



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 161 OF 2018**

**SAMUEL KIMOTHO GITONGA .....1<sup>ST</sup> APPELLANT**

**JAMES MWANZIA NZOMO.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**MARGARET WAYUA KAVUU &**

**ANNA NTHENYA KITHUKU (Suing as legal personal representatives of**

**FRANCIS MUSYIMI KILONZO (DECEASED).....RESPONDENT**

*[An appeal from the Judgment of Hon. Martha Opanga (Senior Resident Magistrate) delivered on 13.11.2018 in Civil Case No. 6 of 2017 before the Senior Principal Magistrate's Court at Kangundo]*

***BETWEEN***

**MARGARET WAYUA KAVUU & ANNA NTHENYA KITHUKU**

**(Suing as legal personal representatives of**

**FRANCIS MUSYIMI KILONZO (DECEASED).....PLAINTIFF**

**-VERSUS-**

**SAMUEL KIMOTHO GITONGA.....1<sup>ST</sup> DEFENDANT**

**JAMES MWANZIA NZOMO .....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

1. According to the pleadings in the trial court filed on 26.1.2017, the deceased was 52 years old when he died as a result of a road accident and an action was brought in the Senior Principal Magistrates Court at Kangundo through his sisters, as legal representatives and dependants of the deceased under the Fatal Accidents Act and the Law Reform Act against the respondents for general damages for pain and suffering, loss of expectation of life and loss of earnings and special damages due to negligence as particularized in paragraph 8 of the plaint.

2. It was pleaded that on 9.7.2015, the deceased was lawfully walking along Tala-Mbiuni road when the 1<sup>st</sup> appellant/ his agent/ his employee drove motor vehicle KCA 820U so negligently that it left its designated lane to the pedestrian pavement and lost control as a result it run over the deceased who sustained fatal injuries. It was pleaded that the deceased was earning Kshs 1,000/- per days as a casual laborer in several farms and had better future prospects which had been cut short by his death leading to damage and loss to his estate as particularized in paragraph 12 of the plaint. The respondents pleaded *res ipsa loquitur* and vicarious liability.

3. The appellants in their joint defence denied negligence and its particulars, denied the accident and denied that the deceased was a pedestrian on the material day. The appellants pleaded on the alternative that the deceased was negligent and that the accident was inevitable and attributed to the negligence of the deceased as particularized on paragraph 4 of their joint defence. The appellants denied the applicability of the doctrine of *res ipsa loquitur* and the particulars of dependency. It was pleaded that the suit was non-compliant with the mandatory statutory provisions and defective and that an application to have the suit struck out was to be made. The appellants prayed that the suit be dismissed with costs.

