On impact our motor vehicle was thrown out of the road - into the bush off the road. The tipper went and; rested on the left side of the road (our side) as one faces Lunga Lunga direction. I think our speed was barely 30 K.P.H., average of 25 to 30 K.P.H. The tipper lorry was coming fast. I cannot estimate its speed but was not as slow as we were going.

On impact our car was badly crashed on the driver's side On the day of the accident the weather was dry. The road is tarmacked – condition good - no potholes - it is straight.

Cross-examined by Miss Njoroge:- The road was, one can say, not very wide and not very narrow. Two motor vehicles can by pass one another .

Looking at the photographs - Subaru was damaged on the right hand side. The tipper was also damaged on the right. . . ,

Motor vehicle KNP No.:369 swerved to outside otherwise it could not have rested on our side.

Re-examination:-

The collision took place on the left hand side of the road - left lane. This was the correct side for Mr. Adembesa to drive towards Lunga Lunga. If driver of KNP No. 369 had not swerved there would be no collision. Our driver was careful in the manner of driving. These were my visitors, he was driving and I was explaining." The police visited the scene of the accident and took measurements. Subsequently statements were recorded from witnesses and police traffic file No.68/91 compiled. PW.2 Sgt.David Okumu produced the said police file as exhibit No.2.This witness said he participated in the investigations of the accident. The driver of motor vehicle Reg. No. KNP 369 who is the first defendant herein, Shadrack Mwoki was subsequently charged with the offence of causing death by dangerous driving. However, as at the time of hearing this suit the case had not been determined as the second defendant failed to turn up, in court and a warrant of arrests was in force. He gave the lower court file number as 257 of 1993.

Sgt. Okumu did not visit the scene of the accident. One P.C. Cheruiyot drew the rough sketch plan which Sgt. Okumu "developed and drew a fair sketch plan". He called P.C. Cheruiyot to identify the point of impact. He added:"The impact was on the lane of the small vehicle KWK 089 - Subaru Station Wagon. After the impact the small motor vehicle rested on the left side of the road - only 2.6 metres from point of impact - off the tarmac.

Motor vehicle KNP No. 369 also rested on the left side of the road towards Ukunda -19.8 metres from

point of impact. It was also off the tarmac.

As a result of my investigations I decided to charge driver of KNP No. 369. From "investigations the lorry was carrying sand from Tiwi to Likoni Driver absconded after the accident and was never seen for many months. He never reported the accident to the police - not even to the owner of the motor vehicle." The defence called three witnesses whose evidence relate to the issue of liability. DW.1 John Mutua Mwololo was employed as a loader in motor vehicle Reg. No. KNP 3 69 a 7 tonner lorry used to carry sand. He said he also knew how to drive. On the date of the accident the lorry was loaded with sand and travelling from Tiwi towards Mombasa. He was seated in the drivers' cabin. He said when they reached Denyenye a small car Reg. No. KWK 089 emerged from the opposite direction (from Mombasa). At that stage the road has a small corner or end towards the right. He was in a position to see ahead. The following is what he told the court of the collision:

"Our motor vehicle was on the left hand of the road. The small car was on the right side of the road. At the scene the road was narrow. It appeared the small car had lost control. It came to our side and knocked our lorry tyre. I saw it. It was being driven fast. The small car came to our side.

After the collision the two motor vehicles; ended up on the same side of the road- right side of the road. The small car was damaged on the right hand side drivers' side. The lorry was damaged on the right tyre. The tyre burst after the impact. After the tyre burst the lorry moved to the small car's side - right hand as one faces Mombasa. The road had a small hill. The lorry was going uphill while the small car was going downhill. It is not true that our lorry was moving at 100 K.P.H. It was carrying sand. It is not true that the lorry had a tyre burst and lost control before the collision. It had a right front tyre burst. As a driver I can say this was a side collision. The collision took place in the middle of the road. There was no way either could avoid the collision. The road was thin. After the collision bur lorry moved for about 5 metres. The small car moved fo rabout 6 metres . " The driver of the lorry Reg- No. KNP 3 69, Shadrack Mwoki

also gave evidence for the defence as DW.3. He also gave an account of the occurrence. He said he was carrying sand from Tiwi towards Mombasa. The lorry had a capacity oof 7 (seven) tonnes when loaded. His speed was about 50 K.P.H. According to him the collision took place after the small car crossed the middle of the road towards the lorry. The road was rough on the sides and had a small bend which was moderate. It is necessary also to set out his version of the collision. He said:

"I was driving along the correct lane. So was the small car . When we were about to bypass the small car swerved to avoid a rough edge of the road towards my side. I also swerved to my left. The small car had swerved towards the right. It was very close and rammed into my lorry. My lorry collided with the small car on the right tyre and mudguard. I saw the small car after the accident. The small car was knocked on the front.