4. The suit proceeded for hearing on **15.5.2018** where the respondents and 2 witnesses testified. The appellants closed their case without calling any witnesses.
5. Parties filed submissions and the court delivered an undated judgement in 2018 in which Hon. M. Opanga held the Appellants 100% liable and awarded the Respondent damages amounting to **Kshs.1,173,562.6/-** inclusive of special damages of **Kshs 76,710/**.
6. This appeal is against the finding of the trial court. The contents of the appellant's appeal are set out in the memorandum of appeal filed on 10.12.2018. Counsel prayed that the appeal be allowed and the entire judgement in the trial court be quashed with costs to the appellants.
7. The appeal was canvassed vide written submissions. Learned counsel for the appellants vide their submissions dated 3.2.2020 framed 6 issues for determination that could be collapsed into liability and quantum. **On the issue of liability, counsel urged the court to find the respondent liable as the deceased was the author of his own misfortune and in the alternative liability be apportioned. On the issue of quantum, counsel submitted that the trial magistrate used a high multiplier and yet the deceased having died at age of 52 had another 8 to 10 years to live. Counsel proposed a multiplier of 6 years leading to an amount of Kshs 173,232/- for loss of dependency. It was counsel's argument that the amount of Kshs 100,000/- ought to have been awarded for loss of expectation of life. On the element of pain and suffering, counsel in placing reliance on the case of Edner Gesare Ogege v Aiko Kebiba (Suing as the father and legal representative of the Estate of Alice Bochere Aiko- Deceased) (2015) eKLR submitted that a conventional sum of Kshs 20,000/- ought to have been awarded. According to counsel, the respondents' failed to prove negligence on the part of the appellants and urged the court to allow the appeal.**
8. In reply, learned counsel for the respondents opposed the appeal vide submissions dated 20.2.2020. Learned counsel submitted that there was no reason demonstrated by the appellants as to why the court should disturb the judgement of the trial court as the respondents proved their case on a balance of probabilities. On the issue of quantum, it was counsel's submission that no reason had been given for disturbing the award of the trial court. Reliance was placed on the case of **Ricarda Njoki Wahome (Suing as administrator of the Estate of the late Wahome Mutahi (Deceased) v Attorney General & 2 Others (2015) eKLR.**
9. This being a first appeal, this court's role as the first appellate court is to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court saw and heard the parties and giving allowance for that and so as to reach an independent conclusion as to whether to uphold the judgment. This was observed in the case of **Selle v Associated Motor Boat Co. [1968] EA 123.**
10. **I have given the facts of the case and the pleadings the attention it deserves and I have considered the case of Ephantus Mango & Geoffrey NguyoNgatia vs Dancun Mwangi Wambugu [1982-88] KAR 278 as quoted in Edith Gicuku Mungai v John Njiru Njeru & another [2019] eKLR that observed that:**
- “A court on appeal will not normally interfere with a finding on fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles.”***
11. Upon evaluating the pleadings, and more specifically the averment by the appellant to the effect that “the suit was non-compliant with the mandatory statutory provisions and was defective and that an application to have the suit struck out was to be made”, the legal issue that I am commended to find is whether the **Civil Suit No. 6 of 2017** was competently before the Kangundo Senior Principal Magistrates court.
12. The provisions of Section 29 of the Limitation of Actions Act provides that where the person injured as a result of a tortious act or omission of another dies, then his or her personal representatives can only bring an action on behalf of the estate of the deceased person within twelve months from the date when the deceased died. And therefore it follows that where such period of twelve months from the date when the deceased dies has lapsed, unless, by application of Sections 22,27 and 28 of the Limitation of Actions Act, leave of court is sought and obtained extending such period for bringing an action, the action would be statute barred.
13. From the pleadings, the accident occurred on 9.7.2015 and this is confirmed from the evidence of Pw3, Francis Kiamba Mutua, the eye witness and as per his witness statement dated 26.1.2017 that he relied upon during trial. From the evidence of Pw 3, the death certificate, the deceased died on 9.7.2015. The suit ought to have been filed by 9.7.2016 and in the instant case it was filed on 26.1.2017. It is my considered view that there is no evidence of any application for leave that was sought by the respondents on record to file the suit out of time and in the absence of the same, the **Kangundo Senior Principal Magistrates Court Civil suit 6 of 2017** was time barred. It follows that the suit was not properly before the court and ought not to have seen the light of day.
14. I therefore find that the appeal is successful on the grounds of an error of law and not on the grounds raised in the appeal but on a ground raised by the appellants in the pleadings. The same was not considered by the trial court and hence it went into error. In this regard the judgement and decree of the trial court made in respect of Kangundo Senior Principal Magistrates Court Civil Suit 6 of 2017 ought to be set aside and substituted with a finding that the suit in the trial court is dismissed for being time barred and for being filed contrary to the provisions of sections 22,27, 28 and 29 of the Limitations of Actions Act.
15. Even though I have found that the suit was improperly lodged before the lower court and is destined for dismissal, I am bound to deal with the issues of both liability and quantum. As regards the issue of liability it is noted that the appellants were found liable in damages to the respondents at 100%. However from the evidence adduced it came out clearly that the deceased was a pedestrian walking off the road. There was no evidence as to what the deceased did in order to avoid the accident in order to save himself. The evidence of the eyewitness (Pw3) is that the Appellants vehicle left the road and moved onto the road reserve and then hit the deceased. It is believed that the deceased must have seen or heard the roar of the vehicle so as to take any action necessary to save his life. It cannot be said that he just walked nonchalantly until the vehicle hit him. The appellant's driver or agent was expected to ensure that the vehicle was properly managed and controlled. The fact that it left off the road is an indication that the driver was negligent. Under those circumstances I would apportion liability in the ratio of 90% to 10% in favour of the respondents. On quantum the sum of Kshs 20,000/ would have been adequate for pain and suffering since the deceased was reported to have died on the spot. On loss of expectation of life I find a sum of Kshs 100, 000/ which is the conventional sums awarded under that head of damage would have been adequate. On loss of dependency, the deceased died at the age of

52 years old and taking into account the fact that retirement age in this country for civil servants is 60 years and the vagaries of life then a multiplier of six years would be appropriate. As the deceased was reported to be a hustler in the name of a casual farm labourer, a sum of Kshs 6, 416/ being the wage of and unskilled labourer in the agricultural sector would have been a suitable multiplicand. On the dependency ratio it is noted that the deceased was not solely supporting the respondents who actually were adults in their own right capable of fending for themselves. At most the deceased could give something small whenever he landed on some casual jobs which ordinarily are not guaranteed on a daily basis. I would find a ratio of 1/3 would have been appropriate thereby working out as  $6,416 \times 6 \times 12 \times \frac{1}{3} = 153,984$ .

16. In the result it is my finding that the Appellants appeal has merit. The same is allowed with an order that the trial court's judgement is hereby set aside and substituted with an order dismissing the suit with costs. The Appellant is awarded the costs of the appeal.

It is so ordered.

Dated and delivered at **Machakos** this **29<sup>th</sup>** day of **May, 2020**.

**D.K. Kemei**

**Judge**