The small car was approaching at very high speed. I estimated it at 85 to 90 K.P.H. When the small car swerved to my lane I also tried to avoid it but it was very near. I swerved to the left. The lorry was not damaged at the front. This was because the small car did not touch the front. After the collision I lost control of the lorry and it ended where it ended. After it stopped I noticed it had no tyre. It had burst after impact. After the impact it moved (the lorry) for about 5 metres to where it stopped. It stopped on the right hand side in the bush as one faces Mombasa.. The small car stopped behind the lorry. It moved about 19 to 20 metres after the impact. It stopped 1.5 to 2 metres off the road on its correct lane towards Diani " This witness disputed the record of the police as reflected in the sketch plan in relation

to the point of impact, the distances covered by the motor vehicles after the impact and their final resting positions. He also denied that he kept a proper look out.

The defence also called one G. A. Pandya an Insurance Assessor who gave evidence as to the damage sustained by the lorry. This witness did not witness the accident. His evidence is more of an opinion. Save as to its relevance in relation to the damage aforesaid very little can be gathered to assist on the issue of liability.

All the defence witnesses were subjected to lengthy and searching cross-examination by the learned counsel for the plaintiff. The record bears that out and I shall only confine myself to the salient points that I consider relevant to the issues at hand.

From the totality of the evidence before me, the parties are blaming one another for the accident. Some facts however are beyond dispute. The two motor vehicles were being driven in opposite directions. After the collision both vehicles finally rested on the same side of the road, that is on the left hand side off the road as one faces Diani or Lunga Lunga direction. The deceased died as a result of serious injuries sustained in the accident. The lorry driver, Shadrack Mwoki was subsequently charged with the offence of causing death by dangerous driving contrary to section 46 of the Traffic Act Cap 403 Laws of Kenya. The case has not been determined.

In the course of driving, the deceased was supposed to be in total control and management of motor vehicle Reg. No. KWK089 while the lorry driver DW.3 had the same responsibility. As a result of several denials by DW.3 of what appeared in his statement to the police as, exhibit 1, this court had to call for the original file which was held by the police for purposes of the lower court proceedings. This was with the knowledge of both learned counsel who also had the opportunity of perusing the same.

It is now clear that DW.3 - the driver of the lorry did not report the accident either to the police or his employer. He instead disappeared to his rural home in Machakos and had to be sought with the help of the police. The reason for that conduct is anybody's guess. DW.3's loader and police investigations confirmed the same.

The denials by DW.3 aforesaid bring into question his demeanour. He was shifty and assertive on loose ground. In so doing he exposed himself even more. He saw the car driven by the deceased approach allegedly at high speed. He did not flash his headlights to draw the attention of the deceased. He did not break. He has not said anything about this and so find he did nothing to that effect. He said he swerved to the left but this is self-defeating. If he swerved to the left, the collision could not have taken place at all because the deceased would have had a clear path assuming without deciding that he swerved to the right as alleged.

The police took measurements of the scene. After the impact the lorry moved a distance of 19.8 metres while the motor vehicle driven by the deceased moved for only 2.6 metres. DW.3 wants us to believe that the police were wrong. does not say why.

The allegation that the lorry's front right tyre burst before the impact has been seriously disputed. It is possible that it burst at the time of the impact. Whichever way one looks at it the fact that the lorry moved for a longer distance than the small car is in itself more suggestive of

high speed. I am fortified in that finding by the fact that it was loaded with sand and there is evidence

suggesting that it was under repair all morning such that the driver may have been rushing to make up for lost time. Negligence has, in my judgment, been established against the lorry driver, DW.3. He was the employee of the second defendant as driver, agent and/or servant for his (the second defendant) benefit. This has not been denied. I find that the second defendant is vicariously liable for the negligence of the driver, DW.3.

• The dead tell no tales so we shall never know the version of the deceased in this accident. We have however, the evidence of PW.1 Mr. Mouko who was sitting next to him in the Then we have the evidence of the police and the discrepancies of DW.1 and DW.3. The question is. Did the deceased contribute to the accident"

It was a clear afternoon. The road, according to Mr. Mouko was straight at that stage. There was no car ahead travelling in the same direction. This has not been alleged. Mr. Mouko saw a small car and the lorry coming from the opposite direction - at high speed. The deceased may have noticed the same. Mr. Mouko noticed the lorry swerve to their lane. The deceased may have noticed the lorry swerving. There must have been some lapse of time from the time the lorry swerved to the time of collision. It must have been a matter of seconds. Whatever the length, it was crucial. A reflex turning/swerving to the left could have made a difference on the part of the deceased. To that extent only, the deceased was negligent. I make that finding with a clear understanding that the collision took place along his lane but there is no suggestion that some short distance off the edge of the road was unsafe to swerve onto.

Having found that both the lorry driver and the deceased were negligent I must now apportion liability. I find no difficulty at all in so doing. The evidence bears me out. The lorry driver DW.3 is more to blame for the accident. I find and hold that he shall bear 90% liability while the deceased shall bear 10% contributory negligence. The second defendant is vicariously liable to the extent of the driver DW.3. I shall now deal with the issue of quantum.

The deceased died at the age of 68 (sixty eight) years. At the time of his death he was an outstanding lawyer with an established private practice in Mombasa. He had also opened another office at Eldoret where he doubled as a farmer. There are two children out of his marriage with the plaintiff namely Mark Isambi Adembesa and Andrew ..Nemesa Adembesa. The plaintiff together with the two sons depended entirely on the deceased. Both sons were still studying when their father died. Mark was at Baring University studying Business Administration in Diving while Andrew was training as an Airline Pilot at Tennessee U.S.A. Both had to discontinue their studies on learning of their father's death and have not been able to return. The farm does not make enough money to finance their training. The deceased also used to provide for holidays and medical

care for the family. There was a running loan on the farm. The plaintiff had to sell 200 acres of land to pay back the loan adding that if the deceased was alive he would have paid that loan. The deceased was energetic and had no thoughts of retiring early. Said the plaintiff:

"He was a terribly energetic person - full of energy. He said when people retire they grow old. I believe that is why he established an office in Eldoret apart from wanting to be near the farm." At a condolence meeting held at Mombasa Law Courts after his demise on 13th December, 1991 Shields J. described the deceased as "A leading Mombasa Advocate who had a distinguished career in both the Local Government Service and in the Profession of being an Advocate Not alone was Mr. Adembesa a resolute upholder of his clients care, he was always conscious of his duty to the court, as an advocate. He was never guilty of any sharp let alone dishonest practice. He was fair and courteous to the Bench

and his opponents." "Mr. Adembesa had achieved a very senior position in the legal profession and we are saddened that he has not lived to enjoy the respect and affection with which a long and distinguished career confers upon him."

Hon. Mr. Justice Shields had known the deceased both from the bar and the Bench. I believe nobody else was more suited to talk of him (the deceased) than the learned Judge. On the basis of the foregoing the question of multiplier can be addressed. But first, the net income of the deceased's practice in Mombasa has not been disputed. It was pleaded at Kshs.50,000/- per month which was confirmed by Mr. Ogot PW.5 the accountant who kept the accounts of the deceased. The deceased must have spent two thirds of this income for the maintenance of his family aforesaid.

I have not entertained, any doubts about the plaintiff's assessment of the strength of the deceased. She also added that by all standards he was a healthy man. His establishing of another office in Eldoret was not a step towards retirement but rather an extension of his services. I have noted the authorities that have been cited on the question of multiplier. Most of them are decisions of this court. But each case must be decided on its own peculiar facts. There will always be a difference between a multiplier applicable to a farmer, hawker, driver, doctor or lawyer depending on the risks they are exposed to and their respective resources and abilities to fight the unexpected occurrences associated with life. Thus, doctors and lawyers may afford better health services which are beyond the reach of a peasant farmer or a hawker. Those are realities of life. I have given consideration to submissions by both learned counsel and, in my judgment find that a multiplier of 8 (eight) years is not appropriate and reasonable in respect of the deceased herein. Damages for loss of dependency therefore work out to $Kshs.50,000/- \times \frac{2}{3} \times 12 \times 8 = Kshs.3,200,448/-$. This sum shall be reduced by 10% contributory negligence leaving a balance of Kshs. 2,880,403.20. Proposed damages for pain and suffering and loss of expectation of life are conceded these total Kshs.80,000/-: that is Kshs.10,000/- for pain and suffering and Kshs.70,000/-

loss of expectation of life. These awards have also to be reduced by 10% contributory negligence leaving a balance of Kshs.72,000/-.

Special damages must be specifically pleaded and strictly proved. This the plaintiff did. Each item was supported by documentary evidence. They amount to Kshs.474,701/=. This figure must also be reduced by 10% leaving a balance of Kshs.427,230.90.

In the end there shall be judgment for the plaintiff against both defendants jointly and severally in the total sum of Kshs.2,952,403.20 general damages plus Kshs.427,230.90 special damages. The plaintiff shall also have the costs of the suit and interest at court rates. Orders accordingly.

A. MBOGHOLI MSAGHA

JUDGE

MOMBASA

1st September, 1994



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